No. 20-1541

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Carlos Granados Benitez,

Petitioner,

v.

William P. Barr, United States Attorney General,

Respondent.

On Petition for Review of an Order
of the Board of Immigration Appeals,
Case No. A 216-557-599

BRIEF OF *AMICI CURIAE* ASISTA IMMIGRATION ASSISTANCE, ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, SAFE HORIZON, AND TAHIRIH JUSTICE CENTER IN SUPPORT OF PETITIONER AND IN SUPPORT OF REVERSAL OF THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

Brian D. Straw
Gregory E. Ostfeld
Greenberg Traurig, LLP
77 West Wacker Dr., Suite 3100
Chicago, Illinois 60601
(312) 456-8400

Counsel for Amici Curiae

FEDERAL RULE OF APPELLATE PROCEDURE 29 CERTIFICATION

Pursuant to Fed. R. App. P. 29(a)(2), undersigned counsel for amici curiae states that all parties have consented to the filing of this brief.

Pursuant to Fed. R. App. P. 29(a)(4)(E), undersigned counsel for amici curiae state that no counsel for the parties authored this brief in whole or in part, and no party, party's counsel, or person or entity other than amici and their counsel contributed money intended to fund the preparing or submitting of this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A) and 26.1, amici curiae—ASISTA Immigration Assistance, Asian Pacific Institute on Gender-Based Violence, National Coalition Against Domestic Violence, National Network to End Domestic Violence, Safe Horizon, and Tahirih Justice Center—are non-profit organizations and do not have parent corporations or issue stock, so there is no publicly held corporation owning 10% or more of their stock.

Dated: August 26, 2020

/s/ *Brian D. Straw*
Brian D. Straw
Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF IDENTITY AND INTEREST

Pursuant to Federal Rule of Appellate Procedure 29(a), the undersigned amici curiae respectfully requests leave to file this Brief of Amici Curiae in Support of Petitioner and in Support of Reversal of the Decision of the Board of Immigration Appeals (hereinafter "BIA").

Amici are nonprofit organizations that serve and advocate on behalf of survivors of domestic violence, sexual assault and other forms of gender-based violence. Based upon their experience and expertise, amici understand that immigrant survivors of violence often face a myriad of barriers seeking justice and protection from abuse, including the fear that reaching out for help may result in their own deportation.

Amici have extensive knowledge about the legal protections for immigrant survivors contained in the Violence Against Women Act (VAWA) and its progeny, which were specifically created to help address these barriers. These protections, like VAWA self-petitions, U visas and T visas, encourage survivors to seek justice and help them to gain independence, safety and stability. For immigrant survivors, meaningful access to these immigration protections can make the difference in their decision to reach out for help or to leave abusive relationships. For

survivors in removal proceedings, meaningful access to these critical protections depends on the courts adhering to the proper standard for granting motions to reopen.

Amici curiae are the following:

ASISTA Immigration Assistance is a national non-profit organization that works to advance and protect the rights and routes to status of immigrant survivors of violence, especially those who have suffered gender-based violence inside the United States. ASISTA worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes in VAWA and its subsequent reauthorizations. ASISTA serves as liaison between those who represent these survivors and the Department of Homeland Security ("DHS") personnel charged with implementing the laws at issue in this appeal, including Citizenship and Immigration Services ("USCIS"), Immigration and Customs Enforcement ("ICE"), and DHS's Office for Civil Rights and Civil Liberties. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates,

and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors.

The ***Asian Pacific Institute on Gender-Based Violence*** (*formerly,* Asian & Pacific Islander Institute on Domestic Violence) is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander and in immigrant communities. The Institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander and immigrant and refugee survivors of domestic violence, sexual assault, and human trafficking, and provides analysis and consultation on critical issues facing victims of gender-based violence in the Asian and Pacific Islander and in immigrant and refugee communities, including training and technical assistance on implementation of the Violence Against Women Act and legal protections for immigrant and refugee survivors. The Institute leads by promoting culturally relevant intervention and prevention, expert consultation, technical assistance and training; conducting and disseminating critical research; and informing public policy.

The **National Coalition Against Domestic Violence** (NCADV) provides

a voice to victims and survivors of domestic violence. NCADV's mission is to lead, mobilize and raise our voices to support efforts that demand a change of conditions that lead to domestic violence such as patriarchy, privilege, racism, sexism, and classism. NCADV is dedicated to supporting survivors, holding offenders accountable, and supporting advocates. NCADV envisions a national culture in which we are all safe, empowered and free from domestic violence.

The **National Network to End Domestic Violence (NNEDV)** is a nonprofit organization in Washington, DC committed to ending domestic violence. As a network of the 56 state and territorial domestic violence and dual domestic violence and sexual assault coalitions and their over 2,000 member programs, NNEDV serves as the national voice of millions of women, children and men victimized by domestic violence. NNEDV was instrumental in the passage and subsequent reauthorizations of the Violence Against Women Act. Immigrants are particularly vulnerable to domestic abuse and other gender based crimes. NNEDV has a strong interest in ensuring that immigrant victims have adequate access to U visa protections so that they can report the crimes they experienced without fear that the disclosure will result in removal proceedings.

Safe Horizon, founded in 1978, is the nation's leading victim assistance organization serving victims of domestic violence, rape and sexual assault, child sexual and severe physical abuse, human trafficking, and other crimes. Safe Horizon assists annually more than 250,000 New Yorkers who have been impacted by violence or abuse. Its mission is to provide support, prevent violence and promote justice for victims of crime and abuse, their families and communities. Established in 1988, Safe Horizon's Immigration Law Project ("ILP") provides free or low-cost legal services to immigrant survivors of crime, violence, abuse, trafficking and torture, in immigration court and administrative applications. ILP currently assists more than 1,000 low and moderate-income immigrants and their family members each year. U-visas and U-visa-based adjustments of status are together the most common forms of relief sought by ILP on behalf of its clients.

The *Tahirih Justice Center* ("Tahirih") is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. In five cities across the country, Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human

trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 25,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of that trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity.

Because of amici's history serving and advocating on behalf of survivors of domestic violence, sexual assault and other forms of gender-based violence and their familiarity with the statutory framework under which crime victims may seek U nonimmigrant relief pursuant to 8 U.S.C. § 1101(a)(15)(U) (the "U statute"), the amici can "for the assistance of the court give[] information of some matter of law in regard to which the court is doubtful or mistaken." *New England Patriots Football Club, Inc. v. Univ. of Colo.*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (quoting 1 Bouvier's Law Dictionary 188 (3d ed. 1914)).

INTRODUCTION

Immigrant populations are particularly vulnerable to crimes like

domestic violence, sexual assault, and human trafficking, in part because people who fear deportation are less likely to report abuse. *See* Stacey Ivie et al., *Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims*, 85 THE POLICE CHIEF 4, 34–36 (Apr. 2018), http://library.niwap.org/wp-content/uploads/PoliceChief_April-2018_Building-Trust-With-Immigrant-Victims.pdf. One of the most intimidating tools of power and control abusers use is threatening to get their victims deported if they seek help. *Id* at 34. Such threats help abusers "maintain control over their victims and . . . prevent them from reporting crimes to the police." *Id*. In essence, abusers weaponize the immigration legal system to further harm victims.

