Case No. 13-1011

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

L.D.G,

Petitioner,

vs.

Eric Holder, Attorney General of the United States,

Respondent

BRIEF *AMICUS CURIAE* OF ASISTA AND Community Legal Services in East Palo Alto IN SUPPORT OF PETITIONER

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I. CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae submits the following corporate disclosure statement:

Community Legal Services in East Palo Alto states that it is a California nonprofit corporation, which has no corporate parents. It is not publicly traded. Similarly, ASISTA is a nonprofit corporation that is not publicly traded.

s/Ilyce Shugall
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Community Legal Services in East Palo Alto

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IV. STATEMENT OF INTEREST OF *AMICUS CURIAE*

ASISTA Immigration Assistance ("ASISTA") co-founded the National Network to End Violence Against Immigrant Women, which worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault and other crimes. Such routes were prescribed in the 1994 Violence Against Women Act (VAWA) and its progeny. ASISTA serves as liaison for the field with Department of Homeland Security personnel charged with implementing these laws, most notably United States Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and the Department of Homeland Security's (DHS') Office on 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.

Community Legal Services in East Palo Alto ("CLSEPA") is a non-profit organization that provides legal assistance to low income immigrants in and around East Palo Alto, California, where two-thirds of the population is Latino or Pacific Islander. The immigration team provides consultations to and

represents local residents in various types of immigration benefits, including applications for U nonimmigrant status. East Palo Alto is a small city that suffers from significant criminal activity. CLSEPA has a close working relationship with the East Palo Alto Police Department as well as crime victims in the community. These relationships facilitate crime victims in reporting crimes to the police department which accordingly assists law enforcement in investigating and prosecuting criminal activity.

V. SUMMARY OF ARGUMENT OF *AMICUS CURIAE*

The instant amicus brief sets forth two specific arguments. First, public policy and due process require a venue in which to review a denial of a waiver of inadmissibility in connection with an application for U nonimmigrant status. The immigration court is the appropriate venue for de novo adjudication of the waiver after such a denial, as it is in the context of other waivers of inadmissibility. Second, the applicable statutes and regulation do not preclude, but rather provide for such adjudication subsequent to a denial of a U nonimmigrant status waiver in immigration court. See 8 U.S.C. § 1182(d)(14); 8 U.S.C. § 1182(d)(3); 8 C.F.R. § 212.17.

VI. ARGUMENT

A. PUBLIC POLICY AND DUE PROCESS REQUIRE A VENUE TO ENGAGE IN REVIEW OF A DENIAL OF A WAIVER OF INADMISSIBILITY IN CONNECTION WITH U NONIMMIGRANT STATUS

1. Background on U Nonimmigrant Status

Congress created U nonimmigrant status to assist victims of certain crimes as well as to assist law enforcement in the investigation and prosecution of such crimes. See Victims of Trafficking and Violence Prevention Act (VTVPA 2000), Pub. L. 106-386, 114 Stat. 1464 § 1513(a) (Oct. 28, 2000); "USCIS Publishes New Rule for Nonimmigrant Victims of Human Trafficking and Specified Criminal Activity," USCIS News Release (Dec. 8, 2008). Congress recognized that immigrant victims may not have legal status, and therefore may be reluctant to help in the investigation or prosecution of criminal activity for fear of deportation. See New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (2007). The fear of deportation can cause immigrant communities to cut themselves off from police and not offer information about criminal activity, even when victimized. As the President of the Police Foundation testified before Congress:

> In communities where people fear the police, very little information is shared with officers, undermining the police capacity for crime control and

> quality services delivery. As a result, these areas become breeding grounds for drug trafficking, human smuggling, terrorist activity, and other serious crimes. As a police chief in one of our focus groups asked, "How do you police a community that will not talk to you?"

Hearing on Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws, 111th Cong. 111-19 at 81-82 (statement of Hubert Williams), http://judiciary.house.gov/hearings/hear_090402.html. Consequently, predators remain on the street, emboldened because they know they can strike with impunity. Moreover, the perpetrators victimize and endanger everyone, not just undocumented immigrants.

Congress intended the U visa to "strengthen the ability of law enforcement agencies to investigate and prosecute such crimes as domestic violence, sexual assault, and trafficking in persons, [and other qualifying criminal activity often targeting immigrants,] while offering protection to alien crime victims in keeping with the humanitarian interests of the United States." 72 Fed. Reg. at 53015 (emphasis added); Pub. Law 106-386, 114 Stat. at 1533. Congress also sought to encourage law enforcement officials to better serve immigrant victims. Id.

