**Nos. 16-70732, 13-70840**

IN THE

# United States Court of Appeals for the Ninth Circuit

PHILIP MAN,
*Petitioner,*

v.

LORETTA E. LYNCH, ATTORNEY GENERAL OF THE UNITED STATES,
*Respondent.*

On Appeal from an Order Entered by the Board of Immigration Appeals, Case No. A75-538-479

## BRIEF OF *AMICI CURIAE* ASISTA, ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE, FREEDOM NETWORK USA, HER JUSTICE, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE, AND NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF PETITIONER


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

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 the 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 provides 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 promotes culturally relevant intervention and prevention; provides expert consultation, technical assistance and training; conducts and disseminates critical research; and informs public policy.

The California Partnership to End Domestic Violence (the "Partnership") is the federally recognized State Domestic Violence Coalition for California. Like other Domestic Violence Coalitions throughout the U.S. States and territories, the Partnership is rooted in the battered women's movement and the values that define this movement, including working toward social justice, self-determination, and ending the oppression of all persons. The Partnership has a 30-year history of providing statewide leadership, and has successfully passed over 100 pieces of legislation to ensure safety and justice for domestic violence survivors and their children. We believe that by sharing expertise, advocates and legislators can end domestic violence. Every day we inspire, inform, and connect all of those concerned with this issue, because together we're stronger. The Partnership's mission and work are focused on protecting the safety of domestic violence victims and their children and holding batterers accountable.

Freedom Network USA is the largest national alliance of experienced advocates advancing a human rights-based approach to human trafficking in the United States. Our members believe that empowering survivors with choices and support leads to transformative, meaningful change. Together, we influence federal and state policy through action and advocacy. We guide the discussion narrative by prioritizing the self-determination and empowerment of survivors in the development of policies, procedures, and programs. Our members work directly with survivors whose insights and strengths inform our work. And through our national effort, we increase awareness of human trafficking and provide decision makers, legislators, and other stakeholders with the expertise and tools to make a positive and permanent impact in the lives of all survivors.

Since 1993, Her Justice has been dedicated to making a real and lasting difference in the lives of low-income, under-served, and abused women by offering them legal services designed to foster equal access to justice and an empowered approach to life. Her Justice provides legal services to over 3,000 women every year in all five boroughs of New York City. It has continually been on the forefront of ensuring meaningful access to the courts, especially for low-income litigants and survivors of domestic violence, who generally face unique challenges in this arena. In 2015, 71% of Her Justice's clients were born outside the United States. Assisting immigrant victims of domestic violence has been a substantial

part of the organization's practice since its founding. Its immigration practice pursues remedies for survivors of gender-based violence including petitions for U nonimmigrant status ("U visas"). The U visa is a vital remedy that offers clients and their children the safety, stability, and self-determination that was stripped from them by their abusers. However, the vast majority of these individuals will have at least one ground of inadmissibility, often as a result of their victimization. Denying them the possibility of a comprehensive review of their inadmissibility waivers by an immigration judge will render U visa relief meaningless for many victims.

The National Network to End Domestic Violence ("NNEDV") is a not-for-profit organization incorporated in the District of Columbia in 1994 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. NNEDV was instrumental in promoting Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000, 2005, and 2013 and, working with federal, state and local policy makers and domestic violence advocates throughout the nation, NNEDV helps identify and promote policies and best practices to advance victim safety. 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. NNEDV believes that empowering immigration judges with the ability to issue a waiver of inadmissibility at a hearing could be crucial to many domestic violence victims who may not be able to fully express themselves in writing due to issues related to trauma or education/literacy levels. Allowing a victim to orally apply for a waiver at a hearing could be the key for so many victims of domestic violence who might otherwise lack the ability to "make their case" in a written application.

The New York State Coalition Against Domestic Violence ("NYSCADV") is a statewide membership organization comprised of local domestic violence service providers, allies, and community members committed to ending domestic violence through education, advocacy, and social change. Founded in 1978, NYSCADV works to create and support the social change necessary to prevent and confront all forms of domestic violence.