In an effort to combat these issues, Congress passed VAWA in 1994, and included provisions that allowed battered immigrants to "self-petition" for legal status, without relying on their abusers, recognizing that "a battered spouse may be deterred from taking action to protect himself or herself, such as filing a protection order, filing criminal charges or calling the police, because of the threat or fear of deportation." Katrina Castillo et al., *Legislative History of VAWA (94, 00, 05), T and U-Visas, Battered Spouse Waiver, and VAWA Confidentiality*, NAT'L

IMMIGRANT WOMEN'S ADVOCACY PROJECT (June 17, 2015), http://library.niwap.org/wp-content/uploads/2015/VAWA_Leg-History_Final-6-17-15-SJI.pdf.

In 2000, Congress reauthorized and reinforced VAWA's protections for survivors and created two new forms of immigration relief: U and T nonimmigrant status, more commonly known as the U visa and T visa. Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464–1548 (Oct. 28, 2000). As an incentive to cooperate with law enforcement, these visa forms offer temporary protection from deportation for qualifying immigrant crime survivors. *See* 8 U.S.C. §§ 1101(a)(15)(T)–1101(a)(15)(U). To qualify for a U visa, the noncitizen must demonstrate that he or she has been the victim of a "qualifying criminal activity" (hereinafter "QCA"). *See* 8 U.S.C. §1101(a)(15)(U)(iii).

A recent analysis by USCIS shows that the U visa program is working. From 2012 through 2018:

- 46% of QCAs certified on Form I-918B[1] were felonious assaults;
- 41% were domestic violence;
- 15% were sexual assault;
- 9% were false imprisonment;
- 4% were murders; and
- 2% were crimes against a child.

U.S. Citizenship and Immigration Servs., *Trends in U Visa Law Enforcement Certifications, Qualifying Crimes, and Evidence of Helpfulness,* U VISA REPORT, at 4 (Jul. 2020) (hereinafter "U Visa Report"), https://www.uscis.gov/sites/default/files/document/reports/U_Visa_Report-Law_Enforcement_Certs_QCAs_Helpfulness.pdf. Most certified QCAs are gender-based violence. *Id.*

Congress' clear intent in creating the U visa was to overcome noncitizen victims' fears that contacting law enforcement would result in their deportation. *See* New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007). The BIA decision in this case, *Granados Benitez v. Barr*, thwarts this Congressional goal and occurs at a time when DHS has

---

[1] Form I-918 Supplement B (hereinafter "Form I-918B") is used by law enforcement agencies "to certify that a petitioner seeking U nonimmigrant status is a victim of a qualifying crime and was helpful . . . in the detection, investigation or prosecution of criminal activity."

launched numerous efforts to eviscerate U visa law without legislative approval.

The BIA's decision to deny Mr. Granados' motion to reopen sends a message to both crime victims and law enforcement: Perpetrators may once again use our immigration courts as weapons against their victims. Amici ask this Court to stand firm against Executive efforts to eliminate, through practice and policy, the protections for crime survivors Congress created in the U visa. We respectfully request that this Court remand with instructions that the BIA reopen Mr. Granados' case and allow him to stay in the United States while he awaits his U visa.

SUMMARY OF ARGUMENT

Amici respectfully submits that this Court should reverse the BIA's decision to deny Petitioner's motion to reopen his removal proceedings. Congress created the U visa to provide protection to noncitizen victims of violent crimes who may not otherwise report their perpetrators because they fear deportation. The laws enacting and expanding the U visa and the legislative history of those laws illustrate Congressional intent that U visa applicants remain in the United States while their U visa applications are pending. The BIA's decision in this case will make crime

victims—and in particular, immigrant survivors of domestic violence—less likely to report crimes in the future.

Recent case law on this subject makes clear that if a Petitioner can "show that he was prima facie eligible for a U visa" then the case "merit[s] reopening." *Vigil-Carballo v. Barr*, 812 F. App'x 553, 554 (9th Cir. 2020). The BIA abused its discretion by holding that the grant of deferred action by USCIS is insufficient to merit reopening. A "waiting list determination" is "[a] USCIS decision on a U visa petition that is the functional equivalent of a full adjudication on the merits of the petition." U.S. Immigration and Customs Enforcement*, ICE Directive 11005.2: Stay of Removal Requests and Removal Proceedings Involving U Nonimmigrant Status (U visa) Petitioners*, at § 3.5 (Aug. 2, 2019), attached as Exhibit 1.[2] Moreover, "[f]inal orders of removal issued by an

---

[2] This Court can take judicial notice of ICE Directive 11005.2 under Federal Rule of Evidence 201. ICE Directive 11005.2 was filed in Federal Court in *ASISTA Immigr. Assistance, Inc. v. Albence*, No. 3:20-cv-00206-JAM, Dkt. No. 1–1 (D. Conn. Feb. 13, 2020). *See Kowalski v. Gagne*, 914 F.2d 299, 305 (1st Cir. 1990) ("It is well-accepted that federal courts may take judicial notice of proceedings in other courts . . . ."). Moreover, Respondent cannot reasonably question the accuracy of Exhibit 1 as ICE has published an FAQ regarding ICE Directive 11005.2. U.S. Immigration and Customs Enforcement, ***Revision of Stay of Removal Request Reviews for U Visa Petitioners,*** (Aug. 2, 2019),

immigration judge are subject to reopening for cancellation in light of the U visa approval." *Id.* at § 5.2.7.

USCIS and ICE, have implemented systems over the years to ensure crime victims are not removed while awaiting decisions on their U visa cases. The BIA has, in the past, adopted a similar framework. This Court should repudiate the BIA's decision in this case, which is contrary to the law and the intent of Congress.

ARGUMENT

I. Congress Intended the U Visa Statute to Prevent the Deportation of Immigrant Crime Survivors Who Cooperate with Law Enforcement; Enforcing Agencies Have Issued Supporting Regulations and Guidance Consistent with Congressional Intent.

In 1994, Congress enacted the watershed Violence Against Women Act of 1994, Pub. L. No. 103-322, Tit. IV, 108 Stat. 1902 (Sept. 13, 1994), representing our nation's first systems-wide attempt to halt and address violence against all women in this country, including noncitizens. VAWA provided a "self-petitioning" option for immigrants subjected to "battery or extreme cruelty" by a United States citizen or lawful permanent resident spouse or parent. *Id.* at § 40701; *see* 8 U.S.C. §§ 1154(a)(1)(A)(ii),

---

https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners.

1154(a)(1)(B)(ii). That law freed many immigrant domestic violence survivors from the inherent power and control abusive spouses otherwise possessed over their immigration status in our family immigration system.