The U visa facilitates the reporting of crimes to law enforcement by immigrant victims, while providing law enforcement with a means to regularize the status of cooperating

individuals during investigations and prosecutions. 72 Fed. Reg. at 53015; Pub. Law 106-386, 114 Stat. at 1533. By protecting individual immigrant victims, safer communities are created, which is a benefit to all residents, not just unauthorized immigrants.

Congress recognized that applicants for U nonimmigrant status may be inadmissible to the United States for a variety of reasons and therefore created a generous waiver of inadmissibility at 8 U.S.C. § 1182(d)(14). As the status is nonimmigrant rather than immigrant, the Department of Homeland Security clarified that the general nonimmigrant waiver found at 8 U.S.C. § 1182(d)(3) can similarly be used to waive grounds of inadmissibility in the U visa context.[1] 8 C.F.R. § 212.7(a), (b).

Applications for U nonimmigrant status as well as any corresponding ground of inadmissibility are filed with the United States Citizenship and Immigration Services (USCIS) at the Vermont Service Center (VSC). 8 C.F.R. § 214.14(c); Instructions to Form I-918, http://www.uscis.gov/files/form/i-918instr.pdf (last visited June 17, 2013); Instructions to Form I-192, http://www.uscis.gov/files/form/i-192instr.pdf (last

[1] An individual in U nonimmigrant status may apply for adjustment of status to that of a lawful permanent resident after he or she has been continuously physically present in the United States for at least three years in U nonimmigrant status. 8 U.S.C. § 1255(m). Therefore, U nonimmigrant status often leads to lawful permanent residency.

visited June 17, 2013). While the Administrative Appeals Office (AAO) has jurisdiction over U denial generally, 8 C.F.R. § 214.14(c)(5)(ii), the regulation at 8 C.F.R. § 212.17(b)(3) instructs that there is no appeal of a denial of a waiver of inadmissibility under that section. Inadmissibility waiver denials are, therefore, reviewed by the same adjudicators and supervisors who originally issued the denials.

As discussed in detail in Section B below, nothing in the statute or regulations precludes adjudication by an immigration judge of a U nonimmigrant status waiver under 8 U.S.C. § 1182(d)(3). Moreover, given the important Congressional goals of the U visa, the ameliorative nature of the relief and the complete lack of meaningful review provided by USCIS, *amici* suggest that it is vital that this Court establish that the Executive Office for Immigration Review is an appropriate forum for reviewing denials of a crime victim's inadmissibility waiver.

2. There Must Be a Means for Review of Denials of Applications for Waivers of Inadmissibility in Connection With U Nonimmigrant Status

Due process requires meaningful review in a forum with a neutral arbiter. Noncitizens, even those charged with entering the country illegally, are entitled to procedural due process when threatened with deportation. Non-citizens who have entered

the United States, "even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." Shaughnessy v. United Sates ex. rel. Mezei, 345 U.S. 206, 212 (1953). Years of case law support this position. In as early as 1886, the Supreme Court held that the provisions of the Fourteenth Amendment, under which due process falls, "are universal in their application, to all persons within the territorial jurisdiction." Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886). This principle extends to individuals without lawful status. "[E]ven aliens whose presence in this country is unlawful have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." Plyler v. Doe, 457 U.S. 202, 210 (1982). Moreover, the Seventh Circuit confirmed this fundamental idea, holding that non-citizens become entitled to due process as soon as they cross the border. Bayo v. Napolitano, 593 F.3d 495, 502 (7th Cir. 2010).

Encompassed in this due process right is a right to meaningful review, including de novo adjudication by an immigration judge subsequent to administrative decisions. The Ninth Circuit, for example, has held that the primary purpose of the due process clause is "to protect individuals from a government's arbitrary exercise of its powers." Redman v. County of San Diego, 942 F.2d 1435, 1440 (9th Cir. 1991). "[D]ue process requires that a

person subject to enforcement of a statutory or administrative scheme be permitted to test the validity of that scheme through judicial review." Brown & Williamson Tobacco Corp v. Engman, 527 F.2d 1115, 1119 (2nd Cir. 1975); see also Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) (stressing the importance of judicial review of administrative agency decisions).

