No. 16-3784

IN THE

# United States Court of Appeals for the Seventh Circuit

JORGE BAEZ-SANCHEZ,
*Petitioner,*

v.

JEFF SESSIONS, ATTORNEY GENERAL OF THE UNITED STATES,
*Respondent.*

On Appeal from an Order Entered by the Board of Immigration Appeals, Case No. A206-017-181

## MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AMERICANS FOR IMMIGRANT JUSTICE, ASISTA, ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, END DOMESTIC ABUSE WISCONSIN, FREEDOM NETWORK USA, ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, INDIANA COALITION AGAINST DOMESTIC VIOLENCE, AND NATIONAL NETWORK TO END DOMESTIC VIOLENCE IN SUPPORT OF REVERSAL


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## CORPORATE DISCLOSURE STATEMENT

The undersigned, counsel of record for Amici Curiae, Americans for Immigrant Justice, ASISTA, Asian Pacific Institute on Gender-Based Violence, End Domestic Abuse Wisconsin, Freedom Network USA, Illinois Coalition Against Domestic Violence, Indiana Coalition Against Domestic Violence, and National Network to End Domestic Violence, hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit. Counsel of record is a senior counsel at Davis Polk & Wardwell LLP. Associates at Davis Polk & Wardwell LLP also assisted in the preparation of this brief. Attorneys with the Stanford Law School Immigrants' Rights Clinic and the non-profit entities Community Legal Services in East Palo Alto and Sanctuary for Families further assisted in the preparation of the brief. The amici are non-profit entities, have no corporate parents and otherwise have nothing to disclose pursuant to these Rules.

## MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b), the undersigned amici respectfully request leave to file the accompanying Brief as Amici Curiae in Support of Reversal. The petitioner, Jorge Baez-Sanchez, consents to the filing of the proposed amicus curiae brief. The amici have also requested consent from counsel for the respondent, who take no position on the motion. Therefore, the amici are submitting this motion for leave to file its brief, which is attached below.

Amici curiae are nonprofit organizations that work to address domestic violence and other gendered forms of violence, as described in more detail in the Statement of Identity, Interests, and Authority of Amici Curiae included in the accompanying brief. Because of amici's history addressing gendered 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 provide a "unique perspective" that "can assist the court of appeals beyond what the parties are able to do," *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (citing *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)). Then-circuit judge Samuel Alito explained the reasons why amicus briefs providing unique perspective can benefit the appellate process:

> Even when a party is very well represented, an amicus may provide important assistance to the court. "Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with a particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." *Luther T. Munford, When Does the Curiae Need An Amicus?* 1 J. APP. PRAC. & PROCESS 279 (1999) . . . .
>
> The criterion of desirability set out in Rule 29(b)(2) is open-ended, but a broad reading is prudent. . . . If an amicus brief that turns out

> to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief. On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.

*Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132-33 (3d Cir. 2002) (Alito, J), *aff'd*, 299 F.3d 221 (3d Cir. 2002). The considerations identified by Justice Alito strongly support admission of the attached brief.

The amici's proposed brief "articulate[s] a distinctive perspective [and] present[s] specific information, ideas, arguments, etc. that go[es] beyond what the parties whom the amici are supporting have been able to provide." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner J., in chambers). Whereas the petitioner's briefing will necessarily focus on the legal basis under which immigration judges and Department of Homeland Security have dual jurisdiction over waivers of inadmissibility, amici are in a position, based on their history and experience, to explain the history and purpose of the U statute and offer reasons why it is consistent with the legislative scheme and Congress' intent in enacting this statute that immigration judges be able to exercise jurisdiction to consider waivers of inadmissibility for persons seeking U nonimmigrant relief. The amici's proposed brief will detail how Congress' purpose, relevant legislative history, and considerations of fundamental fairness are consistent with the view of the plain language of the statute discussed in the petitioner's brief; just like the plain language, all these considerations militate against the Board of Immigration Appeals' erroneous interpretation.

**Conclusion**

For the forgoing reasons, the motion for leave to file a brief as amici curiae should be granted. If such relief is granted, the undersigned amici respectfully request that the accompanying brief be considered filed as of the date of this Motion's filing.

Respectfully submitted,

*/s/ Daniel F. Kolb*

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Dated: **March 13, 2017**

**CERTIFICATE OF SERVICE**

I hereby certify that on March 13, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

*/s/ Daniel F. Kolb*

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## BRIEF OF *AMICI CURIAE* AMERICANS FOR IMMIGRANT JUSTICE, ASISTA, ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, END DOMESTIC ABUSE WISCONSIN, FREEDOM NETWORK USA, ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, INDIANA COALITION AGAINST DOMESTIC VIOLENCE, AND NATIONAL NETWORK TO END DOMESTIC VIOLENCE IN SUPPORT OF REVERSAL


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The undersigned, counsel of record for Amici Curiae, Americans for Immigrant Justice, ASISTA, Asian Pacific Institute on Gender-Based Violence, End Domestic Abuse Wisconsin, Freedom Network USA, Illinois Coalition Against Domestic Violence, Indiana Coalition Against Domestic Violence, and National Network to End Domestic Violence, hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit. Counsel of record is a senior counsel at Davis Polk & Wardwell LLP. Associates at Davis Polk & Wardwell LLP also assisted in the preparation of this brief. Attorneys with the Stanford Law School Immigrants' Rights Clinic and the non-profit entities Community Legal Services in East Palo Alto and Sanctuary for Families further assisted in the preparation of the brief. The amici are non-profit entities, have no corporate parents and otherwise have nothing to disclose pursuant to these Rules.