Other immigrant crime victims, however, did not receive protection under the provisions of VAWA. With this background, Congress created the U visa program in 2000 both to help survivors of violent crimes find safety and to provide a tool for law enforcement to work with crime victims too afraid of deportation to report the crimes they experience. Victims of Trafficking and Violence Protection Act of 2000, at § 1513(a). Congress explicitly stated that it was creating the U visa to "facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status," *id.* § 1315(a)(2)(B), and to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute" serious crime. *Id.* § 1513(a)(2)(A).

The legislative history surrounding the enactment of the U visa program demonstrates that Congress intended to alleviate the barriers that immigrant crime victims face and specifically to address the fear of

deportation that prevents many from reporting domestic violence. Senator Patrick Leahy explained that the U visa "ma[d]e it easier for abused women and their children to become lawful permanent residents" and ensured that "battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States." 146 Cong. Rec. S10185 (2000) (statement of Sen. Patrick Leahy). Senator Paul Sarbanes stated that this expansion of VAWA "will also make it easier for battered immigrant women to leave their abusers w*ithout fear of deportation*." 146 Cong. Rec. S8571 (2000) (statement of Sen. Paul Sarbanes) (emphasis added).

More recently, during the debate on the Violence Against Women Reauthorization Act of 2013, Senator Amy Klobuchar described the importance of the U visa program from a former prosecutor's perspective, recounting cases where the perpetrator threatened to deport the immigrant victim if the victim came forward to law enforcement. 159 Cong. Rec. S497, 498 (2013).

The intent of Congress is clear: Immigrants who have been victimized in the United States should be able to work with law enforcement without the threat of deportation. While Mr. Granados is not a "battered

immigrant wom[a]n," the BIA's decision in this case will have far-reaching impacts on such immigrant survivors of abuse and may result in survivors remaining with their abusers for fear of deportation. *See* 146 Cong. Rec. S8571 (2000).

A. DHS Policies and Regulations Demonstrate that Agencies Understood and Have Sought to Implement Congress' Intention That U Visa Applicants Remain in the United States.

DHS has implemented a structure designed to prevent U visa applicant removals—in line with Congressional intent. Under 8 C.F.R § 214.14(c)(1)(i), ICE is authorized "to file, at the request of the alien petitioner, a joint motion to terminate proceedings without prejudice with the immigration judge or Board of Immigration Appeals, whichever is appropriate, *while a petition for U nonimmigrant status is being adjudicated by USCIS*." (emphasis added). Similarly, 8 C.F.R. § 214.14(c)(1)(ii) provides for stays of a final order of removal while a survivor's U visa application is being processed.

Because Congress limited the number of U visas that USCIS may allocate annually to 10,000, USCIS created a regulatory "waitlist" for U visa applicants who would receive a visa except for the 10,000-visa annual cap. 8 C.F.R. § 214.14(d)(2). USCIS grants deferred action and

attendant work authorization to U visa applicants on the waitlist. *Id.* USCIS explained that it created the waitlist "to balance the statutorily imposed numerical cap against the dual goals of enhancing law enforcement's ability to investigate and prosecute criminal activity and providing protection to alien victims of crime. . ." *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53,014, 53,027 (Sept. 17, 2007).

It remains the stated policy of ICE that in removal cases involving crime victims and witnesses, ICE "should exercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice." U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,* (June. 17, 2011), https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf. In addition to the very real psychological and physical harm that can result from deportation, the removal of a U visa petitioner could impact that individual's U visa eligibility, including under 8 U.S.C. § 1182(a)(9)(A)(i) or (ii); and (a)(9)(B)(i)(II). Given this,

deporting U visa petitioners would defeat both Congressional intent and the stated goal of ICE to "minimize any effect that immigration enforcement may have on the willingness" of immigrants to assist law enforcement.

Moreover, ICE Directive 11005.2 demonstrates that DHS recognizes a "waiting list determination" as "[a] USCIS decision on a U visa petition that is the functional equivalent of a full adjudication on the merits of the petition." ICE Directive 11005.2, at § 3.5. "Final orders of removal issued by an immigration judge are subject to reopening for cancellation in light of the U visa approval." *Id.*, at § 5.2.7. ICE Directive 11005.2 goes so far as to state that if, after a final order of removal has been issued by an immigration judge, "USCIS places the U visa petition on the waiting list" the ICE Office of the Principal Legal Advisor "may join a motion to reopen and dismiss proceedings, without prejudice." *Id.*, at § 5.3.2.

B. Precedent Supports Protections for U Visa Applicants.

In 2012, the BIA issued *Matter of Sanchez-Sosa*, ensuring that crime victims seeking U visas would not be removed while USCIS determined the fate of their applications. *Matter of Sanchez Sosa*, 25 I. & N. Dec. 807 (BIA 2012). The BIA held that in determining whether good cause exists

to continue removal proceedings to await USCIS's decision on a U visa applicant's case, an immigration judge must consider the immigrant's "prima facie eligibility for the U visa." *Id.* at 813 n.7.

For U visa applicants seeking a continuance, the BIA held that immigration judges should consider good faith factors including: "(1) the DHS's response to the motion; (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for the continuance and other procedural factors." *Id.* at 812–13. As a general rule, the BIA determined that a rebuttable presumption exists that "a prima facie approvable [U visa] application . . . will warrant a favorable exercise of discretion." *Id.* at 815.

Contrary to what DHS may argue, the *Matter of L-A-B-R* decision does not change the *Sanchez-Sosa* standard. *See Matter of L-A-B-R-*, 27 I. & N. Dec. 405, 413, 418 (A.G. 2018). In fact, *L-A-B-R* states unequivocally that it is "consistent with Board precedents." *Id.* at 418 (citing *Matter of Sanchez Sosa,* 25 I. & N. Dec. at 812–14). Similarly, the BIA's decision in *Matter of L-N-Y-* does not change the framework established in *Sanchez-Sosa* and *L-A-B-R-*. *Matter of L-N-Y-*, 27 I. & N. Dec. 755, 757 (A.G. 2020) (discussing the legal standard under *Sanchez-Sosa* and *Matter of L-A-B-*

R-). Ultimately, in *L-N-Y-* the BIA denied the petitioner's requested continuance, holding that secondary factors discussed in *L-A-B-R-* militated against the continuance. *Id.*, at 759.

i. The BIA Has Repeatedly Applied Sanchez-Sosa to Motions to Reopen.

