SURVIVING CRIME AND FACING DEPORTATION: U VISAS AS A DEFENSE AGAINST REMOVAL IN A SYSTEM OF DIVIDED AGENCY JURISDICTION

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ABSTRACT

The Trafficking Victims Protection Act (TVPA) established the U visa, a humanitarian immigration status for survivors of serious crimes who cooperate with law enforcement to report criminal activity. The benefit is intended to serve two symbiotic purposes: provide undocumented victims of crime with humanitarian protection from deportation and strengthen law enforcement's ability to prosecute crime. A statutory cap of 10,000 annual visas has led to an unanticipated ten-year adjudication backlog for noncitizens applying today.

U visa applicants in removal proceedings are within a system of divided jurisdiction: only the U.S. Citizenship and Immigration Service may adjudicate the U visa, while administrative law immigration judges of the Department of Justice's Executive Office for Immigration Review (EOIR) have exclusive jurisdiction over removal proceedings. Because the TVPA does not explicitly protect an applicant from deportation during the unanticipated adjudication delay, U applicants remained vulnerable to deportation until their visas were finally issued, contrary to congressional intent. To address this problem, the Department of Homeland Security (DHS) and immigration courts implemented a discretionary framework intended to prevent the deportation of U visa applicants.

This Article is the first to analyze the framework of discretionary relief for U visa applicants across DHS and EOIR. It documents this framework's vulnerabilities, as evidenced by the inconsistent application and underutilization by agencies under the Bush and Obama administrations, and the vast number of policies implemented to undermine discretion during the Trump administration. This Article argues that relying on an exercise of discretion to protect U applicants undercuts statutory intent. Steps taken under the Biden administration to encourage discretionary protection are promising,

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but more lasting reform should be implemented to protect immigrant victims of crime and encourage cooperation with law enforcement.

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I. INTRODUCTION

Elena and her abusive husband, Honduran citizens, entered the United States without inspection in 2005. A year later, Elena gave birth to a child within the United States. In 2016, following a particularly violent abusive episode, Elena reported her husband's brutality to the police. As a result, he was charged with assault. After Elena cooperated with law enforcement during prosecution, her husband pleaded guilty, was transferred to immigration custody, and was deported to Honduras.

Elena was left without any source of income and began working long hours to support her family. She moved into a room in an apartment shared with another undocumented family. Five years later, immigration enforcement officers entered the apartment looking for her roommate, but initiated removal proceedings—administrative law proceedings to determine whether a noncitizen may be deported—against everyone present. Elena consulted with an immigration attorney, who helped her file a petition for U nonimmigrant status, a four-year visa for survivors of serious crimes who cooperate with law enforcement.

Elena is now caught between two branches of the immigration system. On the one hand, U.S. Citizenship and Immigration Services (USCIS), the subagency of the Department of Homeland Security (DHS) responsible for lawful immigration in the United States, has sole jurisdiction to consider her U visa petition. At the same time, an administrative immigration judge of the Department of Justice (DOJ)'s Executive Office for Immigration Review (EOIR) is tasked with determining whether (1) she is removable and (2) whether she is eligible for any form of immigration benefit that may allow her to remain legally in the United States.

U Nonimmigrant Status, colloquially known as the U visa, is a form of humanitarian immigration status available to noncitizen survivors of serious crimes who have suffered substantial harm and cooperate with U.S. law enforcement to report those crimes. Congress envisioned the U visa as a mechanism to protect undocumented women and children suffering from domestic violence in the shadows out of fear that they would be deported if they sought law enforcement assistance or left their abusers.[1] The U visa also provides protection to immigrant victims of other violent and coercive

1. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1518, § 1502 (a)(3) (2000). In fact, almost 80 percent of U visa applicants have no lawful immigration status at the time of filing. U.S. CITIZENSHIP & IMMIGR. SERVS., U VISA REPORT: U VISA DEMOGRAPHICS (2020), https://perma.cc/7VGY-TMRK (analyzing data through FY 2019) [hereinafter U VISA DEMOGRAPHICS REPORT].

crimes, such as trafficking, kidnapping, sexual violence, and felonious assault.[2]

Created as part of the Trafficking Victims Protection Act of 2000 (TVPA), the purpose of the U visa was twofold: 1) to encourage cooperation with law enforcement to effectuate prosecution of crimes against immigrants and (2) to provide undocumented survivors with relief from deportation.[3] The statute includes an annual cap of 10,000 visas, which has led to a large backlog and a wait time of over ten years for current applicants.[4]

Despite legislative intent to provide survivors of serious crimes with protection from deportation, noncitizens stuck in the backlog have often found no such relief. When a U nonimmigrant status applicant, referred to below as a "U petitioner," appears before an immigration court to defend against removal, the immigration judge lacks authority to grant U status because USCIS has exclusive jurisdiction over U petitions. U.S. Immigration and Customs Enforcement (ICE) chief counsel and government attorneys with the ICE Office of the Principal Legal Advisor (OPLA), are tasked with prosecuting removal cases. OPLA attorneys hold discretionary authority to dismiss removal proceedings but exercised this authority sparingly and inconsistently under the Bush and Obama administrations and refused to do so during the Trump administration. Up until 2017, immigration judges could use discretionary tools to defer the proceedings of a U petitioner until USCIS adjudication, including: (1) termination of proceedings; (2) administrative closure, which temporary paused proceedings; or (3) a series of continuances. During the Trump administration, DOJ whittled away these discretionary tools, creating a system where an immigration judge had little choice but to order removal, contrary to legislative intent. This put U petitioners at risk for removal and exposed the vulnerabilities of a system relying entirely on individual discretionary actions by a number of different agency actors to carry out statutory intent.

While EOIR, the sub-agency of DOJ responsible for adjudicating immigration removal and appeals cases throughout the United States, does not publish statistics on how many noncitizens in removal proceedings have pending U petitions, USCIS data confirms that from 2012 to 2018, approximately 22 percent of all principal U petitioners, survivors of serious crimes applying for relief, reported that they were previously in removal, exclusion, or deportation proceedings.[5] About 13 percent reported that they were in removal proceeding at the time of filing.[6] And in 2018 alone, these percentages were even higher: 33 percent of petitioners were previously in removal proceedings and

2. 8 U.S.C. § 1101(a)(15)(U)(iii) (2018).
3. Pub. L. 106-386, 114 Stat. 1464.
4. 8 U.S.C. § 1184(p)(2)(A) (2012).
5. U VISA DEMOGRAPHICS REPORT, *supra* note 1, at 5. This report does not provide information on the outcome of prior removal proceedings.
6. *Id.*

15 percent had ongoing removal proceedings at the time of filing.[7] Accordingly, this is an issue that impacts a substantial number of principal U petitioners and their family members who are eligible for status because of a qualifying familial relationship with the principal, known as derivatives. It also impacts future applicants, who may be hesitant to report crimes to law enforcement or apply for U status without assurances that they will be protected from removal while their petition is pending.

During the first year of the Biden administration, DHS implemented policies which have the potential to provide much needed immediate relief, including a streamlined system for providing prompt protection by directing agency officials to refrain from taking enforcement actions against U petitioners.[8] Yet, the fundamental problem is that these policies continue to require an affirmative exercise of discretion by various agency officials to provide relief. The shifting treatment of U petitioners in removal proceedings during the Obama and Trump administrations exposed the vulnerabilities of the current discretionary framework and how easily it can be abused to withhold relief from immigrant victims of serious crime. A number of the implemented policies hindered procedural due process for survivors in removal and added significant administrative inefficiencies to our immigration system. For instance, during the Trump administration, agency officials summarily withheld discretion with limited oversight. Agency employees could do so again under guidance from a future administration that is unsympathetic toward U petitioners. Without lasting change, U petitioners awaiting adjudication by a future administration ten years from now have little assurance that discretion will continue to be exercised favorably to provide relief. DOJ and DHS under the Biden administration now have an opportunity to institute lasting reforms to these systems to protect U petitioners from removal and streamline adjudication, while reducing administrative efficiencies.

This Article argues that relying on discretion to protect U applicants from removal is problematic because it undermines the purpose of the U visa. Part I of this Article sets forth the history, purpose, statutory requirements, and current adjudication framework for U nonimmigrant status. Part II discusses the divided jurisdiction discretionary framework for U petitioners in removal proceedings, the Trump era erosion of discretionary powers, and the protective policies instituted by the Biden administration, demonstrating the impact on U petitioner, Elena. Part III pinpoints the problems with the current discretionary system, principally how it may be manipulated to undermine both the legislative intent behind U nonimmigrant status and agency goals of administrative efficiency. Part IV sets forth proposed solutions to provide secure

7. *Id.*

8. U.S. CITIZENSHIP & IMMIGR. SERVS., *Chapter 5: Bona Fide Determination Process* (June 14, 2021), https://perma.cc/KN5U-5AUW [hereinafter *Bona Fide Determination Process*]; Tae D. Johnson, *ICE Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims*, U.S. IMMIGR. & CUSTOMS ENF'T (2021), https://perma.cc/85PA-K5KM [hereinafter ICE Directive 11005.3].

protection to U petitioners in line with the humanitarian purpose of U nonimmigrant status while curbing administrative inefficiencies, including enactment of a prohibition on issuing or executing a removal order against a U petitioner.

II. U NONIMMIGRANT STATUS

A. *Legislative History and Purpose*

Following extensive congressional investigation into the problems of violence against women, Congress enacted the watershed Violence Against Women Act (VAWA I), legislation designed to prevent and reduce domestic violence and sexual assault.[9] VAWA I established a number of protections for victims of gender-based violence, including an exception to the general rule that only U.S. citizens or lawful permanent residents may petition for immigration status on behalf of a qualifying relative. By providing battered women and their children with the ability to self-petition for lawful immigration status without relying on their abusers, the law removed one barrier to escape, preventing abusers from using immigration status as a mechanism of control.[10]

After enactment, many realized that VAWA I did not go far enough to protect battered immigrants and encourage collaboration with law enforcement.[11] In response, Congress enacted, with wide bipartisan support, the Violence Against Women Act of 2000 (VAWA II) as part of the TVPA.[12] VAWA II was intended to expand protections based upon the statutory finding that "there are several groups of battered immigrant women and children who do not have access to the immigration protections of [VAWA I] which means that their abusers are virtually immune from prosecution because *their victims can be deported* as a result of action by their abusers" and existing immigration laws could not "offer [victims] protection no matter how compelling their case under existing law."[13] Specifically, the Battered Immigrant Women Protection Act of 2000, Title V of VAWA II, was enacted (1) to "remove barriers to criminal prosecutions of persons who commit acts of

9. Pub. L. No. 103-322, §§ 40001-703, 108 Stat. 1796, 1902-55 (1994) (codified as amended in scattered Sections of 8, 16, 18, and 42 U.S.C.); *see also* S. 2754, 101st Cong. (1990); S. Rep. No. 102-197 (1991); S. Rep. No. 103-138 (1993); H.R. Rep. No. 103-711 (1994).

10. Pub. L. No. 103-322, § 40701(a)(1)(C); Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN'S L.J. 137, 144 (2002).

11. *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the House Immigration Subcomm.*, 106th Cong. (2000) (testimony of Barbara Strack, Acting Exec. Assoc. Comm'r, Off. of Pol'y & Planning, Immigr. & Naturalization SERVS., Dep't of Just.).

12. Pub. L. No. 106-386, div. A, 114 Stat. 1464, 1466–91 (codified as amended in scattered sections of U.S.C.); Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL'Y REV. 587, 596 (2011).

13. § 1502(a)(3), 114 Stat. at 1518 (emphasis added).

battery or extreme cruelty against immigrant women and children;" and (2) to "offer protection against domestic violence."[14]

In furtherance of these goals, VAWA II created U nonimmigrant status to provide a path to residency for battered immigrants excluded by VAWA I.[15] The purpose of U nonimmigrant relief is: (1) to strengthen the ability of law enforcement to investigate crimes committed against noncitizens while (2) "offering protection to victims of such offenses in keeping with the humanitarian interests of the United States."[16] Congress recognized these dual purposes of law enforcement and victim protection as symbiotic, finding that providing battered immigrant women and children under VAWA I with:

> protection against deportation allows them to obtain protection orders against their abusers and frees them to cooperate with law enforcement . . . in criminal cases brought against their abusers and the abusers of their children without fearing that the abuser will retaliate by withdrawing or threatening withdrawal of access to an immigration benefit under the abuser's control.[17]

Such a finding confirms that fear of removal is a major obstacle undocumented immigrants must overcome to report crimes.[18]

Proponents of VAWA II further highlighted the important connection between deportation relief and law enforcement cooperation. Representative Sheila Jackson Lee noted that "[b]attered immigrant women and children were not able to appeal to law enforcement agencies and courts for protection because they simply feared being . . . deported."[19] Senator Paul Sarbanes expressed strong support for the legislation, noting that it would "make it

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14. § 1502(b), 114 Stat. at 1518.
15. McCormick, *supra* note 12, at 598.
16. § 1513(a)(2)(A), 114 Stat. at 1533.
17. § 1502(a)(2), 114 Stat. at 1518.
18. Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273, 306 (2018) (noting abusers exploit widespread fear of deportation to further control their partners); Leslye E. Orloff & Dave Nomi, *Identifying Barriers: Survey of Immigrant Women and Domestic Violence in the D.C. Metropolitan Area,* 6 POVERTY & RACE 1, 10 (1997) (25 percent of battered immigrants stated that immigration issues prevented them from leaving their abusers); Kwong, *supra* note 10, at 143. Unfortunately, fear of removal amid increased immigration enforcement efforts continues to serve as a barrier to reporting. In a study interviewing law enforcement and victims, officials listed fear of removal as one of the top reasons victims choose not to cooperate and 37 percent of victims who chose not to report identified this fear as a primary reason for not reporting. NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT, PROMOTING ACCESS TO JUSTICE FOR IMMIGRANT AND LIMITED ENGLISH PROFICIENT CRIME VICTIMS IN AN AGE OF INCREASED IMMIGRATION ENFORCEMENT: INITIAL REPORT FROM A 2017 NATIONAL SURVEY 1, 43 (2018), https://perma.cc/2ERT-DRW5; Kathryn Finley, *Access to Justice in a Climate of Fear: New Hurdles and Barriers for Survivors of Human Trafficking and Domestic Violence*, CTR. FOR MIGRATION STUD. (2019), https://perma.cc/RPP7-NRDB (citing declining domestic violence reports in cities such as Houston, Los Angeles, Denver, and San Diego); ACLU, FREEZING OUT JUSTICE, HOW IMMIGRATION ARRESTS AT COURTHOUSES ARE UNDERMINING THE JUSTICE SYSTEM (2018), https://perma.cc/E99Y-UUX5 (finding that courthouse ICE arrests had a chilling effect on immigrant reporting of crime).
19. *Battered Immigrant Women Protection Act of 1999: Hearing Before the Subcomm. on Immigr. and Claims of the H.R. Comm. on the Judiciary*, 106th Cong. 65 (2000) (statement of Rep. Jackson-Lee).

easier for battered women to leave their abusers without fear of deportation."[20] And in a statement supporting the VAWA Reauthorization Act of 2013, Senator Amy Klobuchar noted that in her experience as a former prosecutor, U visas were a "necessary component" for law enforcement, because perpetrators threatened to deport immigrant victims to prevent them from coming forward.[21]

The TVPA also created T nonimmigrant status, a temporary status for noncitizen survivors of a severe form of trafficking in the United States who cooperate with law enforcement.[22] The legislative intent behind T nonimmigrant status was similar to U status, but specific to victims of trafficking: To expand protection for immigrant victims of trafficking and provide relief from deportation so that they are able to remain in the United States and assist law enforcement in prosecuting traffickers.[23]

B. *Statutory Requirements*

The statute defines U nonimmigrants to include those who DHS determines have (1) suffered substantial physical or mental abuse as a result of a qualifying criminal activity that; (2) occurred in the United States; (3) possess information concerning the qualifying criminal activity; and (4) helped, help, or are likely to be helpful to law enforcement to report such activity.[24] To meet the reporting requirement, petitioners must provide a certification signed by law enforcement confirming they have been or are likely to be helpful in investigating or prosecuting the crime.[25] The statute includes a detailed list of serious crimes which constitute qualifying criminal activity such as rape, domestic violence, kidnapping, murder, and felonious assault.[26]

The U visa provides noncitizens with status to reside and work legally in the United States for four years.[27] After three years of lawful presence in the United States, U nonimmigrants may apply for permanent residence through a process known as adjustment of status.[28]

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20. 146 Cong. Rec. S8571 (2000) (statement of Sen. Paul Sarbanes) (emphasis added).
21. 159 Cong. Rec. S502 (2013) (statement of Sen. Amy Klobuchar).
22. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464, 1477–78 (2000).
23. 146 Cong. Rec. S10170 (2000) (statement of Sen. Ted Kennedy).
24. 8 U.S.C. 1101(a)(15)(U)(i) (2018).
25. 8 U.S.C. § 1184(p)(1) (2012). The certification requirement has received widespread critique. Unfettered law enforcement discretion to provide or withhold a certification results in "a geographic roulette, wherein victims in identical circumstances are either granted or denied certification depending on the location of the agency from which they seek it." Nanasi, *supra* note 18, at 304–05; *see also* Jean Abreu, Sidney Fowler, Nina Holstberry, Ashley Klein, Kevin Schroeder, Melanie Stratton Lopez & Deborah M. Weissman, *The Political Geography of the U Visa: Eligibility as a Matter of Locale*, UNIV. N.C. SCH. OF L. IMMIGR./HUM. RTS. POL'Y CLINIC 22 (2014), https://perma.cc/JE2S-HYAJ.
26. 8 U.S.C. § 1101(a)(15)(U)(iii) (2018).
27. 8 U.S.C. § 1184(p)(6) (2012); 8 C.F.R. § 214.14(g)(1) (2009).
28. 8 U.S.C. § 1255(m)(1) (2006).