The National Immigrant Justice Center ("NIJC"), a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based not-for-profit organization that provides legal representation and consultation to immigrants, refugees and asylum-seekers of low-income backgrounds. Each year, NIJC represents hundreds of individuals before the immigration courts, Board of Immigration Appeals ("BIA"), Federal Courts of Appeals, and the Supreme Court of the United States through its legal staff and a network of nearly 1,500 pro bono attorneys. This has included representation of dozens of individuals who are eligible for U visas as victims of designated crimes. Prior to *Matter of Khan*, 26 I & N Dec. 797 (BIA 2016), NIJC represented numerous clients who sought U visa waivers in immigration court under Seventh Circuit precedent; NIJC has direct knowledge of the effects of immigration court review in this context.[1]

[1] Amici file this brief with the consent of counsel for both parties pursuant to Rule 29 of the Federal Rules of Appellate Procedure. No counsel for any party authored this brief in whole or in part, and no person or entity made any monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

Amici support the arguments set forth in the Opening Brief submitted by Petitioner Philip Man ("Petitioner"). As that brief explains, under the plain language of 8 U.S.C. § 1182(d)(3) and § 1182(d)(14), both immigration judges ("IJs") and the DHS independently have jurisdiction 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* Opening Brief at 17-34; *see also L.D.G. v. Holder*, 744 F.3d 1022, 1030-32 (7th Cir. 2014). In addition to those arguments, this brief explains the history and purpose of the U statute and offers further reasons why it is consistent with the legislative scheme 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 persons, 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,

[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 do not need to receive and do not receive visas once found qualified, but are issued U nonimmigrant status. Those who are outside the United States are issued U visas, and upon entry into the country are issued U nonimmigrant status. In both cases, applicants must be admissible into the United States or obtain waivers of inadmissibility. U nonimmigrant relief is commonly referred to as a "U visa."

among others. Their vulnerability is exacerbated by factors including isolation from friends, family, and other support systems; language barriers; cultural differences; and the fear of deportation or losing their children if they were to come forward to report these crimes. The U statute was designed to meet Congress's dual and interrelated goals of providing safety and immigration relief for these victims and empowering them to come forward to aid law enforcement in prosecuting crime.

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 of DHS may be sufficient to demonstrate waiver eligibility. However, the U statute is intended to assist the *most* vulnerable, and for some in this group, a hearing before an IJ may be the most appropriate and indeed the best process for demonstrating waiver eligibility.

The life circumstances that contribute to some individuals' susceptibility to victimization, and the trauma induced by the very crimes to which they have been subjected, may lead crime victims to 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 to which the victim has been subjected is a first step in a longer process that allows the victim to recover, engage in rehabilitation, and stabilize his life. It is critically important that such individuals have 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—a rehabilitation often made possible precisely by virtue of their having been able to come forward due to the promise of a U visa. Such an opportunity is often only possible before an IJ, and not within the limited administrative process provided by DHS.

The experiences of many crime victims seeking U nonimmigrant status and waivers of inadmissibility, as demonstrated by Petitioner's own story, are deeply troubling. Yet, at the same time, these crime victims often exhibit incredible resilience and bravery in coming forward. Putting aside the legal obligation to do so, 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. Doing

so 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 as victims of crime.

## BACKGROUND

### I. Congress Created the U Visa to Protect Noncitizen Crime Victims and to Strengthen the Ability of Law Enforcement to Investigate and Prosecute Crimes

As this Court has recently recognized, Congress's purpose in creating the U visa program was 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's intent 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."). Thus, as the legislative history shows, Congress understood that it takes tremendous courage for a 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.

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.").

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), *available at* https://goo.gl/du9t7p (last accessed Dec. 5, 2016) ("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), *available at* https://goo.gl/EehQno (last accessed Dec. 5, 2016) ("[T]he fear of deportation has created a class of silent victims").

The U visa—and accompanying broad waivers of grounds of inadmissibility—offers generous protections to this vulnerable population, while simultaneously better equipping law enforcement officials to investigate and prosecute qualifying crimes by encouraging immigrant victims to provide assistance without fear of deportation.

