No. 20-2200

In the United States Court of Appeals for the Eighth Circuit

Claudia Gonzales Quechuleno, Betsaida Greys Ramirez Gonzales, and Dulce Dana Ramirez Gonzales

Petitioners,

v.

William Barr, U.S. Attorney General,

Respondent.

BRIEF OF AMICI CURIAE
IMMIGRANT LAW CENTER OF MINNESOTA,
ASISTA IMMIGRATION ASSISTANCE, AND
NATIONAL NETWORK TO END DOMESTIC VIOLENCE
IN SUPPORT OF PETITIONERS AND IN SUPPORT
OF REVERSAL OF THE DECISION OF THE
BOARD OF IMMIGRATION APPEALS

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FEDERAL RULE OF APPELLATE PROCEDURE 29 CERTIFICATION

In accordance with Rule 29(a)(2) of the Federal Rules of Appellate Procedure, the undersigned counsel for amici curiae states that all parties have consented to the filing of this brief.

In accordance with Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that no party's counsel authored this brief in whole or in part, no party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the amici, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rules 29(a)(4)(A) and 26.1 of the Federal Rules of Appellate Procedure, amici curiae—the Immigrant Law Center of Minnesota, ASISTA Immigration Assistance, and the National Network To End Domestic Violence ("Amici")—are nonprofit organizations with no parent corporations and in which no person or entity owns stock.

Dated: September 16, 2020

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STATEMENT OF IDENTITY AND INTEREST

Pursuant to Federal Rule of Appellate Procedure 29(a), the Amici respectfully file this Brief of Amici Curiae in Support of Petitioner and in Support of Reversal of the Decision of the Board of Immigration Appeals.

Amici are non-profit organizations dedicated to protecting and advancing the rights and safety of immigrant survivors of domestic violence, sexual violence, and other forms of gender-based violence. Amici are all organizations that work with immigrant survivors of crimes and are particularly concerned with the intersection of immigration and violence in the United States. Based upon their experience and expertise, Amici understand that immigrant survivors of violence often face many barriers seeking justice and protection from abuse, including the fear that reaching out for help may result in their own deportation.

Amici possess extensive knowledge about the legal protections for immigrant survivors under the Violence Against Women Act ("VAWA") and related statutes, especially VAWA self-petitions, U visas, and T visas. These and related protections encourage survivors to seek justice and help them to gain independence, safety, and stability. For immigrant survivors, meaningful access to immigration protections can make the difference in a decision to seek help or to leave abusive relationships. For survivors in removal proceedings, meaningful access to these protections depends on the courts adhering to Congress's findings, ICE regulations and policy, and BIA's established precedent.

The **Immigrant Law Center of Minnesota ("ILCM")** is a non-profit legal services organization whose mission is to provide immigration legal assistance to low-income immigrants and refugees in Minnesota. ILCM focuses on the rights and legal remedies of the most vulnerable immigrant communities, including victims of serious crimes, domestic violence, and sexual assault. ILCM represents hundreds of clients before the U.S. Citizenship and Immigration Services office ("USCIS") each year, with a specialization in U nonimmigrant status. Since its beginning, ILCM has helped thousands of immigrants to secure legal status in the United States, and to overcome the challenges of obtaining work authorization and citizenship. ILCM assists clients to gain legal status and obtain work authorization to improve their lives and create security and stability for their families.

ASISTA Immigration Assistance ("ASISTA") 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 has worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes addressed in the VAWA and its reauthorizations. ASISTA also serves as a 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 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 judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors.

The **National Network to End Domestic Violence ("NNEDV")** is a nonprofit organization in Washington, D.C. committed to ending domestic violence. As a network of the 56 state and territorial 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 VAWA. 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 experience without fear that the disclosure will result in removal proceedings.

Because of Amici's history of 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), Amici provide this brief for the assistance of the court on an important matter of law.