A statutory numerical cap limits the number of principal petitioners who may be issued a U visa to 10,000 per year.[29] The cap has led to a massive backlog. Applications have exceeded the cap every year since 2010, just a few short years after USCIS began issuing U visas.[30] The queue of pending principal U petitions has grown by 1,183 percent over the past ten years.[31] By the end of the fiscal year 2021, there were 170,805 principal petitions awaiting adjudication.[32] Estimating that 77.1 percent of those petitions are approvable, in line with percentage of approved cases adjudicated in fiscal year 2019,[33] a principal applicant today could expect to wait over thirteen years for a decision on their U petition.[34] Despite heavy criticism by crime victim advocates, law enforcement officials, and immigration practitioners,[35] attempts to abolish or expand the cap have fallen flat.[36]

As enacted, the U visa is a non-discretionary immigration benefit.[37] U petitioners, like other noncitizens, are subject to grounds of inadmissibility in the Immigration and Nationality Act (INA), enumerated reasons for which they are not permitted by law to enter or obtain legal status in the United States.[38] Most U petitioners are inadmissible because they entered without inspection, lack a valid passport, or were previously ordered removed.[39] DHS, however,

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29. 8 U.S.C. § 1184(p)(2) (2012). The cap does not apply to derivative applicants.

30. U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF FORM I-918 PETITIONS FOR U NONIMMIGRANT STATUS BY FISCAL YEAR, QUARTER, AND CASE STATUS, FISCAL YEARS 2009–2022 (2022), https://perma.cc/HNV3-WBSZ [hereinafter USCIS REPORT ON NUMBER OF PENDING U PETITIONS].

31. U.S. CITIZENSHIP & IMMIGR. SERVS., U VISA FILING TRENDS, APR. 2020, ANALYSIS OF DATA THROUGH FY 2019 (2020), https://perma.cc/GM8E-ZNH9 [hereinafter U VISA FILING TRENDS REPORT].

32. USCIS REPORT ON NUMBER OF PENDING U PETITIONS, *supra* note 30.

33. U.S. CITIZENSHIP IMMIGR. SERVS., I-918 PETITION FOR U NONIMMIGRANT STATUS (PRINCIPAL), APPROVAL AND DENIAL RATES BY PETITIONER STATE, FISCAL YEAR 2016–2020 (2021), https://perma.cc/RJ5Q-NB3A [hereinafter U APPROVAL AND DENIAL RATES REPORT] (reporting an average approval rating of cases adjudicated between 2016 and 2020 of 81.5 percent).

34. USCIS last estimated that U petitioners must wait five to ten years, depending on when they applied. U VISA FILING TRENDS REPORT, *supra* note 31, at 3.

35. Jason A. Cade & Meghan L. Flanagan, *Five Steps to a Better U: Improving the Crime-Fighting Visa*, 21 RICH. PUB. INT. L. REV. 85, 107 (2018) ("The statutory cap, along with the agency's approach to the backlog, ultimately contribute to the on-the-ground dynamics that frustrate Congress's goals when it created the U visa."); H.R. REP. NO. 112-480, pt. 1, at 232 (2012) (citing a 2012 letter from the Federal Law Enforcement Officers Association to Senators Leahy and Grassley which notes that limiting the number of U Visas "effectively amputate[s] the long arm of the law"); HUM. RTS. WATCH, IMMIGRANT CRIME FIGHTERS: HOW THE U VISA PROGRAM MAKES US COMMUNITIES SAFER 41 (2018), https://perma.cc/4MJN-VE2R (urging Congress to consider raising or removing the cap); HUM. RTS. INITIATIVE OF NORTH TEX. & SMU JUDGE ELMO B. HUNTER LEGAL CTR., FLAWED DESIGN: HOW THE U VISA IS REVICTIMIZING THE PEOPLE IT WAS CREATED TO HELP (2020), https://perma.cc/SLZ3-QS7G (urging Congress to raise or eliminate the cap).

36. For example, in 2012, Senators Leahy and Crapo proposed a bipartisan bill, S.1925, as part of the VAWA Reauthorization Act of 2012 to raise the annual cap to 15,000. H.R. REP. NO. 112-480, at 231–32 (2012). That bill was rejected by House Republicans because it imposed application fees for diversity visas to cover the "$100,000 in public benefits and other expenses" that the Congressional Budget Office estimated could result from the increase in available U visas. *Id.* at 240.

37. Provided DHS determines a noncitizen has met the eligibility requirements, they are entitled to U nonimmigrant status.

38. 8 USC § 1182 (2013).

39. U VISA DEMOGRAPHICS REPORT, *supra* note 1, at 4, 7 (79 percent of approved principal petitioners required an inadmissibility waiver for entering the country without inspection, while nearly 20 percent required a waiver for lacking a valid passport).

has broad statutory discretion to grant a waiver for all but the most serious grounds of inadmissibility, provided it is in the public or national interest to do so.[40] Accordingly, most U petitioners must file an inadmissibility waiver and require a positive exercise of discretion from DHS to obtain U nonimmigrant status.

C. *Agency Guidance and Regulatory Framework*

The INA specifically authorizes DHS to prescribe regulations governing nonimmigrant status.[41] However, DHS did not publish interim regulations for seven years following enactment. One reason for this delay was the reshuffling of agency responsibility over immigration with the passage of the Homeland Security Act of 2002 (HSA).[42] This Act disbanded the Immigration and Naturalization Service (INS), formerly responsible for administering immigration matters in the United States, and created DHS and its sub-agencies —Customs and Border Protection (CBP), USCIS, and ICE—to coordinate and consolidate disparate agencies in a united front against terrorism in response to the September 11th terrorist attacks.[43] The HSA gave DHS exclusive authority to administer and enforce the immigration and naturalization laws, except as otherwise specified by statute.[44] Within DHS, USCIS oversees and administers naturalization and immigration applications,[45] CBP secures the border,[46] and ICE is responsible for enforcement and removal operations within the United States, including prosecuting noncitizens before the immigration courts and overseeing detention and removal.[47] The Attorney General, however, remains charged with "determining and ruling with respect to all questions of the law"[48] and administers the immigration courts and the Board of Immigration Appeals (BIA) through EOIR.[49]

Before implementing regulations were released, INS and its successor USCIS issued policy memoranda establishing interim procedures to protect victims of serious crime from removal. The Cronin Memorandum, issued by INS Acting Executive Associate Commissioner Michel D. Cronin, provided that, "aliens who are identified as possible victims in the above categories *should not be removed from the United States until they have had the*

40. 8 USC § 1182(d)(14).
41. 8 USC 1184(a)(1) (2020).
42. Department of Homeland Security Act of 2002, Pub. L. No. 107-296, § 1502, 116 Stat. 2135 (2002).
43. *Id.*
44. 8 U.S.C. § 1103(a) (2009).
45. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., *Our History*, https://perma.cc/RZP3-U7MU (last visited Apr. 7, 2022).
46. *See* U.S. CUSTOMS & BORDER PROT., *About*, https://perma.cc/5MTR-VNCA (last visited Apr. 7, 2022).
47. *See* U.S. IMMIGR. & CUSTOMS ENF'T, *Enforcement and Removal Operations*, https://perma.cc/48SF-7NBA (last visited Apr. 7, 2022).
48. 8 U.S.C. § 1103(a).
49. *Id.*

opportunity to avail themselves of the [TVPA]."[50] Instead, INS would utilize existing mechanisms such as humanitarian parole (granting a petitioner abroad permission to enter the United States), deferred action (a determination deferring removal of an individual as an act of prosecutorial discretion which allows the recipient to obtain work authorization), and a stay of removal (an administrative order to defer the execution of an outstanding order of removal) to provide interim protection.[51] The memorandum applied broadly, aiming to protect not only those determined to be eligible, but all possible victims who might be eligible.[52] Because affirmative immigration benefit adjudicators, prosecutors, administrative law immigration judges of the immigration courts, and deportation field officers were within INS, they were all subject to this single policy memorandum. The memorandum created a clear, streamlined, agency-wide procedure, and required coordination to prevent the deportation of immigrant survivors of serious crimes until they had the opportunity to obtain U nonimmigrant status.

Soon after its formation, DHS released an interim rule governing the petition process for T nonimmigrant status, but no corresponding rule for U nonimmigrant petitions.[53] Instead, the new USCIS Associate Director of Operations issued a second memorandum, known as the Yates Memorandum, for potential U nonimmigrants, noting that "a more unified, centralized approach" was necessary to provide interim relief until regulations were issued.[54] The Yates Memorandum centralized the process for providing U interim relief at one of USCIS's adjudication centers, the Vermont Service Center, where USCIS personnel would receive and review such applications.[55] USCIS officers were charged with reviewing prima facie evidence of each eligibility requirement submitted by applicants.[56] Evidence was considered prima facie provided it was sufficient to render a reasonable conclusion that the noncitizen *may* be eligible when regulations were finally issued.[57] Applicants who set forth prima facie eligibility would be granted U interim relief, which consisted of deferred action and permission to work legally in the United States until an actual U visa could be issued under

50. Memorandum from Michael D. Cronin, on Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2, to the Immigr. & Naturalization SERVS. (Aug. 30, 2001) (on file with author) (emphasis in original).

51. *Id.*

52. *Id.* at 3.

53. New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for ''T'' Nonimmigrant Status, 67 Fed. Reg. 4784 (Jan. 31, 2002) (to be codified at 8 C.F.R. pt. 103, 212, 214, 274a, 299).

54. Memorandum from William R. Yates, on Centralization of Interim Relief for U Nonimmigrant Status Applicants, to U.S. Citizenship & Immigr. Servs. (Oct. 8, 2003) (on file with author).

55. *See id.* at 2 (the USCIS Vermont Service Center was principally tasked with adjudicating all relief under VAWA I and II).

56. *See id.* (noting that USCIS did not have jurisdiction to issue deferred action to anyone in removal proceedings or with a final order of removal).

57. *Id.*

implementing regulations. The Yates Memorandum, however, applied only to USCIS and provided no instruction to OPLA or EOIR.

DHS finally released interim U nonimmigrant regulations (hereinafter the Interim Regulations) in September 2007.[58] These regulations defined relevant terms contained in the statute and set forth filing procedures and adjudication standards for the U petition and accompanying inadmissibility waiver.[59] The Interim Regulations also set forth distinct rules applying to those who had been granted "U interim relief" under the Cronin and Yates memoranda, requiring them to reapply under the new procedures.[60]

1. *Creation of the U Waitlist*

In the preamble to the Interim Regulations, DHS anticipated that the cap would quickly be exceeded, noting the tension between the needs of law enforcement for "a stable mechanism through which to regularize the status of victims and witnesses" and Congress's annual cap.[61] To balance the cap with the stated dual statutory goals, USCIS created a "U nonimmigrant status waitlist."[62]

Under the Interim Regulations, once USCIS issues 10,000 U visas in a particular fiscal year, it continues to review "all pending and subsequently submitted petitions … in the normal process to determine eligibility."[63] Eligible petitioners who are not granted U status solely because the cap has been reached must be placed on the waitlist.[64] As additional visas become available, they are issued chronologically, beginning with the oldest petition filing date.[65] USCIS grants deferred action to U petitioners on the waitlist, enabling those petitioners to apply for work authorization.[66] USCIS is also authorized to grant parole to permit waitlisted U petitioners abroad to enter the United States.[67]

Despite the intent to "provid[e] a stable mechanism through which victims cooperating with law enforcement can regularize their immigration status" to all eligible petitioners exceeding the statutory cap,[68] USCIS has afforded waitlist protections to a very small percentage of U petitioners. USCIS has placed a decreasing number of principal U petitioners on the waitlist in recent years. In 2018, USCIS placed only 7,421 principal petitioners on the waitlist,

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58. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014 (Sept. 17, 2007) (codified at 8 C.F.R. 214.14). Final regulations have not been issued.
59. 8 C.F.R. § 214.14 (2020).
60. 8 C.F.R. § 214.14(a)(13).
61. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. at 53027.
62. 8 C.F.R. § 214.14(d)(2).
63. 72 Fed. Reg. at 53027.
64. 8 C.F.R. § 214.14(d)(2).
65. *Id.*
66. *Id.*
67. *Id.* In 2016, the Obama administration proposed a streamlined parole policy, but it has not been implemented. AM. IMMIGR. LAWS. ASS'N, *USCIS Accepts the Ombudsman's Recommendation to Adopt Parole Policy for U Visa Petitioners and Family Members* (Sept. 7, 2016), https://perma.cc/JMR4-Z72E.
68. 72 Fed. Reg. at 53027.

about one-third of the number added in 2014, due to "agency resource constraints."[69] This represents a mere 5 percent of the total number of principal U petitions pending in 2018.[70]

These "agency resource constraints" are largely a result of the USCIS funding structure and insufficient allocation of resources to adjudication. In fiscal year 2021, USCIS's enacted operating budget totaled $4,079,093,000, about 97 percent of which is generated through USCIS fees charged for benefit applications.[71] In a 2018 declaration (the Neufold Declaration) filed in litigation regarding the waitlist adjudication delays, Donald Neufeld, the Associate Director for Service Center Operations for USCIS, testified that the approximately 83 permanent immigration service officers (ISOs) at the Vermont and Nebraska Service Center adjudicate U petitions, out of the total 1,336 ISOs employed by those Service Centers, or 6 percent of the available workforce.[72] An additional thirteen ISOs were in training, which would increase USCIS's adjudication capacity by 13 percent.[73]

2. *USCIS Bona Fide Determination and Adjudication*

In 2008, just a year after the issuance of the Interim Regulations, Congress authorized USCIS to grant work authorization to any noncitizen "who had a pending, bona fide petition" for U nonimmigrant status in the Trafficking Victims Protection Reauthorization Act (2008 TVPRA).[74] Yet USCIS did not implemented any procedures to provide pre-waitlist U petitioners with work authorization and relief from removal for over a decade.

Prior to June 2021, USCIS used the following procedures to adjudicate U petitions. About a month after receiving the petition, the Nebraska or Vermont Service Center issued a receipt notice, accepting the petition for processing.[75] Within two weeks, USCIS would issue a biometrics appointment for applicants to have their fingerprints taken at a local USCIS Application

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69. U VISA FILING TRENDS REPORT, *supra* note 31, at 7–8.

70. *Id*. at 4 (noting there were 135,000 pending principal petitions in 2018).

71. DEP'T OF HOMELAND SEC., FISCAL YEAR 2021 BUDGET IN BRIEF 62 (2021), https://perma.cc/VK5T-KQ7H. While there is no filing fee for a U petition, noncitizens requiring a waiver of inadmissibility must remit a fee with their Form I-192 and their application for employment authorization, unless they establish eligibility for a fee waiver. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., I-918, PETITION FOR U NONIMMIGRANT STATUS, https://perma.cc/9DMA-U4L3 (last visited Apr. 7, 2022); U.S. CITIZENSHIP & IMMIGR. SERVS., I-192, APPLICATION FOR ADVANCE PERMISSION TO ENTER AS A NONIMMIGRANT, https://perma.cc/5PGW-PKYE (last visited Apr. 7, 2022); U.S. CITIZENSHIP & IMMIGR. SERVS., I-912, REQUEST FOR FEE WAIVER, https://perma.cc/NA3B-VYET (last visited Apr. 7, 2022).

72. Solis v. Cissna, No. 9:18-cv-00083-MBS, 2019 WL 8219790, at 13 (D. S.C. 2019) (summarizing the Neufeld Declaration and concluding that the defendants failed to carry their burden to establish the reasonableness of the waitlist adjudication delay).

73. *Id*.

74. 8 U.S.C. § 1184(p)(6) (2012). Sponsors of the William Wilberforce Trafficking Victims Protection Reauthorization Act noted that U petitioners "should not have to wait for up to a year before they can support themselves and their families," and that USCIS should endeavor to issue work authorization within sixty days of filing. *See* 154 Cong. Rec. H10905 (daily ed. Dec. 10, 2008) (statement of Reps. Berman and Conyers).

75. SALLY KINOSHITA, BOWYER, FARB, KAMHI & SEITZ, THE U VISA OBTAINING STATUS FOR IMMIGRANT VICTIMS OF CRIME 68 (Immigrant Legal Resource Center, 6th ed. 2019).

Support Center, which USCIS then relied on to conduct initial background checks, including an FBI fingerprint and name check and a review of DHS databases.[76] Following the completion of background checks, ISO officers conducted two separate adjudications—(1) the waitlist adjudication and (2) final approval adjudication.

USCIS generally reviews U petitions for waitlist eligibility chronologically with limited exceptions.[77] Wait times are increasing because receipts continue to exceed the statutory cap every year.[78] In June 2021, ISOs conducted waitlist adjudications for cases filed in June of 2016, resulting in a five year delay for 2016 petitioners.[79] A waitlist adjudication by an ISO consisted of a substantive review of the petition and accompanying evidence to determine whether the petitioner met the eligibility requirements.[80] Upon a positive waitlist determination, USCIS would issue deferred action and the petitioner would become eligible for employment authorization.[81]

On June 14, 2021, USCIS finally implemented a bona fide determination (BFD) process for U petitioners whose petitions have not yet been evaluated for the waitlist, as authorized by the 2008 TVPRA.[82] Under this new policy, all pending and future petitioners deemed by USCIS to have "bona fide" U petitions who are not considered a risk to national security or public safety and who warrant a favorable exercise of discretion may be issued four years of deferred action and work authorization.[83] While neither the 2008 TVPRA nor the Interim Regulations defined the term "bona fide," USCIS specified that a bona fide petition is one that is "made in good faith; without fraud or deceit."[84] Under this policy, USCIS will consider a pending petition bona fide where (1) it includes all required initial evidence, such as a properly filed law enforcement certification and a personal statement from the petitioner describing the facts of victimization; and (2) USCIS has received background check results for the petitioner based upon completed biometrics, the USCIS system for capturing fingerprints.[85] If the background check results reveal arrests or convictions indicating the noncitizen may be a threat to public

76. *Id.*; *Solis*, 2019 WL 8219790, at 13. One such exception allows USCIS to expedite waitlist adjudication upon a prima facie determination request from ICE on behalf of a petitioner in removal proceedings or requesting a stay of a final order of removal, as discussed further below.

77. *Solis*, 2019 WL 8219790, at 17.

78. U VISA DEMOGRAPHICS REPORT, *supra* note 1, at 2.

79. U.S. CITIZENSHIP & IMMIGR. SERVS., CHECK CASE PROCESSING TIMES, https://perma.cc/BLM7-FUYW (last visited Apr. 7, 2022) (showing case processing times for U Nonimmigrant Status (I-918) at Vermont Service Center and Nebraska Service Center by choosing "I-918" from the "Form" dropdown and selecting the Service Center from the "Field Office or Service Center" dropdown).

