Putting the U in Underinclusive: The Shortcomings of U Visa Procedures in Light of the 2021 Bona Fide Determination Process

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“We all should care about victims of domestic violence, documented or not, because they are all people who do not deserve such treatment... Domestic violence is against the law and all victims, regardless of their legal status, deserve protection.”

I. INTRODUCTION

Kenia left her home in El Salvador in 2004 with the hope of having asylum waiting for her in the United States. Instead, a long battle for citizenship awaited her. After nearly fifteen years in the United States, Kenia applied for U Nonimmigrant Status (U visa), a visa available for victims of certain crimes, such as domestic abuse, which aid law enforcement efforts to prosecute those crimes. During her time in the United States, Kenia was in a relationship with a man who physically assaulted her—displaying fresh markings and cuts on her face at the time of reporting—giving her the ability to seek help through a U visa. Kenia obtained an emergency protective order against the man, but, in 2019, while the U visa application was pending, U.S. Immigration and Customs Enforcement (ICE) initiated deportation proceedings without providing an opportunity for her

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3. See id. (describing Kenia’s detention after arriving in United States).


5. See Yu, supra note 2 (describing abuse Kenia suffered while in United States).
U visa claim to be resolved.6 Despite her efforts, Kenia was deported to El Salvador, separated from her two adult children in the United States.7

Kenia’s experience is not an isolated incident: Thousands of legitimate U visa applicants have sustained immeasurable harm at the hands of the United States because of a catastrophic lack of proper review procedures.8 In response to stories like Kenia’s, the U.S. Citizenship and Immigration Services (USCIS) created the “Bona Fide Determination Process” and published policy manual guidance to aid in its June 2021 implementation.9 Under this new process, a U visa application that meets certain threshold requirements indicative of its potential for approval no longer undergoes the waitlist adjudication; instead, it creates an alternative route for noncitizens to obtain protections while waiting for a final decision on their U visa determination.10 Through this determination, USCIS may grant qualifying noncitizens a Bona Fide Determination Employment Authorization Document (BFD EAD).11 This document allows immigrants to legally obtain employment in the United States, regardless of their citizenship status.12 If approved for a BFD EAD, the petitioner may also obtain deferred action,

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6. See id. (explaining resistance to grant Kenia’s continuance). In denying the request for a continuance, ICE officials found no compelling reason to warrant a favorable exercise of discretion in Kenia’s case. See id. (describing unfortunate denial of continuance for noncriminal domestic abuse victim).
7. See id. (stating Kenia deported while two sons remained in United States).
8. See id. (describing Kenia’s experience and how others faced similar harm when seeking stays of deportation). The Board of Immigration Appeals (BIA) has broad discretion to grant or deny a request for a continuance of deportation proceedings, and it has not hesitated to move forward with hearings, even where the noncitizen was in the process of obtaining a U visa, under previous policies. See id. (noting rules give ICE power to initiate deportation proceeding before BIA without consulting USCIS); Quecheluno v. Garland, 9 F.4th 585, 588 (8th Cir. 2021) (detailing factors BIA considers when applicants request continuances, discerning abuse of discretion).
11. See supra note 9 and accompanying text (detailing awards of BFD EAD and process required to apply).
effectively shielding them from deportation for a four-year period, solving the dilemma posed by Kenia’s story.\(^{13}\)

U visa benefits are particularly vital for immigrants who have been subjected to domestic abuse.\(^{14}\) There are certain domestic abuse concerns specific to noncitizens that are especially troubling, such as threats and manipulation regarding their citizenship status; in theory, the U visa provides a way for them to obtain lawful residency without the assistance or cooperation of their abuser.\(^{15}\) The victims also have the opportunity to achieve independence in the form of lawful employment, which is especially critical for breaking free from the cycle of abuse.\(^{16}\)

Although the 2021 USCIS policy catalyzes a much-needed change in U visa procedures, many cracks still exist that are detrimental for noncitizen domestic abuse victims.\(^{17}\) Specifically, the prolonged application process and tyrannical cap on the number of applications considered per year inhibits many victims’ ability to receive the proper help.\(^{18}\) The inability of noncitizens to obtain nonmigrant status within a reasonable time frame—if at all—substantially hinders

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14. See infra Section II.B (explaining hardships of domestic abuse on immigrants).
15. See infra Section II.B.1 (addressing domestic abuse tactics used against noncitizens specifically regarding their immigration status).
16. See supra note 9, 12 and accompanying text (noting possibility of employment authorization with U visa and other benefits); infra Section II.B (identifying ways abusers exert control over noncitizen victims).
the effectiveness of the U visa. Recent proposals to raise the statutory cap from the current 10,000 applicants to 30,000 applicants further demonstrate this ineffectiveness.