INTRODUCTION

Particularly vulnerable to crimes such as domestic violence, sexual assault, and human trafficking, noncitizen immigrant populations live in fear that if they report these crimes they will be deported.[1] Abusers prey on that fear. As one study concluded, "One of the most intimidating tools abusers and traffickers of undocumented immigrants use is the threat of deportation. Abusers and other criminals use it to maintain control over their victims and to prevent them from reporting crimes to the police."[2]

To solve this problem, Congress passed the Violence Against Women Act ("VAWA"). Among its more important provisions, VAWA allows abused or battered immigrants to seek certain forms of relief that would allow them to remain in the country regardless of their noncitizen status. These innovations are important, because without them, an abused immigrant "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."[3]

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[1] *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), available at: http://library.niwap.org/wp-content/uploads/PoliceChief_April-2018_Building-Trust-With-Immigrant-Victims.pdf (last visited Sept. 15, 2020).

[2] *Id.*

[3] 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), available at: http://library.niwap.org/wp-content/uploads/2015/VAWA_Leg-History_Final-6-17-15-SJI.pdf (last visited Sept. 15, 2020).

In 2000, Congress reinforced VAWA's protections for survivors and created a new form of immigration relief—what is commonly known as the U Visa.[4] The U Visa protects noncitizen immigrants who are victims of domestic abuse by permitting them to safely remain in the country if they report a "qualifying criminal activity" against them and assist law enforcement with the prosecution of the perpetrator. *See* 8 U.S.C. § 1101(a)(15)(U)(iii). This case, and many like it, concerns the U Visa program.

A recent analysis shows that the U Visa program is working. From 2012 through 2018, recipients of U Visas reported the following qualifying crimes against them, most of which were gender-based violence:

- 46% were felonious assaults;
- 41% were domestic violence;
- 15% were sexual assault;
- 9% were false imprisonment;
- 4% were murders against relatives; and
- 2% were crimes against a child.[5]

Police were able to investigate, and prosecutors were able to prosecute, these crimes because noncitizen victims came forward and reported them.

[4] Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464–1548 (Oct. 28, 2000).

[5] U.S. Citizenship and Immigration Services, *Trends in U Visa Law Enforcement Certifications, Qualifying Crimes, and Evidence of Helpfulness*, U VISA REPORT, at 4 (Jul. 2020), available at: https://www.uscis.gov/sites/default/files /document/reports/U_ Visa_Report-Law_Enforcement_Certs_QCAs_ Helpfulness.pdf (last visited Sept. 15, 2020).

Even after reporting a violent crime against her and then applying for legal protection, the U Visa applicant still faces a problem: while her application is pending, she could still be ordered removed, a result which would thwart the entire purpose of the U Visa program. To address that problem, Congress and the courts have arrived at a sensible solution: a domestic abuse victim who is in removal proceedings or subject to a final order of removal, but who also has a U Visa application pending, can receive a reprieve from removal until her U Visa application has been adjudicated. *See Matter of Sanchez-Sosa*, 25 I. & N. Dec. 807 (BIA 2012) (creating a presumption that removal proceedings are continued when an applicant establishes a prima facie case of eligibility for the U Visa); *Caballero-Martinez v. Barr*, 920 F.3d 543, 551 (8th Cir. 2019) (noting that a completed U Visa application "weighs in favor of pausing the removal process"). This makes sense and is consistent with Congress's statutory findings. *See* Pub. L. No. 106-386, 114 Stat. 1464, § 1513(a)(2)(A), *as codified in* 8 U.S.C. § 1101 note (Congress's finding that the U Visa program would "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"). When victims of domestic violence—citizens and noncitizens alike—report crimes, the United States is a safer place for everyone.[6]

[6] *See, e.g.*, Human Rights Watch, *Immigrant Crime Fighters: How the U Visa Program Makes US Communities Safer* 14 (July 3, 2018), available at: https://www.hrw.org/sites/default/files/report_pdf/us0718_web.pdf (last visited Sept. 15, 2020).