80. *Solis*, 2019 WL 8219790, at 12.

81. 8 C.F.R. § 214.14(d)(2) (2020).

82. Policy Alert, U.S. Citizenship & Immigr. Servs., *Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners* (June 14, 2021), https://perma.cc/LW66-6EFM [hereinafter USICS Bona Fide Policy Alert].

83. *Id.* at 2.

84. 8 U.S.C. § 1184(p)(6); *see also*, USCIS Bona Fide Policy Alert, *supra* note 82; *Bona Fide Determination Process*, *supra* note 8.

85. *Bona Fide Determination Process*, *supra* note 8, at A.1.

safety or national security, the petitioner will not receive a BFD.[86] The policy also provides that upon the issuance of a BFD, the petitioner will no longer need to have their petition re-adjudicated to join the U waitlist.[87] Instead, they will be automatically added to the waitlist, and visas will continue to be issued as they become available in chronological receipt order.[88]

The USCIS policy alert specifies that the BFD process will apply to all pending and future U petitions but does not provide a time frame or procedures for conducting the BFD for pending applicants. In the first quarter of fiscal year 2022, USCIS conducted 7,213 BFD reviews, but received over 9,525 new U petitions.[89] Given the significant application backlog and high number of new applicants, it will likely take years for USCIS to conduct an assessment for all pending U petitioners, resulting in delays similar to the prior waitlist adjudications.

Thus, before June 2021, there were only two adjudication categories for pending U petitions: those awaiting waitlist adjudication and those awaiting final adjudication and approval. Only those in the latter category were eligible for deferred action and work authorization. The June 2021 BFD process adds a third adjudication category which will occur sometime between the receipt of the petition and the waitlist adjudication and, in the case of a positive determination, will replace the waitlist adjudication entirely. The BFD process replaced the prior prima facie determination process that previously occurred upon a request from ICE officials for a petitioner in removal proceedings or with a prior order of removal, because the policy manual specifies that a petition deemed bona fide will also be considered to have met the prima facie standard.[90] This has potential to provide U petitioners with relief much earlier in the adjudication process. However, USCIS's allocation of resources to and efficiency in conducting BFDs will ultimately dictate the policy's efficacy for backlogged and future petitioners.[91]

Despite long wait times, U petitioners have consistently had a high success rate, such that the majority of people who apply can eventually expect to gain legal status.[92] Of the 12,706 principal petitions adjudicated by USCIS in

86. *Id*.
87. *Id*.
88. USCIS Bona Fide Policy Alert, *supra* note 82, at 3.
89. USCIS REPORT ON NUMBER OF PENDING U PETITIONS, *supra* note 30; U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, BONA FIDE DETERMINATION (BFD) REVIEWS BY BFD DECISION FISCAL YEAR, QUARTER AND CASE STATUS, FISCAL YEARS 2009–2022 (2022), https://perma.cc/UB3K-UCH8.
90. *Bona Fide Determination Process*, *supra* note 8, at 4.
91. As of November 2021, "practitioners have reported receiving notices of BFD for cases filed in 2016 and early 2017." Ariel Brown, Alison Kamhi, & Amy Cheung, *Overview of the New U Nonimmigrant ("U Visa") Bona Fide Determination*, ILRC & ASISTA 4 (Nov. 2021), https://perma.cc/YR5K-YC6T.
92. U APPROVAL AND DENIAL RATES REPORT, *supra* note 33 (reporting an average approval rating of cases adjudicated between 2016 and 2020 of 81.5 percent).

fiscal year 2020, 77.1 percent were granted.[93] This is quite high for an immigration benefit, compared with the 57 percent grant rate for principal T petitions adjudicated in 2020,[94] the 34 percent grant rate for affirmative asylum cases interviewed in fiscal year 2017,[95] and the 19 percent 2020 grant rate for asylum cases adjudicated by the immigration courts.[96] Because most U petitioners are inadmissible, this also means that historically USCIS officers have generally exercised discretion broadly in adjudicating waivers for U petitioners.[97] Accordingly, despite the long wait, U petitioners are likely to obtain U status.

III. SPLIT JURISDICTION FOR U PETITIONERS IN REMOVAL

The Interim Regulations gave USCIS sole jurisdiction to adjudicate U petitions,[98] in line with the statutory language authorizing DHS to make eligibility determinations.[99] This was consistent with the general allocation of immigration benefits adjudication to USCIS,[100] and also allowed for streamlined processing in light of the restrictive statutory cap. Yet, following the issuance of a notice to appear, the DHS charging document in removal proceedings, immigration courts have sole jurisdiction to determine removability and eligibility for relief from removal. This results in a type of divided jurisdiction over U petitioners in removal proceedings—only USCIS can adjudicate their U petition, but an immigration judge presides over and determines removability.

ICE is not required to initiate removal proceedings against every undocumented noncitizen the agency encounters. On the contrary, one of the key levers of discretion is to decline to arrest or initiate removal proceedings and

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93. *Id*.

94. U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF FORM I-914, APPLICATION FOR T NONIMMIGRANT STATUS BY FISCAL YEAR, QUARTER AND CASE STATUS, 2008–2021, https://perma.cc/Z9PW-9E4Q (last visited Apr. 7, 2022).

95. U.S. CITIZENSHIP & IMMIGR. SERVS., COPY OF USCIS AFFIRMATIVE ASYLUM DECISIONS FY2009–FY2018 Q2 (June 26, 2016), https://perma.cc/4YLG-4Q8A.

96. EXEC.OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS ASYLUM DECISION RATES (Apr. 19, 2021), https://perma.cc/J5RZ-8Y3M.

97. In July 2020, USCIS made sweeping changes to its policies for exercising discretion in adjudicating immigration benefits, including inadmissibility waivers for U petitioners. Policy Alert, U.S. Citizenship & Immigr. Servs., *Applying Discretion in USCIS Adjudication* (July 15, 2020), https://perma.cc/V4GH-9L4K. Updated guidance required adjudicators to considering over twenty-two factors, which scholars and advocates have criticized as harmful to survivors of crime and contrary to congressional intent because it creates additional requirements for relief not included by statute and places "new emphasis on the ability of officers to deny a benefit" where an applicant otherwise meets statutory requirements. Peggy Gleason, *USCIS Policy Manual Makes Sweeping Changes to Discretion*, IMMIGRANT LEGAL RES. CTR. (Mar. 2021), https://perma.cc/FQ9Q-9767; Julie Dahlstrom, *Trafficking and the Shallow State,* 12 UC IRVINE L. REV. 61, 103 (2021). Practitioners should closely examine future USCIS adjudication statistics, compared to prior years, to determine the impact of this policy on I-192 waiver adjudications for applicants for U and T nonimmigrant status.

98. 8 C.F.R. § 214.14(c)(1) (2020).

99. Violence Against Women and Department of Justice Reauthorization Act of 2005, PL109-162, 1119 Stat. 3054 (Jan. 5, 2006).

100. 8 U.S.C. § 1103(a) (2009).

instead issue deferred action.[101] But, once a U petitioner is placed in removal proceedings, an agency exercise of discretion is required to terminate or postpone those proceedings until USCIS adjudication, so that they are not ordered removed. Discretion could be exercised by either ICE chief counsel, who represents the government to prosecute or seek removal, or the presiding immigration judge. If an order of removal has already been issued, officers of ICE's Enforcement and Removal Operations office are charged with executing removal but may exercise discretion by granting an administrative stay to allow that noncitizen to temporarily remain. The framework for each is set forth below.

A. *DHS Discretionary Framework*

1. *Discretion Provided by Regulation*

The Interim Regulations adopt a permissive discretionary framework for providing removal relief to U petitioners. The preamble highlights the inclusion of specific provisions to "identify a mechanism that conserves prosecutorial resources with respect to a class of aliens who are providing assistance in investigating and prosecuting criminal activity."[102] The Interim Regulations give ICE chief counsel discretion to file or join a motion with the immigration court or BIA to terminate the removal proceedings without prejudice.[103] For U petitioners with prior removal orders, the procedures differ depending on whether the order of removal was issued by DHS or EOIR. Expedited orders of removal issued by DHS[104] are automatically cancelled upon the issuance of a U visa.[105] In contrast, U nonimmigrants with orders of removal issued by the immigration court must move to reopen and terminate those proceedings to clear their record.[106] ICE chief counsel has

101. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 484 (U.S. 1999) (noting that the agency has discretion to abandon prosecution at each stage, including before proceedings are initiated, and may issue deferred action); *Delegation No. 7030.2: Delegation of Authority to the Assistant Secretary for U.S. Immigration and Customs Enforcement*, DEP'T OF HOMELAND SEC. (Nov. 13, 2004), https://perma.cc/C2P3-2M63 (delegating among other authorities, the authority to exercise prosecutorial discretion in immigration enforcement matters).

102. 72 Fed. Reg. at 53022.

103. 8 C.F.R. § 214.14(c)(1). While the rule "specifically addresses the use of joint motions to terminate, it does not preclude the parties from requesting a continuance of the proceeding." 72 Fed. Reg. at 53022, n.10. Unlike the T regulations, the rule does not explicitly authorize administrative closure. *See* 8 C.F.R. § 214.11 (2020). The omission of this explicit authority prevented immigration judges during the Trump administration from granting administrative closure for U petitioners as discussed in Section V.B.2 below.

104. Expedited Orders of Removal were created by the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208 (1996), 110 Stat. 3009-546 § 302. *See also* AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL (2019), https://perma.cc/RH96-RKNJ.

105. 8 C.F.R. 214.14(c)(5)(1), (f)(6). USCIS, however, has set forth no mechanism to provide documentation confirming the automatic cancellation of an expedited removal order. Therefore, approved U nonimmigrants may run into problems when they travel abroad or encounter ICE officers in the United States.

106. Because DHS issued the Interim Regulations independently of EOIR, it had no authority to cancel or rescind removal orders issued by an immigration judge.

discretion under the regulations to join a motion to reopen a prior immigration court removal order.[107]

Federal law and the Interim Regulations also provide a discretionary framework for DHS to stay the removal of a U petitioner during the pendency of the petition. The 2008 TVPRA authorized DHS to grant an administrative stay of a final order of removal for a U or T petitioner whose petition has been determined by DHS to set forth prima facie case for approval until the petition was adjudicated.[108] The statute did not define prima facie or assign responsibility within DHS for the determination. The Interim Regulations delegate this discretionary authority to ICE, clarifying that while ICE retains authority to execute U petitioner's final removal order, ICE may exercise its discretion to grant a stay.[109] The regulations do not address the process for determining whether a petition is prima facie approvable.

2. *ICE Guidance on Exercising Discretion*

Beginning in 2007, ICE adopted policies and procedures encouraging the exercise of discretion to protect "prima facie" U petitioners in removal proceedings or subject to a prior order during USCIS adjudication. But in 2019, ICE revoked those policies, issuing a much less favorable "totality of the circumstances" policy. In 2021, ICE returned to its prior position by implementing a superseding policy instructing the exercise of discretion absent extraordinary circumstances. The changing guidance is described below.

Following the Interim Regulations, ICE issued two memoranda instructing deportation officers and ICE chief counsel, respectively, to view favorably a noncitizen's request for discretionary relief. The Venturella Memo, authored by then Acting Director of ICE David Venturella, concluded that USCIS has jurisdiction to determine prima facie eligibility because USCIS has sole jurisdiction over U petitions.[110] The Venturella Memo directed ICE deportation officers to request a prima facie determination from USCIS upon receipt of a U petitioner's stay request.[111] If USCIS found the petitioner prima facie

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107. 8 C.F.R. § 214.14(c)(1)(ii) (principal petitioners); 8 C.F.R. § 214.14(f)(2)(ii) (derivative family members). A joint motion by both parties is required to overcome certain regulatory rules restricting the number of motions an individual may file and the time period for filing. See 8 C.F.R. §1003.23(b)(1) for timing and numerical restrictions on motions to reopen removal proceedings before the immigration court.

108. 8 U.S.C. §1227(d)(1) (2008). While neither the statute nor the regulations define prima facie, the term was first introduced as an evidentiary standard in granting interim U relief before DHS issued the Interim Regulations. There, a noncitizen was considered to be prima facie eligible where they submitted sufficient evidence to "render a reasonable conclusion that the alien may be eligible" for the relief. Yates, *supra* note 54. ICE and the BIA subsequently incorporated the standard into processes for evaluating a pending U nonimmigrant status petition for viability, as discussed below.

109. 8 C.F.R. § 214.14(c)(1)(ii). Note that this regulatory framework is also less beneficial than the applicable rules for T nonimmigrants with prior orders of removal. The T regulations automatically stay removal orders for bona fide T petitioners until USCIS completes adjudication of the application. *See* 8 C.F.R. § 214.11(d)(9) (2020).

110. David J. Venturella, *Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-Visa) Applicants*, IMMIGR. & CUSTOMS ENF'T 1, 3 (Sept. 24, 2009), https://perma.cc/8DXP-3HAT.

111. *Id.*

eligible, ICE officers should "favorably view" and grant the request for the stay, absent adverse factors.[112]

The Vincent Memo, issued by former Principal Legal Advisor Peter S. Vincent, instructed ICE chief counsel on procedures for requesting prima facie review both for individuals with a final order of removal and for petitioners in removal proceedings.[113] The Vincent Memo instructed ICE chief counsel to request a continuance to allow USCIS to make a prima facie determination for U petitioners in removal proceedings.[114] If USCIS issued a prima facie determination, ICE chief counsel was instructed to consider administratively closing or terminating proceedings, pending final adjudication of the petition.[115] The Vincent Memo further provided that, following the final approval of a U petition, chief counsel should favorably exercise discretion to move to terminate proceedings or, following a final order of removal, to join a motion to reopen and terminate proceedings.[116]

Officers at USCIS, however, adopted narrower procedures for conducting the prima facie determinations than those set forth by ICE. In 2010, the Vermont Service Center stated that it would only entertain requests from ICE to issue a prima facie determination for detained U petitioners and those with final removal orders, omitting non-detained petitioners in removal proceedings.[117]

In 2011, ICE issued additional guidance instructing chief counsel to exercise prosecutorial discretion for certain victims and witnesses, to minimize any negative effect of enforcement on their willingness to report crimes.[118] That memo, known as the Morton Memo, also stated that it is against ICE policy to initiate removal proceedings against someone known to be a victim or witness to a crime.[119]

Despite these three memos, ICE officers under the Bush and Obama administrations did not routinely grant motions to terminate removal proceedings for prima facie U petitioners.[120] For this reason, U petitioners often relied on the alternative docket management tools discussed below, such as

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112. *Id.*

113. Peter S. Vincent, *Guidance Regarding U Nonimmigrant Status (U Visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal,* U.S. IMMIGR. & CUSTOMS ENF'T (Sept. 25, 2009), https://perma.cc/LS94-V3JL.

114. *Id.* at 2.

115. *Id.*

116. *Id.*

117. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., *Executive Summary, Vermont Service Center Stakeholder Engagement* (Apr. 19, 2010), https://perma.cc/JH24-FHVJ; KINOSHITA, BOWYER, FARB, KAMHI & SEITZ, *supra* note 75, at 70.

118. Memorandum from John Morton, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, to U.S. Immigr. & Customs Enf't 1–2 (2011) https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

119. *Id.*

120. KINOSHITA, BOWYER, FARB, KAMHI & SEITZ, *supra* note 75, at 180 ("Most ICE attorneys will oppose termination until the person has been granted U nonimmigrant status.").

administrative closure or continuances, to prevent orders of removal during adjudication.[121]

During the Trump administration, ICE took a less favorable position towards U petitioners facing removal. In 2019, ICE issued a fact sheet revoking the prima facie determination policy and instead instructed its officers and attorneys to conduct their own totality of the circumstances review to determine whether a stay of removal or the termination of removal proceedings was appropriate.[122] The fact sheet noted that it is "ICE policy to respect USCIS' grant of deferred action" and it is permissible for ICE to join a motion to terminate for those waitlisted or approved, but was silent as to petitioners who had not yet been placed on the waitlist.[123] By abandoning the prima facie determination standard, ICE departed from the 2008 TVPRA amendment and regulatory guidance expressly authorizing the Secretary to grant stays for prima facie petitioners.[124]

Shortly after assuming office, President Biden issued an executive order articulating foundational policies and priorities for immigration enforcement and directing DHS to take actions advancing those policies.[125] In September 2021, DHS issued guidelines for immigration enforcement in line with the executive order.[126] Under these guidelines, DHS should prioritize for removal noncitizens who pose a threat to national security, public safety, or border security.[127]

In August 2021, ICE issued a directive adopting a "victim centered approach" to immigration enforcement.[128] The policy provides that "absent

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121. *Id*. at 180–82.

122. U.S. IMMIGR. & CUSTOMS ENF'T, *Fact Sheet: Revision of Stay of Removal Request Reviews for U Petitioners* (Aug. 2, 2021), https://perma.cc/JWY4-F7YU [hereinafter ICE 2019 Fact Sheet]. This policy has been criticized by practitioners because it creates "enormous barriers for survivors of violence; it eliminates critical procedural safeguards and will lead to an increased risk that survivors may face deportation before their cases are decided." ADVANCED SPECIAL IMMIGRANT SURVIVORS TECH. ASSISTANCE, POLICY UPDATE: CHANGES IN ICE GUIDANCE WILL IMPEDE ACCESS TO PROTECTIONS FOR IMMIGRANT SURVIVORS OF VIOLENCE (2019), https://perma.cc/S378-BE9H.

123. ICE 2019 Fact Sheet, *supra* note 122.

124. In March 2021, ICE agreed not to deny a stay of removal, remove, or oppose a continuance for a U petitioner, departing from the 2019 totality of the circumstance policy, in response to federal litigation. ASISTA v. Johnson, No. 3:20-cv-00206-JAM (D. Conn.) (granting joint motion to stay proceedings Mar. 18, 2021).