The BIA has repeatedly applied *Sanchez-Sosa* to determine whether proceedings should be reopened based on a noncitizen application for a U visa or other relief before USCIS. The BIA abused its discretion in this case by holding that it is a requirement that "respondent's visa petition is approved by USCIS" before a motion to reopen is granted. Previously, the BIA has cited *Sanchez-Sosa* in finding that reopening is warranted in light of "new and previously unavailable documentary evidence concerning the respondent's application for nonimmigrant U visa status." *In re Peleayz*, No. A208 934 106, at 3 (BIA Oct. 24, 2017), (available at https://www.scribd.com/document/365695330/Augustine-Peleayz-A208-934-106-BIA); *see also In re Y-A-L-L-*, AXXX XXX 594, 2 (BIA Oct. 29, 2015), (available at https://www.scribd.com/document/290079091/Y-A-L-L-AXXX-XXX-594-BIA-Oct-29-2015) (granting respondent's motion to reopen in light of the respondent "awaiting final adjudication of her application" for a U visa); *In re Rosales De La Cruz*, A088 806 933, 1 (BIA

Feb. 18, 2016), (available at https://www.scribd.com/document/303206526/Javier-Alejandro-Rosales-de-La-Cruz-A088-806-933-BIA-Feb-18-2016) (holding that because "respondent's spouse is prima facie eligible for a U-visa" the record should be remanded "for consideration of whether proceedings should be continued pending a decision by USCIS on respondent's U-visa petition"); *Adan Ramirez-Rios*, A088 658 419 (BIA Feb. 29, 2016), (available at https://www.scribd.com/document/304204056/Adan-Ramirez-Rios-A088-658-419-BIA-Feb-29-2016) (remanding "for consideration of whether proceedings should be continued pending a decision by USCIS on the respondent's U-visa petition.") (citing *Matter of Sanchez Sosa,* 25 I. & N. Dec. at 812).

In fact, in *Zhi Feng Zhou*, A073 874 177 (BIA May 23, 2018), (attached hereto as Exhibit 2), the BIA reopened the record and terminated respondent's proceedings without prejudice over DHS's objections based upon the fact that respondent's U visa application had been approved and placed on the waiting list.

The BIA has departed from its prior practices in this case. Mr. Granados' application for a U visa has been approved and he has been placed on the waiting list. The BIA has repeatedly shown that a

prima facie showing of eligibility is sufficient to reopen and continue a case "pending a decision by USCIS on the respondent's U-visa petition." *Adan Ramirez-Rios*, No. A088 658 419, 2016 Immig. Rptr. LEXIS 4097, at *2 (BIA Feb. 29, 2016). In this case, like in *Zhi Feng Zhou*, USCIS already made a decision on Mr. Granados' application for a U visa and placed him on the waiting list. All that remains is for USCIS to work through the waiting list before his U visa will be issued.

The BIA did not address the *Sanchez-Sosa* factors at all. In particular, the BIA did not analyze Mr. Granados' "prima facie eligibility for the U visa." *Matter of Sanchez Sosa,* 25 I. & N. Dec. at 813 n.7. Similarly, the BIA did not analyze the fact that DHS did not file any opposition to Mr. Granados' motion, which is another of the *Sanchez-Sosa* factors. *Id.* at 812-13 ("If the DHS does not oppose a continuance, 'the proceedings ordinarily should be continued by the Immigration Judge. . . .'").

While Mr. Granados' motion to reopen differs from a motion for a continuance, there is no legitimate reason for the BIA to abandon the rebuttable presumption that an individual who has filed a prima facie approvable U visa application with USCIS will warrant a favorable exercise of discretion. *Caballero-Martinez v. Barr*, 920 F.3d 543, 550 (8th

Cir. 2019) (holding that there is "no distinguishing feature that would cause the principle stated in *Sanchez-Sosa*—pausing removal proceedings pending the adjudication of a petition potentially rendering removal inapplicable—to operate differently depending on whether the triggering event occurs while the case is before the IJ or before the BIA.") This is particularly true when the motion is based upon a waiting list determination—the equivalent of an approval—instead of a prima facie approvable application.

ii. The U Visa Backlog Further Demonstrates the Need for Sanchez-Sosa.

Tens of thousands of U visa applicants are waiting for their applications to be reviewed. *See* U.S. Citizenship and Immigration Servs., *Number of Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status 2009-2020* (Fiscal Year 2020, Quarter 2), (2020), https://www.uscis.gov/sites/default/files/document/data/I918u_visastatistics_fy2020_qtr2.pdf. As of March 31, 2020, more than 150,000 U visa applicants are categorized as "pending." *Id.*

USCIS is not publishing data regarding the "waitlisted pending" categorization, so it is unclear precisely how many U visa applicants are in a similar position to Mr. Granados: already approved but waiting for

one of the 10,000 U visas available annually. *Id.* Nonetheless, the data are clear that individuals in the "waitlisted pending" categorization experience an extended wait time to receive their U visa. *Id.*

Given this extended wait time even after USCIS has placed a U visa applicant on the waiting list, the BIA should insist that immigration judges reopen cases where U visa applicants have been placed on the waiting list. *See Matter of Alvarado-Turcio*, A201 109 166, 2–3 (BIA Aug. 17, 2017) (available at https://www.scribd.com/document/360077591/Edgar-Marcelo Alvarado-Turcio-A201-109-166-BIA-Aug-17-2017) (recognizing the significant U visa backlog and holding that "processing delays are insufficient, in themselves, to deny an alien's request for a continuance").

While amici could not find any cases where the First Circuit has considered this question, other circuits have found that USCIS delays are not sufficient reason to deny continuances. *See Malilia v. Holder*, 632 F.3d 598, 606 (9th Cir. 2011) (holding that "delays in the USCIS approval process are no reason to deny an otherwise reasonable continuance request"); *Ahmed v. Holder*, 569 F.3d 1009, 1013 (9th Cir. 2009) (noting "concern about blaming a petitioner for an administrative

agency's delay in processing an employment-based visa application"). The same should be true in this case.

The BIA decision in this case is entirely predicated on delays in awarding a U visa which has otherwise been approved. Mr. Granados—and other U visa applicants—should not be punished for delays which are entirely outside of their control. The First Circuit should reverse the BIA's decision and allow Mr. Granados to reopen his removal proceedings based upon USCIS's decision to waitlist his U visa application.

iii. Federal Court Precedent Also Supports Reopening Mr. Granados' Case.

As this Court has previously noted, "[t]o prevail on a motion to reopen, the applicant must establish both 'a prima facie case for the underlying substantive relief sought' and that the evidence supporting the motion to reopen was 'previously unavailable [and] material.'" *Perez-Tino v. Barr*, 937 F.3d 48, 52 (1st Cir. 2019) (*quoting I.N.S. v. Abudu*, 485 U.S. 94, 104, 108 S. Ct. 904 (1988)).

In this case, Mr. Granados filed his petition for U nonimmigrant status after his order of removal was issued. He received word from USCIS that he had been placed on the waitlist for a U visa on September 23, 2019—after he had already appealed his order of removal to the BIA the first

time. For these reasons, it is clear that the evidence supporting Mr. Granados' motion to reopen—his waitlist determination—was not available previously.