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## STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF AMICI CURIAE

Amici curiae are nonprofit organizations that work to address domestic violence and other gendered forms of violence.

Americans for Immigrant Justice ("AI Justice"), formerly Florida Immigrant Advocacy Center, is a non-profit law firm dedicated to promoting and protecting the basic rights of immigrants. Since its founding in 1996, AI Justice has served over 90,000 immigrants from all over the world. Its clients are unaccompanied immigrant children; survivors of domestic violence, sexual assault, and human trafficking and their children; immigrants who are detained and facing removal proceedings; as well as immigrants seeking assistance with work permits, legal permanent residence, asylum and citizenship. A substantial portion of its clients include individuals who have been irreparably traumatized and victimized by abuse and violence and are seeking refuge. Part of its mission is to ensure that immigrants are treated justly, and to help bring about a society in which the contributions of immigrants are valued and encouraged. In Florida and on a national level, AI Justice champions the rights of immigrants; serves as a watchdog on immigration detention practices and policies; and speaks for immigrant groups who have particular and compelling claims to justice.

ASISTA is a membership organization that works to advance and protect the rights and routes to status of immigrant crime survivors, especially those who have suffered gender-based violence inside the United States. In the 1994 Violence Against Women Act and its progeny, ASISTA worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes. 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, Immigration and Customs Enforcement, 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 communities. The Institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander survivors, and is a leader on providing analysis on critical issues facing victims in the Asian and Pacific Islander ("API") communities, including training and technical assistance on implementation of the Violence Against Women Act, immigration law and practice, and how they impact API 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 Institute's vision of gender democracy drives its mission to strengthen advocacy, change systems, and prevent gender violence through community transformation.

End Domestic Abuse Wisconsin (End Abuse) is Wisconsin's statewide coalition against domestic abuse, serving mainstream and culturally specific programs and advocates, survivors, and allies throughout the state. End Abuse provides training and technical assistance to programs on legal areas including immigration. End Abuse provides direct legal representation annually to hundreds of immigrant victims of domestic violence and sexual assault. End Domestic Abuse Wisconsin understands that undocumented victims and their children often remain hidden and unable to access help because they fear removal from the country. End Abuse

is the only statewide coalition led by social policy advocates, lobbyists, attorneys, and experts working to support, connect, equip, empower and lead organizations for social change to end domestic abuse because everyone deserves dignity and safety.

Freedom Network USA is the nation's largest network of service providers and individuals working directly with survivors of human trafficking in the United States. Many of the qualifying U Visa crimes are related to human trafficking cases and, as such, trafficked persons may seek a U Visa as a result of their victimization. Such applicants may have been forced to commit crimes by the trafficker, or have been vulnerable to trafficking as a result of a prior criminal history. It is critical that these survivors be given an opportunity to explain these complex issues before an Immigration Judge to protect their eligibility for immigration relief.

The Illinois Coalition Against Domestic Violence ("ILCADV") is a membership organization comprised of over 50 agencies in Illinois that provide services to victims of domestic violence and their children. ILCADV provides advocacy, training and public education to professionals on the issues of domestic violence and best practice in developing responses to domestic violence in the community. ILCADV builds networks of support for and with survivors, and advances statewide policies and practices that transform societal attitudes and institutions to eliminate and prevent domestic abuse.

The Indiana Coalition Against Domestic Violence ("INCADV") pursues a vision where all people engage in healthy relationships characterized by the mutual sharing of resources, responsibilities and affection; where youth are nurtured with those expectations; and where all people are supported within a society committed to equality in relationships and equity in opportunity as fundamental human rights. INCADV works to eliminate domestic violence through the implementation of prevention programs and public awareness in communities and

schools, through advocacy for system and societal change, and through the influencing of public policy and the allocation of resources; INCADV works for the prevention and elimination of domestic violence – until the violence ends.