125. Exec. Order No. 13,993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 20, 2021). Following the Executive Order, DHS, and later ICE, issued implementing interim guidance memorandums encouraging the exercise of prosecutorial discretion for noncitizens who are not priorities for removal. *See* David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*, U.S. DEP'T OF HOMELAND SEC. (Jan. 20, 2021), https://perma.cc/B47A-Q59R; Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*, U.S. IMMIGR. & CUSTOMS ENF'T (Feb. 18, 2021), https://perma.cc/Z8RW-N54L (authorizing ICE chief counsel to exercise prosecutorial discretion after weighing a list of relevant aggravating and mitigating factors and providing that removal cases for noncitizens with "a viable avenue to regularize their immigration status outside of removal proceedings" generally merit dismissal without prejudice").

126. Alejandro N. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law*, U.S. DEP'T OF HOMELAND SEC. 2, 6 (Sept. 30, 2021), https://perma.cc/A647-HSZ6.

127. *Id*. at 2.

128. ICE Directive 11005.3, *supra* note 8, at 1.

exceptional circumstances, ICE will exercise discretion to defer decisions on civil immigration enforcement action against the applicant (primary and derivative) until USCIS makes a final determination on the pending victim-based immigration benefit application."[129] Specifically, the directive instructs ICE officials to defer to USCIS's adjudication by considering dismissing proceedings for bona fide U petitioners and agreeing to continue proceedings for other pending U applicants.[130] Absent extraordinary circumstances, ICE officials are directed to grant a stay of removal for U petitioners with outstanding removal orders.[131] Should ICE officials choose to proceed with an enforcement action due to extraordinary circumstances, they are required to obtain approval from supervisory level officials to do so, which should help limit potential abuses of discretion by individual agency actors.[132] Accordingly, this memorandum restores and improves upon the former ICE discretionary protections for U nonimmigrant applicants.

B. *EOIR Framework and Erosion of Discretionary Tools*

As discussed above, because USCIS has sole jurisdiction, immigration judges may not adjudicate U petitions.[133] Circuit courts are split as to whether immigration judges have authority to adjudicate the corresponding waiver for inadmissible U petitioners.[134]

Unlike DHS, EOIR has not promulgated regulations providing discretionary relief to U petitioners in removal proceedings. The BIA, however, has issued precedential decisions shedding light on how immigration judges have utilized discretionary powers to do so.

Immigration judges have traditionally relied on their general discretionary authority to postpone removal proceedings for a U petitioner awaiting adjudication. Specifically, 8 C.F.R. 1003.10(b) gives immigration judges independent judgment and discretion to take any action consistent with the INA and regulations that is necessary for the disposition of a case.[135] Under this authority, immigration judges used docket management tools such as termination, administrative closure, or a string of continuances to allow sufficient time for USCIS to adjudicate a pending U petition. However, during the

129. *Id*. at 2.
130. *Id*. at 8.
131. *Id*.
132. *Id*. at 9–10.
133. Perez Vargas, 23 I&N Dec. 829, 831 (B.I.A. 2005) (quoting Aurelio, 19 I&N Dec. 458, 460 (B.I.A. 1987)).
134. The Seventh and Eleventh Circuits have held that immigration judges have concurrent jurisdiction over an I-192 inadmissibility waiver under INA § 212(d)(3), as opposed to INA § 212(d)(14). *See* LDG v. Holder, 744 F.3d 1022 (7th Cir. 2014); Baez-Sanchez v. Sessions, 872 F.3d 854 (7th Cir. 2017); Meridor v. U.S. Att'y Gen., 891 F.3d 1302 (11th Cir. 2018). Both the BIA and Third Circuit have held that immigration judges may not adjudicate an I-192 waiver for a U petitioner. *See* Sunday v. U.S. Att'y Gen., 832 F.3d 211 (3d Cir. 2016); Khan, 26 I&N Dec. 797 (B.I.A. 2016).
135. 8 C.F.R. § 1003.10(b) ("Immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.").

Trump administration, EOIR sought to dramatically curb the use of those tools. These discretionary powers, and the specific steps taken to limit them, are explained in detail below.

1. *Termination*

Termination, the dismissal of removal proceedings, can be either with or without prejudice.[136] The removal proceedings of a noncitizen, who is referred to by the immigration courts as a respondent, might be terminated, for example, where the charges of removability are not sustained, or upon ICE chief counsel's agreement not to prosecute. If DHS wished to seek removal of a noncitizen whose proceedings had been terminated without prejudice, the ICE chief counsel would need to begin from scratch, issuing and serving a new notice to appear detailing the specific charges of removability.

Historically, ICE chief counsel generally did not exercise their regulatory discretion to terminate proceedings for U petitioners, and immigration judges were usually unwilling to terminate a U petitioner's proceedings over DHS objection.[137] In 2018, the Attorney General took steps to further limit immigration judges' ability to terminate proceedings. In *Matter of S-O-G- & F-D-B-*, the Attorney General held that immigration judges have no inherent authority to terminate or dismiss removal proceedings and may do so only under the circumstances expressly identified by regulation.[138] In light of DHS's refusal to terminate and the subsequent decision in *Matter of S-O-G & F-D-B-*, immigration judges did not typically terminate proceedings for U petitioners.

On June 11, 2021, the Acting EOIR Director issued a memorandum to all immigration court and BIA personnel on the DHS enforcement priority guidelines.[139] The memorandum reminds EOIR personnel that the role of both the immigration courts and the BIA is to resolve disputes,[140] and that adjudicators should accordingly use their resources to resolve questions in cases that remain in dispute, including by disposing with undisputed cases as appropriate that do not fit within DHS's enforcement priorities.[141] Accordingly, immigration judges are now encouraged to grant termination upon a joint or unopposed motion by a U petitioner in removal proceedings.

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136. Where proceedings are terminated with prejudice, the government is unable to refile charges of removability against the applicant based on prior allegations of removability.

137. KINOSHITA, BOWYER, FARB, KAMHI & SEITZ, *supra* note 75, at 179–80.

138. S-O-G- & F-D-B-, 27 I&N Dec. 462 (A.G. 2018), *abrogated* by Chavez Gonzales v. Garland, 16 F.4th 131 (4th Cir. 2021). The Interim Regulations expressly authorize ICE chief counsel to file or join a motion to terminate a U petitioner's removal proceedings, but do not authorize immigration judges or the BIA to terminate *sua sponte*, as they were promulgated solely by DHS. However, another regulation provides immigration judges with the authority to terminate where ICE agrees to exercise prosecutorial discretion because it is no longer in its best interest to prosecute. 8 C.F.R. § 1239.2(c) (2004).

139. Jean King, *Effect of Department of Homeland Security Enforcement Priorities*, U.S. DEP'T OF JUST. 1 (June 11, 2021), https://perma.cc/JRB4-5842.

140. *See* 8 C.F.R. § 1003.1(d) (1958); 8 C.F.R. §1003.10(b) (2021).

141. King, *supra* note 139, at 2.

2. *Administrative Closure*

Before 2018, immigration judges regularly relied on the second discretionary tool, administrative closure, to pause pending removal cases where a collateral action could determine the outcome of removal proceedings.[142] Administrative closure is a procedural tool that allows for removal cases to be put on hold, or removed from the active court docket, during the adjudication of a collateral issue or form of relief such as a U nonimmigrant status petition.[143] Unlike terminated proceedings, administratively closed cases can be reopened upon a request from either ICE chief counsel or the noncitizen, without requiring the filing of a new notice to appear and a new finding of removability. Administrative closure has often been used as a type of prosecutorial discretion, prioritizing certain cases while deferring others.[144] Experts recognized administrative closure as a key tool in increasing the efficiency of immigration courts and reducing the court backlog, because removing cases from the active docket frees up the court's resources to conclude active cases ripe for adjudication.[145]

For many years, administrative closure was favored by U petitioners, judges, and ICE chief counsel as a compromise: it allowed for the indefinite postponement of removal proceedings during the pendency of a U petition, while preserving a way for either party to easily resume proceedings following adjudication. If the U visa was approved, the noncitizen could move to reopen and terminate. If it was denied, DHS could resume proceedings to seek the noncitizen's removal. The BIA noted this directly in a precedential case, urging DHS to consider agreeing to administrative closure because "it will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge"[146] and would "avoid the repeated rescheduling of a case that is clearly not ready to be concluded."[147] Indefinite postponement benefited all parties, in light of the court and U backlogs, and used minimal administrative resources.

In 2018, however, the Attorney General held in *Matter of Castro-Tum* that immigration judges lack the general authority to administratively close proceedings, overruling prior case law endorsing the use of administrative

142. Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 YALE L.J. FORUM 567, 570, 574 (2020).

143. Avetisyan, 25 I&N Dec. 688, 692 (B.I.A. 2012) (recognizing administrative closure as a tool used to "temporarily remove a case from an Immigration Judge's active calendar").

144. *See, e.g.*, AM. IMMIGR. LAWS. ASS'N, PROSECUTORIAL DISCRETION IMPLEMENTATION: SYNTHESIS OF CHAPTER REPORTS (2012) (on file with author).

145. BOOZ, ALLEN, HAMILTON, LEGAL CASE STUDY: SUMMARY REPORT 26 (2017), https://perma.cc/FRV9-DJE9 (recommending administrative closure of cases awaiting adjudication in other agencies or courts to reduce the backlog).

146. Hashmi, 24 I&N Dec. 785, 791 n.4 (B.I.A. 2009) (discussed below as the pivotal case establishing the good cause standard for continuances where a visa petition is pending before USCIS).

147. *Id.*

closure as a case management tool.[148] Following this decision, immigration judges could use administrative closure only where regulations explicitly permit it, like for T nonimmigrants in removal proceedings.[149] The Third, Fourth, and Seventh Circuits overruled *Matter of Castro-Tum*, concluding that the plain language of 8 C.F.R. § 1003.10(b) unambiguously conferred general authority on immigration judges to administratively close cases.[150] In response, EOIR issued final regulations on December 16, 2020 explicitly providing that nothing in the regulation nor any other regulation contained in the chapter "shall be construed as authorizing a judge to administratively close" a case.[151] A district court preliminarily enjoined the rule on March 10, 2021.[152]

On July 15, 2021, the new Attorney General overruled *Castro-Tum*, reviving administrative closure as a docket management tool that all immigration courts may rely on to provide relief to U petitioners and other noncitizens awaiting adjudication of a collateral matter.[153] This is a welcome action restoring immigration judge authority to exercise discretion in favor of U petitioners, and indicates that DOJ will reconsider the December 16, 2020, final regulations.[154]

3. *Continuances*

The third docket management tool utilized by immigration judges is the power to continue proceedings to allow for the resolution of outcome determinative collateral matters, like a U petition. An immigration judge may continue removal proceedings for "good cause shown."[155] As administrative closure became increasingly unavailable, U petitioners caught in the backlog and noncitizens planning to promptly submit a U petition heavily relied on continuances to postpone proceedings. But, like other discretionary options, the Trump administration whittled away at the power to grant a continuance through agency precedent, policy memoranda, and proposed regulations which, if enacted, would have prohibited immigration judges from continuing cases for U petitioners.

In 2012, the BIA set forth a reasonable standard for evaluating good cause for a continuance and applied a rebuttable presumption in favor of a

148. Castro-Tum, 27 I&N Dec. 187 (A.G. 2018), *overruled by* Cruz-Valdez, 28 I&N Dec. 326 (A.G. 2021).

149. 8 C.F.R. §§ 214.11(d)(1)(i), (k)(2)(i) (2020).

150. Zuniga v. Barr, 937 F.3d 282, 297 (4th Cir. 2019); Morales v. Barr, 973 F.3d 656, 667 (7th Cir. 2020); Sanchez v. U.S. Att'y Gen., 997 F.3d 113, 124 (3d Cir. 2021). *But see* Hernandez-Serrano v. Barr, 981 F.3d 459, 461, 466 (6th Cir. 2020) (upholding *Castro-Tum)*.

151. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588, 81655 (Dec. 16, 2020) (amending 8 C.F.R. § 1003.10(b)).

152. Centro Legal De La Raza v. Exec. Off. Immigr. Rev., 524 F. Supp. 3d 919, 980 (N.D. Cal. 2021) (granting preliminary injunction).

153. Cruz-Valdez, 28 I&N Dec. 326, 326 (A.G. 2021).

154. *Id*. at 329.

155. 8 C.F.R. § 1003.29 (2008); *see also* 8 C.F.R. § 1240.6 (2008) (an immigration judge may grant such continuance *sua sponte* or upon application by the respondent or DHS, for good cause shown).

continuance for U petitioners in removal proceedings. The BIA first laid the grounding framework for this standard in *Matter of Hashmi*, which defined the parameters of good cause for noncitizens awaiting adjudication of a family based visa petition and adjustment pending with USCIS.[156] The BIA instituted a presumption that "discretion should be favorably exercised where a prima facie approvable visa petition and adjustment application have been submitted in the course of an ongoing removal hearing."[157] This presumption was reasonable given the "significant interest at stake," the opportunity to acquire lawful permanent resident status through a family based petition.[158] With that presumption in mind, the BIA then set forth five factors to be considered in the determination of good cause:

> (1) the DHS response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment merits a favorable exercise of discretion; and (5) the reasoning for a continuance and other procedural factors.[159]

The focus of these factors was the ultimate likelihood of success of the noncitizen's application to obtain permanent residence.

In *Matter of Sanchez Sosa*, the BIA adapted the *Hashmi* standard and set forth an even more favorable standard for U petitioners and noncitizens requesting a continuance in order to pursue a U petition.[160] Following a remand by the Ninth Circuit concluding that an immigration judge abused his discretion in denying a noncitizen's motion to continue to pursue a U petition, the BIA articulated the factors that immigration judges and the BIA should consider in determining good cause for a continuance for a U petitioner.[161]

Under this framework, the immigration judge should first consider DHS's position on the continuance. If DHS does not reasonably oppose, then proceedings should be continued.[162] Where DHS opposes, the inquiry focuses on the likelihood of success of the U petition.[163] Specifically, the immigration judge must consider whether the underlying petition is prima facie approvable, the reason for the continuance, and other procedural factors.[164] In determining whether the petition is prima facie approvable, the immigration judge evaluates "whether it is likely that the respondent will be able to show" that he meets the statutory and regulatory requirements for U nonimmigrant

156. *Hashmi*, 24 I&N Dec. at 785.
157. *Id.* at 790.
158. *Id.*
159. *Id.*
160. Sosa, 25 I&N Dec. 807, 812–15 (B.I.A. 2012).
161. *Id.*
162. *See id.* at 813.
163. *Id.*
164. *Id.* at 807.

status, by reviewing the underlying U petition and evidence.[165] Prima facie eligible petitioners are entitled to a rebuttable presumption in favor of a continuance for a reasonable period of time.[166] The immigration judge could, however, consider other factors, including the "length of time the application has been pending, the number of continuances the court has provided, and additional relevant considerations in determining whether a continuance is warranted."[167] USCIS delays not attributable to the applicant "auger[] in favor of a continuance," because "[d]elays in the USCIS approval process are not reason to deny an otherwise reasonable continuance request."[168]

While *Matter of Sanchez Sosa* instructs judges to make a prima facie assessment evaluating the viability of the underlying U petition, DHS already had a process in place calling on USCIS to make that initial *prima facie* determination. Specifically, as discussed above, 2009 ICE policy guidance required ICE chief counsel to request a continuance to allow USCIS to make a prima facie determination for U petitioners in removal proceedings.[169] The BIA's reliance on immigration judges, as opposed to USCIS, to make this initial determination may be a recognition of the Vermont Service Center's policy which limited prima facie review only to those with final removal orders or detained individuals.[170] Encouraging the judge to make a prima facie determination, instead of deferring to USCIS, required three sub-agencies, EOIR, ICE, and USCIS, to review and assess the merits of the same petition, leading to additional administrative inefficiency.

During the Trump administration, the Attorney General and EOIR took a number of steps to render the *Sanchez Sosa* presumption meaningless and facilitate the removal of U petitioners. In 2018, the Attorney General issued *Matter of L-A-B-R-*, restricting the good cause standard for continuances in collateral matters in response alleged "overuse of continuances in the immigration court."[171] The decision maintained the *Matter of Hashmi* and *Matter of Sanchez Sosa* framework, confirming that the primary consideration in evaluating good cause should be the likelihood of the collateral relief and whether it would materially affect the outcome of the removal proceedings.[172] However, the decision introduced a list of secondary factors which the court should also consider.[173] Secondary factors included the respondent's diligence in seeking collateral relief, DHS's position on the continuance, concerns of administrative efficiency, length of continuance requested,

165. *Id*. at 813.
166. *Id*. at 815.
167. *Id*. at 814–15.
168. *See id*. at 814.
169. *See* Vincent, *supra* note 113, at 1; Venturella, *supra* note 110, at 2.
170. U.S. CITIZENSHIP & IMMIGR. SERVS., VERMONT SERVICE CENTER STAKEHOLDER MEETING APRIL 6, 2010 VAWA, U & (SOME) T QUESTIONS 5 (Apr. 6, 2010), https://perma.cc/G7TC-9CMV; KINOSHITA, BOWYER, FARB, KAMHI & SEITZ, *supra* note 75, at 70.
171. Matter of L-A-B-R-, 27 I&N Dec. 405, 411–12 (A.G. 2018).
172. *Id*.
173. *See id*. at 402.

the number of hearings held and prior continuance requests, and the timing of the continuance motion.[174] The Attorney General stated his position was consistent with, and did not overrule, the relevant BIA precedent, including *Matter of Sanchez Sosa*.[175]

Then, in 2020, the BIA issued *Matter of L-N-Y-*, a decision purporting to reconcile *Matter of L-A-B-R-* with prior precedent and discussing the balancing of primary and secondary factors to determine good cause for a U petitioner.[176] In evaluating those factors, the BIA held that the noncitizen's prima facie U eligibility and the U petition's potential determinative impact on the outcome of removal proceedings were not dispositive, ignoring the *Sanchez Sosa* presumption, because *Matter of L-A-B-R-* secondary factors weighed against a continuance.[177] In *Matter of L-N-Y-*, the secondary factors relied on by the immigration judge in denying a continuance included: (1) delay in seeking U status where the underlying crime occurred ten years prior; (2) DHS's opposition; (3) the uncertainty as to when U status might become available; and (4) that the U petitioner was detained.[178] The BIA entirely disregarded the fact that by the time of the petitioner's motion to remand for a continuance, USCIS had placed the petitioner on the U waitlist and issued a grant of deferred action.[179] While the BIA claimed that the decision was consistent with *Matter of Sanchez Sosa*, it has been criticized by experts and practitioners as "a results-based decision meant to instruct IJs [Immigration Judges] to deny continuances."[180] Appellate courts have reached differing conclusions regarding whether the BIA's affirmance of an immigration judge's discretionary denial of a U petitioner's continuance request could be considered an abuse of discretion.[181]