This Court has not considered an appeal from a motion to reopen in the context of an immigrant whose U visa application has been waitlisted. It has, however, considered a motion to reopen based upon an immigrant whose VAWA self-petition had been approved by USCIS "thereby fulfilling a prerequisite for Bolieiro to obtain relief under VAWA." *Bolieiro v. Holder*, 731 F.3d 32, 36 (1st Cir. 2013). Because the Court had already granted Bolieiro's petition for review, the Court did not ultimately reach the complicated factual and legal issues relating to her VAWA self-petition. *Id.* at 41. It did however, note that the BIA would have to consider the issue. *Id.*

The Ninth Circuit, however, has considered the question of when a motion to reopen should be granted in light of a U visa application. *Vigil-Carballo*, 812 F. App'x at 554. Under the Ninth Circuit's standard, when Petitioner can "show that he was prima facie eligible for a U visa" then the case "merit[s] reopening." *Id.*

In this case, Mr. Granados has established more than "a prima facie case." *Perez-Tino*, 937 F.3d at 52; *Vigil-Carballo*, 812 F. App'x at 554. Instead, Mr. Granados received a "waiting list determination" which ICE guidance notes "is the functional equivalent of a full adjudication on the merits of the petition." ICE Directive 11005.2, at § 3.5. Given this, the BIA should have "paus[ed] removal proceedings." *Caballero-Martinez*, 920 F.3d at 550.

II. The Impact of a Failure to Correct the BIA's Error Could Be Catastrophic.

The BIA must not shirk its duty to protect U visa applicants, either by refusing to apply its own *Sanchez-Sosa* prima facie analysis or through denying motions to reopen, such as Mr. Granados' motion. It is important to remember that the decision in this case will have far reaching impacts. The vast majority of the QCAs certified by law enforcement agencies in U visa applications are gender-based violence. U Visa Report, at 4. If this Court does not reverse the decision of the BIA, it will undermine the Congressionally-enacted U visa program and deal lasting harm to immigrant survivors of gender-based violence.

The implications of this case are real and far-reaching. Between 34 and 49.8 percent of immigrant women in the United States experience

domestic violence in their lifetimes. *Battered Immigrant Woman Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 58 (2000) (statement of Leslye Orloff, Director, Immigrant Women Program, NOW Legal Defense and Education Fund). While women with unstable immigration statuses are more likely to experience abuse, they are half as likely to report their abuse to law enforcement. Nawal H. Ammar et al., *Calls to Police and Police Response: A Case Study of Latina Immigrant Women in the USA*, 7 INT'L J. OF POLICE SCI. & MGMT. 230, 236 (2005).

In the United States generally, between 53 and 58 percent of battered women report their abuse. Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 68 (2003). That number falls to 43.1 percent among battered immigrant women with *stable permanent* immigration status. *Id.* Among undocumented battered immigrant women, only 18.8 percent are willing to report their abuse to law enforcement. *Id.* The lack of secure immigration status has a significant impact on immigrant victims' willingness to contact law enforcement or social services. Angelica Reina

et. al, "*He Said They'd Deport Me": Factors Influencing Domestic Violence Help-Seeking Practices Among Latina Immigrants*, 29 J. INTERPERSONAL VIOLENCE 593, 600–601 (2014).

A 2017 survey of more than 700 advocates working with survivors of intimate partner violence, sexual abuse, and human trafficking revealed that 43 percent of advocates had clients who dropped a civil or criminal case due to fear of immigration enforcement. Tahirih Justice Center, et al., *Key Findings: 2017 Advocate and Legal Service Survey Regarding Immigration Survivors*, TAHIRIH JUSTICE CENTER (2017), https://www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf. When faced with the difficult decision to report, survivors are already suffering from various measurable cognitive and psychological reactions to trauma, such as high anxiety, depression, feelings of helplessness rooted in fears of not being believed and self-blame, and other symptoms related to post-traumatic stress disorder. Catherine Cerulli et.al, "*What Fresh Hell is This?" Victims of Intimate Partner Violence Describe Their Experiences of Abuse, Pain and Depression,* 27 J. FAMILY VIOLENCE 773–781 (2012).

Compounding these psychological afflictions with the additional fear of deportation effectively demobilizes survivors from seeking help.

The decision to report carries significant risk for immigrant survivors of violence. Many of these survivors continue living in situations that jeopardize their physical safety because of the risk of deportation if they come forward. Deportation, it should be noted, comes with its own significant documented hazards: loss of financial stability, the possibility of increased violence in one's home country, loss of access to the justice system and services that are assisting them with their recovery, and either separation from their children or subjecting their children to deportation. For many survivors, these risks were not worth reporting the violence they were suffering. The U visa, however, is supposed to provide a potential pathway for these survivors—and for many is their last hope. Jacqueline P. Hand & David C. Koelsch, *Shared Experiences, Divergent Outcomes: American Indian and Immigrant Victims of Domestic Violence*, 25 WIS. J.L. GENDER & SOC'Y 185, 205 (2010).

A. Deportation Strips Immigrant Women of Financial Stability, Plunging Them Into Poverty.

When deciding whether or not to report violence, many immigrant survivors are forced to choose between abuse or poverty. Domestic

violence is a leading cause of homelessness for women within the United States. Charlene Baker, et.al, *Domestic Violence, Housing Instability, and Homelessness: A Review of Housing Policies and Program Practices for Meeting the Needs of Survivors,* 15 AGGRESSION & VIOLENT BEHAVIOR, 430, 431 (2010). Lack of resources can seriously constrain a victim's ability to escape from or recover from intimate partner violence. Judy Postmus, et. al, *Understanding Economic Abuse in the Lives of Survivors*, 27 J. INTERPERSONAL VIOLENCE 411, 412–14 (2012).

This risk is amplified for immigrant survivors who often lack resources or a support network of friends or family within the country. Aarati Kasturirangan, et al, *The Impact of Culture and Minority Status on Women's Experience of Domestic Violence*, 5 TRAUMA VIOLENCE & ABUSE 318, 322–23 (2004).

Many immigrant survivors are thus faced with the choice between the food and shelter provided by their abuser and the risk of deportation where that meager support will be stripped away. For immigrant survivors with children who have been here for multiple years, deportation means returning to a country where their support structure may no longer exist. Their ability to provide safe housing and food for

their families is impaired. For these survivors, deportation almost certainly means homelessness and deep poverty. Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273, 309 (2018) (hereinafter *U Visa's Failed Promise*).

For many survivors, this is reason enough to stay with their abuser rather than reporting a crime and facing potential deportation. To allow Petitioner in this case "to be ground to bits in the bureaucratic mill against the will of Congress" will only serve to reinforce these women's fears and prevent them from reporting crimes. *Benslimane v. Gonzales*, 430 F.3d 828, 833 (7th Cir. 2005).

B. Deportation Forces Immigrant Victims of Abuse to Make a Sophie's Choice Between Remaining with Their Abusers or Being Removed to an Unsafe Country.

For many survivors in Mr. Granados' position who seek U visas, they risk deportation to a country they left precisely because they feared for their safety and the safety of their children. When weighing the impossible choice of continuing to be subjected to the abuse by a single known individual within the borders of a country that guarantees certain protections versus the known and unknown abuses that may be inflicted

should they be returned to a country that is unsafe, many survivors may choose to remain silent so as not to risk deportation.