## ARGUMENT

### I. IJs and DHS Independently Have the Statutory Authority to Consider Waivers of Inadmissibility for U Visa Applicants

Both IJs and DHS independently have the authority to adjudicate waivers of inadmissibility for U visa applicants. That IJs have such authority is clear from the plain language of 8 U.S.C. § 1182(d)(3), which provides that the Attorney General has the authority to waive the inadmissibility of aliens applying for temporary

nonimmigrant visas (of which the U visa is one). *See L.D.G.*, 744 F.3d at 1030. As Petitioner argues, and as the Seventh Circuit has held, the authority to grant waivers of inadmissibility that is conferred upon IJs by 8 U.S.C. § 1182(d)(3)(A) is unaffected by the separate waiver authority conferred upon DHS by 8 U.S.C. § 1182(d)(14). *See* Opening Brief at 17-34; *L.D.G.*, 744 F.3d at 1030-31.

In addition, this Court should reject the reasoning of the Third Circuit in *Sunday v. Att'y Gen. United States of Am.*, 832 F.3d 211, 214-16 (3d Cir. 2016), which focused on the term "admission." The Third Circuit's interpretation of the statute disregards case law holding that the term "admission" appears in different contexts in immigration law and that the term should not be automatically interpreted to refer to entry at the border, especially "where absurd or bizarre results" would ensue. *Matter of Fajardo Espinoza*, 26 I & N Dec. 603, 606 (BIA 2015); *Matter of Agour*, 26 I & N Dec. 566, 570-71 (BIA 2015); *see also United States v. Hernandez-Arias*, 757 F.3d 874, 880 (9th Cir. 2014) ("[B]oth this court and the BIA . . . have not limited the scope of 'admitted' to [§ 1101(a)(13)(A)'s] strict definition." (internal quotation marks omitted)). It would be "absurd or bizarre" for U visa applicants—a victimized group for whom Congress has expressed particular solicitude, *see supra* pp. 10-11—to be denied a benefit that is available to applicants for a waiver of inadmissibility who have not similarly been the subject of Congress's solicitude. It would be equally "absurd or bizarre" for

only certain U visa applicants—namely, those who are outside the United States—to be given a benefit not available to those applicants already physically present in the United States and often residing with their abusers or otherwise subject to abuse from them. As the Opening Brief explains, the Third Circuit failed to "square its reading of [the] regulations with the statute," and in fact the regulations on which that Court relied are outdated and conflict with the plain language of the statute. *See* Opening Brief at 23-27 & n.8.

## II. Because U Waiver Denials Are Unreviewable Within DHS, the Protection Afforded by Independent IJ Consideration of U Waiver Applications Is Consistent With the Legislative Goal of Protecting This Vulnerable Population

Depriving applicants of access to IJs when seeking waivers of inadmissibility would significantly undermine Congress's purpose in establishing the U visa program. Congress's intent in creating the program was to offer assistance and safety to vulnerable individuals in exchange for assistance provided by those individuals to law enforcement. It is implausible that Congress would have held out to the traumatized population for whom the U visa was created the carrot of lawful nonimmigrant status and safety for themselves and their children in the United States, only to deprive them of that opportunity by conditioning it on

what is effectively a one-time shot at a waiver of inadmissibility that is restricted solely to a paper application whose denial is unreviewable.[3]

Indeed, the fundamental unfairness of such a scheme is demonstrated by the fact that the appellate division within DHS (the AAO) reviews denials of *U visa* applications, but has held that it lacks jurisdiction to review denials of *U waiver* applications. *See supra* p. 16 n.3. Under that scheme, even the most arbitrary decision of United States Citizenship and Immigration Services ("USCIS") denying a U waiver necessarily means that the application for a U visa is doomed, no matter how severe the trauma suffered by the applicant or significant the assistance provided to law enforcement. That cannot have been Congress's intention when it set out to offer humanitarian relief to noncitizen crime victims by creating the U visa program, though it is the inevitable consequence of the BIA's erroneous conclusion that IJs lack jurisdiction to consider U waivers.

[3] 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), *available at* 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 Dec. 5, 2016). 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).

