
December 28, 2020

Ms. Lauren Alder Reid
Assistant Director
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

Re: RE: "Good Cause for a Continuance in Immigration Court Proceedings"
RIN 1125-AB03; EOIR Docket No. 19-0410; Dir. Order No. 02-2021,
Submitted via: www.regulations.gov

Dear Ms. Alder Reid:

On behalf of ASISTA, I am submitting this comment in opposition to the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) proposed rule, "Good Cause for a Continuance in Immigration Court Proceedings" initially published in the Federal Register on November 27, 2020 (hereinafter "proposed rule").[1]

ASISTA's mission is to advance the dignity, rights, and liberty of immigrant survivors of violence. For over 15 years, ASISTA has been a leader on policy advocacy to strengthen protections for immigrant survivors of domestic violence, sexual assault, human trafficking and other crimes created by the Violence Against Women Act (VAWA) and the Trafficking Victims Protection Act (TVPA). We assist advocates and attorneys across the United States in their work on behalf of immigrant survivors of violence. We submit this comment based on our extensive experience.

The proposed rule vastly narrows what EOIR will consider to be "good cause" for a continuance. Coupled with the myriad of other limitations that DOJ has placed on immigration court procedures (e.g. limits on administrative closure), the proposed rule diminishes access to immigration benefits for thousands of individuals, including crime survivors. In this way, DOJ

[1] Executive Office for Immigration Review, Department of Justice. "Notice of Proposed Rulemaking: Good Cause for a Continuance in Immigration Court Proceedings" (hereinafter "Proposed Rule" (85 FR 75925) November 27,2020, available at https://www.federalregister.gov/documents/2020/11/27/2020-25931/good-cause-for-a-continuance-in-immigration-proceedings

has undermined the bipartisan Congressional goals to make humanitarian immigration relief accessible to victims. We urge DOJ to immediately withdraw the proposed rule.

## I. DOJ has Failed to Provide a Meaningful Opportunity for Review

DOJ issued this notice of proposed rule-making simultaneously with another EOIR proposed rule regarding motions to reopen.[2] DOJ has provided the public with a mere 30-day period in which **to review and comment on them both**. This time frame is utterly insufficient. Executive Order 12866 states that agencies "should afford the public a ***meaningful opportunity*** to comment on any proposed regulation, which in most cases should include a comment period of ***not less than*** 60 days."[3] Instead, DOJ has placed unjustified administrative and personal strains on stakeholders by providing such short comment periods for the rules, especially with a deadline that falls in the middle of the holiday season.

Stakeholders, including our own organization, must balance the demands of responding to constant and complex changes to immigration policy, while at the same adapting to irregular work conditions and engaging in care-taking responsibilities during the COVID-19 pandemic. DOJ has not provided any rationale why such a short comment period is necessary. Rather, the agency willfully and deliberately derides the proper administrative process by providing such an inadequate timeframe to review and provide comment.

Given the limitations DOJ has needlessly placed on the comment period, this comment reflects only a fraction of the substantive issues we would have liked to address in our response. Should the comment period be extended, we would provide further details regarding our additional concerns.

## II. Background on VAWA and TVPA-based Forms of Immigration Relief

Many immigrant survivors of domestic violence, sexual assault, and human trafficking fear that reaching out for help will result in their deportation.[4] A 2019 nationwide survey of advocates found that 75% of advocates who work with survivors state that immigrant survivors fear calling the police and 3 out of 4 advocates surveyed stated that survivors fear going to court for a matter related to the abuser/offender, with one responded stating "Immigrant survivors no longer want

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[2] Executive Office for Immigration Review, Department of Justice. "Notice of Proposed Rulemaking: Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal"(85 FR 75942) November 27,2020, available at https://www.federalregister.gov/documents/2020/11/27/2020-25912/motions-to-reopen-and-reconsider-effect-of-departure-stay-of-removal

[3] Executive Order 12866 58 Fed. Reg. 190 (September 30, 1993), available at https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf [Emphasis added].