Recently, however, the Board of Immigration Appeals ("BIA") has taken an approach that entirely undermines the U Visa program and contravenes its own precedent. It has allowed U Visa applicants to be removed even while their applications are pending. The BIA decision in this case exemplifies this problem. Even after U Visa applicant Ms. Gonzales Quechuleno[7] had moved to reopen removal proceedings after submitting her U Visa application, the BIA denied the motion. Its decision in this and other cases sends a message to both crime victims and law enforcement that perpetrators of gender-based violence may once again use immigration courts as weapons against their victims.

This Court should not allow immigration courts or the federal judiciary to be weaponized in such a manner. Amici respectfully ask this Court to repudiate BIA efforts to eliminate, through practice and policy, protections for crime survivors Congress created in the U Visa. Amici respectfully request that the Court vacate the decision below and remand with instructions that the BIA reopen Ms. Gonzales Quechuleno's case, apply the BIA's existing precedent, and allow her to stay in the United States while she awaits a final adjudication of her U Visa.

[7] This appeal involves Petitioners Claudia Gonzales Quechuleno and her children Betsaida Greys Ramirez Gonzales, and Dulce Dana Ramirez Gonzales. For the purposes of this brief, all references to Ms. Gonzales Quechuleno or "Petitioner" include her children.

SUMMARY OF ARGUMENT

In denying Petitioner's motion to reopen, the BIA perpetuated a recent legal error this Court should take the opportunity to correct: it allowed a domestic violence victim to be subject to deportation even though she submitted a bona fide U Visa application. Such a result contradicts Congress's statutory findings underlying the U Visa program and courts' longstanding approach to this issue.

Congress created the U visa to protect noncitizen victims of violent crimes who may not otherwise report their perpetrators because they fear deportation. The laws enacting and expanding the U Visa program illustrate Congress's intent that U Visa applicants remain in the United States while their U Visa applications are pending. Indeed, after Congress enacted the U Visa program, USCIS and ICE implemented systems to ensure crime victims were not removed while awaiting decisions on their U Visa applications. Likewise, the BIA initially followed their lead. In *Sanchez-Sosa*, it created a presumption that typically prevented noncitizen immigrants from being deported while awaiting decisions on their U Visas.

But now the BIA refuses to follow its own decision in *Sanchez-Sosa*. In cases like Petitioner's and many others, it has refused to accord U Visa applicants the sort of continuances that would allow them to remain in the country pending adjudication of their applications. Its decision will make crime victims—and in particular, immigrant survivors of domestic violence—less likely to report crimes in the future.

Aside from contradicting its own precedent, the BIA's decision also will have far-reaching negative consequences if left uncorrected. It will deter noncitizen immigrant crime victims from reporting their crimes. It will cause individuals who Congress authorized to remain in the country to be deported, and along with it, all of the negative consequences attendant with deportation. And it will impair law enforcement authorities from effectively and efficiently performing their jobs.

The Court should reverse so the BIA can apply the correct standard.

ARGUMENT

I. Congress Created The U Visa Program To Encourage Noncitizen Immigrants Who Are Victims Of Qualifying Crimes To Report Those Crimes Without Fear Of Removal.

A. The U Visa program reflects a comprehensive bipartisan effort to protect noncitizen immigrants who are victims of crimes to report those crimes and participate in criminal proceedings.

In 1994, Congress enacted the watershed Violence Against Women Act, Pub. L. No. 103-322, Tit. IV, 108 Stat. 1902 (Sept. 13, 1994), representing our nation's first systems-wide attempt to halt 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), 1154(a)(1)(B)(ii). VAWA freed many immigrant domestic violence survivors from the inherent power and control abusive spouses otherwise possessed over their immigration status.

Certain categories of other noncitizen crime victims, however—principally, those who were abused by someone other than a spouse or parent—were left unprotected. To fill that gap, 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 experienced. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, § 1513(a) (Oct. 28, 2000), *as codified at* 8 U.S.C. § 1101 note. In its statutory findings, Congress specified 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 crimes. *Id.* § 1513(a)(2)(A).

