

# DEPORTING JANE DOE: WHEN IMMIGRANT CRIME VICTIMS FALL THROUGH THE CRACKS OF THE LAW DESIGNED TO PROTECT THEM

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*Jane Doe and her seven-year-old child fled gang violence in Honduras in the summer of 2017. After a grueling trip through the desert they were apprehended by U.S. Customs and Border Patrol and were placed in deportation proceedings. Through the help of a legal aid attorney that came to the detention center, Jane learned that she and her child would be eligible to apply for asylum. Jane and her child spent four months in a family detention center before being released to an extended family member in a city in Florida. They were told they would have to appear in Immigration Court the following month.*

*Most of Jane's money had been spent on the smugglers who brought her across the border, and what remained was taken by customs and border patrol when she was apprehended, so she and her son found a cheap studio apartment in a bad part of town and Jane began cleaning houses for cash. Just a few weeks after settling in, Jane responded to a knock on her apartment door. She opened the door just a crack to see who was there and a man with a crazed look in his eyes holding a machete forced his way into her apartment.*

*Jane tried her best to fight him off and screamed in Spanish for her child to hide and call for help on her phone. Her child hid under the bed while the man assaulted her at knife point. Jane's child dialed 911 and the police arrived an hour later due to confusion about the address as Jane's child did not speak English and no translator was immediately available. Jane was terrified of being deported, and despite her injuries, she grabbed her asylum application to show the police. Jane was taken to the hospital for a rape kit. Jane's attacker was arrested two days later based on her description. Jane's attacker had attacked two other women in the region*

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*and they had been unable to identify him. Several months later the prosecutor in Jane's case signed a U visa law enforcement certification stating that Jane had been a victim of rape, was being helpful in the prosecution of her rape case, and was instrumental in the prosecution of three additional assault cases by the same perpetrator. The prosecutor explained to Jane that the U visa was a special visa created to offer immigration status to immigrant victims of crime who are helpful in the investigation and prosecution of a crime. The prosecutor was hesitant initially to sign the U visa certification because she preferred to sign after case completion because of the potential for victim impeachment.*

*Through the help of a law school clinic, Jane applied for the U visa. Unfortunately, only 10,000 U visas are available each year and there were thousands of U visa cases pending ahead of Jane's. Even though the law required that U visa applicants with approvable cases who exceeded the 10,000 per year cap be put on a waiting list, due to the significant number of applicants, it was taking well over 4 years for an applicant to be placed on a waiting list.*

*Because Jane was in deportation proceedings, Jane's pro bono clinic attorney made humanitarian requests with U.S. Citizenship and Immigration Services to place her case on the waiting list and filed motions for her deportation case to be administratively closed or continued because of her eligibility for the U visa. As happened with many U visa applicants in removal proceedings, the requests to be placed on the waitlist and the motions were denied. This occurred despite letters and phone calls from the prosecutor's office testifying as to the importance of Jane's role in multiple active criminal cases. The Department of Homeland Security Immigration and Customs Enforcement attorney prosecuting Jane for immigration violations opposed any continuance and argued that if Jane's asylum were denied, Jane could wait for the U visa in her home country or ask again for reprieve from deportation officers after she was ordered removed.*

*Jane's individual removal hearing was scheduled for January 10, 2020. Under the Trump era immigration policies, Jane knew that she would likely be ordered removed on that date. Her asylum case was based on her child's fear of gang recruitment and was likely to fail and no continuances would be granted while she awaited the grant of her U visa which was years away from approval. Just days before her hearing the immigration judge assigned to her case retired and her case was taken off the docket. At this time, it has not been reassigned.*

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## INTRODUCTION

It was no surprise to immigrant communities and immigrant advocates that after campaigning on a hardline immigration platform, Donald Trump would immediately begin using executive powers available to him to effectuate his policies.<sup>1</sup> However, the speed and depth with which he dismantled decades of policy and precedent was unexpected. Behind his agenda was what has been described as the “sheer bureaucratic” cunning of hardline immigration advisor Stephen Miller.<sup>2</sup> Within his first five days of office Trump issued three immigration related executive orders that altered our immigration policies in an unprecedented fashion.<sup>3</sup> The executive orders included drastic measures such as the suspension of the United States refugee program for all countries for at least 120 days, the expansion of the categories of persons prioritized for removal from the United States to include potentially all undocumented persons, and the construction of a

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1. SARAH PIERCE & ANDREW SELEE, IMMIGRATION UNDER TRUMP: A REVIEW OF POLICY SHIFTS IN THE YEAR SINCE THE ELECTION (Dec. 2017), <https://www.migrationpolicy.org/sites/default/files/publications/TrumpatOne-final.pdf> [<https://perma.cc/YKG9-QT96>].

2. Nahal Toosi, *Inside Stephen Miller's hostile takeover of immigration policy*, POLITICO (Aug. 29, 2018, 5:13 AM), <https://www.politico.com/story/2018/08/29/stephen-miller-immigration-policy-white-house-trump-799199> [<https://perma.cc/W3U4-GCBL>]; see also Maggie Haberman, *A Familiar Force Nurtures Trump's Instincts on Immigration: Stephen Miller*, N.Y. TIMES (Nov. 4, 2018), <https://nyti.ms/2yOLq6M> [<https://perma.cc/V9BJ-KB7F>] (Miller began shaping President Trump's immigration policies back in 2016 when working on the Republican party platform).

3. Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02095.pdf> [<https://perma.cc/UPF3-Y4Z2>]; Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02102.pdf> [<https://perma.cc/MDJ7-KN6R>]; Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-02-01/pdf/2017-02281.pdf> [<https://perma.cc/HQS3-9FDU>].

border wall.<sup>4</sup> One order also changed the focus from immigrants as victims to immigrants as perpetrators by creating an office to assist United States citizens who were victims of crimes committed by immigrants.<sup>5</sup>

Although unsettling, the crisis faced by Jane Doe and the challenges faced by the law enforcement office attempting to prosecute her rapist were not unique. Immigrant victims of crime and the communities where these crimes have occurred have been facing a crisis that was meant to have been averted two decades ago.<sup>6</sup> In 2000, recognizing the vulnerabilities of immigrant survivors of crime, Congress enacted the U visa, a form of immigration relief that provides victims of violent crime, including survivors of sexual assault, a path to lawful status.<sup>7</sup> Recognizing that immigrants without lawful status are likely to be too frightened to report crimes and assist in prosecution, the U visa was intended to aid law enforcement in efforts to investigate and prosecute crime.<sup>8</sup>

The original statute, however, provided no provision to stop or delay the deportation of victims.<sup>9</sup> This omission likely exists because it was presumed that there would be sufficient visas available to victims and that applications could be processed in a timely fashion. However, changed enforcement priorities, marked increases in U visa applications, and the decreased authority of immigration judges over their dockets created a perfect storm to prevent the statute from fulfilling its purpose.<sup>10</sup>

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4. Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02095.pdf> [<https://perma.cc/UPF3-Y4Z2>]; Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02102.pdf> [<https://perma.cc/MDJ7-KN6R>]; Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-02-01/pdf/2017-02281.pdf> [<https://perma.cc/HQS3-9FDU>].

5. Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02102.pdf> [<http://perma.cc/EB7J-D8W8>].

6. *See generally* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

7. Victims of Trafficking and Violence Protection Act of 2000 § 1513, 114 Stat. 1464, 1533–37; Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)(iii) (2012).

8. *See* Victims of Trafficking and Violence Protection Act of 2000 § 1513(a)(2), 114 Stat. 1464, 1533–34 (“The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes . . . while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.”).

9. *See generally* Victims of Trafficking and Violence Protection Act of 2000.

10. *See* Nora Caplan-Bricker, “*I Wish I’d Never Called The Police*,” SLATE (Mar. 19, 2017, 8:12 PM), [http://www.slate.com/articles/news\\_and\\_politics/cover\\_story/2017/03/u\\_visas\\_gave\\_a\\_safe\\_path\\_to\\_citizenship\\_to\\_victims\\_of\\_abuse\\_under\\_trump.html](http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u_visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html) [<https://perma.cc/H8XP-GF6K>].

This Article will first introduce the U visa, and then will identify the legislative and regulatory gaps in the law. Then it will discuss the changes made at the executive level during the Trump administration and consider how those changes have undermined the spirit of the statute. Finally, it will review President Biden's executive and regulatory changes and propose a statutory solution. While there have been many improvements that protect survivors like Jane Doe, this article proposes that the only permanent way to avoid a repeat of the crisis of the past four years would be to permanently lift the statutory cap on the number of U visas issued.

### I. THE U VISA: LEGISLATIVE INTENT AND STATUTORY REQUIREMENTS

Congress created the U nonimmigrant visa category with the passage of the Victims of Trafficking and Violence Protection Act (including the Battered Immigrant Women's Protection Act) in October 2000 (BIWPA/VTVPA).<sup>11</sup> The inclusion of the U visa was in response to concerns about the vulnerability of immigrants to crime victimization, with a particular focus on women and children.<sup>12</sup> The U visa was negotiated in conjunction with the passage of the T visa, a visa available to immigrant survivors of human trafficking.<sup>13</sup> Through these two visas, Congress sought to encourage the reporting of crimes by immigrants by offering them protection.<sup>14</sup> The U visa provided immigrant victims of crime the possibility of acquiring legal status if they reported and cooperated with law enforcement and met other statutory requirements.<sup>15</sup>

This Author was the manager of a Domestic Abuse shelter for immigrant women in Seattle, Washington prior to the existence of the U visa and, like many immigrant and battered women's advocates, participated in advocacy efforts to support its negotiated passage.<sup>16</sup> Prior to

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11. Victims of Trafficking and Violence Protection Act of 2000 § 1513, 114 Stat. 1464, 1533–37; 8 U.S.C. § 1101(a)(15)(U)(iii).

12. Victims of Trafficking and Violence Protection Act of 2000 § 1513(a)(1)(A) (“Congress makes the following findings: (A) Immigrant women and children are often targeted to be victims of crimes committed against them in the United States, including rape, torture, kidnaping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained. (B) All women and children who are victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes.”).

13. *Id.*

14. *Id.*

15. 8 C.F.R. § 214.14(b) (2021).

16. The Author worked for Consejo Counseling and Referral as a domestic violence victim advocate and as the manager of the Mi Casa shelter in Seattle, Washington from 1997 to 2001.

the existence of the U visa, it was very common for immigrant survivors of gender-based violence to be unwilling or unable to report their victimization due to fears related to their immigration status. On more than one occasion I represented immigrant survivors whose abusive partners had reported them to the immigration authorities as a tool to abuse and control. I also had conversations with law enforcement agencies who were concerned about their own obligations to report unauthorized victims to immigration authorities and also law enforcement officers and prosecutors who were concerned that they were unable to prosecute criminals due to their inability to offer secure immigration protection to victims.

While the immigration provisions of the Violence Against Women's Act of 1994 provided tremendous relief to abused immigrants married to US Citizen and lawful permanent resident abusers, there was no relief for those survivors in other types of violent relationships.<sup>17</sup> In the shelter where this author worked, the greatest need was for immigration relief for survivors whose abusers either had not married them or who had no immigration status. This gap in the law was filled in 2000, through the passage of the BIWPA/VTVPA. Congress intended to serve two purposes with the law: (1) to increase law enforcement's ability to investigate and prosecute cases of domestic violence, sexual assault, human trafficking, and other violent crimes; and (2) to provide humanitarian support to survivors of certain violent crimes.<sup>18</sup> The idea was to encourage the participation of hesitant victim witnesses by offering immigration protection to those who cooperate in the investigation of the given crime.<sup>19</sup>

In order for immigrant victims to receive the protections of the U visa, they are required to prove (1) that they are victims of a qualifying crime that occurred in the United States or its territories; (2) that they possess information about the crime; (3) that they are being, have been, or will likely be helpful in the investigation; and (4) that they suffered substantial physical or mental harm as a result of the crime.<sup>20</sup> Only certain more serious and violent crimes enumerated in the statute qualify the victim for this protection.<sup>21</sup>

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17. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1953 (1994).

18. Victims of Trafficking and Violence Protection Act of 2000 § 1513(a)(2), 114 Stat. 1464, 1533-34.

19. *Id.*

20. Victims of Trafficking and Violence Protection Act of 2000 § 1513, 114 Stat. 1464, 1533-37; 8 U.S.C. § 1101(a)(15)(U)(i).

21. The list of crimes are as follows:

Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in 18 U.S.C. §

While the authority to decide whether a petitioner qualifies for a U visa lies with U.S. Citizenship and Immigration Services (USCIS), all U visa applications must include a signed certification by a federal, state, or local law enforcement agency indicating that the victim had been, was being, or would likely be helpful in the investigation or prosecution of a qualifying crime.<sup>22</sup>

While Congress passed the BIWPA/VTVPA in 2000, the Department of Homeland Security did not publish final regulations or create the application forms for the U visa or the law enforcement certification until 2008.<sup>23</sup> Further, Congress included no federal requirement that law enforcement agencies certify victims for the U visa even if there was evidence that the investigation resulted in a conviction because of the assistance of the victim.<sup>24</sup> The agency charged with reviewing U visa applications is a specialized Unit within US Citizenship and Immigration Services, commonly referred to as the “VAWA Unit.”<sup>25</sup> In that Unit, USIS has specially trained adjudicators who review U visa and T visa applications as well as VAWA self-petitions.<sup>26</sup>

At its inception, Congress included a statutory cap on the number of U visas that could be granted each year at 10,000.<sup>27</sup> During the first year applicants were eligible to apply for the U visa, applications exceeded 10,000.<sup>28</sup> That trend has continued.<sup>29</sup>

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1351); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

8 U.S.C. § 1101(a)(15)(U)(iii).

22. 8 U.S.C. § 1184(p)(1); 8 C.F.R. § 214.14(d)(1).