Further, where an immigrant abuser may be prosecuted and deported, a survivor who came forward to assist in the investigation and prosecution of the crime and sought protection through a U visa would now run the risk of being deported to that same country while the U visa case is pending. Such a survivor would be left without any protection in a country where the abuser may be waiting to retaliate. If the BIA's decision stands it would undermine the intent of the U visa program which exists to encourage cooperation with law enforcement authorities and provide protection for survivors who come forward.

Indeed, deportation itself may aggravate the domestic abuse that survivors experience. If the United States deports survivors who courageously report their abuse, they will be sent away without any protection and will be at an increased risk of postseparation abuse that seeks to re-establish control over the survivor after she has threatened to leave. Petra Ornstein & Johanna Rickne, *When Does Intimate Partner Violence Continue After Separation?* 19 VIOLENCE AGAINST WOMEN 617, 622–25 (2013). At least half of women who leave their abusers are

followed and harassed or further attacked by them. Carolyn R. Block, *How Can Practitioners Help an Abused Woman Lower Her Risk of Death?*, 250 NAT'L INST. OF JUSTICE J. 1, 6 (2003). In fact, attempting to leave a violent relationship was the cause of 45 percent of murders of a woman by a man. *Id.* If the United States deports survivors instead of offering them protection, they "may be reluctant to seek any form of help in the future, which could increase the level of risk and danger they face in their relationships." *U Visa's Failed Promise*, at 296.

If survivors report abuse and are not offered protection from deportation, their physical safety, and that of their children, can be further compromised. Denying the Petitioner in this case the relief he seeks will only serve to reinforce for the immigrant community that the safety offered by the U visa program is a false promise that cannot be relied upon. The BIA's decision in this case reinforces the coercive threats that abusers tell survivors that when they are deciding whether to report their abuse to law enforcement, they may well be deciding between the risk of physical harm with their abuser or the increased risk of physical harm that accompanies deportation. The BIA's decision puts at risk the very lives that the U visa program purports to protect.

C. Fear of Deportation Prevents Law Enforcement From Doing Their Job.

When immigrant crime victims fear accessing the U.S. criminal justice system, everyone suffers. Criminals target vulnerable populations such as immigrants. Pauline Portillo, *Undocumented Crime Victims: Unheard, Unnumbered, And Unprotected,* 20 THE SCHOLAR 345, 354–55 (2018), https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1006&context=thescholar. Gang members and criminal enterprises are strengthened by immigrant vulnerability to deportation because witnesses will not come forward. Dan Lieberman, *MS-13 Members: Trump Makes the Gang Stronger,* CNN (July 28, 2017), https://www.cnn.com/2017/07/28/us/ms-13-gang-long-island-trump/index.html.

Victim fear generated by deportations fetters the ability of law enforcement to take dangerous criminals off the street. Meagan Flynn, *Houston's Chief Acevedo, Defiant and Introspective, Rails Against SB 4,* HOUSTON PRESS (Apr. 28, 2017), https://www.houstonpress.com/news/hpd-chief-acevedo-lambasted-sb4-in-defiant-candid-monologue-9394376. Witnesses will no longer report. Lindsey Bever, *Hispanics "Are Going Further into the Shadows" Amid Chilling Immigration Debate, Police*

Say, WASH. POST (May 12, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/12/immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say.

When crime witnesses and victims are too afraid to speak out, we are all unsafe. The BIA's decision in this case has made all of us less safe.

CONCLUSION

For the foregoing reasons, amici support the position of Mr. Granados and respectfully request that this Court grant the relief requested by Petitioner.

Dated: August 26, 2020 By: */s/ Brian D. Straw*

Brian D. Straw
Gregory E. Ostfeld
Greenberg Traurig, LLP
77 West Wacker Dr., Suite 3100
Chicago, Illinois 60601
(312) 456-8400
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 6,411 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century font.

/s/ Brian D. Straw
Brian D. Straw

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Brian D. Straw
Brian D. Straw

EXHIBIT 1

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

ICE Directive 11005.2: **Stay of Removal Requests and Removal Proceedings Involving U Nonimmigrant Status (U Visa) Petitioners**

Issue Date: August 2, 2019
Superseded: 11005.1: *Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-Visa) Applicants* (Sept. 24, 2009), and Memorandum from Peter S. Vincent, Principal Legal Advisor, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal* (Sept. 25, 2009).
Federal Enterprise Architecture Number: 306-112-002b

1. **Purpose/Background.** This Directive sets forth U.S. Immigration and Customs Enforcement (ICE) policy regarding Stay of Removal requests and the exercise of prosecutorial discretion to join motions to terminate removal proceedings involving U nonimmigrant status (U visa) petitioners and their qualifying family members. Aliens subject to pending removal proceedings or a final order of removal may apply for a U visa with U.S. Citizenship and Immigration Services (USCIS),[1] and those aliens subject to a final order of removal who have a pending U visa petition may request a Stay of Removal from ICE Enforcement and Removal Operations (ERO), as may any other alien subject to a final order of removal.[2]

   The U visa enables certain removable aliens who are victims of crime to assist law enforcement without fear of removal. The U visa is intended to strengthen the ability of local, state, and federal law enforcement agencies, including ICE Homeland Security Investigations (HSI), to detect, investigate, and prosecute cases of human trafficking, domestic violence, sexual exploitation, female genital mutilation, and other specified criminal activity. Local, state, and federal law enforcement are authorized to complete certifications for victims applying for a U visa; within ICE, HSI Special Agents in Charge (SACs) and the Associate Director (AD) for the Office of Professional Responsibility (OPR) are delegated this certification authority.

2. **Policy.** It is ICE policy to comply with applicable law governing U visas and to encourage victims of crime to work with law enforcement. Where a U visa petitioner's law enforcement certification is signed by HSI or OPR, ICE will generally grant a Stay of Removal request filed by that alien or join a motion to terminate removal proceedings, accordingly. In cases involving pending U visa petitioners and their qualifying family members in which ICE does not sign the law enforcement certification, ICE ERO Field Office Directors (FODs) and Office of the Principal Legal Advisor (OPLA) attorneys will

[1] 8 C.F.R. § 214.14(c)(1)(i)-(ii).
[2] Immigration and Nationality Act (INA) §§ 237(d), 241(c)(2).

consider the totality of the circumstances, including any favorable or adverse factors, and any federal interest(s) implicated when determining whether to exercise discretion to grant or deny a Stay of Removal or join a motion to terminate removal proceedings.[3] Assistance provided by a U visa petitioner to law enforcement, prosecutors, judges, or other officials in the detection, investigation, prosecution, conviction, or sentencing of criminal activity will generally be considered a significant favorable factor, but is not necessarily dispositive.

ICE will no longer routinely request *prima facie* determinations nor expedited adjudications from USCIS. An alien with a pending U visa petition whose Stay of Removal request is denied may be processed for removal absent any legal impediment to removal.

Stays of Removal granted to U visa petitioners will generally be granted for an initial period of 180 days and may be extended for additional 180-day periods thereafter, in ICE's discretion. A Stay of Removal will not be granted after USCIS places the U visa petitioner on the waiting list, as such aliens are granted deferred action by USCIS, rendering a stay unnecessary.[4] A Stay of Removal will not be extended if USCIS denies the U visa and the petitioner exhausts all administrative appeals, in which case ERO may continue to process the alien for removal.