The legislative history leading to enactment of the U Visa program confirms that Congress intended to create a program that would address the fear of deportation that had prevented many noncitizen immigrants 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). Senator Paul Sarbanes stated that this expansion would "also make it easier for battered immigrant women to leave their abusers without fear of deportation." 146 Cong. Rec. S8571 (2000).

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. She recounted cases in which the perpetrator had threatened to deport the immigrant victim if the victim came forward to law enforcement. 159 Cong. Rec. S497, 498 (2013).

Congress's statutory findings confirm its clear intent to protect noncitizen immigrants who are victims of certain qualifying crimes by allowing them to report the crimes to law enforcement without the threat of deportation.

B. Consistent with Congress's intent, enforcing agencies have created a regulatory framework that allows U Visa applicants to remain in the country while their applications are adjudicated.

Consistent with Congress's intent, federal agencies that enforce immigration laws created a regulatory scheme that encourages noncitizen immigrant crime victims to report their crimes without fear of deportation while their U Visa applications are pending. That scheme is elegant and simple: removal proceedings against the applicant are stayed until the U Visa application is adjudicated.

For example, DHS has created such a framework through one of its implementing regulations. 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 [removal] 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." 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.

In addition to these regulations, USCIS also created a separate "waitlist" to address a growing problem: the number of immigrants who qualify for U Visas far exceeds the cap on the number of U Visas that may be granted annually. *See* C.F.R. § 214.14(d)(2). To prevent applicants above the cap from being deported while their applications are pending, USCIS created a regulatory "waitlist." *See id.* Any applicant that would otherwise qualify for a U Visa except for the cap is placed on the waitlist. USCIS 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."[8]

ICE has implemented these regulations as a matter of specific, written agency policy. ICE instructs enforcement authorities to "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."[9] In 2009, ICE re-emphasized this directive by issuing two memoranda

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[8] *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53,014, 53,027 (Sept. 17, 2007).

[9] U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), available at: https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf (last visited Sept. 15, 2020).

establishing a system in which it seeks a "prima facie determination" from USCIS for U Visa applicants seeking stays or similar relief.[10] If the U Visa applicant provides proof that she has filed such an application, then "the OCC [Office of Chief Counsel] *shall* request a continuance to allow USCIS to make a prima facie determination." *Id.* at 2. Furthermore, once USCIS has determined that the noncitizen has made a prima facie case, then the OCC "should consider administratively closing the case or seek to terminate proceedings pending final adjudication of the petition." *Id.*[11]

Finally, as a matter of policy, ICE even allows the Office of the Principal Legal Advisor to join a motion to reopen removal proceedings once the U Visa application is approved.[12] These established ICE policies goes so far as to state that if, after a final

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[10] *See* Department of Homeland, Immigration and Customs Enforcement, *Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-visas) Applicants*, (Sept. 24, 2009), available at https://asistahelp.org/wp-content/uploads/2018/12/ICE-Guidance-Adjudicating-Stay-Request-Filed-by-U-Applicants.pdf (last visited Sept. 15, 2020); Department of Homeland, Immigration and Customs Enforcement, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal* (Sept. 25, 2009), available at https://asistahelp.org/wp-content/uploads/2018/12/ICE-Memorandum-OPLA-Removal-Proceeding-or-with-Final-Orders-of-Deportation.pdf (last visited Sept. 15, 2020).

[11] ICE has previously asserted that this guidance is no longer its policy. *See* Department Of Homeland Security, Immigration and Customs Enforcement, *Revision of Stay of Removal Request Reviews for U Visa Petitioners* (Aug. 2, 2019), https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners#wcm-survey-target-id (last visited Sept. 15, 2020). But this is just a FAQ document, and it fails to revoke prior guidance, provide new guidance, or speak to the memorandum addressing U Visa applicants in immigration proceedings.