The National Network to End Domestic Violence ("NNEDV") is a not-for-profit organization incorporated in the District of Columbia in 1994 (www.nnedv.org) with a mission to end 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. WomensLaw, one of NNEDV's signature projects, provides legal information about various forms of domestic-violence-related immigration relief, including U Visas, through the WomensLaw.org website, which is visited by more than 1.5 million individuals annually. NNEDV also corresponds with thousands of victims of domestic violence each year through the WomensLaw Email Hotline, a large percentage of whom are undocumented Spanish-speaking and English-speaking immigrants who are victims of crime and potentially eligible for U Visa relief. Undoubtedly, many victims of domestic and sexual abuse who qualify for U Visa relief may end up in removal proceedings. NNEDV strongly supports the right of immigration judges to grant waivers of inadmissibility to U Visa applicants in removal proceedings.[1]

[1] Amici file this brief with the consent of both parties pursuant to Rule 29 of the Federal Rules of Appellate Procedure. The respondent takes no position on the amici curiae's motion for leave to file. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

As this Court has held, the plain language of 8 U.S.C. § 1182(d)(3) and § 1182(d)(14), confers jurisdiction upon both immigration judges ("IJs") and DHS to determine waivers of inadmissibility for persons seeking U nonimmigrant relief pursuant to 8 U.S.C. § 1101(a)(15)(U) (the "U statute"). *See L.D.G. v. Holder*, 744 F.3d 1022, 1030-32 (7th Cir. 2014); *see also* Opening Brief at 12-23. In this brief, Amici support the position taken by Petitioner in his Opening Brief and by this Court in *L.D.G*. by explaining the history and purpose of the U statute and offering further reasons why it is consistent with the legislative scheme and Congress' intent in enacting this statute that IJs be able to exercise jurisdiction to consider waivers of inadmissibility for persons seeking U nonimmigrant relief (referred to herein as a "U Visa").[2]

In enacting the U statute, Congress focused on highly vulnerable people, particularly women and children without immigration status who are especially susceptible to victimization through crimes of domestic violence, sexual assault, kidnapping, rape, torture, felonious assault, extortion, and human trafficking, among others. The vulnerability of this population of immigrants is exacerbated by factors including isolation from friends, family and other support systems; language barriers; cultural differences; and the fear of deportation and of being permanently separated from their children if they were to come forward to report these crimes. The U statute was designed to meet Congress' dual and interrelated goals of providing safety and

[2] Because the majority of principal applicants for relief under the U statute are physically present in the United States at the time they apply, they are issued U nonimmigrant *status*, not U *visas*. Those who are outside the United States, most typically their children or other derivatives, are granted U Visas, and upon entry into the country are granted U nonimmigrant status. In both cases, applicants must be admissible into the United States or obtain waivers of inadmissibility. All U nonimmigrant relief is commonly referred to as a "U Visa."

immigration relief for these victims and of empowering them to come forward to aid law enforcement in prosecuting crime, thus strengthening and protecting communities.

While Petitioner's brief explains in detail the legal basis under which IJs and DHS have dual jurisdiction over waivers of inadmissibility, the availability of these alternative forums makes particular sense in light of the circumstances in which crime victims often find themselves. For some U applicants, the administrative process afforded through DHS may be sufficient to demonstrate waiver eligibility. However, Congress designed the U statute to assist the *most* vulnerable, and for some vulnerable applicants, a hearing before an IJ, with the opportunity to present live testimony, may be necessary for demonstrating waiver eligibility. For these applicants, an in-person hearing gives the opportunity to explain their situation and circumstances in person, tell their stories fully, rebut questionable evidence, explain evidence that may appear damaging at first blush but is in fact benign, and perhaps most importantly, demonstrate their rehabilitation.

The life circumstances that leave some individuals susceptible to criminal victimization, and the trauma induced by the crimes to which they have been subjected, may result in increased rates of drug abuse, depression, post-traumatic stress disorder, difficulty working, or minor criminal activity. However, it is often the case that the very act of coming forward and disclosing to law enforcement the criminal activity from which they have suffered is a first step in a longer process that allows crime victims to recover, rehabilitate, and stabilize their lives. Such disclosure may be aided by the IJ review process in ways that are not available through the limited paper procedures provided by DHS.

As a matter of basic fairness, these exceptionally vulnerable individuals need to have their voices heard—not only in paper applications submitted to DHS, but *literally* heard by IJs,

who can work through the complexity of their circumstances, assess credibility, evaluate the quality of evidence, and ensure that U waiver applicants have an opportunity to address faulty or misconstrued evidence. The experiences of many crime victims seeking U nonimmigrant status and waivers of inadmissibility are deeply troubling, and incredibly complex. Yet, at the same time, these crime victims often exhibit incredible resilience and bravery in coming forward and working with law enforcement to help ensure the safety of their communities. Allowing crime victims to tell their stories to IJs will help fulfill the promise made by Congress to these individuals, so that they can move forward and repair the damage done to their lives by having been victims of crime.

As explained below, Congress' purpose, relevant legislative history, and considerations of fundamental fairness are consistent with the plain language of the statute and militate against the Board of Immigration Appeals' erroneous interpretation.