Furthermore, it is ICE policy to respect USCIS's grant of deferred action to a U visa petitioner. Accordingly, ICE will not remove a U visa petitioner or qualifying family member whom USCIS has placed on the waiting list and granted deferred action unless a new basis for removal has arisen since the date of the waiting list placement or USCIS terminates deferred action.

3. **Definitions.** The following definitions apply for purposes of this Directive only.

3.1. **Headquarters Responsible Official (HRO).** The Executive Associate Directors (EADs) for ERO and HSI, and the AD for OPR.

3.2. **Stay of Removal.** A determination in the unreviewable discretion of the Department of Homeland Security (DHS) to temporarily defer the execution of a final order of removal issued to an alien.[5]

3.3. **U Nonimmigrant Status or "U visa."** An immigration benefit available for alien victims of qualifying crimes who have suffered substantial physical or mental abuse as a result of having been a crime victim; have information about the criminal activity; and were helpful, are being helpful, or are likely to be helpful to law enforcement officials in investigating and prosecuting those crimes.[6]

---

[3] ICE officers and agents will make enforcement determinations on a case-by-case basis in accordance with federal law and consistent with DHS and ICE policy.
[4] *See* 8 C.F.R. § 214.14(d)(2).
[5] INA §§ 237(d), 241(c)(2); 8 C.F.R. §§ 241.6(a), 1241.6(a).
[6] INA § 101(a)(15)(U); 8 C.F.R. § 214.14.

3.4. **U Nonimmigrant Status Certification, Form I-918, Supplement B, or "U visa certification."** USCIS Form I-918, Supplement B, *U Nonimmigrant Status Certification*, is completed by a federal, state or local law enforcement agency to certify that the petitioner, among other things, is or has been a direct or indirect victim of qualifying criminal activity; possesses information about the qualifying criminal activity; and has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim. Victims are required to submit Form I-918, Supplement B, as a part of their petition to USCIS.[7]

3.5. **Waiting List Determination.** A USCIS decision on a U visa petition that is the functional equivalent of a full adjudication on the merits of the petition, including complete fingerprint and background checks and adjudication of any accompanying waivers of inadmissibility. A petitioner is placed on the waiting list when, due solely to the statutory cap, a U-1 nonimmigrant visa is not currently available. When a U visa petitioner is placed on the waiting list, by regulation, USCIS grants deferred action or parole to the alien and any qualifying family members and may afford them employment authorization.[8]

4. **Responsibilities.**

4.1. **The HROs and the Principal Legal Advisor** are responsible for ensuring compliance with the provisions of this Directive and issuing any necessary guidance.

4.2. **HSI and OPR SACs** are responsible, as U visa certifying officials, for signing vetted U visa certifications for alien victims of crime who are helpful in HSI or OPR investigations, on a case-by-case basis and confirming upon request by ERO that HSI or OPR completed a certification for a particular victim.

4.3. **ERO FODs** are responsible for adjudicating Stay of Removal requests from U visa petitioners.

4.4. **OPLA Attorneys** are responsible for considering requests from U visa petitioners to join motions to terminate removal proceedings and reviewing for legal sufficiency, as appropriate, HSI or OPR's final approval or disapproval of an alien's request for a U visa certification.

5. **Procedures/Requirements.**

5.1. **Signing U Visa Certifications.** HSI and OPR will follow the procedures for vetting and signing U visa certifications, as appropriate, for alien crime victims who are helpful to HSI investigations as outlined in HSI HB18-06, *U Nonimmigrant Status (U Visa) Handbook* (Sept. 21, 2018), or as updated and OPR Investigative Guidebook, *Section 3.40.8 U Nonimmigrant Status* (Oct. 2012).

[7] 8 C.F.R. § 214.14(c)(2).
[8] 8 C.F.R. § 214.14(d).

5.2. Stay of Removal Requests.

5.2.1 Initiating Stay of Removal Requests. When ICE assumes civil immigration custody of an alien, ERO must determine whether the alien is an applicant or beneficiary of an application or petition for a benefit protected by 8 U.S.C. § 1367, including pending and approved U visas, by consulting the Central Index System database (or any successor information technology system established to assume the same functions).[9]

If the alien has or claims to have a pending U visa petition, the FOD, or designee, upon the alien's request, will provide him or her with Form I-246, *Application for Stay of Removal,* and enter the date of this action in EARM. If the alien does not file a Stay of Removal request within five business days, ERO may continue to process the alien for removal.

5.2.2. Reviewing Stay of Removal Requests. Upon receiving a Stay of Removal request from a pending U visa petitioner for whom HSI or OPR has completed the U visa certification, ERO will verify the U visa certification with the issuing HSI or OPR SAC office. If confirmed, ERO will generally grant the U visa petitioner's Stay of Removal request given the close coordination and information sharing within ICE.

In all other cases, upon receiving a Stay of Removal request from a U visa petitioner, the FOD will consider the totality of the circumstances, any favorable or adverse factors (including the extent and nature of any criminal history), and any federal interest(s) implicated. Assistance provided by a U visa petitioner to law enforcement, prosecutors, judges, or other officials in the detection, investigation, prosecution, conviction, or sentencing of criminal activity will generally be considered a significant favorable factor, but is not necessarily dispositive. Convictions for crimes related to a petitioner's victimization will generally not be considered an adverse factor. ICE will not consider the merits of the U visa petition. ICE will no longer routinely request *prima facie* determinations nor expedited adjudications from USCIS. 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.

As with any other Stay of Removal request, a Stay of Removal is not appropriate when there exist national security concerns, evidence the U visa petitioner is a human rights violator, has engaged in immigration fraud and/or has significantly abused the visa or visa waiver programs, or has a criminal history that evidences that the alien poses a risk to public safety.

5.2.3 Adjudicating Stay of Removal Requests. After careful consideration, if the FOD, in his or her unreviewable discretion, determines that the totality of the circumstances merit a Stay of Removal, the FOD will grant the Stay of Removal for an initial 180-day period,

[9] DHS Instruction No. 002-02-001, *Implementation of Section 1367* (Nov. 7, 2013); DHS Directive No. 002-02, *Implementation of Section 1367 Information Provisions* (Nov. 1, 2013).

and may then renew it for additional 180-day periods thereafter, so long as no new adverse factors arise.

5.2.4. Memorializing a Discretionary Decision. Upon deciding to grant or deny a U visa petitioner's Stay of Removal request, the FOD will provide the petitioner and the attorney of record, if applicable, with written notice of the decision; place a copy of the notice in the U visa petitioner's A-file; and enter the decision into the ENFORCE Alien Removal Module (EARM).

5.2.5. Detention/Release. As in all cases, if a U visa petitioner is not subject to mandatory detention, and particularly where the FOD has granted a Stay of Removal, FODs should consider whether continued detention is appropriate given the facts and circumstances of the case.