[4] *See* Cora Engelbrecht. "Fewer Immigrants Are Reporting Domestic Abuse: Police Blame Fear of Deportation" New York Times (June 3, 2018), available at https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html

to go to family court. They are too scared. They put up with abuse and they refuse to get child support because they are scared they will be reported to Immigration [authorities].[5]

Abusers and perpetrators of crime often prey on that same fear: "[o]ne 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."[6] The service providers and advocates we serve hear these stories often. Survivors report that abusive partners "often threatened them with halting or stopping their immigration process. Common threats included contacting immigration or withholding the [survivors'] green card."[7] As survivors may rely on their abusive spouse for their legal status, these threats coerce survivors to stay silent about the abuse they endure.[8]

As part of its efforts to stop the weaponization of our immigration system by abusers, rapists, human traffickers and other perpetrators of crime, a bipartisan majority in Congress created special paths to immigration relief for survivors in VAWA because it recognized:

> a battered spouse may be deterred from taking action to protect him or herself, such as filing for a civil protection order, filing criminal charges, or calling the police, because of the threat or fear of deportation. Many immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. ***They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave***.[9]

Later Congress established, also in a bipartisan fashion, two additional remedies for immigrant survivors: the T visa to assist victims of human trafficking, and the U visa to assist noncitizen

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[5] *See* "May 2019 Advocate Survey: Immigrant Survivors Fear Reporting Violence" Asian-Pacific Institute on Gender Based Violence, ASISTA Immigration Assistance,
Casa de Esperanza: National Latin@ Network, National Alliance to End Sexual Violence, National Domestic Violence Hotline, National Network to End Domestic Violence, and Tahirih Justice Center available at https://www.tahirih.org/pubs/may-2019-advocate-survey-immigrant-survivors-fear-reporting-violence/ ;*See also* Rebecca Tan. "Amid immigration crackdown, undocumented abuse victims hesitate to come forward" Washington Post (June 30, 2019) available at https://www.washingtonpost.com/local/social-issues/amid-immigration-crackdown-undocumented-abuse-victims-hesitate-to-come-forward/2019/06/30/3cb2c816-9840-11e9-830a-21b9b36b64ad_story.html?utm_term=.f0302819c5d2

[6] *See* Stacey Ivie et al. "Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims", Police Chief Magazine (April 2018), available at http://www.policechiefmagazine.org/wp-content/uploads/PoliceChief_April-2018_F2_Web.pdf *See also* Matthew Haag. "Texas Deputy Accused of Molesting 4-year-old and Threatening to Deport Her Mother" New York Times (June 18, 2018), available at https://www.nytimes.com/2018/06/18/us/cop-molests-girl-deport-mother.html;

[7] Monica Scott, Shannon Weaver and Akiko Kamimura. "Experiences of Immigrant Women who Applied for Violence Against Women Act (VAWA) self-petitions in the United States: Analysis of Legal Affidavits." Diversity and Equality in Health and Care (2018) 15(4): 145-150, available at http://diversityhealthcare.imedpub.com/experiences-of-immigrant-women-who-applied-for-violence-against-women-act-vawa-self-petition-in-the-united-states-analysis-of-lega.pdf

[8] *Id.*

[9] *See* H.R. REP. NO. 103-395, at 26-27 (1993)[Emphasis added]; *See also* Section 1513(a)(2)(A),

victims of certain eligible crimes (including domestic violence, sexual assault, and trafficking) who are willing to assist in the investigation or prosecution of those crimes ***in keeping with the humanitarian interests of the United States.***[10] In creating these new remedies for immigrant victims, Congress recognized the importance of fostering cooperation between undocumented victims and law enforcement or other agencies tasked with investigating crimes.[11] Congress found that "providing battered immigrant women and children . . . *with protection against deportation* . . . frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers."[12]

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."[13] Senator Paul Sarbanes stated that this expansion of the Violence Against Women Act of 1994 "will also make it easier for battered immigrant women to leave their abusers w*ithout fear of deportation*."[14] More recently, during the debate on the Violence Against Women Reauthorization Act of 2013, Senator Amy Klobuchar described the importance of the U visa program from a former prosecutor's perspective, recounting several cases where the perpetrator threatened to deport the immigrant victim if the victim came forward to law enforcement.[15] The intent of Congress could not be any clearer: immigrants who have been victimized in the United States should be able to pursue protection without the threat of deportation.