## ARGUMENT

### I. Congress Created the U Visa to Protect Vulnerable Noncitizen Crime Victims and to Encourage Those Victims to Cooperate with Law Enforcement

The legislative history of the U visa shows that Congress understood that it takes tremendous courage for a noncitizen victim of abuse to step out of the shadows and confront an abuser. Congress intended to support this effort by affording such victims a broad and generous opportunity to find safety for themselves and their children.

Congress created the U Visa program to protect immigrant "women and children who are victims of [qualifying] crimes." *United States v. Cisneros-Rodriguez*, 813 F.3d 748, 762 (9th Cir. 2015) (citation omitted); *see also* Battered Immigrant Women Protection Act of 2000 ("BIWPA") § 1513(a)(1)(B). The legislative history clearly demonstrates that Congress' goal in

establishing the U Visa was to express solicitude for this particularly vulnerable group. As Senator Patrick Leahy explained, the U statute was intended to "make it easier for abused women and their children to become lawful permanent residents" and to ensure that "battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States." *See* 146 Cong. Record S10185 (2000) (statement of Sen. Patrick Leahy); *see also* 146 Cong. Record S8571 (2000) (statement of Sen. Paul Sarbanes) ("[VAWA II] will also make it easier for battered immigrant women to leave their abusers without fear of deportation."); 146 Cong. Record H8094 (2000) (statement of Rep. John Conyers) ("There are still demographic groups that need better access to services and the criminal justice system. Predominantly among them are people who have not had their immigrant status resolved and are not yet citizens but are subject to lots of unnecessary violence.").

Congress intended the U Visa program to provide generous humanitarian relief for one of the nation's most vulnerable populations. Immigrant victims of domestic violence face social and physical isolation, as well as other economic and psychological hurdles that make it difficult for them to report their abusers. *See* Cecilia Menjívar and Olivia Salcido, *Immigrant Women and Domestic Violence: Common Experiences in Different Countries*, 16 Gender & Soc'y 898, 901-02 (2002) ("[T]he experiences of immigrant women in domestic violence situations are often exacerbated by their specific position as immigrants, including limited host-language skills, lack of access to dignified jobs, uncertain legal statuses, and experiences in their home countries, and thus their alternatives to living with their abusers are very limited."). Fear of deportation adds another hurdle for immigrants who lack legal status. *See* Beth Lubetkin, *Violence Against Women and the U.S. Immigration Laws*, 90 Am. Soc'y Int'l L. Proc. 616, 620 (1996) ("Fear of deportation deters abused immigrant women from coming forward to report abuse.");

International Association of Chiefs of Police, *Police Chiefs Guide To Immigration Issues*, 28 (2007), http://www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf (last accessed Feb. 23, 2017) ("Immigrant women may be less likely to report abuse than nonimmigrant women due to . . . a fear of deportation if they are not legally documented to live within the United States."); Stacey Ivie and Natalie Nanasi, *The U Visa: An Effective Resource for Law Enforcement*, FBI Law Enforcement Bulletin 10, 10 (Oct. 2009), https://www2.fbi.gov/publications/leb/2009/october2009/oct09leb.htm (last accessed Feb. 23, 2017) ("[T]he fear of deportation has created a class of silent victims").

In addition to protecting immigrant victims of qualifying crimes, Congress "also intended to strengthen the ability of law enforcement agencies to detect, investigate and prosecute" those crimes. *Cisneros-Rodriguez*, 813 F.3d at 762 (internal quotation marks and citation omitted); *see also* BIWPA § 1513. In particular, Congress was concerned that "abusers are virtually immune from prosecution because their victims can be deported as a result of action by their abusers and the Immigration and Naturalization Service cannot offer [those victims] protection no matter how compelling their case under existing law." BIWPA § 1502. Congress also recognized that undocumented victims of domestic abuse are reluctant to report their abusers and help law enforcement with the investigation and prosecution of crimes if they fear being deported. *See* New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007) ("Alien victims may not have legal status and . . . therefore may be reluctant to help in the investigation or prosecution of criminal activity for fear of removal from the United States."); *see also* Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections under VAWA I & II*, 17 Berkeley J. of Gender, Law and Just. 137, 150 (2002) ("Few noncitizen crime victims willingly contribute to

criminal prosecutions without some protective immigration status shielding them from retaliatory deportations.").

Since the enactment of the U visa, law enforcement authorities have continued to recognize the essential role of community cooperation—including by undocumented victims of crime—to effective law enforcement and preventing criminal activity. As the Department of Justice has remarked, "[s]trong relationships of mutual trust between police agencies and the communities they serve are critical to maintaining public safety and effective policing. Police officials rely on the cooperation of community members to provide information about crime in their neighborhoods, and to work with the police to devise solutions to crime and disorder problems." Dep't of Justice, *Importance of Police-Community Relationships and Resources for Further Reading*, *available at* https://www.justice.gov/crs/file/836486/download (last accessed Feb. 24, 2017). As the Criminal Justice Policy Research Institute wrote with the support of the Oregon Law Enforcements Contracts Committee and the Salem Oregon Police Department, "[p]ositive police-community relations are critical for effective crime prevention, case investigation, officer safety, and successful police-citizen interactions." Portland State Univ., *Decreasing Crime by Increasing Involvement: A Law Enforcement Guidebook for Building Relations In Multi-Ethnic Communities*, 2011, https://www.pdx.edu/cjpri/sites/www.pdx.edu.cjpri/files/Decreasing_Crime_By_Increasing_Involvement.pdf.