4. *Proposed Regulations and Policy Memo*

In a direct attempt to undercut the *Sanchez Sosa* presumption, in November 2020, EOIR issued proposed regulations which would practically prohibit an immigration judge from granting a continuance to a U petitioner.[182] Up to this point, the good cause standard had been defined solely through precedential

174. *Id.*
175. *See id.* at 418.
176. *See* Matter of L-N-Y-, 27 I&N Dec. 755, 757–759 (B.I.A. 2020).
177. *See id.* at 757–58.
178. *See id.* at 758.
179. *See id.* at 756.
180. PRACTICE ADVISORY: THE IMPACT OF MATTER OF L-N-Y-, 27 I. &N. DEC. 755 (B.I.A. 2020), ASISTA 1, 10 (2020), https://perma.cc/5YT9-APRZ.
181. *See* Quecheluno v. Garland, 9 F.4th 585, 589–590 (8th Cir. 2021) (holding that BIA abused its discretion by refusing to apply *Matter of Sanchez Sosa* factors and presumption in denying a U petitioner's motion to reopen); Guerra Rocha v. Barr, 951 F.3d 848, 854 (7th Cir. 2020) (holding that BIA abused its discretion by refusing to remand to determine whether continuance for prima facie U petitioner was warranted); Benitez v. Wilkinson, 987 F.3d 46 (1st Cir. 2021) (finding that BIA abused its discretion in denying a motion to reopen removal proceedings to allow a U petitioner to seek a continuance after he was placed on the U waitlist). *But see* Chavez Romero v. U.S. Att'y Gen., 817 F. App'x 919 (11th Cir. 2020) (upholding denial of noncitizen's motion to remand).
182. Good Cause for a Continuance in Immigration Proceedings, 85 Fed. Reg. 75925, (proposed Nov. 27, 2020) (to be codified at 8 C.F.R. pts. 1003, 1240).

decisions, but the proposed regulations set forth a narrow definition in response to a purported assertion that improper use of continuances contributed to the immigration court backlog.[183]

The proposed regulations explicitly provide U petitioners may only establish good cause for a continuance where they prove the U visa will be approved within six months of the requested continuance.[184] Because the formerly published USCIS case processing times reflected the time between filing and waitlist adjudication and did not account for final approval, there would have been no way for even a waitlisted deferred action recipient to establish that final visa approval would occur within six months[185] Accordingly, this standard would have set an impossible bar for U petitioners in removal proceedings by creating rigid and exacting standards for establishing likelihood of collateral relief which are inconsistent with *Sanchez Sosa* and the USCIS adjudication policies.[186]

In January 2021, former EOIR Director McHenry issued a memorandum addressing continuances and replacing a former policy memorandum to account for new legal and policy developments.[187] This memorandum noted that continuance requests regarding collateral matters are governed by *Matter of L-A-B-R-*, but listed a number of "principles [that] may also apply in specific cases," including the general statement that "too remote" visa availability does not establish good cause.[188] In his discussion of continuance requests for U petitioners, McHenry purported to recognize evolving case law and refer adjudicators to new precedents, while exclusively citing BIA case law and circuit court case law supporting the position that a continuance is not warranted where the U petition remains remote and highlighting the faulty reasoning that a U petitioner would not be prejudiced by removal because they can continue to await adjudication of their visa abroad.[189] The memorandum cited the proposed regulations on continuances as instructive for adjudicators.[190]

The proposed regulations were not finalized before the Biden administration assumed office. EOIR has yet to issue revised guidance explicitly

183. *Id.* at 75928.

184. *Id.* at 75934–35.

185. *Historical National Median Processing Time (In Months) For All USCIS Offices for Select Forms by Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 28, 2022), https://perma.cc/9YKM-L4BJ (noting in July 2021, a sixty-and-a-half to sixty-one month processing time from initial filing to waitlist determination). USCIS has temporarily removed the processing times for the U Visa, noting that "[w]hile USCIS implements the BFD process and gathers initial data on the BFD adjudications . . . USCIS is not reporting processing times for the Petition for U Nonimmigrant Status (Form I-918)."

186. The preamble to the proposed regulations makes no mention of the *Sanchez Sosa* rebuttable presumption and distinguishes the case, noting that the statutory cap had not yet been reached when that decision was issued, and accordingly, a visa was immediately available. *See* Good Cause for a Continuance in Immigration Proceedings, 85 Fed. Reg. at 75927 n.5.

187. James R. McHenry III, *Continuances*, EXEC. OFF. FOR IMMIGR. REV. (2021), https://perma.cc/M9BH-ZANS.

188. *Id.* at 3–4.

189. *Id.* at 4.

190. *Id.* at 6.

addressing the continuance framework for U petitioners and accordingly, immigration judges must follow *Sanchez Sosa*, as amended by *L-A-B-R-* and *L-N-Y-*.

5. *Status Docket*

In the midst of DHS's opposition to termination for U petitioners and the restriction on administrative closure, some immigration courts created status dockets—non-hearing dockets utilized to free up space on active hearing dockets. Removal hearings whose outcome could be determined by a collateral matter, such as a pending petition for relief with USCIS or a criminal proceeding, could be placed on the special docket. In lieu of appearing for short preliminary scheduling hearings, known as master calendar hearings, a noncitizen on the status docket was merely required to update the court regarding the status of the collateral matter, often every six months or annually.[191] Unless the respondent failed to provide an update or either party expressly requested a hearing, the case could remain on the status docket until the resolution of the collateral matter.[192] Although data has not been released documenting how widely this tool is used, a July 2019 email from the Deputy Chief Immigration Judge obtained through a Freedom of Information Act request indicated that there were around 21,000 cases on the status docket.[193]

In January 2018, EOIR first publicly recognized the existence of these informal status dockets in a memorandum setting forth case priorities and immigration court performance metrics.[194] The memorandum exempted narrowly defined "status" cases from its mandates, including cases where an immigration judge is required to continue a case pursuant to binding authority to await USCIS adjudication.[195] Soon after, EOIR issued further policy guidance designed to limit the use of a status docket to cases where courts are required by law or policy to delay adjudication of a case.[196] This memorandum prohibited immigration judges from placing U petitioners on the status docket because a continuance is not mandated by law or policy. The memorandum also contemplated removal from the status docket of any case that was not appropriately placed on the docket initially, which would include U

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191. *See*, *e.g.*, *Sample Redacted Status Docket Notice*, PHIL. IMMIGR. COURT (Aug. 2019) (on file with author) [hereinafter *Status Docket Notice*] (requiring reporting in eleven months); PRACTICE ADVISORY: STATUS DOCKETS IN IMMIGRATION COURTS, CATH. LEGAL IMMIGR. NETWORK, INC. 3–4 (Sept. 30, 2019), https://perma.cc/8QMC-FKYM.

192. *Status Docket Notice*, *supra* note 191.

193. *See* E-mail from Mary Cheng, Deputy Chief Immigr. J., Exec. Off. for Immigr. Rev., to All Immigr. JJ. (July 29, 2019, 02:51 PM) (on file with author).

194. James R. McHenry III, *Case Priorities and Immigration Court Performance Measures,* EXEC. OFF. FOR IMMIGR. REV. (2018), https://perma.cc/CLE7-D2KB.

195. *Id.* at app. A n.7.

196. James R. McHenry III, *Use of Status Dockets*, EXEC. OFF. FOR IMMIGR. REV. (2019), https://perma.cc/C4HW-Z494.

nonimmigrant status cases, but it is unclear whether immigration judges returned such cases to their active docket.[197]

C. *Impact of Split Jurisdiction Framework on Elena*

To illustrate how this web of regulations, precedential decisions, and policies issued by USCIS, ICE, and EOIR impacted U petitioners during the Trump administration and continue to impact petitioners today, it is helpful to apply them to Elena's case, the noncitizen survivor of domestic violence introduced above.

As set forth in the introduction, Elena was placed in removal proceedings four years after cooperating with the district attorney's office to report her husband's crime. Elena then connected with an immigration attorney and applied for U nonimmigrant status. Based on the number of pending petitions at the end of Fiscal Year 2021, she can expect to wait over thirteen years until she is able to obtain a final approval.[198]

In removal proceedings, assume Elena's attorney filed a proposed joint motion to terminate removal proceedings with ICE Chief Counsel's Office, citing 8 C.F.R. § 214.14(c)(1)(i), which allows ICE to join a motion to terminate based on a pending U petition.

1. *Trump-Era Outcome*

As USCIS did not adopt a bona fide adjudication system until 2021 and placed few cases on the waitlist, Elena would not have been eligible for deferred action or a work permit while she awaited adjudication of her U petition. As discussed above, this could take around ten years.

In consideration of Elena's joint motion request, prior to 2019, ICE would have been required under the Venturella Memo to seek a prima facie determination from USCIS, evaluating whether Elena's petition included sufficient evidence on its face to satisfy the eligibility requirements and seek a continuance while USCIS conducted their review.[199] If USCIS determined the petition was prima facie approvable, this prior guidance encouraged administrative closure or termination. But despite this guidance, ICE attorneys routinely opposed motions to terminate or administratively close proceedings for U petitioners.

Based on the 2019 Fact Sheet summarizing the principles of the revised ICE policy, ICE no longer had any such obligation to obtain a prima facie determination, nor guidance encouraging termination for a U petitioner who had not yet been placed on the waitlist.[200] Accordingly, ICE would have

197. *Id*. at 3.
198. USCIS REPORT ON NUMBER OF PENDING U PETITIONS, *supra* note 30.
199. Venturella, *supra* note 110, at 1.
200. ICE 2019 Fact Sheet, *supra* note 122, at 2.

opposed Elena's motion, citing internal guidance not to join unless or until USCIS grants deferred action or U nonimmigrant status.[201]

The ICE chief counsel's refusal to join a motion to terminate proceedings would leave the immigration judge with limited discretionary options to prevent Elena's removal. First, immigration judges in all but the Third, Fourth, and Seventh Circuits could not have relied on general regulatory authority to administratively close the case.[202] The immigration judge similarly could not have terminated proceedings over ICE chief counsel's objection, because authority to do so is not explicitly provided for by law.[203] Similarly, the immigration judge could not have placed Elena on a status docket, because the judge is not required to do so by law or policy.[204] Accordingly, the only discretionary tool that the judge could have considered would be a continuance for good cause.

Elena's counsel would likely have filed a motion to continue the proceedings, citing the *Matter of Sanchez Sosa* rebuttable presumption. Assuming ICE would not request a prima facie determination, the immigration judge would have conducted a prima facie assessment of the U petition in accordance with *Matter of Sanchez Sosa*.[205] The judge would have considered the qualifying crime, helpfulness of the applicant, the substantial harm suffered by the petitioners, and the "likelihood that USCIS will exercise its discretion favorably" on the waiver of inadmissibility.[206]

Provided Elena established her prima facie eligibility, the immigration judge would then have weighed the positive primary factors, prima facie eligibility and the fact that approval by USCIS would be determinative of the removal proceedings, against the secondary facts set forth in *Matter of L-A-B-R-*, including the length of time that Elena "waited" to apply for the visa following the occurrence of the crime (five years), DHS opposition to a motion to continue, the length of a continuance necessary to allow for adjudication (ten years), and the impact on administrative resources.[207]

ICE chief counsel would likely have opposed a continuance, as was its position in *Matter of L-N-Y-*, despite the fact that the petitioner in that case had been placed on the waitlist and granted deferred action by USCIS.[208] The immigration judge would still have had discretion to continue, but the EOIR

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201. *Id.* at 2 ("It is also permissible for ICE to join a motion to terminate proceedings for petitioners *who have been waitlisted or approved*."); KINOSHITA, BOWYER, FARB, KAMHI & SEITZ, *supra* note 75, at 180.

202. Matter of Castro-Tum, 27 I. &N. Dec. 271 (A.G. 2018), *vacated and remanded by*, Matter of Cruz-Valdez, 28 I. &N. Dec. 326 (A.G. 2021); Romero Zuniga v. Barr, 937 F.3d 282, 297 (4th Cir. 2019); Meza Morales v. Barr, 973 F.3d 656, 665 (7th Cir. 2020); Arcos Sanchez v. U.S. Att'y Gen., 997 F.3d 113, 124 (3d Cir. 2021).

203. Matter of S-O-G- and F-D-B-, 27 I&N Dec. 462 (A.G. 2018).

204. McHenry III, *supra* note 196, at 1.

205. Matter of Sanchez Sosa, 25 I&N Dec. 807, 815 (B.I.A. 2012).

206. *Id.* at 814. In two circuits, the immigration judge can adjudicate the inadmissibility waiver. See discussion in *supra* note 136.

207. *Matter of L-A-B-R-*, 27 I&N Dec. at 415.

208. *Matter of L-N-Y-*, 27 I&N Dec. at 758.

guidance and proposed regulations emphasizing the principle that a case should not be continued if relief was too remote would weigh against a continuance.[209] The remoteness of the U adjudication, combined with Elena's "lack of diligence" in applying for the visa, and ICE's opposition, would likely under *Matter of L-N-Y-* have been found to outweigh the primary presumption.[210] The immigration judge might have reasoned in her decision that Elena can seek an administrative stay of removal from ICE, and if all else fails, Elena can await adjudication of her U petition abroad, and accordingly, is not prevented from continuing to seek relief.

If the immigration judge denied the continuance and Elena did not assert any alternative entitlement to relief from removal, she would have been ordered removed. Elena could have appealed to the BIA, but such appeal would have been unlikely to succeed under *Matter of L-N-Y-*. Given the lenient abuse of discretion standard applied by the circuits, a reviewing court would likely conclude that the immigration judge's decision not to continue was not an abuse of discretion.[211]

Once Elena's removal order became final, she could have requested a stay of removal from ICE. Under the 2019 ICE Fact Sheet, ICE would not have requested a prima facie determination from USCIS and would have based its decision on the "totality of the circumstances." The 2019 Fact Sheet discussing ICE Directive 11005.2 notes that it is ICE policy to grant a stay for those with deferred action or a final approval, but is silent as to pending petitions.[212] Applying the totality of the circumstances, ICE could have denied the stay based on the fact that Petitioner waited five years to apply for the U visa (after the underlying crime occurred), the long adjudication wait, and the fact that Elena would be able to await the adjudication from her petition outside of the United States and consular process upon approval.[213]

If ICE denied the stay, Elena would have had no right of appeal. She would have been removed and would then have to decide whether or not to bring her United States citizen child with her to await a grant of her U visa. Under current processing times, she would likely need to wait outside of the United States for at least ten years.

Upon her removal and departure from the United States, Elena would trigger two new inadmissibility grounds (for unlawful presence and a prior order

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209. McHenry III, *supra* note 187; Good Cause for a Continuance in Immigration Proceedings, 85 Fed. Reg. at 75,925.

210. Elena is unfairly held accountable for USCIS's backlog under *Matter of L-N-Y-* because the wait time for a visa is an adverse factor considered by the immigration judge. It is inequitable to hold the USCIS backlog, caused by a lapse in oversight and lack of USCIS resources, against a prima facie U petitioner.

211. Chavez-Romero v. Att'y Gen., 817 F. App'x 919 (11th Cir. 2020); Montelongo-Leyva v. Barr, 820 F. App'x 503 (8th Cir. 2020).

212. ICE 2019 Fact Sheet, *supra* note 122, at 2.

213. *Id*. at 2 ("The fact that a petitioner can continue to pursue a U visa adjudication from outside the United States is not alone a reason for ICE to deny a Stay of Removal request.").

of removal).[214] She would need to amend or file a new inadmissibility waiver to waive these specific grounds, unless her petition remained pending for longer than the applicable 10-year re-entry bars.[215] USCIS would have discretion to waive these grounds in conjunction with her U approval. Assuming Elena's U petition and waiver is eventually approved, she would then need to schedule an interview with the Department of State at the nearest U.S. embassy or consulate to apply for her U visa to enter the United States, known as consular processing. The Department of State would not re-evaluate the merits of her U petition, but Elena would need to submit a form and additional biographic evidence.[216] Consular processing procedures and timing varies depending on the particular consular location.[217]

2. *Biden Administration Impact*

During President Biden's first year in office, DHS announced policy changes which promise much needed relief to U petitioners in removal proceedings. Under ICE Policy Directive 11005.3, ICE officials are generally instructed to refrain from taking enforcement actions against U petitioners. Yet, the Attorney General and EOIR have not yet issued any revised guidance specifically addressing U petitioners, and the success of DHS's revised policies will depend on the resources allocated to U adjudication and the consistent positive discretionary exercise by ICE chief counsel.

Once Elena's U petition is filed, she must await a BFD from USCIS to receive deferred action and a work permit.[218] Because there are over 170,000 principal applicants awaiting adjudication, Elena may wait years for this determination, just as former and current U petitioners have waited years to be placed on the waitlist.

If Elena has not yet received, or has been denied, a BFD, ICE chief counsel is instructed under the victim-centered approach to "consider whether agreeing to a continuance of removal proceedings would be appropriate."[219] Where USCIS has made a positive BFD, ICE chief counsel will "consider whether seeking dismissal of pending removal proceedings would be appropriate."[220]

During the Bush, Obama, and Trump administrations, however, ICE chief counsel often chose not to exercise discretion to provide available relief to U petitioners, despite agency level policies like the Vincent Memo and Morton

214. *See* Immigration and Nationality Act § 212(a)(9)(A)(ii), (a)(9)(B) (2022).

215. *Id.* Specifying a ten-year bar applies for those who were ordered removed and those who accrued more than one year of unlawful presence.

216. U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL § 402.6-6(F)(1)(e) and (f) (2021), https://perma.cc/92L2-BCUE; *Consular Processing for Overseas Derivative T and U Nonimmigrant Status Family Members: Questions and Answers*, USCIS (Apr. 6, 2012), https://perma.cc/WM6K-8W5T; *see also* KINOSHITA, BOWYER, FARB, KAMHI & SEITZ, *supra* note 75, at 214.

217. KINOSHITA, BOWYER, FARB, KAMHI & SEITZ, *supra* note 75, at 214.

218. *Bona Fide Determination Process*, *supra* note 8.