Indeed, these protections play a critical role in helping immigrant survivors find independence, safety and stability for themselves and their children. Over the years since Congress created the U visa, USCIS and Immigration and Customs Enforcement ("ICE") have implemented several policies to ensure legitimate crime victims are not removed while awaiting decisions on their U visa cases.[16] The BIA previously adopted a similar framework to avoid removing crime victims

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[10] Public Law No: 106-386, 114 Stat. 1464 (2000) (indicating that Congress created the U and T visa program to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking...and other crimes...committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.")

[11] *Id. See also* section 1513(a)(2)(A), Public Law No: 106-386, 114 Stat. 1464.

[12] Pub. L. No. 106-386, § 1502(a)(2), 114 Stat. 1464 (2000) (emphasis added).

[13] 146 Cong. Rec. S10185 (2000) (statement of Sen. Patrick Leahy)

[14] 146 Cong. Rec. S8571 (2000) (statement of Sen. Paul Sarbanes) (emphasis added);

[15] 159 Cong. Rec. S497, 498 (2013)

[16] See e.g. John Morton. "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs" (June 17, 2011) (Hereinafter "Morton Memo"); available at: https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf/; Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Order of Deportation or Removal," Peter S. Vincent, Principal Legal Advisor, ICE(Sept. 25, 2009) available at: https://www.ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf (Vincent Memo); "Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant," David J. Venturella, Acting ICE Director (Sept. 24, 2009); available at: https://www.ice.gov/doclib/foia/dro_policy_memos/11005_1-hd-stay_requests_filed_by_u_visa_applicants.pdf (Venturella memo);

in immigration proceedings.[17] And yet, despite the immense benefit that these protections provide for survivors and their families, DOJ has repeatedly attempted to leverage bureaucracy to limit access to these protections in ways that directly contravenes Congressional intent.

## III. The Proposed Rule Will Harm Immigrant Crime Survivors

The proposed rule outlines that if the possibility of relief is speculative or remote it would not warrant "good cause" for a continuance. For immigrant visas, this means that the Respondent must demonstrate:

1) that a visa is immediately available or the approval of the visa application would provide or would provide a priority date within six months or less from the immediate action date in the Visa bulletin for the month in which a motion to continue;
2) They are prima facie eligible for the visa and if applicable eligible for adjustment and any necessary waivers; and
3) Immigration judges have jurisdiction of the adjustment and relevant waivers as a matter of discretion.[18]

Thus, in order to request *a continuance* based on having an application pending before USCIS, a Respondent must essentially be able to present their entire case, including eligibility for adjustment and waivers "as a matter of discretion." These additional factors do not simplify the processes for Immigration Judges--rather they add arbitrary, unnecessary and burdensome requirements. Even more egregious, if an immigrant visa application or petition is approved, but is granted parole or deferred action, this would not constitute good cause for a continuance. This provision may directly impact VAWA self-petitioners and their family members who are granted deferred action pursuant to approval of the I-360 VAWA self-petition. Thus, while the priority dates are current for the F2A visa bulletin category,[19] whether they will change in the future is unknown. In addition, VAWA derivatives who may fall into the F2B categories will not be able to avail themselves of a continuance in immigration court for processing delays wholly outside of their control.