In this case, for instance, Petitioner was the victim of a shooting, as a consequence of which he carries bullets in his body and suffers from chronic pain and post-traumatic stress disorder. *See* Opening Brief at 6-7. He provided evidence against his attackers, risking retaliation against himself and his family and helping bring about the conviction of a gang member. *See id.* at 7. The injuries he sustained, coupled with his youth and the environment in which he lived, caused him to engage in certain inappropriate activities. However, he paid a price for that activity, has long outgrown his inappropriate behaviors, learned other ways to cope with his issues, has sole custody of his two U.S. citizen children (for whom he is the sole provider), and as attested by his psychologist and probation officer, has been rehabilitated. *See id.* at 10. Nonetheless, USCIS denied his waiver applications on the basis of cursory (at best) reasons, apparently false documentation, and erroneous interpretations. *See id.* at 13-15; *see also infra* pp. 22-23.

These types of circumstances—involving complex family relationships, impoverished and dangerous environments, and chaotic personal backgrounds and histories—create the individual stories and histories of many victims who ultimately muster the courage to come forward to aid law enforcement. By doing so, crime victims expose themselves to the possibility of deportation. If the opportunity for IJ review of a waiver application—which is provided for in the

statute—is denied, the system will be perceived as (and in fact will be) far less fair to U applicants than Congress intended. In the absence of jurisdiction by IJs to adjudicate a U waiver of inadmissibility, a DHS denial of a U waiver—which is unreviewable—will effectively result in the inability of any otherwise U qualified and eligible applicant to avail himself of the benefits 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. Without real waiver review, the U visa for someone in need of a waiver is essentially an empty promise.

## III. IJ Review of U Waiver Determinations Helps Insure Procedural Fairness

Allowing IJs to consider U waiver applications adds a measure of fairness to an administrative procedure that otherwise contains no provision for review. In particular, unlike the purely administrative and unreviewable process at DHS, IJ review of U waiver applications (1) provides reasonable constraints on the adjudicative process, because IJs are required to provide a reasoned basis for their decisions and (2) promotes due process by allowing the applicant to contest and explain evidence.

First, this Court's requirement that IJs provide a reasoned explanation of their decisions underscores the need for IJ adjudication of U waiver applications. Although IJs are given significant leeway in adjudicating discretionary questions,

they "cannot reach their decisions capriciously" and "must indicate how they weighed the factors involved" and "how they arrived at their conclusion." *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005) (citation, internal quotation marks, and alterations omitted); *see also Yepes-Prado v. U.S. Immigration and Naturalization Serv.*, 10 F.3d 1363, 1370 (9th Cir. 1993) ("Agencies abuse their discretion no less by arriving at plausible decisions in an arbitrary fashion than by reaching unreasonable results."). 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.*, *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) ("We have long held that the BIA abuses its discretion when it fails to provide a reasoned explanation for its actions." (collecting cases)); *see also Jara-Arellano v. Holder*, 567 F. App'x 544, 545 (9th Cir. 2014) (granting petition for review in part because "[n]either the IJ nor the BIA provided any reasoning, explanation, or analysis for its conclusion," which prevented this Court from conducting a meaningful review); *Rahmati v. Holder*, 365 F. App'x 774, 776-77 (9th Cir. 2010) (remanding to the BIA because the IJ "provided no meaningful analysis supporting his conclusion" and failed to issue "a reasoned explanation" of his decision, which the BIA had summarily affirmed without opinion).

Second, proceedings in immigration court permit an applicant 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 may not appear before the administrator adjudicating their case in order to effectively contest the evidence brought against them. As is explained in the Opening Brief, this appeal itself presents an example of the procedural unfairness that flows from unfettered discretion, as USCIS violated its own regulations as well as principles of due process by denying Petitioner's waiver application based on undisclosed derogatory evidence that was not shared with Petitioner and to which Petitioner never had a chance to respond. *See* Opening Brief at 11-14, 47-48. Likewise, after granting a motion to reopen, USCIS committed further legal and factual errors in its subsequent denial notice, including (again) reliance on unidentified and erroneous evidence to which Petitioner was not given the opportunity to respond. *Id*. at 15-16, 49.

## IV. In Some Cases, a Waiver of Inadmissibility May Depend on the Crime Victim's Credibility, Which IJs Are Well Qualified to Evaluate in an In-Person Hearing

Crime victims' waiver applications under section 1182(d)(3) involve three factors, each of which relates to 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)). Unlike DHS adjudicators—who consider only a crime victim's paper submission—IJs may conduct in-person hearings to assess the victim's credibility. As this Court has explained, such in-person hearings are important because "[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.