219. ICE Directive 11005.3, *supra* note 8, at 8.

220. *Id.*

Memo encouraging protection. ICE Policy Directive 11005.3 requires ICE officials to obtain supervisory approval before taking an enforcement action against Elena, which should help prevent individual actors from arbitrarily withholding discretion, but it is possible that it will still be more difficult in certain jurisdictions to obtain prosecutorial discretion than others despite this policy.

If ICE chief counsel does not dismiss or support a continuance of Elena's proceedings, the immigration judge could grant administrative closure[221] or could continue proceedings over chief counsel's objection. But, as continuances are typically only granted for a six-month period, her ability to prevent a removal order during U adjudication, which will take years, remains uncertain and would need to be evaluated under the *Matter of L-N-Y-* framework, as discussed above. If ordered removed, Elena would still likely benefit from ICE Directive 11005.3, which provides that ICE will generally grant a stay of removal for a pending U petitioner absent extraordinary circumstances.[222]

IV. CRITIQUES OF SPLIT JURISDICTION DISCRETIONARY SYSTEM

The current statutory and regulatory framework for providing relief to U petitioners in removal proceedings is problematic because it relies on discretionary actions by various sub-agencies administering our immigration system. ICE chief counsel and immigration judges have arbitrarily and inconsistently exercised discretion in favor of or against U petitioners.[223] This variability is highly problematic because it offends principles of justice and equity and runs contrary to the fundamental tenet that "agency action must be based on non-arbitrary, 'relevant factors.'"[224] In addition, the discretionary framework is subject to erosion, such that a future administration disinclined towards providing relief to immigrant victims of crime might enact policies narrowing, or even eliminating, the exercise of discretion for U petitioners like Elena, in many ways similar to the actions taken by agency officials under the Trump administration.

The failure of the discretionary system to provide secure and consistent relief to U petitioners results in two problems. First, this system undermines the statutory intent of the U visa by frustrating the two primary purposes of

221. Matter of Cruz-Valdez, 28 I&N Dec. 326 (A.G. 2021).

222. Upon approval of the U petition, Elena would be reliant on ICE chief counsel's exercise of discretion to join a motion to reopen and terminate her removal proceedings, to remove the prior order from her record.

223. Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN L. REV. 367, 406–07 (2020) (raising concerns of arbitrary discretionary denials in immigration cases); *see also* Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 328 (2007) (finding serious disparities in the immigration judge grant rates for asylum seekers from certain countries both between and within individual immigration courts).

224. Judulang v. Holder, 132 S. Ct. 476, 485 (2011) (quoting Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Daniel Kahneman recognized the phenomenon of high variability in discretionary legal judgments, among other human decisions, as "noise" which is troublesome from an equity standpoint and, along with bias, can have a significant negative impact on the quality of our judgments. DANIEL KAHNEMAN, NOISE: A FLAW IN HUMAN JUDGMENT 12 (2021).

strengthening law enforcement's ability to investigate crimes and offering protection from removal to immigrant victims of crime. Second, the discretionary framework in its current form undercuts agency goals of administrative efficiency by potentially requiring USCIS employees, ICE chief counsel, and an immigration judge to evaluate the underlying merit of the pending U petition for nonimmigrant status, despite the fact that USCIS has sole jurisdiction to adjudicate the U petition.

A. *Harm to Survivors of Crime and Law Enforcement Efforts*

As set forth above, Congress created U nonimmigrant status in recognition that the protections for immigrant survivors of crime under VAWA I did not go far enough to shield immigrant survivors and encourage collaboration with law enforcement.[225] VAWA II expressly memorialized this in the statutory finding that abusers of undocumented immigrants who are unable to access immigration protections "are virtually immune from prosecution *because their victims can be deported*."[226] Fear of removal is a major obstacle to convincing undocumented immigrant victims to come forward and report crimes, highlighting the connection between reporting crimes and immigration status.[227] U nonimmigrant status was created to remedy these problems by (1) strengthening the ability of law enforcement to investigate crimes against immigrant victims while (2) offering protection to victims in keeping with the humanitarian interests of the United States. Thus, the statutory intent is clear: to incentivize survivors of serious crimes to cooperate with law enforcement in the investigation and prosecution of perpetrators while providing humanitarian relief in the form of protection from removal.[228]

The current statutory and regulatory discretionary framework fails to provide survivors with secure protection from removal throughout the lengthy adjudication process, undermining the statutory intent to provide protection in light of the humanitarian and law enforcement interests of the United States.

The discretionary framework to protect U petitioners from removal has been problematic since its inception in 2007, because ICE chief counsel's exercise of discretion varied widely across jurisdictions under the Bush and Obama administrations. While some chief counsel and judges exercised their discretion to terminate or administratively close removal proceedings, others opposed those remedies and even opposed continuances for U petitioners.

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225. *Battered Immigrant Women Protection Act of 2000: Hearing on H.R. 3083 Before the H. Immigr. Subcomm.*, 106th Cong. 44 (2000) (statement of Barbara Strack, Acting Executive Associate Comm'r, Office of Policy and Planning, Immigration and Naturalization Service).

226. Pub. L. No. 106-386, §1502(a)(3) (emphasis added).

227. See discussion and citations *supra* note 18.

228. See discussion in Part II.

Relying on DHS and EOIR employees to favorably exercise discretion creates vulnerability for a type of "darkside discretion," or the negative exercise of discretion by an adjudicator to deny a remedy for which a noncitizen is statutorily eligible.[229] U petitioners caught in the adjudication backlog who appear to meet the eligibility requirements might still be denied relief from removal based on an adjudicator's decision not to exercise discretion with limited agency oversight. As discussed above, a decision not to exercise discretion is generally not appealable. This leaves U petitioners in limbo without entitlement to secure relief.

Further, the actions of DHS and EOIR administrators during the Trump administration highlighted the vulnerabilities of the discretionary framework as new policies and precedential decisions undermined the legislative intent to provide survivors of crime with secure relief from removal. These actions are examples of the rise of the Trump administration "shallow state," in which administrative actors exercised interpretive and discretionary powers to restrict access to important immigration benefits in furtherance of an administration intent on limiting access to humanitarian immigration benefits, often in contradiction to our statutory immigration framework.[230]

While the Biden administration has implemented helpful policy changes at DHS to provide immediate relief, including the BFD process to provide deferred action and employment and an ICE chief counsel policy in favor of prosecutorial discretion, questions remain regarding how quickly and consistently these policies will be implemented. Further, while these policies encourage a positive exercise of discretion, they do not alter the basic discretionary framework, which remains insufficient to provide noncitizens with certainty regarding their relief from removal throughout the pendency of their U petitions.

This is primarily because of the ease with which the framework can be eroded, as seen during the Trump administration. The Biden administration policies encouraging exercises of discretion were implemented through agency policy guidance without notice and comment, as opposed to a statutory or regulatory amendment. But because of the ten-year backlog, victims of crime today considering reporting to law enforcement must not only consider whether they will be protected under this administration, but also under future administrations, who may take a less favorable position towards U petitioners and revoke guidance encouraging discretionary relief, like the Trump administration. The actions of DHS chief counsel, EOIR, and ICE, detailed above during prior administrations, create a blueprint for how the regulatory framework may be manipulated to withhold relief. Without more

229. Wadhia, *supra* note 223, at 369.

230. Dahlstrom, *supra* note 97, at 92 (describing "shallow state" attempts to erode immigration protections for trafficking victims).

lasting reforms, history might repeat itself.[231] Accordingly, while victims may find some assurances in promises to widely exercise discretion and increased supervisory oversight of enforcement actions against victims, lasting relief from removal remains uncertain. For this reason, the discretionary framework undercuts the statutory intent to provide widespread relief.

The discretionary framework also frustrates the second statutory purpose of strengthening law enforcement's ability to detect, investigate, and prosecute crimes against immigrant victims, because it fails to provide sufficient certainty to U petitioners. This is due to the link between fear of removal and willingness to report.[232] As fear of removal increases, fewer immigrant survivors are willing to report perpetrators and seek protective orders.[233] A 2018 report by the ACLU found that more than 50 percent of the police officers surveyed concluded that domestic violence, human trafficking, and sexual assault crimes have become more difficult to investigate because immigrant survivors are afraid to seek assistance from law enforcement.[234] When immigrant victims cease reporting crimes out of fear of deportation, law enforcement's ability to detect and prosecute such crimes is drastically hindered. During the Trump administration, as the discretionary framework for providing removal relief was eroded, survivors of crime lost confidence in their ability to obtain relief.[235] And while the current system provides temporary assurances, it may not be enough to convince potential U petitioners that such relief will continue to exist in future administrations. Accordingly, the discretionary framework may continue to frustrate the intended purpose of improving law enforcement's ability to prosecute crimes against immigrant survivors. This ultimately makes immigrant victims and their communities more vulnerable to violent crime.

Two flawed arguments have been relied on to support the contention that issuing an order of removal to a U petitioner does not frustrate congressional intent to protect immigrant victims of crime. First, that the issuance of a removal order does not necessarily result in removal from the United States,

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231. As the Sixth Circuit warns in connection with the BFD process "[a] future administration could rescind the BFD process just as easily as this administration established it; the program could be retracted before any of Plaintiffs' applications are adjudicated by USCIS." Garcia v. U.S. Dep't of Homeland Sec., 25 F.4th 430, 441 (6th Cir. 2022).

232. Nanasi, *supra* note 18, at 302 ("Immigrants' fear of deportation is a significant factor in their unwillingness to engage with law enforcement.").

233. FINLEY, *supra* note 18, at 8–9; TAHIRIH JUST. CTR., KEY FINDINGS, 2017 ADVOCATE & LEGAL SERVICE SURVEY REGARDING IMMIGRANT SURVIVORS (2017), https://perma.cc/UKQ5-6M5N (noting that 78 percent of advocates reported that immigrant survivors expressed concerns about contacting the police); Heidi Glenn, *Fear of Deportation Spurs Four Women to Drop Domestic Abuse Cases in Denver*, NPR (Mar. 21, 2017), https://perma.cc/4SX2-796C.

234. ACLU, *supra* note 18, at 1. Police Departments in Houston, Los Angeles, Denver, and San Diego have also reported a decline in domestic violence reports to law enforcement in immigrant communities. Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*, N.Y. TIMES (June 3, 2018), https://perma.cc/Z66F-SYBJ.

235. Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (Apr. 30, 2017), https://perma.cc/ZG3S-RBY7 (noting law enforcement officials attribute decreased reporting to policy changes and harsh statements in immigration).

because the U petitioner can apply for a stay of removal from ICE during the pendency of the application, and second, that removing a U petitioner has no bearing on the ultimate outcome of the U petition. But both of these arguments ignore the resulting uncertainty for survivors and its impact on law enforcement reporting.

First, the argument that the issuance of a removal order will not result in a U petitioner's removal from the United States because the petitioner can apply for an administrative stay from the Enforcement and Removal Operations Officers of ICE merely shifts the responsibility to provide relief to another office of DHS. And while current ICE policy is to grant a stay absent extraordinary circumstances, the prior 2019 policy was entirely discretionary based on ICE's totality of circumstances evaluation.[236] This left U petitioners vulnerable to removal and was likely to result in disparate results across the country. Unlike an underlying removal order, which may be appealed to the BIA and then a federal circuit, there is no right to review of a denial of an administrative stay. Forcing U petitioners to apply for a stay of removal to remain in the country imposes additional burdens because a request for stay is not automatic. Assuming the U petitioner is represented, counsel must submit an additional application which, unless representation is pro bono, would likely be an additional charge for the U petitioner. Unrepresented U petitioners face an uphill battle, as they may not be aware of this avenue for relief and may face additional challenges navigating the application system.

Second, some may argue, as the BIA, Seventh and Eleventh Circuits, and DOJ reasoned in discussing continuances for U petitioners, that removal does not undermine congressional goals to provide relief because U petitioners removed from the United States may await the adjudication of their petition from abroad and eventually re-enter the country legally by consular processing.[237] But this reasoning ignores the legislative history, which emphasized the U visa as a tool to prevent deportation of immigrant survivors of crime and incentivize crime victims to cooperate with law enforcement.[238] Specifically, it discounts both the substantial harm that U respondents face if forced to depart the country and the statutory scheme intended to allow

236. ICE Directive 11005.3, *supra* note 8; ICE 2019 Fact Sheet, *supra* note 123.

237. *See Matter of L-N-Y-*, 27 I&N Dec. at 760 ("Moreover, as the Immigration Judge noted, the respondent may continue to pursue his U visa, even after he is removed."); Chavez v. Romero, 817 Fed. Appx. 919, 924 (11th Cir. 2019) (finding that remand is not mandated where there are other avenues of relief including administrative stay of removal and the option to obtain status abroad through a consulate); Alvarez Espino v. Barr, 959 F.3d 813, 818 (7th Cir 2020) ("[DHS] will process the [U visa] application whether or not Alvarez-Espino has a final order of removal against him . . . . Because Alvarez-Espino can continue to pursue every immigration benefit he seeks [outside of removal proceedings], the Board did not abuse its discretion in denying his motion for remand or for a continuance."); 85 Fed. Reg. at 75,925, 75,930 ("The mere conceivability of relief prior to the issuance of a removal order would hardly establish good cause for delaying the proceedings, because no continuance would be necessary to preserve the alien's ability to pursue the collateral matter with another agency.").

238. *See* § 1502(a)(2), 114 Stat. at 1518; § 1513(a)(2)(A), 114 Stat. at 1533.

survivors of serious crime to remain in the United States throughout the adjudication of their petition through a generous inadmissibility waiver.

The removal of a U petitioner, like the removal of a noncitizens generally, often results in substantial harm for both the individual and their family. Noncitizens subject to removal may fear a variety of harms, including physical, psychological, economic, and social harm.[239] For example, a U petitioner may fear removal due to extremely dangerous conditions or climate disasters in his or her home country.[240] This is especially true where the perpetrator of the qualifying crime was deported to the same country and has threatened to retaliate against their victim if they return.[241] Removing someone with such underlying fears results in substantial additional trauma.[242] Further, removal results in a number of additional hardships for noncitizens and their families, including family separation, where some family members may be U.S. citizens or have other legal status, loss of income, financial hardship, and loss of access to the justice system and crime victims services available to survivors of crimes within the United States.[243] In light of these harms, it is even more important that U petitioners are able to rely on their pending petition as a defense against removal to ensure procedural due process right to a full and fair removal hearing.

The statutory scheme expressly includes a mechanism for applicants who would otherwise be inadmissible to obtain immigration status without leaving the United States, supporting the conclusion that U petitioners should be able to remain throughout adjudication. DHS may waive all but one ground of inadmissibility for U and T nonimmigrant applicants within the United States, if the Secretary considers it to be in the public interest to do so.[244] Under current immigration law, this extremely broad waiver is available within the United States solely for victims of domestic violence, serious crimes, and trafficking.[245]

To understand just how generous this provision is, it is helpful to compare it to the process for a noncitizen who entered without inspection applying as

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239. Barbara Buckinx & Alexandra Filindra, *The Case Against Removal: Jus Noci and the Harm in Deportation Practice*, 3 J. MIGRATION STUD. 393, 398 (2015).

240. Sarah Stillman, *When Deportation is a Death Sentence*, NEW YORKER (Aug. 13, 2021), https://perma.cc/6SNZ-UD9F.

241. TAHIRIH JUST. CTR., NATIONWIDE SURVEY: A WINDOW INTO THE CHALLENGES IMMIGRANT WOMEN AND GIRLS FACE IN THE UNITED STATES AND THE POLICY SOLUTIONS TO ADDRESS THEM 5 (Jan. 31, 2018), https://perma.cc/3CC3-TBLG (finding clients facing deportation suffer intense fear for their safety, anticipating retaliation from persecutors in the form of kidnapping, rape, and torture upon return home).

242. Regina Day Langhout, Sara L. Buckingham, Ashmeet Kaur Oberoi, Noe Ruben Chavez, Dana Rusch, Francesca Esposito, & Yolanda Suarez-Balcazar, *Statement on the Effects of Deportation and Forced Separation on Immigrants, Their Families, and Communities*, 62 AM. J. CMTY. PSYCH. 1, 3–12 (2018).

243. Samantha Artiga & Barbara Lyons, *Family Consequences of Detention/Deportation: Effects on Finances, Health, and Well-Being*, KAISER FAMILY FOUND. (2018), https://perma.cc/U2B8-CNDJ.

244. 8 U.S.C. § 1182(a)(2)(H) (2013). U nonimmigrants may apply for a waiver of any ground of inadmissibility except those in INA § 212(a)(3)(e).

245. *Id*.; 8 U.S.C. § 1182(d)(13) (2013); 8 U.S.C. § 1255(c) and (h) (2022).

an immediate relative of a United States citizen. Immediate relatives of United States citizens who entered the country without inspection are required to leave the United States and apply for lawful entry from abroad. For adults who have been in the United States without legal status for over one year, this often triggers the unlawful presence ground of inadmissibility, which requires the applicant to remain outside of the United States for either three or ten years before they can re-enter lawfully, unless they obtain a waiver under the relevant section of INA § 212. This waiver requires a showing of extreme hardship to a qualifying U.S. citizen or lawful permanent resident relative. In contrast, the U inadmissibility waiver may be granted from within the United States and requires no showing of hardship to a qualifying United States citizen or lawful permanent resident relative. Accordingly, this permissive scheme to allow U petitioners to obtain status without departing the United States establishes Congress's specific intent to ensure applicants may remain in the United States throughout the adjudication. Requiring applicants to return home to await the issuance of the visa abroad directly undermines the intent to encourage victims of crime to report to law enforcement and apply for U status without fear of removal.

B. *Undermines Agency Goals of Administrative Efficiency*

EOIR faces a devastating national backlog of over 1,503,000 pending removal cases.[246] EOIR regulations require the Director of EOIR to "direct the conduct of all EOIR employees to ensure the efficient disposition of all pending cases."[247] This is reflected in the agency mission of adjudicating immigration cases "fairly, expeditiously, and uniformly."[248] During the Trump administration, administrative efficiency was often cited as the key priority, with an emphasis on reducing the pending caseload.[249]

But contrary to this stated goal, the discretionary framework, combined with the policies implemented between 2017 and 2020, undermined administrative efficiency both within EOIR and within the immigration system as a whole. The new BFD process and prosecutorial discretion policies have the potential to alleviate inefficiencies, but if discretion is not exercised expeditiously in favor of U petitioners, administrative inefficiencies will remain.