Because due process compels a right to seek review of administrative decisions, should the statutory and regulatory scheme for U nonimmigrant waivers be interpreted such that a U crime victim cannot seek de novo adjudication subsequent to the denial of a waiver under 8 U.S.C. § 1182(d)(3) or § 1182(d)(14), the statute and/or regulation would be unconstitutional.[2] Moreover, the need for procedural protections – specifically, review of an administrative decision-- is particularly compelling in the U nonimmigrant process. As set forth above, U nonimmigrant status was created by Congress to protect victims of crime and to ensure that such victims will cooperate with law enforcement in the investigation of criminal activity. Limiting de novo adjudication of waiver denials to only that part of the agency that decided the waiver violates basic procedural

[2] The constitutional concerns are even greater for a U nonimmigrant status applicant in removal proceedings as longstanding Supreme Court case law is clear that an individual in removal proceedings must be afforded due process. Shaughnessy v. United Sates ex. rel. Mezei, 345 U.S. 206, 212 (1953).

fairness for the victims of crimes Congress sought to help. Law enforcement has certified that these applicants have been helpful to them; they deserve review by a neutral arbiter, particularly one who is determining whether or not they should be removed from the country.

"'[I]t is a cardinal principle' of statutory interpretation… that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" Zadvydas v. Davis, et al., 533 U.S. 678, 689 (2001) (citing Crowell v. Benson, 285 U. S. 22, 62 (1932); United States v. X-Citement Video, Inc., 513 U. S. 64, 78 (1994); United States v. Jin Fuey Moy, 241 U. S. 394, 401 (1916)). In Zadvydas, the Supreme Court noted that it has "read significant limitations into other immigration statutes in order to avoid their constitutional invalidation." Id. (citing United States v. Witkovich, 353 U. S. 194, 195, 202 (1957)).

Precluding any type of review of a waiver of inadmissibility in any neutral adjudicatory body raises constitutional concerns. Therefore, regulations purporting to preclude any sort of review should not be construed to eliminate review by the Immigration Court, Board of Immigration Appeals and the Administrative Appeals Office. This is particularly important in statutes that may be interpreted such that an office within an administrative

agency—here the USCIS Vermont Service Center—is the only entity with authority to adjudicate an application.

EOIR adjudicates inadmissibility waiver denials in other contexts; USCIS precludes meaningful review of U inadmissibility waivers in its own system. *Amici* suggest, therefore, that to avoid violations of crime victims' due process rights, EOIR must assume de novo adjudication of U visa waivers subsequent to their being denied. This will ensure crime victims receive the protections Congress intended.

3. Ensuring a Meaningful Review of Denials of U Nonimmigrant Waiver Applications Will Promote Well-Reasoned Decisions by the Adjudicatory Bodies Tasked With Adjudicating Such Applications

Even in discretionary decisions, the adjudicator must provide a reasoned decision when denying an application for a waiver of inadmissibility. For example, the BIA established a clear standard in deciding inadmissibility waivers under INA section 212(h) (8 U.S.C. § 1182(h)). "The immigration judge must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and human considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interest of this country." Matter of Mendez-Moralez, 21 I. & N. Dec. 296, 301 (1996). The immigration judge is required to enunciate the basis for his or her decision in the

opinion. Id. This includes an explanation of how the immigration judge weighed the factors and arrived at his or her conclusion. Sagaydak v. Gonzales, 405 F.3d 1035, 1040 (9th Cir. 2005). In the U context, the same adjudicators and supervisors that denied the waiver decide whether that denial was well-reasoned. Given this regulatory structure, immigration judges are the only neutral arbiters available to decide whether those adjudicators wrongfully denied a U crime victim's inadmissibility waiver.

B. THE STATUTE AND REGULATIONS PROVIDE FOR DE NOVO REVIEW OF A DENIAL OF A U VISA WAIVER IN IMMIGRATION COURT

Amici agrees with the arguments set forth by counsel for Petitioner regarding the statutory and regulatory authority for the immigration judge to adjudicate a waiver de novo in the context of an application for U nonimmigrant status. As such, the arguments will not be repeated at length in the instant brief. Rather, *amici* will highlight key points in Petitioner's brief and assert them in a broader context.