All three *Hranka* factors can implicate an applicant's credibility. First, the applicant could testify about his rehabilitation efforts, suggesting a low risk of harm to society. By appearing in immigration court to provide such testimony, an IJ would be able to assess the applicant's voice, facial expressions, and body language to better evaluate the applicant's sincerity in ways that cannot be done on paper alone. Similarly, the IJ could 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. By making such in-person evaluations, the IJ would be in a much better position to determine whether the applicant has genuinely rehabilitated himself, and thus could find that the applicant does not pose a significant risk of harm to society. Second, where the seriousness of the applicant's prior legal violations is unclear from the record, he could testify about the nature of those violations. If the IJ believes the applicant's description of his past conduct, the IJ could find that although the prior violations appeared to be serious on paper, they were in fact not as serious as they seemed in light of mitigating circumstances. Third, the applicant and others testifying on his behalf could proffer an explanation of why he wished to be admitted into the United States. For instance, he could explain 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 itself illustrates how in-person proceedings can be critical in assessing the *Hranka* factors. USCIS cursorily found that Petitioner "remain[s] a risk to society if admitted," even though it acknowledged that there was no record

that Petitioner had engaged in any criminal activity since 2007. A.R. 283. In-person testimony from Petitioner and the friends, family members, probation officer, psychologist, and supervisor who submitted written statements in support of his waiver application, *see id*. at 280-82, could have demonstrated that Petitioner is rehabilitated and no longer poses a risk to society, notwithstanding his nearly decade-old criminal activity. Likewise, USCIS cursorily stated that Petitioner's "criminal law violations are very serious," *id*. at 283, though testimony regarding the reasons why Petitioner associated with gang members—leading to his three convictions from 2005-2007 relating to marijuana—could have demonstrated that those violations seemed more serious on paper than they really are. Opening Brief at 7-8. Finally, while USCIS ostensibly acknowledged that "family unity is an important factor to consider" and that removing Petitioner would "undoubtedly be difficult for [him] and [his] family," it held that "these factors to [sic] not outweigh the seriousness of [Petitioner's] criminal violations." A.R. at 283. Had Petitioner and his family been able to testify in-person—including testimony as to the developmental disabilities faced by Petitioner's son, for whom Petitioner has sole custody, *id*. at 282-83—an IJ could have evaluated their demeanor and assessed the credibility of Petitioner's explanation of why he wishes to remain in the country.

The BIA's decision in *Hranka* further 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 on 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 this Court has 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.

The importance of being able to present live testimony for the subset of applicants described above is especially acute in light of the requirements for U visa eligibility. 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 and difficulties that may preclude them from offering compelling written statements in support of their waiver application. First and foremost, such victims have by definition been traumatized. These individuals, who have been rendered extremely vulnerable by trauma, and who have nevertheless mustered the courage to step forward and help law enforcement, should be afforded a generous opportunity to present their cases, in order to fulfill Congress's purpose in creating the U visa program. Indeed, 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, and 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]

Live testimony before an IJ, translated by a court-provided interpreter if necessary, can ameliorate these vulnerabilities and various linguistic and economic obstacles. This Court has recognized that due to their experience in presiding over immigration proceedings, IJs are "qualified to decide whether an alien's testimony has about it the ring of truth." *Sarvia-Quintanilla v. I.N.S.*, 767 F.2d 1387, 1395 (9th Cir. 1985). Indeed, IJs frequently make credibility determinations when

[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."). As this Court has recognized, such 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").

presiding over removal proceedings. *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.

Thus, 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 are well situated to make a credibility determination based on such testimony.

## CONCLUSION

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

Respectfully submitted,

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## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for amici curiae states that amici are unaware of any related cases.

Dated: December 19, 2016

*/s/ Andrew Yaphe*
Andrew Yaphe

**Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number** 16-70732, 13-70840

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Signature of Attorney or Unrepresented Litigant [s/ Andrew Yaphe] Date [Dec 19, 2016]

("s/" plus typed name is acceptable for electronically-filed documents)

## CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2016, 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.

Dated: December 19, 2016

*/s/ Andrew Yaphe*
Andrew Yaphe