For nonimmigrant visas, the proposed rule indicates that unless a Respondent demonstrates that the the visa and waiver would vitiate all grounds of removability charged and that a final approval of a visa application or petition, including waivers, has occurred or will occur within six months of the request, they will not be able to demonstrate good cause.[20] Similarly, this rule does not apply to prima facie determinations, parole, deferred action, bona fide determinations or any similarly disposition short of approval. This provision is arbitrary and absurd for myriad

[17] *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012)
[18] Proposed Rule at 75940.
[19] Department of State. December 2020 Visa Bulletin, available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-december-2020.html
[20] Proposed Rule at 75940

reasons and will specifically and uniquely harm Respondents applying for survivor-based nonimmigrant relief like U and T visas. Again, the proposed rule directly contravenes existing law and authority and unjustly punishes survivors for circumstances over which they have no control, including the egregious and surging USCIS processing delays. [21]

### A. The Proposed Rule Punishes Survivors for Administrative Inefficiencies

USCIS processing times are at crisis levels. A report by the American Immigration Lawyers Association (AILA) shows that average processing times continued to climb, and the average case processing time has now risen by 101 percent from FY14 through FY19.[22] Processing times for survivor-based forms of immigration protections like VAWA self-petitions and U and T visas have skyrocketed, undermining the effectiveness of these critical benefits. VAWA self-petitions now take between 17.5 and 22.5 months to be adjudicated.[23] USCIS' posted processing times for T visa applications for victims of human trafficking are between 18 and 29 months,[24] which at the higher limit represents a 353% increase from FY2015 when these applications took 6.4 months to adjudicate.[25] In the case of U visas, the delay is even more egregious, as there is nearly a 5 year backlog in the adjudication process. When *Sanchez Sosa* was issued in June 2012, processing times for U visas were a little over six months.[26] Current processing times for I-918 U visa petitions show that adjudications can take between 57 and 57.5 months.[27] This is the posted time for placing cases on the **U visa waitlist**, not the issuance of a full 4-year U visa. USCIS estimates it could take between 5 and 10 years for applicants to obtain a U visa depending on when they filed.[28]

The U visa regulations provide that all eligible U visa petitioners, who due solely to the cap, are not granted U nonimmigrant status **must** be placed on a waitlist **and granted deferred action** while on the waitlist.[29] This regulatory directive signifies that but for the annual visa cap, that a waitlisted petitioner has an approvable application; it is not simply speculative as the proposed

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[21] *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012)
[22] American Immigration Lawyers Association. "AILA Policy Brief: Crisis Level USCIS Processing Delays and Inefficiencies Continue to Grow" (February 26, 2020), available at https://www.aila.org/advo-media/aila-policy-briefs/crisis-level-uscis-processing-delays-grow
[23] *See* USCIS Processing Times at https://egov.uscis.gov/processing-times for processing times for I-360 VAWA self petitions adjudicated at the Vermont Service Center
[24] *Id*. for processing times for I-914 Application for T Nonimmigrant Status processed at Vermont Service Center
[25] *See* USCIS. "Historic National Average Processing Times for All USCIS Offices", available at https://web.archive.org/web/20190823154954/https://egov.uscis.gov/processing-times/historic-pt
[26] USCIS. "Vermont Service Center Processing Time Report (8/17/12)" Reporting processing times as of June 30, 2012, available at https://www.aila.org/infonet/processing-time-reports/vsc/2012/vsc-ptr-08-17-12
[27] *See* USCIS Processing Times at https://egov.uscis.gov/processing-times/ for processing times for I-918 Petition for U Nonimmigrant Status adjudicated at the Vermont or Nebraska Service Centers
[28] USCIS. U visa Filing Trends (April 2020), available at https://www.uscis.gov/sites/default/files/document/reports/Mini_U_Report-Filing_Trends_508.pdf
[29] 8 CFR 214.14(d)(2)

rule would frame it. The fact that this is given so little weight under the proposed rule is unconscionable.