This Note will examine the history of the U visa and its continuing failures despite recent attempts to alleviate significant wait times with the Bona Fide Determination Process. Part II begins by considering the impact domestic abuse has on all victims, as well as the specific risks to noncitizen victims in the United States. Part II will detail U visa legislation and the evolving goals of noncitizen domestic abuse relief. Part III will then discuss the inadequacy of the updated procedures to handle the influx of U visa applications which continues to grow each year, highlighting why this must be addressed imminently. This Note concludes that efforts should be made to distribute the influx of U visa applicants among the federal governmental agencies and, subsequently, to increase the yearly cap to better accommodate the number of applicants.

II. HISTORY

A. Overview of Domestic Abuse

Domestic abuse consists of a pattern of abusive behavior that is used by one intimate partner in a relationship to gain or maintain power and control over another partner. Because gaining power over another can be done in a number of ways, domestic abuse can take numerous forms. For instance, it may consist

21. See infra Section II.D and Part III (detailing U visa protections and lack of consistent, efficient implementation).
22. See infra Sections II.A and II.B (discussing definition of domestic abuse and specific concerns relating to noncitizen victims).
23. See infra Section II.C and II.D (highlighting battered immigrant legislation and evolution of U visa protection).
24. See infra Part III (explaining flaws in current policies for U visa processing).
25. See infra Part IV (advocating for greater distribution of work for U visa processing and increased cap).
26. See Domestic Abuse, ROYAL COLL. OF NURSING, https://www.rcn.org.uk/clinical-topics/Domestic-violence-and-abuse [https://perma.cc/P9UP-BNDM] (providing cross-government definition of “domestic abuse”). “Domestic abuse” is often used interchangeably with “domestic violence” and “intimate partner violence,” but this Note will use the term “domestic abuse” regarding the U visa and other legislative schemes to emphasize the fact that actual violence is not required. See id. (using “domestic abuse,” “domestic violence,” and “intimate partner violence” alike).
of emotional, physical, and sexual abuse, in addition to threats of such abuse, intimidation, and other harmful behaviors. Typically, domestic abuse can be described as a cycle of power and control, leaving the victim trapped and isolated.

Domestic abuse is highly prevalent in today’s society, with an average of one in two women succumbing to contact sexual violence, physical violence, or stalking by an intimate partner in the United States. According to a study conducted from 2016 to 2017 in the United States, nine million women reported domestic abuse in just that year. Globally, one in three women have been subjected to either physical or sexual violence in their lifetime. Victims of domestic abuse continuously suffer from its negative consequences: 42% of women who experienced intimate partner violence reported physical injuries as a result of the

Immigrant Victims of Domestic Violence] (explaining variety of forms domestic abuse can take). Domestic abuse is much more than physical violence and often takes the form of mental and emotional damage. See id. (detailing nonphysical impact of domestic abuse on victims).


29. See Power and Control: Break Free from Abuse, NAT’L DOMESTIC VIOLENCE HOTLINE, https://www.thelotline.com/identify-abuse/power-and-control/ [https://perma.cc/FJ5D-PW5G] (highlighting difficulty escaping domestic abuse). The Domestic Abuse Intervention Project in Duluth, Minnesota developed the Power and Control Wheel as an important discussion tool breaking down the moving parts of domestic abuse that trap the victims. See id. (explaining creation of Power and Control Wheel model). The Power and Control Wheel model identifies power and control as the goal of the various tactics of abuse, with behaviors that indicate actions which are purposeful and systematic. See Understanding the Power and Control Perspective Wheel, ROCKLAND Cnty. Coll., https://sunyrockland.edu/about/dei/domestic-violence/understanding-the-power-and-control-perspective-wheel/ [https://perma.cc/5DSU-WMCQ] (listing goals of domestic abuser according to Power and Control Wheel model). The abuser’s desire is to exert control over their partner, and the various forms of abuse are used as tactics to control. See id. (providing overview of how abuser uses Power and Control). The tactics included in the wheel are the following: (1) coercion and threats; (2) intimidation; (3) emotional abuse; (4) isolation; (5) minimizing, denying, and blaming; (6) using children; (7) using male privilege; and (8) economic abuse. See id. (listing types of abusive behaviors often used for establishing control over victims); see also Amanda Kipper, What Are the Power and Control Wheels, DOMESTICSHelters.ORG (Aug. 16, 2021), https://www.domesticshelters.org/articles/identifying-abuse/what-are-the-power-and-control-wheels [https://perma.cc/AT9Y-DMKJ] (asserting victims confirm existence of Power and Control Wheel tactics in their abusive relationships).