23. Off. of the Att’y Gen., New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, Interim Rule, 72 Fed. Reg. 179 (Sept. 17, 2007) (codified at 8 C.F.R. §§ 103, 212, 214, 248, 274a, 299).

24. 8 C.F.R. § 214.14.

25. Leslye E. Orloff & Janice V. Kaguyutan, *Offering A Helping Hand: Legal Protections For Battered Immigrant Women: A History Of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL’Y & L. 95, 138–39 (2002).

26. See Leslye E. Orloff et al., *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act’s Immigration Protections and Its “Any Credible Evidence” Rules - A Call for Consistency*, 11 GEO. J. GENDER & L. 619, 645–46 (2010).

27. 8 U.S.C. § 1184(p)(2).

28. *USCIS Approves 10,000 U Visas for 6th Straight Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 11, 2014), <https://www.uscis.gov/archive/uscis-approves-10000-u-visas-for-6th-straight-fiscal-year> [https://perma.cc/P325-VCFT].

29. U VISA FILING TRENDS, U VISA REPORTS, U.S. CITIZENSHIP & IMMIGR. SERVS. (April 2020), [https://www.uscis.gov/sites/default/files/document/reports/Mini\\_U\\_Report-Filing\\_Trends\\_508.pdf](https://www.uscis.gov/sites/default/files/document/reports/Mini_U_Report-Filing_Trends_508.pdf) [https://perma.cc/6P6Z-XXY3].

## II. A PERFECT STORM: ENFORCEMENT PRIORITIES AND THE U VISA BACKLOG

### A. Enforcement Priorities

Immigrant communities, immigration attorneys, and immigrant rights advocates all knew that the election of Donald J. Trump would have a devastating impact on the relief available to immigrant communities because he campaigned on a restrictionist platform.<sup>30</sup> Drastic changes in US immigration policy under the Trump administration profoundly altered the United States immigration system and particularly impacted immigrant survivors of violent crime.<sup>31</sup> In this section, I will discuss these changes in policies and then will outline the impact of these new enforcement policies on immigrant victims.

Even USCIS, the benefits branch of the Department of Homeland Security, changed its customer service focus, as illustrated by the removal of “a nation of immigrants” from its mission statement under President Trump.<sup>32</sup> This was replaced with a mission more focused on national security and protection.<sup>33</sup> There was a marked shift to a protectionist national security focused immigration system.<sup>34</sup> In 2019, USCIS Acting Director Ken Cuccinelli told Fox News that he saw “USCIS as a vetting agency, not a benefits agency.”<sup>35</sup> This meant a shift from providing access to visas to a focus on preventing access. This change trickled down to all aspects of the immigration process and crime victims were not immune.<sup>36</sup>

Prior immigration enforcement prosecutorial discretion policies had outlined a framework for prioritizing United States resources—such as emphasizing the removal of persons convicted of serious crime.<sup>37</sup> However,

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30. Howard S. Meyers, III, *Immigration Law: An Examination of America's Immigration System at a Time of Uncertainty*, 44 MITCHELL HAMLINE L. REV. 743, 784–85 (2018).

31. See Caplan-Bricker, *supra* note 10.

32. Richard Gonzales, *America No Longer A 'Nation Of Immigrants,' USCIS Says*, NPR: THE TWO-WAY (Feb. 22, 2018, 6:18 PM), <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says> [<https://perma.cc/SZ5Q-SRFW>].

33. The new mission statement reads: “U.S. Citizenship and Immigration Services administers the nation’s lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.” *Mission and Core Values*, U.S. CITIZENSHIP & IMMIGR. SERVS. (last updated July 5, 2020), <https://www.uscis.gov/about-us/mission-and-core-values> [<https://perma.cc/28CK-AJBH>].

34. See Adam Shaw, *Cuccinelli puts hardline stamp on immigration agenda, just 2 months into USCIS job*, FOX NEWS (Aug. 23, 2019), <https://www.foxnews.com/politics/cuccinelli-immigration-agenda-just-2-months-into-uscis-job> [<https://perma.cc/DN4F-XL2R>].

35. *Id.*

36. *Id.*

37. *Facts Sheet: Summary of Executive Order “Enhancing Public Safety in the Interior of the United States”*, AM. IMMIGR. COUNCIL (May 2017), <https://www.american>



the Trump administration greatly expanded “enforcement priorities.”<sup>38</sup> U.S. Immigration and Customs Enforcement (ICE) stated in a year-end report, ICE no longer exempts groups of removable [noncitizens] from enforcement.<sup>39</sup> On January 25, 2017, President Trump signed a new executive order entitled “Enhancing Public Safety in the Interior of the United States.”<sup>40</sup> This new executive order redefined the Department of Homeland Security’s enforcement priorities to such an extent that the American Immigration Council (an immigrant rights think tank) deemed them “meaningless.”<sup>41</sup> If everything is a priority, then nothing is really a priority.

The Department of Homeland Security (DHS) memorandum which implemented the new executive order severely limited the discretion of immigration-enforcement to assess an individual immigrants’ circumstances when making case enforcement decisions.<sup>42</sup> Posturing that immigration officers “shall faithfully execute the immigration laws of the United States against all removable [individuals].”<sup>43</sup>

In August 2019, ICE issued a fact sheet regarding how it would respond to pending U visa cases when the victims were in removal proceedings.<sup>44</sup> In the memorandum, ICE noted, correctly, that “the U visa regulations do not prevent pending U visa petitioners from being removed.”<sup>45</sup> ICE noted that under former ICE Directive 11005.1, when considering whether ICE should use prosecutorial discretion for U visa applicants ICE was required to request a prima facie determination from USCIS.<sup>46</sup> ICE categorized this as a “simple confirmation that the petition was filed correctly and was not a substantive review of the petition” and found that as the number of U visa petitions submitted increased, this process became burdensome on both agencies and often did not impact ICE’s decisions.<sup>47</sup> However, under ICE’s new Directive 11005.2, ICE directed its officers and attorneys to review the totality of the

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[immigrationcouncil.org/sites/default/files/research/summary\\_of\\_executive\\_order\\_enhancing\\_public\\_safety\\_in\\_the\\_interior\\_of\\_the\\_united\\_states.pdf](https://www.immigrationcouncil.org/sites/default/files/research/summary_of_executive_order_enhancing_public_safety_in_the_interior_of_the_united_states.pdf) [https://perma.cc/YHU8-X9VC].