These shameful delays compromise the safety and well-being of applicants and their families, and continue to grow substantially since at least 2015.[30] For years, advocates have raised their concerns about the growing processing times, and USCIS' efforts to address the backlog have been insufficient.[31] Such long waits for the adjudication of their cases, coupled with other barriers (like a lack of access to work authorization or other financial support) can be devastating to victims, and may possibly place them either facing homelessness or having to return to violent homes. Similarly, survivors who are facing these incredible backlogs risk potential deportation before their applications are adjudicated, which contravenes the purpose of these bipartisan protections established by Congress ***to provide protection from removal***.

Congressional goals are also undermined by U and T visa processing delays as they negatively impact law enforcement's ability to investigate and prosecute criminal activity within their own communities. Staff at the Denver district attorney's office put it plainly, "If the delay is too long, it could limit the value of the tool."[32]

The proposed rule adds insult to this injury for crime survivors. Not only do they face the insecurity and lack of safety waiting years for a decision on their affirmative applications before USCIS, but now DOJ is actively blocking their path toward relief. By limiting administrative closure, by limiting motions to reopen, restricting access to status dockets and continuances, by implementing arbitrary scheduling orders and other policies, DOJ is shutting the door on immigrant crime survivors which destabilizes and undermines bipartisan Congressional will.

### B. The Proposed Rule Ignores the Obligations of Immigration Judges Under Existing Law

In 2012, the BIA issued *Matter of Sanchez Sosa*, setting the criteria for considering continuances for U visa applicants in removal proceedings.[33] The BIA held that in determining whether good cause exists to continue removal proceedings to await USCIS's decision on a U visa petition, an immigration judge must consider the immigrant's "prima

[30] *See* Note 25 *supra*, specifically information posted for I-918: Petition for U Nonimmigrant Status, showing the posted processing times for U visa applications in FY2015 was 11.5 months ; *See also* Kate Linthicum. "Safety for immigrant victims put on hold by U-visa delay" Los Angeles Times (Feb. 1, 2015), available at http://www.latimes.com/local/california/la-me-u-visa-20150202-story.html.

[31] Sign on letter to USCIS regarding U visa backlog with USCIS Response (2016) available at https://asistahelp.org/wp-content/uploads/2019/07/2016-ASISTA-Sign-on-letter-on-U-processing-delays-and-response-1.pdf

[32] *See* Human Rights Watch. "Immigrant Crime Fighters: How the U visa Program Makes U.S. Communities Safer" (July 8, 2019) available at https://www.hrw.org/report/2018/07/03/immigrant-crime-fighters/how-u-visa-program-makes-us-communities-safer

[33] 25 I&N. Dec. 807 (BIA 2012)

facie eligibility for the U visa."[34] The BIA held that immigration judges should consider good faith factors including "(1) DHS's response to the motion; (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for the continuance and other procedural factors."[35] The BIA determined a rebuttable presumption exists that an individual who has filed a prima facie approvable U visa petition with USCIS will warrant a continuance.[36] The Board in *Sanchez Sosa* found that if a petition has been filed with USCIS with a law enforcement certification and it meets the criteria to be granted, then "any delay not attributable to the Respondent 'augurs in favor of a continuance.'"[37] The Board also laid out other factors the IJ may consider, including the history and number of continuances being granted by an Immigration Judge, and the length of time the petition is pending.[38]

Previously, the prima facie determinations outlined in *Sanchez Sosa* could be requested by ICE to USCIS. Prior guidance mandated that ICE trial attorneys ***shall request*** a continuance to allow USCIS to make a prima facie determination (PFD) in U visa matters.[39] Once a prima facie case has been established, the Vincent Memo instructed ICE attorneys that they ***should*** consider administrative closure or seek to terminate proceedings pending final adjudication of the petition. This guidance was created to ensure compliance with the TVPRA of 2008.[40] This guidance, along with the *Sanchez Sosa* decision, were designed to create a safety net against the removal of survivors with pending applications. However, ICE has dismantled the protective "prima facie" system it has used for nearly a decade to ensure U visa petitioners are not removed before their petitions are adjudicated.[41]