As law enforcement agencies continue to recognize, then, Congress intended the U visa to provide broad protection to noncitizen victims of crime, to encourage them to come forward to protect community safety.

## II. A Waiver of Inadmissibility May Depend on the Crime Victim's Credibility, Which IJs Are Well Qualified to Evaluate at an In-Person Hearing

Crime victims' waiver applications under section 1182(d)(3) involve three factors, each of which implicates the victim's credibility. Those factors are: (1) "the risk of harm to society if the applicant is admitted"; (2) "the seriousness of the applicant's prior immigration law, or criminal law, violations, if any"; and (3) "the nature of the applicant's reasons for wishing to enter the United States." *United States v. Hamdi*, 432 F.3d 115, 119 (2d Cir. 2005) (quoting *Matter of Hranka*, 16 I. & N. Dec. 491, 492 (BIA 1978)). IJ hearings are necessary to evaluate these three factors in cases like Jorge's because, unlike DHS adjudicators—who consider only a crime victim's paper submission—IJs conduct hearings to assess the victim's credibility in person. At an in-person hearing, "[a]ll aspects of the witness's demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication—may convince the observing trial judge that the witness is testifying truthfully or falsely." *Shrestha v. Holder*, 590 F.3d 1034, 1042 (9th Cir. 2010). And in-person credibility assessments are particularly critical for crime victims, who often suffer from post-traumatic stress disorder and other psychological conditions that may make it difficult for them to establish credibility solely on a paper application.

### A. In-Person Hearings Are Required in Some Cases So IJs Can Evaluate A Victim's Credibility as to the Governing *Hranka* Legal Standard

Each of the three *Hranka* factors can require a determination of a noncitizen victim of crime's credibility. To demonstrate the first factor—relating to the risk of harm to society—the applicant could testify about his rehabilitation efforts after any prior brushes with the criminal justice system. Because the victim could appear in immigration court to provide such testimony,

an IJ would be able to assess the applicant's voice, facial expressions, and body language to evaluate the applicant's sincerity in ways that cannot be done on paper alone. The contrast is particularly stark in the case of victims who do not speak English: in immigration court, they could testify with the aid of an interpreter, but before USCIS, their written statements are prepared in English with the aid of a translator. In-person hearings also permit the IJ to evaluate testimony offered on the applicant's behalf—by friends, family members, and experts—and better determine the validity of their testimony as to the applicant's rehabilitation. Through the availability of such in-person evaluations, the IJ is in a much better position to determine whether the applicant has genuinely rehabilitated himself, and to find whether the applicant poses a significant risk of harm to society.

In-person testimony is critical as to the second *Hranka* factor as well, which asks about the seriousness of any prior immigration or criminal violations. When the seriousness of the applicant's prior violations is unclear from the record, the applicant's testimony can provide necessary additional information about the nature of those violations. If the IJ believes the applicant's description of his past conduct, the IJ may find that, although the prior violations appeared to be serious on paper, there were mitigating circumstances that in context decrease the seriousness of the crimes. This is particularly true as to victims of crime, who may have been forced to engage in illegal activity because of the very abusive relationship that has then formed the basis of the U application. In amici's experience, victims of domestic violence may be forced to commit crimes by their abusers (and this coercion may not be evident in a police report after the crime, when the abuser may still be present and controlling communications with the

police).[3] An in-person hearing would permit a crime victim in such circumstances to explain the context for prior criminal encounters.

Finally, assessment of the third *Hranka* factor, which asks the reasons the applicant wishes to remain in the United States, is also more accurate in an in-person IJ hearing. The applicant and others testifying on his behalf explain, for instance, the nature of the family and community ties that he has formed in this country, which could be corroborated and expanded upon through testimony from friends, family members, and others in the applicant's community. By hearing such testimony in person, the IJ would be better positioned to fully understand the life the applicant has made for himself in this country and thus his reasons for wanting to remain here.