38. *Id.*

39. *Id.*

40. Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02102.pdf> [https://perma.cc/53CG-LJZL].

41. *The End of Immigration Enforcement Priorities*, AM. IMMIGR. COUNCIL (Mar. 2018), <https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration> [https://perma.cc/VBT6-DMQF].

42. *Id.*

43. *Id.*

44. *Revision of Stay of Removal Request Reviews for U Visa Petitioners*, U.S. IMMIGR. AND CUSTOMS ENF’T (Aug. 2, 2019), <https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners> [https://perma.cc/K9QP-S69J] [hereinafter *Revision of Stay Removal Request*].

45. *Id.*

46. *Id.*

47. *Id.*

circumstances, including any favorable or adverse factors, and any federal interest(s) implicated in deciding whether a Stay of Removal or terminating proceedings was appropriate.<sup>48</sup>

In the case of Jane Doe, one would have thought that a rape victim actively participating in the trial of her alleged rapist would warrant such discretion considering the totality of the circumstances. However, ICE determined that her case did not warrant discretion and prosecutorial discretion was denied. ICE opposed her motion to continue and indicated that they would look at her case again if she was ordered removed. But because the backlog of U visa cases was so significant (more than a four year wait), considering the “totality of the circumstances,” they could not support a continuance in Doe’s case.

ICE notes in its fact sheet that if removed, USCIS could continue to adjudicate a U visa petition, meaning the survivor could wait for the adjudication outside of the United States.<sup>49</sup> However, because victims are required to remain helpful to law enforcement throughout the duration of a case in order to have their U visa certification continue, for many U visa applicants being outside the United States would render them incapable of continued helpfulness,<sup>50</sup> as was the case for our Jane Doe.

Further, in its directive, ICE noted that U visa petitioners would have all resources available to them that immigration law permits of anyone else in removal proceedings or with final removal orders, which in cases like Jane Doe’s, effectively mean little to no protection from removal.<sup>51</sup> Doe had an asylum case that was predicated on a particular gang-based social group. Those types of claims were largely impossible to succeed on, due to the remarkable decision by Attorney General Jeff Sessions to certify a number of cases to himself.<sup>52</sup> Doe’s only realistic option to remain in the United States was the U visa.

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48. *Id.*

49. *Id.*

50. U VISA ENFORCEMENT CERTIFICATION GUIDE, THE DEP’T OF HOMELAND SEC., [https://www.dhs.gov/xlibrary/assets/dhs\\_u\\_visa\\_certification\\_guide.pdf](https://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf) [<https://perma.cc/3YHP-XJM2>].

51. *Revision of Stay of Removal Request*, *supra* note 44.

52. A-B, 27 I. & N. Dec. 316 (A.G. 2018). (To qualify for asylum, applicants typically must establish that the gang or domestic violence amounts to persecution because of one of five enumerated grounds, including membership in a “particular social group.” A-B, former Attorney General Jeff Sessions issued a ruling that made it nearly impossible for applicants to satisfy this requirement.) As Ellison & Gupta state:

As part of a wide-ranging attack on asylum, the Trump administration has sought to eliminate asylum based on nonstate actor persecution. In June 2018, the Attorney General (“AG”) issued a sweeping decision, *Matter of A-B-*, vacating a 2014 decision in which the Board of Immigration Appeals had held that those fearing domestic violence could obtain asylum relief. Among other things, the decision heightened the nonstate actor standard, requiring that applicants not only show that their governments were “unwilling or unable” to control the persecution, but also that the

While ICE noted in its directive that “it recognized the significant law enforcement interest in active victim-witnesses remaining in the United States,” it no longer exempted U visa applicants as a class of removable noncitizens from potential enforcement and would consider each case on a case by case basis.<sup>53</sup> This decision undermined the intent of the U visa and caused significant uncertainty and trauma for survivors as well as considerable obstacles for the law enforcement agencies they were assisting.<sup>54</sup>

In addition to the changes to prosecutorial discretion impacting U visa applicants, in 2019, ICE published a revised “U Visa Law Enforcement Guide.”<sup>55</sup> This was not a new guide; however, this Trump-era version of the guide had a very different tone. Previous iterations aimed to provide law enforcement officials with information about how the U visa could be a useful tool for them, what the requirements were, what the law enforcement certification process entailed, and answers to frequently asked questions.<sup>56</sup> Prior versions of this resource guide had been a resource used by advocates to engage with law enforcement about the U visa program and encourage them to consider its benefits.<sup>57</sup> I utilized prior versions of the guide to encourage local law enforcement to consider certifying cases on several occasions. The Trump-era version contained various recommendations on how law enforcement agencies could limit their issuance of U visa certifications for eligible victims and reminded law enforcement about their ability to use discretionary authority to refuse to certify.<sup>58</sup>

Almost immediately upon the publication of this document, I noted a marked change in the tone and attitude of local law enforcement agencies toward the visa. For instance, an officer who presented to our law school clinic told clinic students that he really had the “power to decide who was worthy” of the visa and proceeded to describe his personal suspicions about fraud within the program.<sup>59</sup>

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governments “condoned” or were “completely helpless” to stop the persecution.

Charles Ellison & Anjum Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUM. RTS. L. REV. 441, 442 (2021).

53. *Revision of Stay of Removal Request*, *supra* note 44.

54. *See* Ellison & Gupta, *supra* note 52; *Revision of Stay of Removal Request*, *supra* note 44.

55. LAW ENFORCEMENT RESOURCES GUIDE, AILA DOC. NO. 19080181, U.S. CITIZENSHIP AND IMMIGR. SERVS. (July 31, 2019).

56. Press Release, USCIS Releases U Visa Law Enforcement Resource Guide to Better Support Certifying Agencies to Protect Victims of Crimes, U.S. Citizenship and Immigr. Servs., <https://www.aila.org/File/Related/19080181a.pdf> [<https://perma.cc/3VLB-AVP4>].

57. *Id.*

58. *Id.*

59. Author’s Notes from 2019 Course Guest Speaker.

Among the more concerning recommendations was that law enforcement agencies conduct their own “discretionary background checks” on those seeking U visa certifications.<sup>60</sup> The guide encouraged law enforcement agencies to impose time limitations on certification issuance, and to consider how much time has passed since the crime took place, even though this factor is specifically not included in the statute.<sup>61</sup> Under the statute, certifying officials may complete the certification Form I-918B for an investigation or prosecution that is closed.<sup>62</sup> There is no statute of limitations regarding the time frame in which the criminal activity must have occurred.<sup>63</sup> Federal legislation specifically provides that a victim may be eligible for a U visa based on having been helpful in the past to the detection, investigation, prosecution, conviction, or sentencing of criminal activity.<sup>64</sup> The guide also reminds law enforcement that it may withdraw certifications at any time and encourages law enforcement agencies to notify USCIS of any fraud and any known criminal or gang activity.<sup>65</sup>

The change in enforcement priorities, prosecutorial discretion, and the increased retooling of the U visa purpose from that of a victim serving law enforcement tool to that of a vetting tool, all combined to undermine the spirit and mission of the U visa legislation.