31. See id. (analyzing instances of domestic abuse against women in United States between 2016 and 2017). Although both men and women experience domestic abuse, women are predominantly the victims of such crimes. See Violence Against Women, WORLD HEALTH ORG. (Mar. 9, 2021), https://www.who.int/news-room/fact-sheets/detail/violence-against-women [https://perma.cc/XXS4-DUL9] (asserting men primarily perpetrate instances of domestic abuse against intimate partners).

32. See Violence Against Women, supra note 31 (calculating annual occurrences of domestic abuse worldwide). The World Health Organization analyzed metrics from a 2018 analysis of data gathered from 2000 to 2018 across 161 countries and areas. See id. (detailing population-level surveys and data collection). Of those who have been in a relationship, almost one-third of women aged fifteen to forty-nine years have been a victim of some form of physical and/or sexual abuse by their partner. See id. (finding over quarter of women subjected to domestic abuse). Globally, nearly 38% of all murders of women are committed by intimate partners. See id. (stating causes of murder globally).
abuse. Domestic abuse also readily leads to unseen struggles such as depression, post-traumatic stress disorder, anxiety disorders, sleep difficulties, eating disorders, and suicide attempts.

B. Impact of Domestic Abuse on Noncitizens

1. Specific Domestic Abuse Concerns for Noncitizens

Domestic abuse spans many nationalities, races, ethnicities, and socioeconomic classes, but noncitizens are especially vulnerable. Individuals without citizenship status typically experience heightened risks of domestic abuse. Intimidation and manipulation of citizenship or residency are defining features of domestic abuse against noncitizens. The abusers often destroy or withhold

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33. See id. (detailing likelihood of physical injury from instances of domestic abuse).


36. See Abuse in Immigrant Communities, NAT’L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/resources/abuse-in-immigrant-communities/ [https://perma.cc/CB8H-GTLN] (discussing unique risks immigrants face in domestically abusive relationships); see also Legal Rights Available to Immigrant Victims of Domestic Violence, supra note 27 (dictating particular vulnerability of immigrants subject to domestic abuse).

important documentation like passports, resident cards, driver’s licenses, and health insurance records in an attempt to control victims.\textsuperscript{38} Abusers additionally may exploit their victims’ fears of deportation by using the noncitizen status as leverage to keep their victims stuck.\textsuperscript{39} Beyond status-based concerns, noncitizen victims frequently face additional hardship due to language barriers, lack of information regarding U.S. law, and differing cultural beliefs or practices, forcing them to rely on their abusers.\textsuperscript{40} Combined, these factors render noncitizens particularly at risk of becoming victims of domestic abuse in the United States.\textsuperscript{41}

2. Hurdles Preventing Noncitizens from Seeking Legal Assistance

Although noncitizens are subject to a heightened risk of domestic abuse—accompanied by unique abuse tactics—victims are often reluctant to seek assistance from law enforcement.\textsuperscript{42} Noncitizen women particularly underreport

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38. See Power and Control Tactics Used Against Immigrant Women, supra note 37 (listing intimidation and manipulation tactics female immigrants face).

39. See Alanko, supra note 35, at 57 (explaining connection between citizenship status and domestic abuse tactics). Exploiting a victim’s citizenship status may include threatening to report the victim to law enforcement officers, providing false information to prevent the victim from achieving lawful status, or having them deported. See id. (providing examples of controlling behaviors abusers use against noncitizens).

40. See Abuse in Immigrant Communities, supra note 36 (discussing circumstances, aside from citizenship status, making domestic abuse against immigrants particularly powerful). Barrier-creating factors such as disability, living in rural areas, and LGBTQ+ status can further exacerbate abuse against noncitizens. See Sara Campos, The Intersection of Domestic Violence and Immigration, GENESIS WOMEN’S SHELTER & SUPPORT (July 20, 2020), https://www.genesishshelter.org/the-intersection-of-domestic-violence-immigration/ [https://perma.cc/H5W6-9E26] (listing other considerations working against noncitizens in abusive situations).