[12] *See* United States Dep't Of Homeland Security, Immigration and Customs Enforcement, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal*, (Sept. 25, 2009), available at:

order of removal has been issued by an immigration judge and USCIS grants the U Visa application, the Office of the Principal Legal Advisor "should favorably consider a joint motion to reopen and terminate proceedings." *Id.*

C. The BIA's established precedent applied this regulatory scheme and stayed removal proceedings pending the final adjudication of a U Visa application.

Further bolstering the regulatory scheme described above, the BIA's established precedent confirms that U Visa applicants would under most circumstances remain in the United States pending adjudication of their applications.

The controlling decision on this point is *Matter of Sanchez-Sosa*, 25 I. & N. Dec. 807 (BIA 2012). In *Sanchez-Sosa*, the BIA considered the case of a U Visa applicant who was subject to removal proceedings. The applicant sought a continuance (effectively, a stay of removal proceedings) because he had a pending U Visa application, but the BIA denied his motion. The Ninth Circuit reversed, *Sanchez Sosa v. Holder*, 373 F. App'x 719 (9th Cir. 2012), and remanded so the BIA could consider when and under what circumstances to grant continuances to noncitizens in removal proceedings who had pending U Visa applications.

On remand, the BIA established a presumption that would allow many noncitizens to remain in the country pending final adjudication of their applications.

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https://asistahelp.org/wp-content/uploads/2018/12/ICE-Memorandum-OPLA-Removal-Proceeding-or-with-Final-Orders-of-Deportation.pdf (last visited Sept. 15, 2020).

"As a general rule, there is a rebuttable presumption that an alien who has filed a prima facie approvable application with the USCIS will warrant a favorable exercise of discretion for a continuance for a reasonable period of time." 25 I. & N. Dec. at 815.[13] Following *Sanchez-Sosa*, the BIA has reopened removal proceedings in cases where a removal order was entered before a petitioner had filed a U Visa application. For example, in *In re Peleayz*, 2017 WL 7660455 (BIA Oct. 24, 2017), the BIA cited *Sanchez-Sosa* in finding that reopening was warranted in light of "new and previously unavailable documentary evidence concerning the respondent's application for nonimmigrant U visa status." *Id.* at *1. Additionally, in *In re Y-A-L-L-*, about two months after the court ordered the respondent's removal, the respondent filed a motion to reopen because of a pending U Visa application. The BIA granted the respondent's motion to reopen because she was "awaiting final adjudication of her application" for a U Visa.[14]

[13] DHS has elsewhere attempted to argue that more recent decisions in *Matter of L-A-B-R*, 27 I. & N. Dec. 405 (A.G. 2018), and *Matter of L-N-Y-*, 27 I. & N. Dec. 755, 757 (A.G. 2020), either change or overrule *Sanchez-Sosa*. That is incorrect. *L-A-B-R* states unequivocally that it is "consistent with Board precedents." *Id.* at 418 (citing Sanchez-Sosa). And *Matter of L-N-Y-* does even purport to change or overrule *Sanchez-Sosa* and *L-A-B-R-*. *Matter of L-N-Y-*, 27 I. & N. Dec. 755, 757 (A.G. 2020). To the extent that it might later make these arguments here, they should be rejected.

[14] *See In re Y-A-L-L*, No. A594 (BIA Oct. 29, 2015), available at: https://www.scribd.com/document/290079091/Y-A-L-L-AXXX-XXX-594-BIA-Oct-29-2015 (last visited Sept. 15, 2020)

These decisions establish that, until recently, BIA's policy and practice was to implement Congress's statutory findings and continue (stay) removal of noncitizens with pending U Visa applications until their applications were adjudicated.

II. The BIA's Decision Conflicts With Congress's statutory findings, ICE regulations, and *Sanchez-Sosa.*

Notwithstanding the statutory, regulatory, and common-law framework described above, the BIA has in recent years began to act, in policy and practice, to undermine it, so that U Visa applicants *are* subject to removal proceedings even while their applications remain pending. The decision below is a case in point.