Since ICE unjustly refuses to request prima facie determinations from USCIS, Immigration Judges are thus bound by *Matter of Sanchez Sosa* to assess a prima facie eligibility on their own, focusing the inquiry on the central elements of the U visa petition: qualifying crime, harm suffered, and helpfulness of the applicant.[42] If the respondent is inadmissible, the immigration judge should also assess the "likelihood that USCIS will exercise its discretion

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[34] *Id.* at 813 n.7.
[35] *Id* at 815
[36] *Id*.
[37] *Id*. at 814.
[38] *Id.* at 815.
[39] Peter S. Vincent, Principal Legal Advisor, ICE(Sept. 25, 2009) available at: https://www.ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf (Vincent Memo); "Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant," David J. Venturella, Acting ICE Director (Sept. 24, 2009); available at: https://www.ice.gov/doclib/foia/dro_policy_memos/11005_1-hd-stay_requests_filed_by_u_visa_applicants.pdf (Venturella memo)
[40] Vincent memo at 1.
[41] Immigration and Customs Enforcement. "Revision of Stay of Removal Request Reviews for U Visa Petitioners" (August 2, 2019), available at https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners
[42] Sanchez Sosa at 813.

favorably" in considering the waiver of inadmissibility.[43] Immigration Judges must make these determinations, as the respondent's prima facie eligibility remains a primary factor in the consideration of a continuance in the U visa context.[44] Nothing in the subsequent BIA cases, *Matter of L-N-Y-* or *Matter of L-A-B-R-* eliminates the required factors and analysis presented in *Sanchez Sosa*.[45] Thus, it makes no sense to ***require*** Immigration Judges to conduct this evaluation, and at the same time essentially discount it entirely in determining good cause under the proposed rule.

### C. The Proposed Rule Places Survivors at Increased Risk of Removal and Undermines Congressional Intent

The proposed rule's reliance on stays of removal from DHS to ensure that Respondents have collateral applications adjudicated before removal is grossly misplaced.[46] *Sanchez Sosa* also discusses that Respondents subject to an order of removal may seek a stay from the USCIS to await the adjudication of a U visa, noting that if the U visa is granted, the [Respondent] may file a motion to reopen and terminate removal proceedings under 8 C.F.R. § 214.14(c)(5)(i).[47] When the BIA issued *Sanchez Sosa*, ICE had the prima facie system in place which outlined a process for U visa petitioners to seek stays of removal. Under this 2009 guidance, ICE was instructed to favorably view an individual's request for a stay of removal if USCIS has determined that the alien has established prima facie eligibility for a U visa.[48] When deciding the stay request, the ICE should also consider favorably any humanitarian factors related to the individual or their close relatives who rely on the alien for support. The Venturella memo instructs ICE officers that if ICE grants a stay, it should be for 180 days, and that that period of time ***should be extended*** "as needed" for USCIS ***to complete adjudication of the petition***.[49]

As noted above, ICE's 2019 guidance regarding issuing stays of removal for U visa petitioners has superseded this prior framework which now puts survivors at a greater risk of removal before their applications are adjudicated. Furthermore, ICE's standards and criteria for granting stays of removal are extremely varied nationwide, and ICE has increasingly referenced the fact that U visa petitioners may await adjudication abroad, using this argument in support of stay request denials, a rationale that is repeated in the proposed rule.[50] The proposed rule cites *Matter of L-N-Y-* which restates that respondents are eligible to continue to

[43] *Matter of L-N-Y-* at 758.
[44] *Sanchez Sosa* at 814.
[45] *See Matter of L-A-B-R-* at 413, 418 (citing *Sanchez Sosa* and *Hashmi* with approval).
[46] Proposed rule at 75933
[47] *Sanchez Sosa* at 815, n. 10
[48] Vincent Memo at 2
[49] Venturella Memo at 3.
[50] Proposed Rule at 75930.

pursue a U visa, even after removal, as if this causes them no real harm.[51] This position ignores the reality immigrant crime victims experience and threatens the integrity of the U visa system Congress created to encourage full participation in the U.S. criminal justice system.