42. See Legal Rights Available to Immigrant Victims of Domestic Violence, supra note 27 (asserting fear causes many immigrant women to remain in abusive relationships without seeking aid).
domestic abuse in the United States.\textsuperscript{43} U.S. laws guarantee protection from domestic abuse, regardless of immigration status; nonetheless, many noncitizens fear deportation more than remaining in an abusive situation.\textsuperscript{44} In addition to the deportation concern, victims often do not know the remedies available to them because of cultural differences, language barriers, and isolation.\textsuperscript{45} Further, escaping domestic abuse as a noncitizen can be exceptionally taxing when the victim is reliant on their abuser for their legal status in the United States, whether through marriage, family, or sponsorship.\textsuperscript{46} In these instances, turning to law enforcement can mean losing the security of lawful status—a risk many are unwilling to take.\textsuperscript{47}

C. Legislative Efforts Aimed at Assisting Noncitizen Victims of Domestic Abuse

1. Historical Background of Immigration Based on a Familial Relationship

Traditionally, when the United States first began formally accepting immigrants, an individual seeking to immigrate based on familial status did so based


Seven national organizations conducted a survey and collected data from over 700 victim advocates and attorneys in the United States. \textit{See Campos, supra note 40} (detailing survey used to demonstrate immigrants’ fear of criminal justice system). These surveys determined that 78% of advocates reported that immigrant survivors had concerns about reaching out to law enforcement, 75% of service providers reported that immigrant survivors were reluctant to appear in court for proceedings related to the abuser, and 43% of advocates had worked on cases with immigrant survivors who had dropped civil or criminal cases due to fear. \textit{See id.} (enumerating survey findings of immigrant advocates).

\textsuperscript{45} \textit{See supra} note 40 and accompanying text (discussing significant hurdles preventing abused immigrants from seeking assistance).

\textsuperscript{46} \textit{See} Lannan, \textit{supra} note 17 (describing, from perspective of attorney, hardships of noncitizen leaving domestic abuse); \textit{see also infra} note 48 (highlighting historical prevalence of family-based legal status in United States). The noncitizen status of immigrant victims is known to the abuser, and many use it to their advantage, threatening the immigrant victim with deportation if they speak out or try to protect themselves. \textit{See Lannan, supra note 17} (affirming use of citizenship status against immigrant victims).

\textsuperscript{47} \textit{See supra} note 41 (detailing vulnerabilities and disadvantages of immigrant victims); \textit{see also infra} Section II.C.1 and II.C.2 (demonstrating history of reliance on abuser for lawful citizenship status in United States).
on the approval of a sponsoring family member in the United States who was a lawful, permanent resident or a citizen. The existing policies required the sponsoring family member to petition the United States for a visa for the immigrating family member. Thus, the entire process of obtaining lawful status in the United States, for women, was at the sole discretion of a sponsoring citizen or permanent resident family member, leaving the immigrant entirely unable to achieve lawful status independently. This scheme of immigration law prevailed until 1990, when the legislature intervened to give noncitizens greater powers that were not conditioned on the cooperation of their spouse.

2. Immigration Marriage Fraud Act and the Immigration Act of 1990

Despite the domestic violence issues that were pervasive among noncitizens, it is notable that Congress, out of legitimacy concerns, worsened the domestic violence situation for noncitizens through the passage of the Immigration Marriage Fraud Act (IMFA), which reaffirmed the historical power of the lawful permanent resident spouse over the status of their noncitizen spouse. In 1986, Congress became wary that immigrants were engaging in fraudulent marriages

48. See Settlage, supra note 17, at 1756 (providing overview of immigration system based heavily on familial relationships). Early immigration laws focused primarily on familial relationship as the route for citizenship. See id. (noting exacerbation of abusive relationship from historical family-based citizenship). The reasoning was based in part on the doctrine of coverture: the belief that the wife did not have a legal identity outside of her marriage to her husband, thus, tying all of her rights to him. See Deborah M. Weissman, Addressing Domestic Violence in Immigrant Communities, 65 CAROLINA L. SCHOLARSHIP REPOSITORY, no. 3 (2000), at 14, https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1390&context=faculty_publications [https://perma.cc/6Y29-NN7U] (highlighting incorporation of coverture in early legislative history of immigration law); Catherine Allgor, Coverture—the Word You Probably Don’t Know but Should, NAT’L WOMEN’S HIST. MUSEUM (Sept. 4, 2012), https://www.womenshistory.org/articles/coverture-word-you-probably-dont-know-should [https://perma.cc/HFN2-5CF9] (defining coverture and its impact on history).