## B. Removal Docket Management

Immigration Courts have faced significant backlogs since the Obama era. At the start of the Trump presidency in 2017 there were 542,422 deportation cases pending before the US Immigration Courts.<sup>66</sup> Due to the Trump-era policy changes and the Covid-19 crisis, that number rose to 1,290,766 by the start of 2021.<sup>67</sup>

In addition to increased immigration enforcement and the reduction of prosecutorial discretion under President Trump, one of the challenges to reducing case backlog was the end of Immigration Judges’ (“IJ”) long standing ability to administratively close and continue cases.<sup>68</sup> In July 2017,

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60. LAW ENFORCEMENT RESOURCES GUIDE, *supra* note 55.

61. 8 U.S.C. § 1101(a)(15)(U)(iii); 8 C.F.R. § 214.14(d)(1).

62. *Id.*

63. *Id.*

64. 8 U.S.C. § 1101(a)(15)(U)(iii); 8 C.F.R. § 214.14(d)(1).

65. LAW ENFORCEMENT RESOURCES GUIDE, *supra* note 55.

66. Transactional Records Access Clearinghouse (TRAC), Syracuse University, *The State of Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts* (Jan. 19, 2021), <https://bit.ly/3o2YJXR> [<https://perma.cc/T39U-7YC9>].

67. *Id.*

68. Sergio Fernandez, *Matter of Castro Tum: How the Attorney General Jeff Sessions Changed Immigration Court Efficiency*, U. DAYTON L. REV. (forthcoming 2022); see also Nina Rabin, *Legal Limbo as Subordination: Immigrants, Caste, and the Precarity of Liminal Status in the Trump Era*, 35 GEO. L.J. 567, 598 (2021) (“In addition to the limitations the Attorney General placed on immigration judges’ ability to manage their dockets through

the Chief Immigration Judge issued a memorandum which encouraged Immigration Judges to “deny multiple continuances, including continuances to find an attorney or for an attorney to prepare for a case.”<sup>69</sup> In October of 2017, the DOJ approved a plan entitled the Executive Office for Immigration Review’s (EOIR) Strategic Caseload Reduction Plan, designed to “significantly reduce the case backlog by 2020.”<sup>70</sup> The result was the opposite.<sup>71</sup>

In May of 2018, then-Attorney General Jeff Sessions stripped immigration judges and BIA members of the authority to administratively close cases when he decided the *Matter of Castro-Tum*.<sup>72</sup> In a significant break from precedent, Attorney General Jeff Sessions held that “judges and the BIA do not have the general authority to suspend immigration proceedings.”<sup>73</sup> In August 2018, Sessions also issued a decision in *Matter of L-A-B-R- et al.*, which interfered with an IJ’s ability to grant continuance requests and introduced procedural hurdles that made it significantly harder for immigrants in removal proceedings to request and IJs to grant continuances.<sup>74</sup> In the case of Jane Doe and countless other U visa applicants in removal proceedings, the *Matter of Castro-Tum* and the *Matter of L-A-B-R- et al.* were both cited by the immigration court as reasons why motions to continue and administratively close would be denied. This was despite evidence provided to the court regarding Doe’s active participation in criminal rape prosecutions.

### C. U Visa Backlog

As discussed above, the U visa is statutorily subject to a 10,000 per year numerical cap.<sup>75</sup> By regulation, USCIS is supposed to place petitioners who have established eligibility for U nonimmigrant status, and who would have been granted a visa but for the numerical cap, on a waiting list.<sup>76</sup>

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administrative closure and continuances, DOJ has imposed strict case completion quotas and ordered sudden and unexpected changes in docket management.”).

69. AILA’s POLICY BRIEF: FOIA REVEALS EOIR’S FAILED PLAN FOR FIXING THE IMMIGRATION COURT BACKLOG, AILA DOC. NO. 19021900 (Feb. 21, 2019), <https://www.aila.org/advo-media/aila-policy-briefs/foia-reveals-eoirs-failed-plan-court-backlog> [https://perma.cc/25YA-N7R5].

70. *Id.*

71. *See id.*

72. *Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

73. *Fernandez*, *supra* note 68.

74. *L-A-B-R-*, 27 I. & N. Dec. 405 (A.G. 2018).

75. *See* 8 U.S.C. § 1184(p)(2).

76. *Chapter 6 - Waiting List*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-6> [https://perma.cc/D4X5-56FF].

However, this has not been happening due to USICS's processing delays.<sup>77</sup> While the U visa was created by Congress in 2000, regulations were not promulgated for eight years, leaving behind approximately 70,000 potential visas.<sup>78</sup> By 2009 there were already approximately 12,000 principal U Visa applications pending.<sup>79</sup> By fiscal year 2017, over 35,000 principal petitions were filed and there were approximately 112,000 petitions pending.<sup>80</sup> By the end of 2019 there were approximately 152,000 pending principal petitions.<sup>81</sup> The current backlog is estimated to be approximately 160,000 pending U visa applications.<sup>82</sup>

All petitions placed on the U visa waiting list and all petitions for U nonimmigrant status adjudicated in fiscal year 2020 were received in prior fiscal years and do not include petitions received by USCIS in fiscal year 2020.<sup>83</sup> The Department of Homeland Security reports that on average, a principal petition for U nonimmigrant status that was placed on the waiting list in fiscal year 2020 was pending for approximately forty-eight months before being placed on the U visa waiting list.<sup>84</sup> In 2020, petitioners spent approximately ten months on the waiting list before a final decision was made.<sup>85</sup> Until a U visa applicant is placed on the waiting list, an applicant has no statutory protection from deportation.<sup>86</sup> This was the case for Jane Doe.

## II. SOLUTIONS

### A. Biden Era Legal and Policy Changes Impacting the U visa

Fortunately for Jane Doe, many changes implemented by the Biden administration have improved her situation. She was able to remain in the country long enough to see justice served upon her assailant and continues to be of assistance in other cases.

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77. The Law Offices of Lloyd E. Bennett, *USCIS Processing Delays Remain At Crisis Levels* (Sept. 27, 2021), <https://www.lebpc.com/blog/2021/september/uscis-processing-delays-remain-at-crisis-levels/> [https://perma.cc/KUH2-389S].