In proceedings below, before Ms. Gonzales Quechuleno had filed her U Visa application, the Immigration Judge ("IJ") ordered her and her children's removal to Mexico after denying their applications for asylum. Once Ms. Gonzales Quechuleno filed her U Visa application, she appealed the IJ's decision to the BIA, asking for various forms of relief, including that the BIA reopen her removal proceedings so that the IJ could consider the new evidence of her U Visa application. Despite presenting new evidence that the IJ had not considered—her prima facie eligibility for a U Visa—the BIA denied the motion, without analyzing the factors listed in *Sanchez-Sosa*. This decision conflicts with the presumption established in *Sanchez-Sosa* and that had been applied in other cases: a U Visa applicant that establishes a prima facie showing of abuse is presumptively entitled to a continuance.

The reasons the BIA gave for its about-face do not justify a departure from *Sanchez-Sosa*. Here, the BIA decided not to reopen removal proceedings because (1) DHS has (for now) promised to stay her removal; (2) there is uncertainty regarding when USCIS will decide her U Visa application; and (3) an order of removal had already been entered. None of those facts is cause for a change in the BIA's approach.

The first reason, the DHS's say-so, is insufficient because it can *always* be given, can always be changed, and is nothing more than an unenforceable promise that attempts to side-step the procedural safeguards established by *Sanchez-Sosa*. DHS can rescind that promise at any moment and deport any petitioner in circumstances similar to those here. *See Inemo S. C. v. Dep't of Homeland Sec.*, 2020 WL 1685856, at *3 (D. Minn. Apr. 7, 2020) (recognizing that a "pending U-visa application has no effect on the ability of the government to execute a valid removal order") (citing 8 C.F.R. § 214.14(c)(1)(ii)). The illusory nature of this promise is made even more apparent by a recent ICE directive, No. 11005.2, which *reverses* 10 years of department policy to issue stays to pending U Visa applicants. Under the more recent directive, ICE now claims broad authority to remove U Visa applicants. By using an arbitrary and unenforceable promise as a reason to deny a motion to reopen, the BIA abdicates its responsibility under *Sanchez-Sosa* to ensure that any individual who has a pending U Visa application will not be removed while USCIS determines her fate.

The second reason, uncertainty about the timing of a decision on her U Visa application, conflicts with *Sanchez-Sosa* and other cases that follow it. Those cases hold that a prima facie showing of eligibility is sufficient to reopen a case, even "pending a decision by USCIS on the respondent's U-visa petition." *Adan Ramirez-Rios*, 2016 Immig. Rptr. LEXIS 4097, at *2 (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.").[15] There is no rational distinction between the case before this Court and the cases in which the BIA granted motions to reopen so that it could entertain a *Sanchez-Sosa* prima facie showing. *Cf., e.g.*, *Caballero-Martinez v. Barr*, 920 F.3d 543, 551 (8th Cir. 2019) (remanding to the BIA for clarification on one issue, and noting that a completed U Visa application under *Sanchez-Sosa* "weighs in favor of pausing the removal process").

Nor have other cases found "uncertainty" about the timing of a USCIS decision a persuasive reason to deny a motion to reopen when a petitioner has shown a prima facie eligibility for a U Visa. *See, e.g.*, *Matter of Alvarado-Turcio*, A201 109 166, 2–3 (BIA Aug. 17, 2017)[16] (recognizing the significant U Visa backlog and holding

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[15] *See also In re Rosales De La Cruz,* (BIA Feb. 18, 2016), available at: https://www.scribd.com/document/303206526/Javier-Alejandro-Rosales-de-La-Cruz-A088-806-933-BIAFeb-18-2016) (last visited Sept. 15, 2020) (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").

[16] *Alvarado-Turcio* is available at https://www.scribd.com/document/ 360077591/ Edgar-Marcelo Alvarado-Turcio-A201-109-166-BIA-Aug-17-2017 (last visited Sept.

that "processing delays are insufficient, in themselves, to deny an alien's request for a continuance"). In *Zhi Feng Zhou*, No. A073 874 177 (BIA May 23, 2018),[17] for example, the BIA reopened the record and terminated removal proceedings, *over DHS's objections*, based upon the fact that the immigrant's U Visa application had been approved and placed on the waiting list.