49. See Janet Calvo, A Decade of Spouse-Based Immigration Laws: Coverture’s Diminishment, but Not Its Demise, 24 N. Ill. U. L. REV. 153, 156-157 (2004) (addressing spouse-based immigration policies and coverture ideologies still existing). The fact that the citizen-spouse—typically the husband—had to make affirmative steps on behalf of the noncitizen spouse is not insignificant, considering the vast popularity of spouse-based immigration. See id. at 156 (providing statistics illustrating importance and prevalence of spouse-based immigration). From 1990 to 1999, approximately 120,000 to 170,000 individuals received legal admission to the United States as spouses of citizens. See id. (showing magnitude of spouse-based immigration). Of those spouses immigrating to the United States, 61% were women, who continue to be the predominant seekers of spouse-based admittance. See id. at 156, 160 (indicating majority of spouses admitted to United States women).


51. See supra note 48 and accompanying text (summarizing history of immigration law in United States and highlighting major downfalls); see also infra Section II.C.3 and Section II.C.4 (discussing legislative initiatives to give immigrant women greater independent powers to obtain citizenship).

to obtain lawful permanent residency, passing IMFA to ensure the legitimacy of the system.\textsuperscript{53} IMFA dictated that, in marriages less than two years in length, the immigrant spouse was eligible to obtain conditional residency for two years.\textsuperscript{54} After the conditional residency period passed, the couple had to file a joint petition to remove the conditions of residency so the immigrant spouse could achieve permanent residency.\textsuperscript{55} Moreover, IMFA, in relevant part, stated that the petitioning spouse and the alien spouse must appear for a personal interview with an officer or employee of the U.S. Immigration and Naturalization Service (INS) and jointly submit a petition to the Attorney General requesting the removal of such conditional basis.\textsuperscript{56}

IMFA’s harsh requirements led Congress to enact the Immigration Act of 1990.\textsuperscript{57} This remedy offered a waiver of the joint filing requirement established under IMFA:

The Secretary of Homeland Security, in the Secretary’s discretion, may remove the conditional basis of the permanent resident status for an alien . . . [who] demonstrates that (A) extreme hardship would result if such alien is removed; (B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated . . . ; or (C) the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was

\textsuperscript{53} See Leslye E. Orloff et al., \textit{Offering a Helping Hand: Legal Protections for Battered Women: A History of Legislative Responses}, 10 AM. U. J. GENDER SOC. POL’Y & L. 95, 101-102 (2001) (affirming negative impact of IMFA’s unequal distribution of power between citizen-spouse and noncitizen spouse). In enacting the IMFA, Congress sought to promote family reunification and prevent marriage fraud. See Jones, supra note 52, at 681 (discussing policies underlying passing of IMFA). The Immigration and Naturalization Service (INS) conducted surveys and ultimately estimated that up to 30% of all spousal petitions in the United States involved marital fraud. See \textit{id.} at 681-682 (providing statistical reasoning for INS’s mission to deter fraudulent marriages). At the time, officials believed marriage fraud was impeding on the integrity of the immigration system because marriage was used most frequently to obtain permanent resident status and was easy to achieve. See \textit{id.} at 682 (reiterating importance and seriousness of marital fraud from INS’s perspective).

\textsuperscript{54} See Immigration Marriage Fraud Amendments of 1986 § 1186a (requiring conditional permanent resident status); see also Settlage, \textit{supra} note 17, at 1756-57 (dictating reasons for IMFA’s passage and describing conditional residency requirements).

\textsuperscript{55} See Settlage, \textit{supra} note 17, at 1757 (noting next steps following passage of conditional residency period).

\textsuperscript{56} See Immigration Marriage Fraud Amendments of 1986 § 1154 (detailing process to have conditions removed after two years). The conditional residency and petition requirements perpetuated a history of immigration policies that placed significant weight on the cooperation of the citizen-spouse. See \textit{supra} notes 48-49 and accompanying text (highlighting lack of independent powers for immigrant spouses). The Attorney General had the discretion to change the immigrant spouse’s conditional residency status to a permanent resident status, regardless of the citizen-spouse’s participation, if the immigrant spouse satisfied the requirements for “extreme hardship” or “good faith/good cause.” See Orloff, \textit{supra} note 53, at 102 (emphasizing little impact IMFA’s discretionary waivers had on battered immigrant women).