78. *Chapter 1 - Purpose and Background*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (current as of Dec. 9, 2021), <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-1> [https://perma.cc/GN5Q-5FF2].

79. U VISA FILING TRENDS: ANALYSIS OF DATA THROUGH FY 2019, U.S. CITIZENSHIP AND IMMIGR. SERVS. 4, fig. 1 (Apr. 2020), [https://www.uscis.gov/sites/default/files/document/reports/Mini\\_U\\_Report-Filing\\_Trends\\_508.pdf](https://www.uscis.gov/sites/default/files/document/reports/Mini_U_Report-Filing_Trends_508.pdf) [https://perma.cc/5ES8-ABJ5].

80. *Id.* at 4, figs. 1 and 2.

81. *Id.*

82. ANNUAL REPORT ON IMMIGRATION APPLICATIONS AND PETITIONS MADE BY VICTIMS OF ABUSE – FISCAL YEAR 2020, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Apr. 16, 2021), <https://www.uscis.gov/sites/default/files/document/reports/FY20-Immigration-Applications-Made-by-Victims-of-Abuse.pdf> [https://perma.cc/TA37-TB7C].

83. *Id.* at 5, 10.

84. *Id.*

85. *Id.* at 6.

86. 8 C.F.R. § 214.14(d)(2).

### 1. Court Decisions

In July 2021, Attorney General Eric Garland overruled the *Matter of Castro Tum* in *Matter of Cruz Valdez*.<sup>87</sup> In that case, Garland ruled that the immigration courts should have the authority to administratively close immigration cases.<sup>88</sup> Garland argued that it was appropriate to overrule *Castro-Tum* in its entirety because it “departed from long-standing practice.”<sup>89</sup> Garland restored administrative closure pending the reconsideration of a proposed 2020 administrative closure rule which must go through the rulemaking process.<sup>90</sup> Garland asserts that administrative closure is a “docket management tool” that affords courts “greater flexibility in case management” and does not result in termination or dismissal of case, but temporarily takes the case off an Immigration Judges active calendar.<sup>91</sup> Garland pointed to the usefulness of allowing courts to “pause cases while the U.S. Citizenship and Immigration Services (USCIS) adjudicates a noncitizen’s pending visa petition,” which was previously of great benefit to U visa applicants.<sup>92</sup>

In a welcome turn of events, on September 13, 2021 a federal appeals court ruled that USCIS unreasonably delayed placing four applicants for U visas on a waiting list preventing them from attaining deferred-action status that would protect them from deportation.<sup>93</sup> The Sixth Circuit Court of Appeals rejected USCIS’ argument that its delays in the four consolidated cases were due to the backlog of roughly 160,000 applications for U visas with the court finding “it unhelpful to fixate on the average snail’s pace when comparing snails against snails in a snails’ race.”<sup>94</sup>

### 2. Administrative Remedies

The Trafficking Victims Protection Reauthorization Act of 2008 added language to the Immigration and Nationality Act authorizing USCIS to provide work authorization to people with pending, bona fide U visa

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

88. *Id.* at 329.

89. *Id.*

90. *Id.*

91. *Id.* at 326.

92. *Id.* at 326–27.

93. Barrios Garcia v. DHS, No. 21-037/1056/1063/5022 (6th Cir. Sept. 13, 2021) (recommended for publication pursuant to Sixth Circuit I.O.P. 32.1(b)), [https://fingfx.thomsonreuters.com/gfx/legaldocs/gdpzyqyexvw/IMMIGRATION\\_UVISA\\_DELAY\\_decision.pdf](https://fingfx.thomsonreuters.com/gfx/legaldocs/gdpzyqyexvw/IMMIGRATION_UVISA_DELAY_decision.pdf) [<https://perma.cc/2AVF-3QJY>].

94. *Id.*

applications.<sup>95</sup> Despite this language, it was not until June 14, 2021, that USCIS announced a new “bona fide determination” which allows certain U petitioners and their family members with pending U petitions to receive four-year work authorization and deferred action while they await full adjudication.<sup>96</sup> While deferred action is not an immigration status, it does indicate that an applicant is no longer a priority for removal and would be a significant factor in consideration of any request to continue or administratively close a removal case.<sup>97</sup>

The standards for the new bona fide determination are significantly less stringent than the requirements for an applicant to be placed on the U visa waiting list.<sup>98</sup> USCIS can make a bona fide determination upon an initial review of the U visa application.<sup>99</sup> The adjudicator must simply determine that the application is complete and properly filed and that a criminal background check does not reveal national security or public safety concerns.<sup>100</sup> In contrast, in order to place an applicant on the U visa waiting list, DHS must determine that the U visa application is approvable based on all of the U visa eligibility criteria, which requires a significantly more detailed adjudicatory review.<sup>101</sup> Additionally, a bona fide determination will come before a waiting list decision.<sup>102</sup> As discussed previously, waiting list decisions were taking upwards of fifty months.

While implementation of this new process is still forthcoming and timelines are not clear, this new bona fide determination process will provide significant relief to applicants in removal proceedings like Jane Doe.<sup>103</sup> In addition to the possible protection from removal, the process also offers economic relief to the applicant because the applicant would be eligible for an employment authorization.<sup>104</sup>

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95. See 8 U.S.C. § 214(p)(6) (“The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U).”).

96. *Chapter 5 - Bona Fide Determination Process*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Dec. 9, 2021), <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5> [<https://perma.cc/3RY2-2DSQ>].

97. *Glossary*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/tools/glossary> [<https://perma.cc/JQ87-TB8F>] (last visited Dec. 27, 2021).

98. *Compare Chapter 6 - Waiting List*, *supra* note 76. [<https://perma.cc/LF5J-5HW4>] (last updated Dec. 9, 2021), with *Chapter 5 - Bona Fide Determination Process*, *supra* note 96.

99. *Chapter 5 - Bona Fide Determination Process*, *supra* note 96.

100. *Id.*

101. *Chapter 6 - Waiting List*, *supra* note 76.

102. *Chapter 5 - Bona Fide Determination Process*, *supra* note 96.

103. Author note: as of March 8, 2022, Jane Doe has not received notification of a determination of Bona Fide eligibility.

104. *Chapter 5 - Bona Fide Determination Process*, *supra* note 96.



## B. Statutory and Regulatory Recommendations

### 1. Remove the Cap

There have been many improvements to the plight of survivors like Jane Doe in the first year of the Biden administration through swift executive action. However, just as the Biden administration acted swiftly to dismantle Trump-era immigration policies, the Trump administration did the same to the Obama-era policies.<sup>105</sup> There is no guarantee that the next administration will not reverse course again. The rights of victims like Jane Doe will not be securely protected until Congress acts.