This Court would not be the first to require the BIA to hew to *Sanchez-Sosa* or to reject its reliance on uncertainty as a basis to deny a motion to reopen. *See Malilia v. Holder*, 632 F.3d 598, 606 (9th Cir. 2011) ("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) (describing the "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 and the many like it.

The BIA's third reason—the existence of an order of removal that has already been entered—is likewise no reason to deny a motion to reopen. Indeed, the BIA has granted motions to reopen where an order of removal had already been entered. For example, in *In re Y-A-L-L-*, No. A594 (BIA Oct. 29, 2015),[18] about two months after the court ordered the respondent's removal, she filed a motion to reopen because of a

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15, 2020).

[17] *Zhi Feng Zhou* is available at https://www.scribd.com/document/382793842/Zhi-Feng-Zhou-A073-874-177-BIA-May-23-2018?secret_password=Whfufgxd0DTybISjaQCm (last visited Sept. 15, 2020).

[18] *In re Y-A-L-L* is available at https://www.scribd.com/ document/290079091/Y-A-L-L-AXXX-XXX-594-BIA-Oct-29-2015 (last visited Sept. 15, 2020.)

pending U Visa application. The BIA granted the motion to reopen because she was "awaiting final adjudication of her application" for a U Visa. *Id.* That conflicts directly with what the BIA did here.

The BIA decision below is a significant departure from its prior practices. The BIA provided no sound justification for it. *See Quinteros v. Holder*, 707 F.3d 1006, 1009 (8th Cir. 2013) (an abuse of discretion occurs when the BIA "gives no rational explanation for its decision, departs from its established policies without explanation, relies on impermissible factors or legal error, or ignores or distorts the record"). The petitioner here has established more than the "prima facie case" that was sufficient under *Sanchez Sosa.* Like many other petitioners Amici represent, she has received a "waiting list determination," which "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.

III. If This Court Does Not Correct The BIA's Error, The Impact On U Visa Applicants Could Be Catastrophic.

The BIA's decision below not only conflicts with Congress's intent in creating the U Visa program, the prior regulatory scheme, and the BIA's own precedent; it also could have severe practical consequences.

A. The BIA's standard discourages noncitizen immigrants from reporting crimes against them.

The first and most significant consequence is that victims of some of the most severe crimes of gender-based violence would be discouraged from reporting them.

Empirical evidence supports this conclusion. 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). Among undocumented battered immigrant women, that number falls dramatically: only 18.8 percent are willing to report their abuse to law enforcement. *Id.* Yet the number of immigrant women who experience domestic violence is significant: according to congressional testimony, between 34 and 49.8 percent of immigrant women in the United States experience domestic violence in their lifetimes.[19] While women with unstable immigration statuses are more likely to experience abuse, they are half as likely to report their abuse. 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). The lack of secure immigration status has a significant chilling effect on immigrant victims' willingness to contact law enforcement to report crimes. Angelica Reina et al., *"He Said They'd Deport Me": Factors*

[19] *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).

Influencing Domestic Violence Help-Seeking Practices Among Latina Immigrants, 29 J. INTERPERSONAL VIOLENCE 593, 600–601 (2014).

The sociological evidence on this point abounds.[20] 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, and other symptoms related to post-traumatic stress disorder. *See* 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 discourages survivors from seeking help. The decision to report a qualifying violent crime 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. Yet that is exactly what the BIA's rule encourages. Tens of thousands of U Visa applicants are waiting for their applications to be reviewed.[21] As of March 31, 2020, more than

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[20] *See, e.g.*, Tahirih Justice Center et al., *Key Findings: 2017 Advocate and Legal Service Survey Regarding Immigration Survivors*, TAHIRIH JUSTICE CENTER (2017), available at: https://www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf (noting that 43 percent of advocates had clients who dropped a civil or criminal case, according to a survey of more than 700 advocates) (last visited Sept. 15, 2020).