battered by or was the subject of extreme cruelty perpetrated by his or her spouse or citizen or permanent resident parent. 58

In essence, the Immigration Act of 1990 constituted a shift from citizens or lawful permanent resident spouses holding all of the power over the noncitizen spouse to allowing the noncitizen to remove the conditions of their residency on their own in certain circumstances. 59


In 1994, Congress passed the Violence Against Women Act (VAWA) to enhance justice system protection for battered women. 60 Due to its widespread success, VAWA received reauthorization as part of the Victims of Trafficking and Violence Protection Act in 2000. 61 Congress found that domestic abuse can be terribly exacerbated in marriages where one spouse is not a citizen and relies on their marriage to the abuser. 62 In turn, VAWA created a form of relief for situations where abusers of immigrant spouses would not file for a visa on behalf of their spouse or would threaten to withdraw a filed petition. 63 In such cases, the immigrant spouse was eligible to self-petition for a visa without relying on

58. Id. (creating waiver of joint filing requirement of IMFA for common situations).
59. See id. (providing relief against strict petition and interview requirements of IMFA); see also Settage, supra note 17, at 1759-60 (discussing implementation and impact of Immigration Act waiver for immigrant spouses).
60. See Orloff, supra note 53, at 108 (discussing implementation of VAWA). See generally Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1798-1800 (codified as amended 42 U.S.C. § 13931 et seq.) (producing comprehensive federal legislative package designed to end violence against women). The primary goals of VAWA were simultaneously to enhance justice system protection for battered women and expand collaboration and cooperation between battered women’s supportive services and the criminal and civil justice systems. See Orloff, supra note 53, at 108 (presenting various aspirations of VAWA); see also Factsheet: The Violence Against Women Act, OBAMA WHITE HOUSE, https://obamawhitehouse.archives.gov/sites/default/files/docs/vawa_factsheet.pdf [https://perma.cc/5TV6-QXKA] (highlighting positive change resulting from VAWA protections).
62. See H.R. Rep. No. 103-395, at 26 (1993) (emphasizing importance of domestic abuse legislation specifically aimed at helping noncitizens). Given the unique and especially vulnerable position of battered immigrants, Congress found that it was critical to provide more effective forms of relief. See id. (providing Congress’ reasoning for passing VAWA); see also supra note 36 (highlighting concerns of domestic abuse against immigrants).
63. See Violence Against Women Act (VAWA), IMMIGR. CTR. FOR WOMEN & CHILD., https://www.icwclaw.org/violence-against-women-act-vawa [https://perma.cc/ES9P-7579] (detailing VAWA’s special routes for immigration status for certain battered noncitizens); see also Orloff, supra note 53, at 113 (distinguishing VAWA’s provisions from previous legislation requiring approval or cooperation of abusive spouses).
their spouse’s approval. Additionally, if already in removal proceedings, the immigrant could apply for cancellation of removal. Essentially, if granted relief under VAWA, an immigrant could live and work in the United States and could apply for permanent residency for themselves as well as their children.

The self-petition portion of VAWA required the immigrant be married to a U.S. citizen or lawful permanent resident at the time they filed the application. The immigrant’s spouse must not have filed or be party to any immigration case filed with INS. Additionally, the immigrant had to put forward evidence indicating why it was necessary for the immigrant to have VAWA protection, such as good faith marriage if the abuser was a spouse or step-parent; the relationship to the abuser; the immigration status of the spouse, parent, or child; good moral character; residence with the abusive family member; or parent-child relationship if the application was a nonabusive noncitizen parent whose spouse perpetrated the abuse. If all of these elements were met, the immigrant spouse was entitled to the self-petition protection of VAWA, rendering the abuser’s cooperation unnecessary to receive a visa.

Cancellation or suspension of removal under VAWA protected an eligible battered immigrant from deportation and allowed them to achieve permanent

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66. See Violence Against Women Act (VAWA), supra note 63 (listing benefits of VAWA status). Generally, VAWA was successful in assisting noncitizen victims of abuse, and studies demonstrate that it also aided in decreasing abuse overall. See Monica N. Modi et al., The Role of Violence Against Women Act in Addressing Intimate Partner Violence: A Public Health Issue, 1 J. WOMEN’S HEALTH 5 (Mar. 1, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3952594/ [https://perma.cc/GBD6-L9HM] (discussing passage of VAWA and its various provisions). After Congress enacted VAWA, intimate partner violence against women declined by 53% between 1993 and 2008. See id. (utilizing statistical data to demonstrate VAWA’s impact on intimate partner violence). In addition, the number of intimate partner homicides of women decreased by 26%. See id. (noting significant decrease in intimate partner homicides after VAWA enacted).