This case illustrates how in-person proceedings can be critical in assessing the *Hranka* factors. Here, after listening to Mr. Baez-Sanchez discuss the foolish behavior and circumstances that had resulted in Mr. Baez-Sanchez's arrest and guilty plea, the IJ found that extraordinary circumstances outweighed his offense and justified the positive exercise of discretion. In so finding, the IJ explained that Baez-Sanchez's "convincing[]" in-person testimony indicated that he had "learned from his past mistakes," and "demonstrated that he has grown out of the mistakes he made when he was a teenager." IJ Removal Proceedings Decision at 5, Apr. 28, 2016 ("IJ Decision"). Mr. Baez-Sanchez further demonstrated to the IJ that he is "motivated to be a better person so he may support his family and fiancée and be a role model for his siblings." *Id.* The IJ found Mr. Baez-Sanchez's demeanor and remorse so compelling

[3] *See, e.g.*, Nat'l Latin@ Network, *Wrongful Arrests and Convictions of Immigrant Victims of Domestic Violence, available at* http://www.nationallatinonetwork.org/images/files/Quote_Sheet_for_Hill_Visits_-_Service_Providers.pdf (last accessed February 24, 2017).

that, "weighing the positive factors against the negative factors," the IJ found that "the respondent merits relief as a matter of discretion." *Id.*

Similarly, the BIA's decision in *Hranka* illustrates the important role that credibility may play in a waiver application. In that case, the BIA considered statements made by Hranka's mother about Hranka's employment and character. *Hranka,* 16 I. & N. Dec. at 492. Her mother stated that Hranka was "holding down two jobs . . . working between 60 and 70 hours a week," and that she "had always been well-behaved until the time she began living with a certain man" who was "a very negative influence," but that she had "resumed living with her parents" and no longer had contact with that individual. *Id*. The BIA relied on these statements in finding that Hranka "has been rehabilitated," noting that the statements were "sincere and truthful." *Id*. Such statements, which depend on an individual's sincerity and truthfulness, are precisely the type of evidence that may be difficult to evaluate from a paper record alone.

Although many U waiver applications do not require live testimony, there is a subset of applicants, particularly those with more complex histories, criminal backgrounds, and histories supporting rehabilitation, for whom the merits of their application may well depend on their credibility and for whom the ability to present live testimony may accordingly be indispensable. As other Circuits have observed, "[t]he importance of *live* testimony to a credibility determination is well recognized and longstanding." *Oshodi v. Holder*, 729 F.3d 883, 891 (9th Cir. 2013) (en banc) (emphasis added). Such testimony can be critical to allow an IJ to assess demeanor, including tone, body language, and other cues that reflect on the applicant's veracity. *See Shrestha,* 590 F.3d at 1042.

In light of the *Hranka* factors, a waiver of inadmissibility may depend on the applicant's credibility. And in circumstances where live testimony is important to evaluate the merits of a waiver application, IJs should make a credibility determination based on such testimony.

### B. Victims of Crime May Be So Traumatized That In-Person Testimony May Be Necessary to Assess Their U Waiver Applications.

U visa applicants may be so traumatized that live testimony is necessary to assess eligibility for a waiver. U visa eligibility requires the applicant to have "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity." 8 U.S.C. § 1101(a)(15)(U)(i). Victims of such abuse can face serious complications as a result that may necessitate in-person review of their waiver application.

Victims applying for U status have by definition been traumatized. Many victims, despite being made vulnerable by trauma, nevertheless muster the courage to step forward and aid law enforcement, and these individuals should be afforded a generous opportunity to present their cases in order to fulfill Congress' purpose in creating the U visa program. The opportunity to convey one's full history through *either* written submissions, as are those that are evaluated by DHS, or in-person testimony that may be evaluated by an IJ, is vital to achieving the goals of the U visa system. Though some victims of trauma may exhibit emotional "flat[ness]," *see, e.g.*, *State v. Robinson*, 431 N.W.2d 165, 168, 171-72 (Wis. 1988), and are better served by the ability to provide a written account of their victimization, others are better suited to the more flexible format of live testimony. Empirical research suggests that the "completion of an individualized court process may promote recovery from trauma," because "the effect of verbal disclosure is to enhance one's sense of control over the traumatic memory thereby producing self-confidence, self-esteem and self-efficacy." Rebecca Meghan Davis & Henry Davis, *PTSD Symptom Changes in Refugees*, 16 Torture 10, 16-18 (2006); *see also* Stevan M. Weine, Alma Dzubur

Kulenovic, Ivan Pavkovic & Robert Gibbons, *Testimony Psychotherapy in Bosnian Refugees: A Pilot Study*, 155 Am. J. Psychiatry 1720, 1723 (1998) (concluding that if trauma survivors tell their stories, it can "reduce symptoms and improve survivors' psychosocial functioning," and noting that the study's "findings run contrary to the opinion . . . that it is not helpful to tell the trauma story"); Edna B. Foa, Barbara Olasov Rothbaum, David S. Riggs, and Tamera B. Murdock, *Treatment of Posttraumatic Stress Disorder in Rape Victims*, 59 J. Consulting and Clinical Psychology 715, 717, 722 (1991) (concluding that when victims relived an assault by "imagining it as vividly as possible and describing it aloud," the procedure "was effective in ameliorating PTSD").[4]

This Court has recognized that IJs are qualified to decide whether an noncitizen's testimony is credible, and that these decisions enjoy "highly deferential" review, *Mansour v. I.N.S.*, 230 F.3d 902, 906 (7th Cir. 2000), and should be only overturned under "extraordinary circumstances." *Pop v. I.N.S.*, 270 F.3d 527, 531 (7th Cir. 2001). Indeed, IJs frequently make credibility determinations when presiding over removal proceedings involving asylum-seekers, who may be similarly traumatized. *See, e.g.*, *Oshodi*, 729 F.3d at 885; *Shrestha*, 590 F.3d at 1045-48. "Because credibility is quintessentially an issue for the trier of fact, the IJ is in the best position to determine, conclusively and explicitly, whether or not the petitioner is to be believed." *Mendoza Manimbao*, 329 F.3d at 661.