During the Trump administration, an immigration judge and employees of USCIS and ICE were often required to review the same underlying petition

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246. *Pending Cases, New Cases, and Total Completions*, EXEC. OFF. FOR IMMIGR. REV. ADJUDICATION STAT. (Jan. 2022), https://perma.cc/NNT2-Q8NY.

247. *Id.*

248. *Section 1.1—Scope of the EOIR Policy Manual*, DEP'T OF JUST. (Apr. 3, 2021), https://perma.cc/WD2S-SY73.

249. Memorandum from James R. McHenry III, on the EOIR Strategic Caseload Reduction Plan, to the Deputy Att'y Gen. (Oct. 23, 2017); Memorandum from James R. McHenry III, Dir., on the Case Priorities and Immigration Court Performance Measures, to the Off. of the Chief Immigr. J., all Immigr. J., all Ct. Adm'r and all Immigr. Ct. Staff (Jan. 17, 2018) (setting forth benchmarks and case completion goals for EOIR judges).

for U nonimmigrant status to determine eligibility for relief from removal. USCIS, responsible for adjudicating the U petition, reviewed the application twice, first to determine waitlist eligibility and then issue final approval, and in some instances, a third time if called upon by ICE to provide a prima facie determination. Under the 2019 ICE policy, ICE chief counsel were required to review the underlying petition to conduct a totality of the circumstances evaluation to determine whether to exercise discretion to provide some form of relief in removal proceedings.[250] Following ICE opposition to a continuance, immigration judges were also required to evaluate the U petition to determine whether the applicant established prima facie eligibility, a factor weighing in favor of the issuance of a continuance.[251] For U petitioners ordered removed, ICE officers were then called upon to evaluate the totality of the circumstances to decide on the U petitioner's administrative stay request. If the stay was granted and U nonimmigrant status was ultimately approved, the U nonimmigrant would then be required to file a motion with the immigration court to reopen and terminate their removal proceedings, creating more work for the immigration judge and ICE chief counsel. On the other hand, if the stay was denied and the U petitioner was removed, they would be required to go through consular processing with the Department of State following the approval of the U petition to be able to re-enter the United States. Ultimately, this resulted in a number of agency officials across DHS and EOIR, potentially including USCIS, ICE chief counsel, the immigration judge, the ICE Enforcement and Removal Office, and ultimately the Department of State, evaluating the merits of one single underlying petition for a petitioner in removal.

Arguably, this split jurisdiction system permitting individual exercises of discretion by each relevant sub-agency, USCIS, ICE, and the EOIR, was an unintended consequence of the restructuring of the U.S. immigration system under the HSA. Before enactment, adjudication of immigration petitions, trial attorneys at the former District Counsel's Office, and the immigration court, and removal enforcement officers were all employed by one single agency, and subject to the policy guidance in the Cronin Memorandum adopting a streamlined agency-wide policy that immigrant survivors of serious crimes should not be removed until they had the chance to obtain U nonimmigrant status.[252] But, following the agency reshuffling, each individual sub-agency, including USCIS, ICE, and EOIR, adopted its own discretionary policies and procedures to provide relief from removal, which were not necessarily complementary, and during the Trump administration were often relied upon to shift responsibility to another sub-agency, based upon an

250. ICE 2019 Fact Sheet, *supra* note 123.
251. *Matter of Sanchez Sosa*, 25 I&N Dec. at 807.
252. Cronin, *supra* note 50, at 2.

assumption that an official from another agency would exercise its discretion to prevent removal.[253]

The USCIS BFD process and ICE's policy on prosecutorial discretion alleviate some, but not all, of the resulting administrative inefficiencies. Assuming that USCIS allocates sufficient resources to conduct BFDs and issue deferred action such that a U petitioner may expect to receive a determination within 120 days of filing their application, this would largely eliminate the need for review by the ICE chief counsel and immigration judges, as they could instead rely on USCIS's determination and issuance of deferred action to terminate removal proceedings. But inefficiencies will remain where USCIS declines to issue or does not promptly issue a BFD. In the example of a USCIS delay, ICE chief counsel would likely agree to a string of continuances for the U petitioner, but this means the case would remain pending on the active docket, adding to the immigration court backlog. And if for some reason ICE opposed a continuance and declined to exercise discretion in favor of the U petitioner, the same inefficiencies would arise regarding the immigration judge's responsibility to assess the viability of the underlying petition for U nonimmigrant status. Additionally, even under the new bona fide system, U petitioners with prior orders of removal must continue to file a motion to reopen removal proceedings and terminate the order of removal, contributing to inefficiencies at the immigration court, which will hinder efforts to streamline the system and clear the immigration court backlog.

V. RECOMMENDATIONS FOR REFORM

Because the regulatory framework for preventing removals of U petitioners relies entirely on the discretionary decisions of USCIS, ICE officers, and immigration judges, it is vulnerable to abuse contrary to the statutory intent and has historically resulted in inconsistent and arbitrary decisions that leave survivors uncertain regarding whether they can remain safely in the United States while they cooperate with law enforcement and their U petitions are adjudicated. Further, a denial to exercise discretion provides limited federal review.[254] In light of this, the discretionary framework should be replaced with secure protection for U petitioners in removal proceedings. A right to remain in the United States during USCIS adjudication will in turn assuage fears and encourage further reporting to law enforcement in immigrant communities.

There are a number of steps that can be taken to create secure relief for U petitioners. First and foremost, Congress should eliminate the statutory cap to reduce the substantial adjudication period. Second, legislation should be

253. For example, the proposed EOIR regulations on continuances rationalized that ordering removal of a U petitioner would not necessarily result in removal, because the petitioner could apply for a stay of the order from ICE. This reasoning is premised on the assumption that ICE would in fact exercise such discretion, which was not certain under the 2019 Fact Sheet. *See* 2019 Fact Sheet, *supra* note 122.

254. 8 U.S.C. § 1252(a)(2); *see also* Wadhia, *supra* note 223, at 407.

enacted to explicitly protect U petitioners from removal and require termination of removal proceedings for bona fide U petitioners.

Additional agency level reforms should also be adopted to provide protection and streamline relief. First, USCIS should request, and Congress should provide, sufficient funding to conduct bona fide U determinations and adopt the process through a published rule in the federal register. Second, the U regulations should be amended to prohibit the issuance or execution of a removal order against a U petitioner, require ICE chief counsel to join a motion to terminate for bona fide U petitioners and to join a motion to reopen and terminate for approved U nonimmigrant status holders with prior orders of removal issued by an immigration court. Finally, reforms are necessary at EOIR to require immigration judges to use docket management tools to provide interim relief to U petitioners in lieu of the discretionary continuance system.

A. *Statutory Amendments*

1. *Eliminate the Statutory Cap*

Eliminating the statutory cap would provide relief to the 286,504 U petitioners currently stuck in the backlog awaiting visa availability.[255] Similarly, provided USCIS allocates sufficient resources to efficiently work through the backlog, it would allow the visa to serve as a tool to provide immediate assistance to survivors of serious crime, in the form of nonimmigrant status and freedom from the threat of removal. The assurance of relief from removal would encourage additional reporting and facilitate law enforcement efforts to fight crime in immigrant communities.[256]

President Biden's proposed immigration reform bill, the U.S. Citizenship Act of 2021, included a provision to increase the statutory cap from 10,000 to 30,000.[257] While this proposal recognizes the need to provide additional relief, it does not go far enough to ensure victims of serious crimes have access to timely relief and further encourage cooperation with law enforcement. In 2017, the number of principal U petitions received within a fiscal year reached an all-time high of approximately 37,000.[258] By 2020, that number had decreased to 22,000, likely as a result of immigrant fears of reporting in a heightened immigration enforcement environment where every undocumented noncitizen was prioritized for removal.[259] But as enforcement operations decrease and prosecutorial discretion resumes, petition receipts are likely to exceed 30,000 once again. The proposed increase is insufficient to

255. USCIS REPORT ON NUMBER OF PENDING U PETITIONS, *supra* note 30.

256. H.R. REP. NO. 112-480, pt. 1, at 232 (2012) ([a]ccording to the Federal Law Enforcement Officers Association, "[b]y limiting the number of u-visas law enforcement can request, Congress is effectively amputating the long arm of the law").

257. H.R. 1177, 117th Cong. § 4302 (2021).

258. USCIS REPORT ON NUMBER OF PENDING U PETITIONS, *supra* note 30.

259. *Id.*

cover the total projected incoming annual receipts, without even considering the backlog. Wait times would, at best, remain stagnant and would be vulnerable to additional delays should the number of receipts increase in the future. Accordingly, such an increase in the statutory cap would serve as a stopgap but would not permanently address the larger problem.

Caps in other areas of immigration law have largely been criticized as unsuccessful. For example, a cap on asylee adjustments created a major bottleneck to relief and intolerable administrative inefficiencies. The first cap, created in 1980, specified that only 5,000 asylees annually could adjust status to legal permanent residents.[260] Just six years later, a backlog developed amid growing numbers of noncitizens receiving asylum annually.[261] The Immigration Act of 1990 doubled the cap to 10,000 annual asylee adjustments and permitted approval for asylees who applied to adjust status before 1990 without regard to the numerical limitations.[262] Yet this temporary respite and increase to the cap was insufficient to address the larger problem. In 2004, approximately 160,000 asylee adjustment applications were pending and the backlog continued to grow as 27,321 noncitizens received asylum.[263] Under this system and backlog, an asylee wishing to adjust status would be required to wait about sixteen years to obtain legal permanent residency.[264] These problems led to the elimination of the cap through the Real ID Act of 2005, allowing asylees to obtain their residency promptly.[265]

A second example of an ineffective cap in the asylee context was the 1,000 person per fiscal year cap on the number of asylum grants and refugee admissions based on coercive family planning claims, enacted in 1996.[266] The cap arose from the 1989 Armstrong-DeConcini amendments to the Emergency Chinese Immigration Relief Act as a solution to quash "fears that this would be a wide-open loophole to circumvent immigration policy."[267] But as the cap did not reduce the number of applicants eligible for relief, those who were not granted due the cap were authorized by the BIA to receive conditional grants of asylum.[268] The cap postponed the attainment of the desired

260. 1980 Refugee Act, Pub. L. No. 96-212, 8 U.S.C. 1182(b) (1980); see Ruth Ellen Wasem, CONG. RSCH. SERV., U.S. Immigration Policy on Asylum Seekers, RL32621, at 3 (2005).

261. Wasem, *supra* note 260, at 4.

262. Immigration Act of 1990, Pub. L. No. 101-649, § 104 (1990); *see also* Wasem, *supra* note 260, at 18.

263. AM. BAR ASS'N, RESOLUTION THAT THE AMERICAN BAR ASSOCIATION SUPPORTS THE REPEAL OF ANNUAL NUMERICAL CAPS THAT RESULT IN UNDUE DELAYS IN THE GRANTING OF LAWFUL PERMANENT RESIDENCE TO THOSE INDIVIDUALS WHO HAVE ALREADY BEEN GRANTED ASYLUM IN THE UNITED STATES, (2005), https://perma.cc/5P95-JFEX; OFF. OF IMMIGR. STAT., 2004 YEARBOOK OF IMMIGRATION STATISTICS, 52 tbl.17 (2006), https://perma.cc/56BL-CEBV (noting USCIS granted 14,359 asylum applications in 2004); U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., FY 2004 STATISTICAL YEARBOOK J1 (2005), https://perma.cc/T6TP-H4K5 (noting EOIR granted 12,692 asylum applications in 2004).

264. Wasem, *supra* note 260, at 18.

265. Real ID Act of 2005, Pub. L. No. 109-13 (2005).

266. H.R. REP. NO. 104-469, at 174 (1996).

267. 135 Cong. Rec. H26925 (daily ed. Nov. 2, 1989) (statement of Rep. Hefley).

268. See in re X-P-T-, 21 I. & N. Dec. 634, 637 (B.I.A. 1996) (en banc).

relief, but had no impact on the number of individuals applying for relief. This created inefficiencies for the adjudicating bodies, EOIR and USCIS, required resources to administer, and led to delays for eligible and deserving asylum seekers. Less than two years after the cap was enacted, the number of noncitizens eligible for asylum based on coercive population control policies exceeded the numeric annual limit, and by 2003, there were over 7,665 principal conditionally approved asylees on a waiting list for final approval.[269] When combined with the asylee adjustment cap, a person obtaining conditional approval under this system would be expected to face a twenty-three year wait to ultimately obtain legal permanent resident status.[270]

The fundamental problem with the use of statutory caps to limit access to immigration benefits is that, while they are typically offered as a compromise to assuage fears of a surge of applications, they do not change the number of noncitizens who may be eligible for and who apply for relief.[271] Unlike a visa program allowing admission into the United States for applicants abroad, caps regulating relief offered to those within the United States do not curb the number of applicants who often have no alternative option but to wait for relief to become available, especially when the numbers of eligible applicants exceed the numerical cap. Instead, the inevitable result is that the administering agencies face challenges handling excess applications, creating substantial adjudication backlogs and delays and leaving applicants in limbo.[272] Accordingly, the problematic use of caps in other contexts make clear that abolishing the cap entirely is the best way to address the U nonimmigrant backlog.

Critics of proposals to increase or entirely abolish the cap have largely relied on the slippery slope argument and unfounded assertions that the U program was susceptible to widespread immigration fraud. In 2012, when an increase to the cap was proposed as part of the 2011 VAWA Reauthorization Act, opponents largely asserted that the U visa program was susceptible to immigration benefit fraud.[273] But, as evidenced above and by the backlog, limiting the number of available visas has no impact on the number of immigrants impacted by serious crimes in the United States that are eligible for U

269. Wasem, *supra* note 260, at 17.

270. Jamie Jordan, *Ten Years of Resistance to Coercive Population Control: Section 601 of the IIRIRA of 1996 to Section 1010 of the Real ID Act of 2005*, 18 HASTINGS WOMEN'S L.J. 229, 244 (2007).

271. Margaret Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & POL. 527, 548 (2015) (criticizing another problematic cap, the 4,000 annual cap enacted by IIRIRA on the number of non-LPR cancellation of removal applicants who may adjust status before the Immigration Court). In 2016, EOIR the number of LPR cancellation cases awaiting decision to be 40,895. *See* AM. IMMIGR. LAWYERS ASS'N, EOIR STAKEHOLDER MEETING AGENDA, UNOFFICIAL AILA NOTES 7 (Nov. 17, 2016) (on file with author).

272. Taylor, *supra* note 271, at 548.

273. S. REP. NO. 112-153 at 12 n.30 (2012) (discussing the minority view of Senators Grassley, Hatch, Kyl, and Cornyn suggesting that the U visa process "need[ed] to be drastically altered in order to prevent fraud"); *see also See Weaknesses in the U Visa Program*, FED'N FOR AM. IMMIGR. REF. (Mar. 21, 2012), https://perma.cc/ZE6F-WGHM (arguing that breadth of the U visa program renders it "subject to fraud").

nonimmigrant status. A more effective method of limiting the number of eligible applicants would be to support law enforcement efforts to reduce the number of violent crimes in immigrant communities by increasing reporting and decreasing domestic violence. Second, claims of widespread immigration fraud through the U visa program are unfounded, as they have not been substantiated by evidence of widespread fraud.[274] Anti-fraud measures are already in place within USCIS to identify and root out fraud.[275] Finally, the reporting requirements of the U petition make it less susceptible to fraud than other types of humanitarian relief. A U petitioner must submit a certification by law enforcement, signed by the head of the relevant law enforcement agency or an employee who has specifically been designated as a certifier.[276] Opportunities for fraud might include bribing a law enforcement official to provide a certification form or making a false report in order to obtain a certification form. However, logically, these types of fraud should be relatively rare and involve high levels of risk for the petitioner. Law enforcement officials who have sworn to uphold and enforce the law are less likely to be susceptible to this type of scheme. Individuals considering submitting a fraudulent petition by generating a false report of a serious crime would generally be deterred by the steep penalties if discovered, as filing a false report is a criminal offense. In most states, false reporting is at the very least a misdemeanor offense or, if considered to rise to the level of obstruction of justice, a felony offense.[277] Accordingly, concerns of widespread abuse and fraud are unfounded and should not legitimately discourage lawmakers from repealing the statutory cap.

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274. Lianna E. Donovan, Note, *The Violence Against Women Act's Protection of Immigrant Victims: Past, Present, and Proposals for the Future*, 66 RUTGERS L. REV. 745, 769–70 (2014); WILLIAM KANDEL, CONG. RSCH. SERV., IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA), R42477, at 13 n.72 (2012) ("Members of USCIS' Fraud Detection and National Security (FDNS) Directorate recently told CRS that they had not seen cases of benefit fraud using the U visa."). Since this time, there have only been three reported fraud prosecutions, a far lower number than the reported levels of fraud for other types of immigration benefits. *Woman Orchestrated Scheme to Obtain U Visas, Charged with Visa Fraud*, DEP'T OF JUST. (Feb. 3, 2020), https://perma.cc/UZ8R-TLMN; *USCIS Detects and Assists in Conviction of U-Visa Fraud Perpetrators*, USCIS (Aug. 2, 2019), https://perma.cc/XT36-D5HP; *Indianapolis Immigration Attorney Pleads Guilty to Fraud Scheme and Identity Theft in Relation to "U-Visa" Applications*, ICE (Nov. 30, 2017) https://perma.cc/94ME-FN2C.

275. Petitions for U nonimmigrant status, T Nonimmigrant Status, and VAWA self-petitions are adjudicated in a centralized location by specially trained adjudicators and potentially fraudulent cases are referred for further investigation by additional immigration authorities. See H.R. REP. NO. 112-480, pt. 1, at 243 (2012); U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-676, IMMIGRATION BENEFITS: ADDITIONAL ACTIONS NEEDED TO ADDRESS FRAUD RISKS IN PROGRAM FOR FOREIGN NATIONAL VICTIMS OF DOMESTIC ABUSE 15–16 (2019).

276. *See* Form I-918 Supplement B, U Nonimmigrant Status Certification, Part 6, https://perma.cc/9ZJW-NJJ5 (last visited May 5, 2022); DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT 9, https://perma.cc/tw7p-79pp (last visited May 5, 2022).