68. See Orloff, supra note 53, at 114 (reciting self-petition requirements).

69. See Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime, supra note 64 (providing qualifications, besides abuse, for VAWA self-petition).

residency without the consent of a U.S. citizen or lawful permanent resident spouse.\textsuperscript{71} To be eligible for such relief, the immigrant had to show that: (1) they had three years of continuous physical presence in the United States; (2) they would suffer extreme hardship if deported; (3) they were, at the time of seeking protections or prior, married to a citizen or lawful permanent resident; (4) they resided with the abuser and married in good faith; and (5) they had good moral character.\textsuperscript{72}

While opening the door for many victimized noncitizens, VAWA protections lacked any solace for battered immigrants who were not married to a U.S. citizen or lawful permanent resident.\textsuperscript{73} VAWA’s limited reach rendered the self-petition and cancellation or suspension of removal proceedings aspects of VAWA inapplicable for many battered immigrants seeking lawful status for themselves and their children.\textsuperscript{74} In light of these concerns, additional efforts were made to create new forms of relief.\textsuperscript{75}

4. Battered Immigrant Women Protection Act

In 2000, Congress enacted the Victims of Trafficking and Violence Protection Act (TVTPA), which included the Battered Immigrant Women Protection Act (BIWPA).\textsuperscript{76} Congress acknowledged that noncitizen victims were reluctant to seek legal relief from their abusers, which put themselves in danger and frustrated law enforcement goals.\textsuperscript{77} Congress intended for the BIWPA to strengthen the ability of law enforcement agencies to prosecute crimes, while also offering protection for immigrant victims.\textsuperscript{78} In sum, BIWPA sought to ensure that unauthorized immigrants and their children who were excluded from VAWA protections would have another route to escape volatile situations and achieve stability.\textsuperscript{79}


\textsuperscript{72} See Orloff, supra note 53, at 115 (stating purpose and requirements of cancellation of removal).

\textsuperscript{73} See Natalie Nanasi et al., The U Visa’s Failed Promise for Survivors of Domestic Violence, 29 YALE J.L. & FEMINISM 273, 282 (2018) (highlighting individuals left out of VAWA protections).

\textsuperscript{74} See id. (noting VAWA self-petitioning left unmarried women with no remedy).

\textsuperscript{75} See id. (explaining need for more inclusive remedies).


\textsuperscript{77} See Abrams, supra note 19, at 26 (explaining why undocumented victims of crimes reluctant to seek help from law enforcement); see also supra note 36 (discussing unique obstacles preventing noncitizens from escaping abusive relationships).

\textsuperscript{78} See Abrams, supra note 19, at 26 (highlighting dual purpose of BIWPA to investigate crimes and protect victims).

\textsuperscript{79} See Elizabeth M. McCormick, Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities, 22 STAN. L. & POL’Y REV. 587, 598 (2011) (detailing BIWPA’s attempt to make up for certain noncitizens’ lack of protection under VAWA). Many noncitizens were unintentionally left out of VAWA; BIWPA sought to fill in these gaps to better protect noncitizen crime victims.
D. U Nonimmigrant Status

The U visa arose as part of BIWPA and was the first remedy for victims of domestic abuse, and certain other crimes, who were not married to a U.S. citizen or permanent resident, allowing nonimmigrants to apply for visa rights independently. Under prior law, abusers were effectively able to shield themselves from any criminal liability because the immigrant spouses had no viable means of obtaining help from law enforcement without risking deportation; for example, the abusive spouse could simply revoke their consent to the victim’s family-based immigration status in the event the immigrant spouse sought law enforcement aid. In addition, noncitizen victims who were not married to their abusers had no recourse under VAWA or any of the previous legislative schemes. The U visa’s creation served two main purposes: (1) to encourage immigrants to report crimes to law enforcement officers; and (2) to provide protection for immigrants who are willing to cooperate and aid the criminal justice system. At its core, the U visa was Congress’s solution for battered immigrants who previously had no remedy.

See id. (discussing shortcomings of VAWA); see also supra notes 73-74 (noting certain noncitizens excluded from protection under previous VAWA legislation).