[4] Moreover, U visa applicants may face language barriers that make it difficult to submit a written affidavit in English. *See* Kwong, *supra*, at 141 ("As a method of power and control over his intimate partner, a batterer may sabotage the immigrant woman's efforts to learn English in an attempt to isolate her."). These language barriers "may result in seeming inconsistencies" when the adjudicator cannot observe the applicant's testimony. *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003). And given the socioeconomic circumstances in which U visa applicants may find themselves, they may be unable to afford the services of an interpreter to assist them in drafting the application. *See* Kwong, *supra*, at 142 (explaining that "a batterer may sabotage his intimate partner's attempts to obtain vocational training or education," forcing her "to obtain a low-paying occupation").

Particularly given that many U applicants have suffered substantial trauma, an in-person hearing may be necessary to evaluate the victim's credibility.

## III. Allowing Immigration Judges Independent Authority Over U Waiver Determinations Is Necessary to Insure Procedural Fairness for Vulnerable Crime Victims

Allowing IJs to consider U waiver applications adds necessary procedural fairness to an administrative procedure that otherwise contains no provision for review. In particular, unlike the unreviewable paper process at DHS, IJ review of U waiver applications promotes Due Process by (1) allowing the applicant an in-person hearing in which to contest and explain evidence and (2) providing reasonable constraints on the adjudicative process because IJs are required to provide a reasoned basis for their decisions.

First, IJ adjudication of U waiver applications increases procedural fairness because, as explained above, proceedings in immigration court permit a noncitizen victim of crime to respond to evidence and dispute any findings based on erroneous evidence. This stands in sharp contrast to the purely administrative process within DHS, in which applicants do not appear before the immigration officer adjudicating their cases and may be deprived of the opportunity to effectively contest the evidence used against them.

Second, allowing IJs to adjudicate U waiver applications ensures procedural fairness because IJs must provide a reasoned explanation of their decisions. This stands in sharp contrast to the unreviewable paper process that U applicants receive from DHS, which can result in poorly reasoned and unsubstantiated U denials.

Although IJs are given significant leeway in adjudicating discretionary questions, they "cannot reach their decisions capriciously." *Kholyavskiy v. Mukasey*, 540 F.3d 555, 568 (7th Cir. 2008). Rather, "[a]fter weighing all of the factors, both favorable and unfavorable, the BIA must

state its reasons for denying relief." *Cordoba-Chaves v. I.N.S.*, 946 F.2d 1244, 1246 (7th Cir. 1991); *cf. Zero Zone, Inc. v. United States Dep't of Energy*, 832 F.3d 654, 668 (7th Cir. 2016) (an agency decision is arbitrary and capricious where the agency has "relied on factors which Congress had not intended it to consider" or "offered an explanation for its decision that runs counter to the evidence before the agency") (internal citation omitted).

This Court has repeatedly held that an IJ must provide meaningful analysis supporting her conclusions and that the failure to provide a reasoned explanation of a decision is an abuse of discretion. *See, e.g.*, *Moosa v. Holder*, 644 F.3d 380, 386 (7th Cir. 2011) (decisions by the BIA "must be supported by a reasoned explanation that correctly reflects the law"); *Gulati v. Keisler*, No. 06-3221, 2007 WL 2988632, at *2 (7th Cir. Oct. 15, 2007) ("the IJ must provide some reasoned explanation" for its decision); *Gebreeyesus v. Gonzales*, 482 F.3d 952, 954 (7th Cir. 2007) (holding that the BIA is required "to issue opinions with rational explanations and adequate analysis of the record" and criticizing a BIA opinion where "the only two reasons it gave to support [its] conclusion are flawed"). Immigration judge review of U visa waivers is necessary to provide U applicants with a reasoned explanation as to the waiver decision; without it, U applicants would be relegated to USCIS paper adjudications, which are not governed by similar standards.