In the year 2000, Congress capped the number of U visas at 10,000 per year without any clear data on the number of immigrants who may be crime victims due to their unauthorized status.<sup>106</sup> As previously discussed, the number of U visa applicants has regularly been well over 20,000 for the past decade.<sup>107</sup> The backlog of U visas remains a problem, both in terms of access to the benefit, and also in terms of being able to remain in the United States.<sup>108</sup>

At the end of 2019 there were 152,000 pending principal applications.<sup>109</sup> In 2020, 22,480 principal applications were filed despite the challenges of the pandemic.<sup>110</sup> Only about 10,000 were approved in 2020, and less than 3,000 were denied.<sup>111</sup> Because the number of individuals issued principal U nonimmigrant status in any fiscal year cannot exceed 10,000, the wait-time for a principal petitioner to receive a final decision (and status, if approved) is currently five to ten years, depending on the individual's placement on the waitlist.<sup>112</sup> As the USCIS Report on Filing Trends states, "[i]f filing trends continue, the pending queue and associated processing times will continue to grow significantly."<sup>113</sup> Over

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105. Michael D. Shear & Zolan Kanno-Youngs, *Biden Issues Orders to Dismantle Trump's 'America First' Immigration Agenda*, N.Y. TIMES (Feb. 2, 2021), <https://www.nytimes.com/2021/02/02/us/politics/biden-immigration-executive-orders-trump.html> [https://perma.cc/8H62-XV8F]; Anthony Zurcher, *Trump's bid to end Obama-era immigration policy ruled unlawful*, BBC NEWS (June 18, 2020), <https://www.bbc.com/news/world-us-canada-53096887> [https://perma.cc/HKH9-FAHK].

106. 8 U.S.C. § 1184(p)(2); 8 C.F.R. § 214.14(d)(1).

107. Jessica M. Vaughn, *Visas for Victims: A Look at the U Visa Program*, CTR. FOR IMMIGR. STUD. (Mar. 30, 2020), <https://cis.org/Report/Visas-Victims-Look-U-Visa-Program> [https://perma.cc/UD4D-S96R].

108. U VISA FILING TRENDS: ANALYSIS OF DATA THROUGH FY 2019, *supra* note 79, at 7.

109. *Id.* at 3.

110. ANNUAL REPORT ON IMMIGRATION APPLICATIONS AND PETITIONS MADE BY VICTIMS OF ABUSE—FISCAL YEAR 2020, *supra* note 82, at 5 tbl. 4.

111. *Id.*

112. U VISA FILING TRENDS: ANALYSIS OF DATA THROUGH FY 2019, *supra* note 79, at 3.

113. *Id.*

the years advocates have recommended a variety of solutions for deficiencies with the U visa legislation.<sup>114</sup> Removing or raising the cap has frequently been discussed.<sup>115</sup>

While restrictionist critics of the U visa remain concerned about fraud, the high number of U visa applicants has not produced significantly different approval rates.<sup>116</sup> Approval rates have remained relatively constant over time: the approval rate is about eighty-four percent for principal petitioners for petitions submitted in 2014 (the last year data are available).<sup>117</sup> For petitions submitted in 2012, the approval rate was eighty-seven percent for principal petitioners (and eighty-eight percent for derivatives).<sup>118</sup>

Efforts have been made to increase the U visa cap most notably when the “gang of eight” proposed comprehensive immigration reform, which included an increase in U visas to 18,000 per year which did not pass.<sup>119</sup> The current immigration bill proposed by the Biden administration proposes increasing the cap from 10,000 to 30,000 per year.<sup>120</sup> There has been no piecemeal attempt by Congress to increase the U visa cap.

In a 2018 report by Human Rights Watch, which was based on interviews of multiple U visa recipients and law enforcement officers, it was recommended that Congress lift or remove the U visa cap as a solution to the U visa backlog.<sup>121</sup> Another remedy proposed in the report was the reallocation of unused Trafficking visas, which are currently capped at 5,000 per year and have remained consistently under that amount.<sup>122</sup> An additional recommendation was to recapture the over 70,000 visas which

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114. *Immigrant Crime Fighters: How the U Visa Program Makes US Communities Safer*, HUM. RTS. WATCH (July 3, 2018), <https://www.hrw.org/report/2018/07/03/immigrant-crime-fighters/how-u-visa-program-makes-us-communities-safer> [https://perma.cc/5U9T-4KJL] [hereinafter *Immigrant Crime Fighters*]; Sara Ramey, *Eliminating the U visa cap will help catch criminals*, THE HILL (Feb. 14, 2018), <https://thehill.com/opinion/immigration/373808-eliminating-the-u-visa-cap-will-help-catch-criminals> [https://perma.cc/8V64-GAWJ]; Jennifer Scarborough & Lisa Cope, *U.S. Reaches U Visa Cap in Less Than 3 Months; Immigrant Victims Left in Limbo*, NAT’L IMMIGRANT JUST. CTR. (Dec. 8, 2013), <https://immigrantjustice.org/staff/blog/us-reaches-u-visa-cap-less-3-months-immigrant-victims-left-limbo> [https://perma.cc/HZ29-4KD4].

115. See *Immigrant Crime Fighters*, *supra* note 114; Ramey, *supra* note 114; Scarborough & Cope, *supra* note 114.

116. Vaughn, *supra* note 107.

117. U VISA FILING TRENDS: ANALYSIS OF DATA THROUGH FY 2019, *supra* note 79, at 6 fig. 4.

118. *Id.*

119. Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th CONG. § 3406 (2013); see also Philip E. Wolgin, *2 Years Later, Immigrants Are Still Waiting on Immigration Reform*, CTR. FOR AM. PROGRESS (June 24, 2015), <https://www.americanprogress.org/article/2-years-later-immigrants-are-still-waiting-on-immigration-reform/> [https://perma.cc/2XWX-P6GV].

120. H.R. 1177, 117th CONG. (2021).

121. *Immigrant Crime Fighters*, *supra* note 114.

122. *Id.*

were never available due to the deadly in the implementation of regulations from 2000 to 2008.<sup>123</sup>

All of the above solutions might have provided additional relief to survivors like Jane Doe had they been in existence during the Trump era. However, there is no way to accurately predict the number of immigrants who might become victims of crime and who might be needed to assist law enforcement. To ensure that we never face a humanitarian crisis like we did during the last administration, where survivors like Jane Doe faced imminent deportation while their visas were pending, there should be no limit to the number of U visas available. While there has been no report yet released about the number of U visa applicants deported during the Trump administration, anecdotally, from the author's experience and reports from numerous practitioners, many were either ordered removed or actually removed.