1. The Regulation at 8 C.F.R. § 212.17 Supports a Finding that an Immigration Judge Has The Authority to Review a Denial of a Waiver of Inadmissibility in Connection with an Application for U Nonimmigrant Status

The regulation at 8 C.F.R. § 212.17(b)(3) states, "[t]here is no appeal of a decision to deny a waiver. However, nothing in this paragraph is intended to prevent an applicant from re-filing a request for a waiver of ground of inadmissibility in appropriate cases." The regulation does not specify where the applicant should re-file the request for a waiver, which suggests that an applicant can re-file the waiver application with the immigration court or some other adjudicatory body with a neutral arbiter. As set forth in Section A, to interpret the regulation such that an applicant can only re-file with the same adjudicators that previously denied the application would raise constitutional concerns, as there would be no meaningful review of the agency decision. A crime victim's ability to re-file his or her waiver application in immigration court provides for the level of review necessary to quell constitutional concerns.

Moreover, other types of applications in the immigration context are initially reviewed by USCIS and, if denied, can subsequently be adjudicated by an immigration judge. For example, an immigration judge has jurisdiction to adjudicate a petition to remove the conditions of residency on Form I-751 if the application is denied by USCIS. See Matter of Francisco Herrera Del Orden, 25 I. & N. Dec. 589 (BIA 2011) (remanding a denied I-751 waiver back to the Immigration Judge so that new evidence could be considered in support of waiver under

§216(c)(4)). Similarly, an immigration judge may review an adjustment of status application under 8 U.S.C. § 1255 after USCIS has denied an application. See In re L-K-, 23 I. & N. Dec. 677 (BIA 2004) (reviewing Immigration Judge's grant of adjustment of status pursuant to § 1255(c)(2) after denial by USCIS on basis of failure to maintain lawful status). Moreover, as noted below, this Court has specifically found that immigration judges retain jurisdiction over 8 U.S.C. § 1182(d)(3) waivers in other contexts.

2. The Statute Provides for De Novo Adjudication of a U Nonimmigrant Waiver in Immigration Court

The regulation similarly suggests de novo adjudication of a waiver in the U nonimmigrant status context is available in immigration court, as it provides that a waiver may be adjudicated under either 8 U.S.C. § 1182(d)(14) or 8 U.S.C. § 1182(d)(3). 8 C.F.R. § 212.17(b)(1). The statute at 8 U.S.C. §1182(d)(3) reads, in relevant part:

> Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) . . . may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (ii) who is inadmissible under subsection (a)[,] . . . but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the

> United States temporarily as a nonimmigrant in the discretion of the Attorney General.

8 U.S.C. § 1182(d)(3)(A).

The Supreme Court has held that if statutory language is clear, that is the end of the inquiry, as the IJ, the BIA and this Court "must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). The Court also concluded that it must "assume that the legislative purpose is expressed by the ordinary meaning of the words used." I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 431, 107 S.Ct. 1207, 1213 (U.S. 1987) (internal quotations omitted).

In this case, the statute grants authority to the "Attorney General" to adjudicate waivers under 8 U.S.C. § 1182(d)(3). The Office of the Attorney General falls within the United States Department of Justice. The United States Department of Justice: Office of the Attorney General, http://www.justice.gov/ag/ (last visited 6/18/2013). Likewise, the Executive Office for Immigration Review falls within the umbrella of the United States Department of justice. The United States Department of Justice: Executive Office for Immigration Review, http://www.justice.gov/eoir/ (last visited 6/18/2013). On the other hand, the Department of Homeland Security is an entirely separate department within the United States President's

cabinet. See U.S. Const. amend. II, § 2; The White House: The Cabinet, http://www.whitehouse.gov/administration/cabinet (last visited 6/19/2013). Moreover, despite amendments to the Immigration and Nationality Act, Congress has declined to amend the language of the Statute even though courts have, both before and after 2002, consistently interpreted the phrase "Attorney General" to include the immigration court. For example, in In re H-N-, 22 I. & N. Dec. 1039, 1043 (1999), the BIA held that 8 C.F.R. § 209—a regulation that uses the phrase "Attorney General"—"simply states that the 'Attorney General' has" certain authority and "that either [] [USCIS] or the Immigration Judges, or both, could exercise jurisdiction over such waivers." Id. After the creation of the Department of Homeland Security, the BIA again held that the immigration judge had jurisdiction because the statute applies to the "Attorney General" which includes the Immigration Judge. In re K-A-, 23 I. & N. Dec. 661, 664 (BIA 2004).

The statute specifies that only the Secretary of Homeland Security may adjudicate the waiver at 8 U.S.C. § 1182(d)(14), in stark contrast to the statute at 8 U.S.C. § 1182(d)(3), which does not limit review to DHS. Following the rules of statutory construction, the immigration courts must, therefore, have the authority to adjudicate an application for a waiver for a U visa applicant under 8 U.S.C. § 1182(d)(3).