## IV. Allowing Immigration Judges to Review U Visa Waiver Applications Furthers Congress' Goal of Protecting Crime Victims Because, Otherwise, Waiver Denials Cannot Be Reviewed

As discussed above, Congress' purpose in creating the U Visa program was to help and protect crime victims—an especially vulnerable, traumatized population—in exchange for the assistance those individuals provide to law enforcement. It is implausible that Congress would have held out this carrot of immigration status only to deprive applicants of any meaningful

review of their applications. Under the BIA's reading of the statute, crime victims would be entitled only to what is effectively a shot at a waiver of inadmissibility that is restricted solely to a paper application the denial of which is unreviewable. As shown by the language of the statute, this was not Congress' intent.[5]

Indeed, the inconsistent treatment of U Visa applications and U waiver applications shows the fundamental unfairness of the scheme advanced by the BIA. The appellate division within DHS (the AAO) reviews denials of *U Visa* applications (submitted by applicants outside the United States), but has held that it lacks jurisdiction to review denials of *U waiver* applications (submitted by applicants within the country). *See supra* p. 19 n.5. Under that scheme, even the most arbitrary USCIS decision denying a U waiver necessarily dooms a U applicant no matter how severe the trauma suffered by the applicant or significant the assistance provided to law enforcement—a result inconsistent with Congress' goal of helping immigrant crime victims.

In this case, for instance, Jorge Baez-Sanchez was the victim of a violent armed robbery when he was only 14 years old.[6] When he was walking home from a friend's house, a car passed him, stopped suddenly, and blocked his path forward. Two people got out, one of whom

[5] The current regulations bar an appeal of a U waiver denial within USCIS, *see* 8 C.F.R. § 214.14(c)(5)(ii); *id.* § 212.17(b); *see also* AAO Non-Precedent Decision at 2-4 (Vermont Service Center Apr. 1, 2015), https://www.uscis.gov/sites/default/files/err/D14%20-%20Application%20for%20U%20Nonimmigrant%20Status/Decisions_Issued_in_2015/APR012015_03D14101.pdf (stating that the Administrative Appeals Office ("AAO") does not have jurisdiction to review whether a U waiver was properly denied and that accordingly "no appeal lies from the denial of the waiver") (last visited Feb. 24, 2017). The regulations do permit applicants to "re-fil[e] a request for a waiver" with USCIS "in appropriate cases." 8 C.F.R. § 212.17(b)(3).

[6] Mr. Baez-Sanchez had actually been the victim of a crime at an even younger age when he and his father were carjacked by an assailant with a firearm. Mr. Baez-Sanchez, who was eight years old at the time, was not able to assist the police in solving that crime and did not base his application on it. (R. 736-37.)

brandished a gun. The assailants demanded the boy's valuables and ultimately took a necklace, his coat, and his cell phone before speeding away. (R. 133.)

After the robbery, Jorge ran home and his father called the police. He had had the presence of mind to commit a partial license plate number from the robber's car to memory, as well as the make and model of the vehicle, which he provided to the police. *See id*. About an hour later, the police called Jorge and asked him to identify his robbers in a police lineup, which he was able to do. This investigation resulted in a guilty plea; if it had not, Jorge Baez-Sanchez, young as he was, was prepared to testify at trial—indeed, he went to court on the trial date because his assailants had not yet pled guilty (perhaps waiting to see whether or not the victim would appear to testify first). *See id.* Despite his youth and the risk to himself and his family, Jorge Baez-Sanchez came forward and demonstrated courage and strength of character. His actions exemplify exactly the sort of cooperation with police that Congress intends to encourage with the U Visa.

Unfortunately, Jorge's youth, the environment in which he lived and poor choices and decisions resulted in his engaging in inappropriate activities (though these did not result in physical injury to anyone). He subsequently paid a heavy price for his poor behavior. However, he learned a serious lesson, outgrew those behaviors, matured, and underwent a period of rehabilitation.

Jorge Baez-Sanchez's story, while unique, is not atypical. U Visa applicants, who are victims of violent crimes, have assisted police at great personal risk. They may live in impoverished and dangerous environments, be involved in complex family relationships, and have chaotic personal backgrounds that make them vulnerable to involvement in minor criminal

activity or poor judgments. But they often will mature and outgrow their youthful indiscretions and poor judgments.

It is not every crime victim who can muster the courage to come forward to aid law enforcement. And those who do expose themselves to the possibility of deportation. If the opportunity for IJ review of a waiver application is denied, the system will be far less fair to U applicants than Congress intended. People who could qualify for U status will correctly perceive that they have a lower likelihood of actually receiving a U waiver. As a result, they will be less likely to cooperate with police investigations, further thwarting Congress' goals.

Unless IJs can adjudicate a U waiver of inadmissibility, DHS's *unreviewable* denial of a U waiver will discourage an otherwise qualified and eligible U applicant from availing herself and her family of the protection of a granted U application. In addition, the denial of a U waiver may also effectively foreclose review of a denied U application, since AAO review of a denied application cannot include a review of the waiver denial.[7] Without IJ power to decide waiver applications, and real waiver review, the U Visa for someone like Jorge is essentially an empty promise.

## CONCLUSION

For the reasons stated herein, as well as the reasons stated in Petitioner's briefing, the Petitioner's appeal should be granted.

[7] *See supra* p. 19 n.5.

Respectfully submitted,

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