Congress ***did not bar*** immigrants in removal proceedings or with outstanding orders of removal from accessing U nonimmigrant status from within the U.S. Instead, Congress created a generous waiver of inadmissibility for U nonimmigrants who may otherwise be inadmissible due to immigration violations.[40] Congress also contemplated the stay of removal orders pending final adjudication of U nonimmigrant status petitions:

> "If the Secretary of Homeland Security determines that an application for nonimmigrant status under subparagraph (T) or (U) of section 1101(a)(15) of this title filed for an alien in the United States sets forth a prima facie case for approval, the Secretary may grant the alien an administrative stay of a final order of removal under section 1231(c)(2) of this title until-
>
> (A) the application for nonimmigrant status under such subparagraph (T) or (U) is approved; or
>
> (B) there is a final administrative denial of the application for such nonimmigrant status after the exhaustion of administrative appeals.[52]

To further Congressional intent, DHS implemented regulations providing protection to those with an approved U nonimmigrant status petition who have an outstanding order of removal:

> For a petitioner who is subject to an order of exclusion, deportation, or removal issued by the Secretary, the order will be deemed canceled by operation of law as of the date of USCIS' approval of Form I-918. A petitioner who is subject to an order of exclusion, deportation, or removal issued by an immigration judge or the Board may seek cancellation of such order by filing, with the immigration judge or the Board a motion to reopen and terminate removal proceedings.[53]

Removal of individuals before their cases are adjudicated can have devastating results: additional trauma, financial instability, the instability and the risk of increased violence in one's home country, loss of access to the justice system and services that are assisting crime victims, and potentially family separation. Deportation causes families "severe and sudden financial impact."[54] In addition, removal can cause U visa petitioners to potentially trigger additional grounds of inadmissibility, which can be exceedingly difficult to address from abroad. In T visa cases, the impact of removal before the adjudication of the application is

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[51] Matter of L-N-Y- at 760
[52] 8 U.S.C. § 1227(d)(1).
[53] 8 C.F.R. § 214.14(c)(5)(i).
[54] Samantha Artiga & Barbara Lyons, *Family Consequences of Detention/Deportation: Effects on Finances, Health, and Well-Being*, Kaiser Family Foundation (2018), *available at* *https://www.kff.org/racial-equity-and-health-policy/issue-brief/family-consequences-of-detention-deportation-effects-on-finances-health-and-well-being/* .

devastating, as removal renders an T visa applicant ineligible for relief given the requirements of the visa. Deporting survivors before their applications are adjudicated thwarts efforts of certifying agencies to investigate or prosecute criminal activity in their communities. These complexities, coupled with the extreme USCIS processing delays, makes this rationale a complete farce.

Thus, ICE has diminished procedural protections for survivors. USCIS continues to inadequately staff and sluggishly process crime victim applications. And now EOIR has eliminated docket management tools, and hightented standards for continuances so they risk deportation before their case is decided. At every point, at every turn, we continue to fail immigrant crime survivors. With this proposed rule, EOIR further shuts the door on those a bipartisan majority Congress chose to protect. Limiting access to continuances deeply prejudices immigrant crime survivors, and as such this proposed rule should be withdrawn.