Congress placed no limit on the number of asylum applications that may be granted in a year.<sup>124</sup> The U visa applicant faces a similar humanitarian condition to the asylum seeker; the U visa applicant finds him or herself in need of protection through no fault of her own. Further, the U visa applicant provides a humanitarian service to the public by participating in the investigation of criminal activity in the United States. The human rights of crime victims should be protected and any numerical cap undermines the law enforcement and humanitarian goals of the visa. This view is reinforced by the United Nations Human Rights Committee which notes that "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations against covenant rights by its agents, but also against acts committed by private persons or entities."<sup>125</sup>

When the U visa was created, Congress knew that crime victims who were at risk of deportation were unlikely to report the crimes as doing so could and did sometimes lead to removal.<sup>126</sup> In some cases, perpetrators sought out immigrants for criminal victimization because they knew they were less likely to report.<sup>127</sup> Until we have some form of comprehensive immigration reform, marginalized immigrants will remain at risk. If Congress is unwilling to pass comprehensive immigration reform, piecemeal immigration legislation should be considered, and among the considerations should be permanently lifting the U visa cap.

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123. *Id.*

124. 8 U.S.C. § 1159(a).

125. UN Human Rights Committee, *General Comment 31[80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

126. *Immigrant Crime Fighters*, *supra* note 114.

127. *Id.*

2. *USCIS Should Implement the Provisions of the Emergency Stopgap USCIS Stabilization Act*

In addition to the statutory U visa cap, USCIS has been unable to review U visa applications to determine they are bona fide and offer interim relief.<sup>128</sup> This is due to USCIS processing backlogs.<sup>129</sup> USCIS is largely funded by its fees.<sup>130</sup> The U visa and other humanitarian forms of Immigration Relief do not require filing fees.<sup>131</sup> Increasing U visa applications and speeding up the bona fide process to assist victims would require more resources. The measures below could offset some of those costs.

While already facing unprecedented case backlogs, the USCIS announced in August 2020 that it would avert furloughing nearly seventy percent of its workforce through aggressive spending reduction measures that would impact agency operations.<sup>132</sup> On September 30, 2020, President Trump signed H.R. 8337 the Continuing Appropriations Act, 2021 and Other Extensions Act.<sup>133</sup> Included in the Act is language from the Emergency Stopgap USCIS Stabilization Act (H.R. 8089), which seeks to address USCIS's budget shortfall by increasing and expanding premium processing fees of certain types of applications.<sup>134</sup> It is estimated that the budget could be increased by \$385 million to \$626 million by implementing these measures.<sup>135</sup> While the law took effect immediately, the increased fees and expanded availability of premium processing will not take effect until USCIS is able to implement them.<sup>136</sup>

Immigration advocates, including the American Immigration Lawyers Association, have called upon USCIS to implement these measures in order to improve agency efficiency and reduce processing fees.<sup>137</sup> These measures could also improve processing for U visa applicants and offset any additional costs that may be incurred by lifting the annual cap on the U visa.

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128. *Id.*

129. *Id.*

130. Doug Rand & Lindsay Milliken, *Congress Just Authorized USCIS to Raise Over \$1 Billion Fees from Business Users*, FED'N OF AM. SCIENTISTS (Oct. 22, 2020), <https://fas.org/pub-reports/congress-just-authorized-uscis-to-raise-over-1-billion-in-fees-from-business-users/> [<https://perma.cc/YB4W-EK23>].

131. *I-918, Petition for U Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/I-918> [<https://perma.cc/4TLM-639Q>] (last updated Nov. 29, 2021).

132. *Featured Issue: USCIS Budget Shortfall and Furloughs*, AM. IMMIGR. LAWS. ASS'N (Dec. 10, 2021), <https://www.aila.org/advo-media/issues/all/uscis-furloughs> [<https://perma.cc/Q4DM-TV2C>] [hereinafter *USCIS Budget Shortfall and Furloughs*].

133. *Id.*

134. *Id.*

135. Rand & Milliken, *supra* note 130.

136. *USCIS Budget Shortfalls and Furloughs*, *supra* note 132.

137. *See generally id.*

### 3. *Expansion of Continued Presence*

In addition to expanding or lifting the U visa cap, another law enforcement tool that should be implemented to protect victims like Jane Doe is already available to survivors of human trafficking. A temporary immigration status called continued presence, offers an interim solution for victims while their cases await adjudication.<sup>138</sup> Continued presence is a form of relief that allows victims to remain in the United States prior to any application or adjudication of their trafficking visa.<sup>139</sup> Law enforcement officials who encounter foreign national victims of severe forms of trafficking in persons may request that the Department of Homeland Security's Center for Countering Human Trafficking process the victim for continued presence to allow them to remain in the United States during the pending investigation and prosecution.<sup>140</sup> A continued presence application can be initiated immediately upon identification of a trafficking victim who may be a potential witness.<sup>141</sup> The status may be requested by any federal, state, or local law enforcement agency with authority to investigate or prosecute human trafficking.<sup>142</sup> Submissions by state and local requesting agencies must be sponsored by a federal agency and routed through designated points of contacts of the federal sponsoring agency.<sup>143</sup> Continued presence allows the survivor to be in the United States lawfully and offers employment authorization and access to emergency public benefits.<sup>144</sup>

Expanding the use of continued presence to victims of U visa category crimes would support the investigating law enforcement agency and the crime victim. It also protects victims in situations where a law enforcement agency feels it is strategically ill advised to certify a victim until after he/she completes their obligation to be helpful. Continued presence would have offered protection to Jane Doe and alleviated the stress experienced by everyone involved with her case.

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138. CONTINUED PRESENCE: TEMPORARY IMMIGRATION STATUS FOR VICTIMS OF HUMAN TRAFFICKING, DEP'T OF HUM. SERVS. (Aug. 2010), <https://www.dhs.gov/xlibrary/assets/ht-uscis-continued-presence.pdf> [<https://perma.cc/7P8T-9VQN>].

139. 28 C.F.R. § 1100.35 (2021).

140. *Id.*

141. *Id.*

142. CONTINUED PRESENCE TEMPORARY IMMIGRATION DESIGNATION FOR VICTIMS OF HUMAN TRAFFICKING, IMMIGR. AND CUSTOMS ENF'T, <https://www.ice.gov/doclib/human-trafficking/pdf/continued-presence.pdf> [<https://perma.cc/ERV3-9JMT>] (last visited Dec. 27, 2021).

143. *Id.*

144. *Id.*

### CONCLUSION

What happened to Jane Doe did not happen in isolation. Without Jane's participation in the criminal justice process, a rapist would have gone free. If survivors like Jane Doe are unable to assist law enforcement because they are deported, we all lose. If survivors are unwilling to come forward because they fear immigration consequences and contact with law enforcement, it is not just the immigrant Jane Does that will be impacted, we are all at risk. So, while it is important to remove the U visa cap and expand continued presence in order to protect victim applicants from removal for humanitarian reasons, it also remains essential from a public safety perspective.