This Court has found that an immigration judge has jurisdiction to adjudicate a waiver of inadmissibility under 8 U.S.C. § 1182(d)(3). Pointing to 8 U.S.C. § 1182(d)(3)(A), this Court found that whether an alien qualifies for a waiver is a decision that is always left to "the discretion of the Attorney General." Atunnise v. Mukasey, 523 F.3d 830, 839 (7th Cir. 2008). This Court further concluded that "the IJ has the catchall authority during removal proceedings "to take any action consistent with applicable law and regulations as may be appropriate." Id. (citing 8 C.F.R. § 1240.1(a)). Notably, like the U visa, the underlying K-3 visa on which the petitioner intended to obtain lawful status was not an application over which the immigration judge had jurisdiction. Nevertheless, this Court concluded that the immigration judge had the authority to adjudicate the waiver. Atunnise, 523 F.3d at 832, 839.

This Court should again conclude that the immigration judge has such authority in the context of an application for U nonimmigrant status. As in the K-3 context, where an immigration judge can only adjudicate the waiver but not the underlying visa, the immigration judge would only have the authority to adjudicate the U inadmissibility waiver.[3] An

[3] The regulation at 8 C.F.R. § 214.14(c)(1) wherein USCIS is granted exclusive authority to adjudicate U nonimmigrant status

applicant for U nonimmigrant status, a status intended to protect victims of crime whom law enforcement has certified have been helpful, should not be in a worse position under the statute than an applicant for a fiancé visa.

3. The Immigration Court, Board of Immigration Appeals, and the Administrative Appeals Office Have the Authority to Review and Adjudicate Waivers of Inadmissibility in Other Contexts

Numerous waivers of inadmissibility exist in the Immigration and Nationality Act. For example, a non-citizen who is inadmissible for fraud or misrepresentation may seek a waiver under 8 U.S.C. § 1182(i). A non-citizen who is inadmissible for certain crimes may seek a waiver under 8 U.S.C. § 1182(h). Likewise, a non-citizen who finds him or herself inadmissible for having been unlawfully present in the United States in excess of 180 days may seek a waiver under 8 U.S.C. § 1182(a)(9)(B)(v). Each of these waivers can be adjudicated by both USCIS and an immigration judge. Compare 8 C.F.R. § 212.7 with 8 C.F.R. § 1212.7.

Matter of Mendez-Moralez is the leading Board of Immigration Appeals opinion that considers the denial of a

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petitions is different from the regulation at 8 C.F.R. § 212.17(b)(3) in two ways. First, 8 C.F.R. § 214.14(c)(1)(i) specifically discusses the procedures to follow when an applicant is in removal proceedings and makes it clear that the immigration judge does not have the authority to review the application. Second, 8 C.F.R. § 214.14(c)(5)(ii) provides for appellate review of a denial of the application at the Administrative Appeals Office.

waiver under 8 U.S.C. § 1182(h) by an immigration judge. 21 I. & N. Dec. 296 (BIA 1996). The case set forth standards by which an immigration judge should review the waiver and makes it clear that an immigration judge has the authority to adjudicate waivers of inadmissibility. Id. at 301-302.

VII. CONCLUSION

If immigration judges can review waivers for other forms of relief, they must also review them for victims of crimes who have shown they are helpful to our criminal system. USCIS has precluded meaningful review within its own system, thus the immigration court is the only recourse for crime survivors wrongfully denied waivers. *Amici* request that this Court assert and insist that immigration courts ensure this fundamental aspect of due process applies to the crime victims Congress intended to protect.

Respectfully Submitted:

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s/Ilyce Shugall_____
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CERTIFICATE OF COMPLIANCE UNDER FEDERAL RULE OF APPELLATE PROCEDURE 29(a)

Federal Rule of Appellate Procedure 29(a) authorizes the filing of this amicus curiae brief. Pursuant to Rule 29(a), counsel for ASISTA and CLSEPA states that Petitioner has consented to the filing of this brief. Respondent takes no position. Accordingly, a motion for leave to file is submitted together with this brief. Counsel for ASISTA and CLSEPA further states that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and complete copy of the attached BRIEF *AMICUS CURIAE* OF ASISTA and Community Legal Services in East Palo Alto, on the following individuals, by means of the Court's ECF System:

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Counsel for Respondent

this 21st day of June, 2013

/s Ilyce Shugall
Ilyce Shugall