[21] *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

150,000 U visa applicants are categorized as "pending" in some form or another. That means the BIA's decision has a potentially severe impact that extends far beyond the circumstances of this case.

B. The BIA's standard will lead to more noncitizen victims being deported, and the attendant harms of deportation.

A second severe consequence of the BIA's decision in this and similar cases is that it will lead to the deportation of many victims of serious violent crimes. And deportation comes with its own slew of adverse consequences.

First, deportation strips immigrant victims of financial stability and further exacerbates the impoverished situations many of them face. When deciding whether to report violence, many immigrant survivors are forced to choose between abuse and poverty. Domestic violence is a leading cause of homelessness for women within the United States. *See* 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).

Year 2020, Quarter 2), (2020), available at: https://www.uscis.gov/sites/default/files/document/data/I918u_visastatistics_fy2020_qtr2.pdf (last visited last visited Sept. 15, 2020).

Many immigrant survivors are thus faced with the choice between the food and shelter provided by their abuser and the risk of deportation when that meager support will be stripped away. For immigrant survivors with children who have been in the country for many 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. *See* Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273, 309 (2018) (hereinafter, "Nanasi").

For many survivors, these risks are reason enough to stay with their abuser rather than reporting a crime and face potential deportation. The Court should not perpetuate a standard that would allow U Visa applicants like those in this case and many others "to be ground to bits in the bureaucratic mill against the will of Congress;" that would only serve to reinforce these women's fears and prevent them from reporting crimes. *See Benslimane v. Gonzales*, 430 F.3d 828, 833 (7th Cir. 2005).

There is another related harm associated with deportation: it would return victims of abuse *in this country* to countries *they fled to be free from abuse in the first place.* Many U Visa applicants are noncitizen immigrants who came to this country precisely because they fled violent circumstances like gang violence or ethnic strife. When weighing the impossible choice of continuing to be subjected to the abuse by a single known individual within the borders of the United States against 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 a more significant and known harm.

C. The BIA's decision prevents law enforcement authorities from efficiently and effectively performing their duties.

A final adverse consequence of the BIA's decision is its impairment of the performance of law enforcement authorities.

The U Visa program has succeeded because it encourages noncitizen immigrant victims of crimes to come forward and thus help in the prosecution of violent criminals. Law enforcement authorities can investigate and prosecute crime effectively only if survivors come forward. The possibility of adverse immigration consequences makes immigrant survivors less likely to come forward than others. As DHS has recognized, the availability of U Visas gives immigrant survivors a "sense of security" that working with law enforcement will not have immigration consequences.[22] And this sense of security in turn aids law enforcement, because survivors "who can tell their story and testify as a witness are key" to successful prosecutions.[23]

By contrast, when immigrant crime victims fear accessing the U.S. criminal justice system, everyone suffers. Criminals target vulnerable populations such as immigrants. Criminal enterprises are strengthened by immigrant vulnerability to

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[22] *See* Department of Homeland Security, *U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal & Territorial Law Enforcement, Prosecutors, Judges, & Other Government Agencies* 3 (2016), available at: https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf (last visited Sept. 15, 2020.)

[23] Department of Homeland Security, *A Victim-Centered Approach*, https://www.dhs.gov/blue-campaign/victim-centered-approach (last visited Sept. 15, 2020)

deportation because witnesses will not come forward. Fear generated by deportations impairs the ability of law enforcement to take dangerous criminals off the street. Witnesses will no longer report.[24] When crime witnesses and victims are too afraid to speak out, we are all unsafe. The Court should not tolerate that outcome.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court vacate the BIA's decision, remand with instructions that the BIA reopen the case below, apply the *Sanchez-Sosa* presumption, and allow petitioners to stay in the United States while awaiting a final adjudication of their U Visas.

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[24] 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-achilling-effect-on-crime-reporting-in-hispanic-communities-police-say/ (last visited Sept. 15, 2020).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief is 6,463 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 MSO in 14-point, Garamond typeface, a font containing Serifs.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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