277. *See, e.g.*, CAL. PENAL CODE § 148.5 (misdemeanor offense); PA. CRIM. CODE § 4906 (misdemeanor offense); N.Y. PENAL L. § 210.50 (falsely reporting an incident is a Class A misdemeanor); 18 U.S.C. § 1001 (federal false statements are considered a felony offense, punishable by up to five years imprisonment).

2. *Explicitly Protect U Petitioners from Removal*

Congress should enact legislation prohibiting the issuance and execution of a removal order against U petitioners, requiring termination of ongoing removal proceedings against bona fide U petitioners, and cancelling all outstanding removal orders by operation of law upon the approval of U nonimmigrant status. This would provide certainty to current and future U petitioners that they may not be ordered removed or removed from the country while their petition is adjudicated, providing much needed assurance and encouraging future cooperation with law enforcement to report crimes. It would also decrease administrative inefficiencies by removing the need for ICE or EOIR to affirmatively exercise discretion to provide relief, or to review and consider motions to reopen and terminate proceedings for a U nonimmigrant status holder with a prior order of removal.

First, legislation should clearly provide that a noncitizen who has a pending petition for U nonimmigrant status may not be ordered removed and any outstanding removal orders may not be enforced while their petition is adjudicated by USCIS. President Biden's U.S. Citizenship Act of 2021 included such a provision prohibiting the removal of not only U petitioners, but also applicants for T nonimmigrant status and VAWA self-petitioners.[278]

Extending this type of relief in certain humanitarian circumstances is not without precedent. For example, in 2008, Congress enacted a provision as part of the TVPRA providing asylum officers with initial jurisdiction over the asylum applications of all unaccompanied minors, including those in removal proceedings.[279] EOIR has interpreted this provision as requiring the continuance of removal proceedings while the asylum application remains pending at USCIS.[280] Enacting a law providing that a U petitioner may not be ordered removed while their petition is adjudicated would similarly require DHS and EOIR make use of the available docket management tools to protect U nonimmigrants from removal. This provision is important because it removes the burden from the U petitioner to establish that some type of discretionary relief by an immigration judge of ICE chief counsel, such as termination, administrative closure, the status docket, or a continuance, is warranted.

This would also create an automatic stay of removal for any U petitioner with a prior order of removal which has not yet been effectuated, so that U petitioners need not apply for a stay of removal. With an automatic stay, ICE enforcement removal officers would not be required to review the merits of a

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278. H.R. 1177, 117th Cong. § 4304(c) (2021). From the wording of the proposed bill, it is not entirely clear whether the provision would cover only the enforcement of an outstanding removal order, or also the issuance of a removal order by an immigration judge. Future proposed legislation should explicitly cover both scenarios.

279. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); 8 U.S.C.A. § 1158, INA 208(b)(3)(C) (2005); *see also* Matter of J-A-B- & I-J-V-A-, 27 I&N Dec. 168, 169 n2 (B.I.A. 2017) (recognizing that this provision gives UACs a "statutory right to initial consideration of an asylum application by DHS").

280. McHenry III, *supra* note 196, at 2.

U petition or to solicit a prima facie determination from USCIS to decide whether to grant a stay. This would provide much needed assurance for petitioners with prior removal orders who are hesitant to report crimes to law enforcement or apply for U status because of immigration enforcement risks. It is also in line with ICE's current victim-centered policy, which provides for a stay of removal for U applicants absent extraordinary circumstances.[281]

Second, legislation should require termination of ongoing removal proceedings against bona fide U petitioners by eliminating them from immigration court jurisdiction. Lack of jurisdiction would require prompt termination or dismissal of their removal proceedings by the immigration judge. This would reduce administrative inefficiency both within DHS and within EOIR by swiftly eliminating the majority of U petitioners from the immigration court backlog of approximately 1.3 million cases and concentrating the discretionary evaluation of U petitions within USCIS.[282] ICE chief counsel and immigration judges would no longer be expected to review the merits to determine whether to exercise discretion for the majority of U petitioners who obtain BFDs from USCIS.

Under this proposal, ISOs specially trained to review and adjudicate U petitions at USCIS would retain discretion to issue the BFD. While too much widespread discretion can lead to inconsistent application and abuse, as discussed above, that is less likely to occur here for two reasons. First, provided a blanket ban against removals is enacted, there is less at stake for a U petitioner in this discretionary evaluation, as it will determine whether they remain in removal proceedings, but not whether they may be ordered removed during adjudication. Second, USCIS ISOs can largely be expected to exercise discretion for a BFD consistently with their position on the inadmissibility waiver and have the necessary training to evaluate the U petitioner's case. Should the adjudicating officer determine that a U petitioner's inadmissibility waiver is unlikely to be granted, due to negative discretionary factors, it would be consistent for that officer to decline to issue a BFD. As discussed above, USCIS officers who adjudicate U nonimmigrant status petitions have specialized training to evaluate claims for survivors of crimes and have exercised generous discretion on inadmissibility waivers, as evidenced by the relatively high grant rate of U petitions.[283] This training and track record alleviates some of the concerns of relying on USCIS to issue a positive discretionary determination before removal proceedings are terminated.

Finally, enacted legislation should include a provision cancelling all prior immigration court removal orders for U nonimmigrant status holders in the United States. This would enact and extend the regulatory provision which currently cancels expedited orders of removal issued by DHS as of the date

281. ICE Directive 11005.3, *supra* note 8, at 8.

282. *Pending Cases, New Cases, and Total Completions*, *supra* note 246.

283. U APPROVAL AND DENIAL RATES REPORT, *supra* note 33 (reporting an average approval rating of cases adjudicated between 2016–2020 of 81.5 percent).

of the approval of the U petition.[284] This provision would provide swift relief for U nonimmigrant status holders with prior removal orders issued by an immigration judge because they would no longer need to file a request with ICE to join a motion to the immigration court to reopen and terminate their removal proceedings. Replacing the current system which relies on ICE discretion to join such a motion with a clear automatic rule would also ensure consistent and swift relief for U nonimmigrant status holders with prior removal orders across the country and promote administrative efficiency.

B. *Agency Reforms*

Additional regulatory reforms should also be implemented at DHS and EOIR to provide enduring relief for U petitioners. These reforms may be adopted without a statutory amendment because they are within the regulatory authority of the agencies and further the statutory intent of protecting immigrant survivors of crime from removal.[285]

1. *DHS Reforms*

USCIS made great progress by implementing the BFD process to provide bona fide U petitioners with employment authorization and deferred action.[286] While the policy expresses a clear intention to provide a BFD to all pending and future U petitioners, it addresses neither the allocation of resources nor the timing for providing BFDs to current and future U petitioners. When the waitlist was first implemented in 2007, one of the primary goals was to provide access to relief from removal and work authorization for U petitioners awaiting visa eligibility. But, because USCIS did not allocate sufficient resources to waitlist adjudications, U petitioners typically were not placed on the waiting list until the year before their final visa approval, providing no relief throughout the long adjudication period.[287] In 2018, only 83 permanent immigration service officers adjudicated U petitions for waitlist and final visa availability, with plans to increase that number by 13 percent.[288] To prevent the same delays with BFDs, USCIS must allocate substantial resources to conduct a BFD and publicly commit to a 120-day timeline

284. 8 C.F.R. § 214.14(c)(5)(i) (2020).

285. *See* 8 U.S.C. § 1103(a), INA § 103(a) (charging the Secretary of Homeland Security with the administration and enforcement of the immigration laws through regulatory authority); *About the Office*, EXEC. OFFICE OF IMMIGR. REV., https://perma.cc/6YL3-5E6L (last visited Apr. 4, 2022) (noting the mission of EOIR is to "adjudicate immigration cases by fairly, expeditiously and uniformly interpreting an administering the Nation's immigration laws"); 8 C.F.R. § 1003.0(b)(1)(ii) (2020) (giving the EOIR Director broad authority to prioritize or defer certain cases).

286. USCIS Bona Fide Policy Alert, *supra* note 82; *Bona Fide Determination Process*, *supra* note 8, at 4.

287. U VISA FILING TRENDS REPORT, *supra* note 31, at 7–8.

288. Solis v. Cissna, No. 9:18-cv-00083-MBS, at 26 (D.S.C. July 11, 2019) (summarizing the Neufold Declaration and concluding that the "insufficient funding" is not a per se reasonable cause for delay and the defendants failed to carry their burden of establishing the reasonableness of the adjudication delay).

for providing a bona fide work permits and deferred action following receipt of their petition.

DHS is typically reticent to create a clear right to adjudication within a set timeframe because of the litigation risks posed by unreasonable delay challenges where the agency fails to meet those deadlines. For example, USCIS defended against lawsuits in response to former regulatory provision 8 C.F.R. § 274a.13, which required the agency to provide an interim work permit, including to pending U petitioners, if USCIS did not adjudicate a pending employment authorization application within ninety days of receipt and subsequently revised the regulation in 2018 to remove the specific time frame and interim employment authorization procedure.[289] And with respect to T nonimmigrant status adjudications, in the preamble to the 2016 T visa regulations, while recognizing that the regulations provide for USCIS to conduct BFDs similar to the determination extended to U nonimmigrants, USCIS rejected a public recommendation that BFDs be made within ninety days of application receipt, noting that the agency could not guarantee a ninety-day BFD because background checks occasionally exceed this period.[290] USCIS could, however, create an exception for cases where background checks are ongoing and strive to meet the adjudication deadline in the majority of cases to provide some commitment and assurance to U petitioners and advocates.

Part of the issue USCIS faces in allocating sufficient resources is that 97 percent of its budget is funded through petition filing fees, rather than Congressional appropriations.[291] But, as there is no filing fee for U nonimmigrant status, and U petitioners commonly rely on fee waivers for their accompanying inadmissibility waiver application, USCIS generates limited filing fees from these applications. Instead USCIS relies on funds from other petitions to cover adjudication costs. For USCIS to provide BFDs for all pending U petitions and keep up with new receipts, the agency must make a budgetary request to Congress for funds earmarked for U adjudications or reallocate its current fee-based operating budget.

Finally, the BFD process should be implemented through a published rule in the Federal Register subject to notice and comment procedures. Rulemaking promotes administrative law values such as transparency in decision making, public deliberation, and accountability.[292] USCIS procedures

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289. *See* 8 C.F.R. § 274a.13(d) (2020); Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398 (Nov. 18, 2016) (final rule eliminating interim EADs); Complaint, N.N. v. McAleenan, No. 1:19-cv-05295 WFK (E.D.N.Y. 2019).

290. Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 81 Fed. Reg. 243 (Dec. 19, 2016).

291. DEP'T OF HOMELAND SEC., *supra* note 71.

292. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 65 (1969) ("The procedure of administrative rule-making is . . . one of the greatest inventions of modern government . . . . [A]nyone and everyone is allowed to express himself and to call attention to the impact of various possible policies on his business, activity, or interest."); Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H.L. REV. 1, 61 (2012) (arguing deferred action should be

enacted via its Policy Manual "[do] not create any substantive or procedural right or benefit that is legally enforceable" against the DHS.[293] As the Sixth Circuit recently observed, "USCIS clearly wields sole and unadulterated discretion to set forth, abide by, and eliminate the BFD process."[294] In contrast, agencies are bound by their own regulatory guidance and must interpret regulations reasonably to merit federal court deference.[295] Accordingly, adopting regulatory BFD procedures could serve as a safeguard to ensure that the agency properly implements and consistently applies the BFD process. Further, codifying the BFD process will result in more safeguards and entitlement to relief, should DHS attempt to revoke its exercise of discretion to issue bona fide EADs and deferred action due to resource constraints or pressure from a future administration. This is because any such rescission would also be subjected to regulatory rulemaking process, including consideration of and responses to public comments.[296]

In addition to these reforms at USCIS, the DHS regulations governing U petitioners in removal proceedings or with outstanding removal orders should be amended to better protect immigrant survivors of serious crime from removal, in line with some of the statutory amendments proposed above. Specifically, the regulation providing DHS with the discretionary option to join a motion to terminate for U nonimmigrant status petitioners should be amended to require ICE chief counsel to move to dismiss or terminate ongoing removal proceedings for respondents with U petitions deemed bona fide by USCIS and to clarify that DHS may not seek a removal order or enforce an outstanding removal order against a noncitizen with a pending U nonimmigrant status petition. These regulatory updates would remove the problematic requirement that U petitioners obtain a favorable exercise of discretion by ICE and assure more uniform treatment of U petitioners nationwide.

As discussed above, this type of provision would further the statutory intent behind U nonimmigrant status.[297] These proposed provisions clearly fall within DHS's regulatory authority to administer and enforce immigration laws.[298] Regulatory amendments prohibiting removal of U petitioners and mandating termination or dismissal of removal proceedings for bona fide U petitioners would also lead to greater efficiency and consistency within DHS

published as a rule in the Federal Register to "promote transparency, consistency, acceptability, and accountability").

293. *About the Policy Manual*, USCIS POL'Y MANUAL, https://perma.cc/GZW7-AT6T (last visited Apr. 1, 2022).

294. Barrios Garcia v. DHS, 25 F.4th 430, 441 (6th Cir. 2022) (holding that plaintiff U petitioners' unreasonable adjudication delay claims were not mooted by the issuance of the BFD process).

295. Auer v. Robbins, 519 U.S. 452, 461 (1997) (finding an agency's interpretation of its own regulation to be "controlling unless plainly erroneous or inconsistent with the regulation").

296. *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 101 (2015) (providing that the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance").

297. *See* discussion *supra* Section IV.A.2.

298. INA § 103(a)(3), 8 U.S.C. § 1103(a)(3) (2009).

by ensuring that only USCIS, the agency responsible for adjudicating U nonimmigrant status and the accompanying inadmissibility waiver, reviews the merits of the U petition and issues a discretionary decision impacting the petitioner's entitlement to termination.

2. *Reforms at EOIR*

EOIR should abandon the use of the continuance framework for U petitioners in favor of other docket management tools like administrative closure and termination. The continuance framework, in its current form, requires immigration judges to conduct a discretionary review of an underlying U petition to determine prima facie eligibility.[299] In this determination, the immigration judge also must negatively weigh factors such as the remoteness of final approval and the length of time that a petitioner waited to apply for the visa, which should not be held against U petitioners.[300] Further, because continuances are typically granted in six-month increments, use of repeated continuances during adjudication causes unnecessary administrative inefficiencies and contributes to the court backlog.

The BIA or the Attorney General should revoke *Matter of Sanchez Sosa* and *Matter of L-N-Y-* and clearly state that repeated continuances are not an appropriate docket management tool for noncitizens with a pending U petition.

In lieu of continuances, EOIR should issue regulatory or policy guidance providing that where ICE chief counsel opposes termination, immigration judges are required to administratively close or place U petitioners on the status docket in the interest of providing humanitarian relief from removal and administrative efficiency until the underlying U petition is adjudicated. This is within EOIR's regulatory authority to administer the immigration courts, and also within the Director of EOIR's purview, because the Attorney General has delegated authority to the Director and Chief Immigration Judge to "direct that the adjudication of certain cases be deferred" in order to "ensure the efficient disposition of all pending cases."[301] The Attorney General has already taken the first step necessary to do so by overruling *Matter of Castro-Tum* and thereby ensuring that immigration judges across the country may rely on this docket management tool.[302] EOIR should similarly issue revised guidance widening the categories of noncitizens eligible for a status docket to explicitly include U petitioners.[303] These proposed reforms would remove all U petitioners from the active immigration court docket, reducing the backlog and creating a more efficient and humane system.

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299. *Matter of Sanchez Sosa*, 25 I&N Dec. at 814.
300. *Matter of L-N-Y-*, 27 I&N Dec. at 759.
301. 8 C.F.R. § 1003.0(b) (2020); and 8 C.F.R. § 1003.9(b) (2007).
302. Matter of Cruz Valdez, 28 I&N Dec. 326, 326 (A.G. 2021).
303. If a removal order ban were implemented, immigration judges would be able, under current EOIR guidance, to utilize the status docket for U petitioners because "binding authority" would require the immigration judge to continue the case to await U adjudication. McHenry III, *supra* note 196, at Appendix A.

VI. CONCLUSION

U nonimmigrant status was created to protect immigrant survivors of crime from removal, thereby encouraging them to "report these crimes" and "fully participate" in their investigation and prosecution.[304] Unfortunately, the current discretionary system of providing U applicants with relief from removal has failed to provide secure and lasting protection. This is especially true in light of the ten-year adjudication backlog for U nonimmigrant status because U petitions are adjudicated by USCIS under a different administration than the one in place at the time of filing. The erosion of discretionary protections during the Trump administration exposed vulnerabilities which must be addressed to carry out the statutory intent of protecting U nonimmigrant applicants from removal.

Amending the discretionary framework to provide secure protection from removal for immigrant survivors of crime is particularly important not only for humanitarian reasons, but also to ensure that immigrant survivors feel safe reporting crimes, strengthening law enforcement's ability to investigate and prosecute. With such protections, survivors of domestic violence like Elena would benefit from the certainty that they will be able to remain with family in the United States during USCIS adjudication. Further, implementing enduring policies and procedures across DHS and EOIR to ensure that only USCIS reviews the merits of a U petition and to terminate or otherwise eliminate cases from the immigration court's active docket will greatly increase agency efficiency and will decrease the national backlog of cases before the immigration courts.

The policies announced in the first year of the Biden administration, including reviving administrative closure, adopting a BFD process, and strongly encouraging the broad exercise of ICE prosecutorial discretion have great potential to protect U petitioners in removal proceedings during this administration. However, they cannot be relied upon to be exercised broadly by future administrations who may take a more restrictive view towards immigration policy and prefer policies like those adopted by the Trump administration. Instead, to provide lasting protection, the Biden administration must go further, shepherding legislation and regulatory reform to guarantee removal protection for U petitioners and leverage immigration court docket management tools to eliminate U petitioners from the active court docket. Non-discretionary, lasting protections are necessary to ensure much needed relief for current and future U petitioners and to encourage continued cooperation with law enforcement in furtherance of the statutory intent behind U nonimmigrant status.

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304. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(1)(B), 114 Stat. 1464, 1533 (2021) (codified at 8 U.S.C. § 1101(a)(15)(U)).