5.2.6. Removal of U Visa Petitioners. The removal of an alien whose Stay of Removal request is denied will continue consistent with current removal policies and procedures.

5.2.7. Effect of USCIS U Visa Waiting List Determination, Approval or Denial on the Stay of Removal. If USCIS places the U visa petitioner on the waiting list, ICE will not grant a further Stay of Removal as the petitioner will have been granted deferred action by USCIS, making the stay unnecessary. Given the grant of deferred action for these U visa petitioners, FODs should consider whether continued detention is necessary or appropriate given the facts or circumstances of the case. Upon approval of a U visa, orders of exclusion, deportation, or removal issued by DHS are deemed cancelled by operation of law as of the date of USCIS's approval of Form I-918.[10] Final orders of removal issued by an immigration judge are subject to reopening for cancellation in light of the U visa approval.[11] On the other hand, USCIS's denial of the U visa petition will result in the Stay of Removal being lifted automatically as of the date the denial becomes administratively final.[12]

5.3 U Visa Petitioners in Removal Proceedings.

5.3.1 Petitioning While in Proceedings. Aliens in pending removal, exclusion, or deportation proceedings may petition for a U visa. If an alien in removal proceedings states that he or she has filed a U visa petition with USCIS, provides proof of such filing, and requests that OPLA join a motion to terminate removal proceedings, OPLA will consider on a case-by-case basis whether or not to exercise its discretion to join a motion to terminate proceedings before the immigration judge or the Board of Immigration Appeals while the Form I-918 is being adjudicated.[13] Determinations of whether to join a motion to

[10] 8 C.F.R. § 214.14(c)(5)(i).
[11] Id.
[12] 8 C.F.R. § 214.14(c)(5)(ii).
[13] 8 C.F.R. § 214.14(c)(1)(i).

terminate in such cases will be made consistent with Section 5.2.2 and relevant OPLA guidance regarding the exercise of prosecutorial discretion.[14]

5.3.2 Effect of USCIS U Visa Waiting List Determination, Approval, or Denial on Proceedings. If USCIS places the U visa petitioner on the waiting list while he or she is still in pending removal proceedings, OPLA may move, or join a motion, to dismiss the removal proceedings without prejudice.

If, after a final order of exclusion, deportation, or removal has been issued by an immigration judge, USCIS places the U visa petitioner on the waiting list or approves the petition, OPLA may join a motion to reopen and dismiss proceedings, without prejudice.[15] Orders of exclusion, deportation, or removal issued by DHS are cancelled by operation of law as of the date of USCIS's approval of Form I-918.[16]

If USCIS denies the U visa petition and removal proceedings were previously dismissed, then DHS may file a new Form I-862, *Notice to Appear*, to initiate proceedings against the individual.[17]

6. Recordkeeping. Records in EARM and PLAnet will be retained permanently until the National Archives and Records Administration issue formal guidance.

7. Authorities/References.

7.1. *Victims of Trafficking and Violence Protection Act of 2000*, Pub. L. No. 106-386, 114 Stat. 1464.

7.2. *Violence Against Women and Department of Justice Reauthorization Act of 2005*, Pub. L. No. 109-162, Tit. VIII, 119 Stat. 3053-3077.

7.3. *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, Pub. L. No. 110-457, 122 Stat. 5044.

7.4. *Immigration and Nationality Act of 1952*, as amended (INA), Pub. L. No. 82-414, 66 Stat. 163.

7.5. 8 U.S.C. § 1101(a)(15)(U); INA § 101, U nonimmigrant definition.

7.6. 8 U.S.C. § 1367, Penalties for disclosure of information.

7.7. 8 C.F.R. § 214.14, Alien victims of certain qualifying criminal activity.

---

[14] *See, e.g.*, Tracy Short, Principal Legal Advisor, *Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement* (Aug. 15, 2017).
[15] 8 C.F.R. § 214.14(c)(5)(i).
[16] *Id.*
[17] 8 C.F.R. § 214.14(c)(5)(ii).

7.8. 8 C.F.R. § 1241.6, Administrative stay of removal.

7.9. 8 C.F.R. § 241.6, Administrative stay of removal.

7.10. DHS Instruction Number 002-02-001, *Implementation of Section 1367* (Nov. 7, 2013).

7.11. DHS Directive 002-02, *Implementation of Section 1367 Information Provisions* (Nov. 1, 2013).

7.12. HSI Delegation Order 10006.1, *Authority to Issue U Nonimmigrant Status Certifications within Homeland Security Investigations* (Nov. 18, 2011).

7.13. HSI HB 18-06, *U Nonimmigrant Status (U Visa) Handbook* (Sep. 21, 2018).

7.14. Department of Homeland Security, *U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges and Other Government Agencies* (Jan. 4, 2016).

7.15. Delegation Order 10001.2, *Authority to Issue U Nonimmigrant Status Certifications* (Oct. 4, 2012).

7.16. Tracy Short, Principal Legal Advisor, *Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement* (Aug. 15, 2017).

7.17. OPR Delegation Order 10001.2, *Authority to Issue U Nonimmigrant Status Certifications within the Office of Professional Responsibility* (Oct. 11, 2012).

7.18 OPR Investigative Guidebook, *Section 3.40.8 U Nonimmigrant Status* (Oct. 2012).

8. **Attachments.** None.

9. **No Private Right.** This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.

Matthew T. Albence
Acting Director
U.S. Immigration and Customs Enforcement

EXHIBIT 2

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Manibo, Victor
Wang Law Office PLLC
36-25 Main Street 3rd Floor
Flushing, NY 11354

DHS/ICE Office of Chief Counsel - PHI
900 Market Street, Suite 346
Philadelphia, PA 19107

Name: ZHOU, ZHI FENG

A 073-874-177

Date of this notice: 5/23/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.

Userteam: Docket

File: A073 874 177 – Philadelphia, PA

Date: MAY 23 2018

In re: Zhi Feng ZHOU a.k.a. Keyuan Chen

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Victor Manibo, Esquire

ON BEHALF OF DHS: Jean Celestin
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before us on September 4, 2002, when we dismissed the respondent's appeal from the Immigration Judge's removal order. The respondent has now filed an untimely motion to reopen and terminate proceedings on December 26, 2017. *See* 8 C.F.R. § 1003.2(c). The Department of Homeland Security (DHS) opposes the motion, which will be granted in our sua sponte authority.

In his motion, the respondent states that his U visa application has been approved but that he is currently on the waiting list for the new fiscal year., and he requests termination of his proceedings in accordance with 8 C.F.R. § 214.14(c)(5)(i). Given the respondent's evidence of record, we find exceptional circumstances to warrant a sua sponte reopening of the respondent's record. *See* 8 C.F.R. § 1003.2(a); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). We further find, due to the application of 8 C.F.R. § 214.14(c)(5)(i), that the respondent's proceedings shall be terminated without prejudice. The following order will, thus, be entered.

ORDER: The motion is granted, and the respondent's proceedings are terminated without prejudice.

FOR THE BOARD