### D. The Proposed Rule Adds Ultra Vires Burdens on Survivors

The proposed rule discusses the framework spelled out in *Matter of L-A-B-R-* and subsequently in *Matter of L-N-Y-* which evaluates primary factors for continuances (i.e. ''the likelihood that the individual will receive the collateral relief'' and ''whether the relief will materially affect the outcome of the removal proceedings.') and secondary factors (diligence, DHS position on the motion, the length of the requested continuance, and the procedural history of the case). In *Matter of L-N-Y-,* BIA gave substantial consideration to the fact that the Respondent in that case only applied for U visa relief in 2019 when the qualifying crime occurred in 2009.[55]

Yet, Congress did not establish a statute of limitations for victims to apply for U visa relief. The U visa statute specifically indicates that applicants must prove that they (or in the case of a child under the age of 16, the parent, guardian, or next friend of the alien) have "**been helpful, is being helpful, or is likely to be helpful** to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii)."[56] Thus, the statute contains no time limitations on when survivors may avail themselves to U visa relief given the many barriers they often face accessing protection and safety. Indeed, crime survivors may not avail themselves to U visa relief directly after victimization for myriad reasons, including healing from the trauma and emotional harm they suffered, the lack of knowledge about the U visa program, or lack of representation. If the proposed rule were implemented, we are deeply concerned that immigration judges would apply this *ultra vires* requirement which would put survivors at risk of removal.

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55 Matter of L-N-Y- 27 I&N Dec. 755, 768 (BIA 2020)

56 INA 101(a)(15)U)(i)(III)

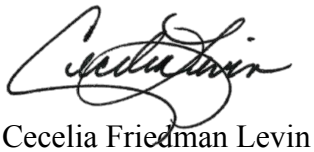
## IV. The Proposed Rule Impedes Access to Counsel

The proposed rule's restrictive definition of "good cause" does not acknowledge the obstacles survivors often face in promptly presenting their cases in immigration court proceedings. Access to counsel is often critical in immigration matters. Studies have shown that represented immigrants in detention who had a custody hearing were four times more likely to be released from detention, and represented immigrants were much more likely to apply for relief from deportation.[57] It is exceedingly difficult for asylum seekers without counsel to navigate the enormous complexity of the U.S. asylum system, especially for claims based on gender-based violence. Adding on to these challenges is the financial insecurity that survivors often face. Abusers commonly prevent survivors from accessing or acquiring financial resources in order to maintain power and control in the relationship.[58] In one study, 99% of domestic violence victims reported experiencing economic abuse.[59] It is therefore highly unrealistic to expect survivors to secure counsel, *pro bono* or otherwise quickly enough without sufficient time for a continuance.

## V. Conclusion

For the reasons mentioned above, we hold that the proposed rule will unjustly prejudice immigrants eligible for benefits to help them gain stability and thrive. Administrative actions like the proposed rule actively create a chilling effect on survivors coming forward to access relief for which they may be eligible. Proceeding with the proposed rule will undermine the situation Congress sought to fix with the creations of survivor-based immigration relief. It will reinforce the growing belief that these benefits are too unreliable, too attenuated, and too much of a risk. This fear emboldens the threats of abusers and perpetrators of crime, and makes us all less safe. We call on DOJ to promptly withdraw the proposed rule as it makes immigration benefits less accessible and runs counter to bipartisan Congressional intent establishing paths to safety for immigrant survivors.

Respectfully submitted,



Cecelia Friedman Levin
Policy Director
ASISTA

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[57] Ingrid Eagly, Esq. and Steven Shafer, Esq. American Immigration Council. (Sept. 28, 2016), available at: https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court

[58] This is known as economic or financial abuse, which is "behavior that seeks to control a person's ability to acquire, use, or maintain economic resources, and threatens their self-sufficiency and financial autonomy." *See* NNEDV. "Financial Abuse Fact Sheet" https://nnedv.org/?mdocs-file=10108; *See also* Melissa Jeltsen. "The Insidious Form of Domestic Violence That No One Talks about" Huffington Post (October 21, 2014) , available at https://www.huffingtonpost.com/2014/10/21/domestic-violence_n_6022320.html

[59] Adrienne E. Adams. "Measuring the Effects of Domestic Violence on Women's Financial Well-Being" Center for Financial Security-University of Wisconsin-Madison (2011), available at https://centerforfinancialsecurity.files.wordpress.com/2015/04/adams2011.pdf