81. See Victims of Trafficking and Violence Protection Act of 2000 § 1502(a)(3) (providing findings behind passing of BIWPA and U visa). The findings supporting the implementation of additional measures for noncitizen victims of crimes assert,

[T]here are several groups of battered immigrant women and children who do not have access to the immigration protections of [VAWA] which means that their 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 them protection no matter how compelling their case is under existing law.

Id.

82. See Kashyap, supra note 80, at 61 (emphasizing shortcomings of VAWA requirements).


84. See Settlage, supra note 17, at 1764 (detailing purpose of U visa to protect unmarried noncitizens or noncitizens with uncooperative spouses).
Although a step in the right direction for battered immigrant aid in the United States in theory, the U visa was initially unsuccessful in practice. Congress enacted the U visa in 2000; nevertheless, Congress did not promulgate any regulations on how to use the U visa for nearly seven years—and as a result, from its inception through September 2007, no U visas were granted to eligible battered immigrants. This delay left many petitioners no better off than they were prior to the U visa’s creation and significantly stalled the furtherance of its purposes.

1. U Visa Eligibility and Application Requirements

To apply for a U visa, an applicant must have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity. The criminal activity must violate local, state, or federal law, and occur in the United States. Although there are almost thirty offenses included under the U visa, the majority of applications cite domestic abuse as the qualifying offense. An applicant must supply information about the specific criminal activity to USCIS. USCIS also requires the applicant to provide evidence that they

85. See McCormick, supra note 79, at 590 (discussing delay in U visa’s implementation); Abrams, supra note 19, at 26 (asserting initial U visa processes inadequate to guide applicants).


87. See Abrams, supra note 19, at 26 (noting delay left petitioners and USCIS unsure about U visa protections); see also Anna Hanson, Note, The U-visa: Immigration Law’s Best Kept Secret, 63 ARK. L. REV. 177, 187 (2010) (explaining delay caused by difficult legal and policy issues debated among many agencies).

88. See 8 U.S.C. § 1101(a)(15)(U)(i)(I) (requiring noncitizen victim to provide proof of physical or mental abuse from crime).

89. See id. at § 1101(a)(15)(U)(i)(IV) (creating jurisdictional requirement for eligible crimes under U visa).

90. See Nanasi, supra note 73, at 278 (detailing number of U visa’s qualifying offenses). The complete list of eligible crimes is as follows: trafficking, incest, sexual assault, abusive sexual contact, prostitution, sexual exploitation, rape, torture, domestic violence, stalking, female genital mutilation, being held hostage,peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, or the attempt, conspiracy, or solicitation to commit any of these crimes. See 8 U.S.C. § 1101(a)(15)(U)(iii) (listing applicable offenses for U visa). A nationwide survey found that 68% of applications were based on domestic abuse. See LESLYE E. ORLOFF ET AL., NAT’L IMMIGRANT WOMEN’S ADVOC. PROJECT, TRANSFORMING LIVES: HOW THE VAWA SELF-PETITION AND U VISAS CHANGE THE LIVES OF SURVIVORS AND THEIR CHILDREN AFTER EMPLOYMENT AUTHORIZATION AND LEGAL IMMIGRATION STATUS 1, 21 (2021), https://iowalibrary.wcl.american.edu/wp-content/uploads/Transforming-Lives-Final-6.8.21-Final.pdf (https://perma.cc/HM8E-LZG4) (providing results of survey of attorneys, advocates and state government staff).

have been helpful, or are likely to be helpful, in the investigation or prosecution
of the qualifying crime.92

An applicant must complete a Form I-918, Petition for U Nonimmigrant Sta-
tus by supplying basic biographical information.93 The second required form is
a certification that must be completed by a government entity with authority to
certify U visas.94 Further, an applicant has the option to file a supplement to the
petition for qualifying family members.95 Finally, an applicant may file supple-
mental evidence, such as a personal statement providing a narrative of the crimes,
affidavits, medical reports, court documents, and police reports to verify their
claim of victimization.96 In making a determination on any petition, the consular
office of the Attorney General considers any credible evidence relevant to the
petition.97

2. Benefits Derived from U Visa Status

Applicants granted U visa nonimmigrant status have the benefit of lawful sta-
tus for up to four years.98 The Attorney General may extend the four-year period
due to delays in consular processing, a request from law enforcement, or

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92. See id. at § 1101(a)(15)(U)(i)(III) (dictating helpfulness requirement proven by applicant through law
enforcement certificate). See generally Alanko, supra note 35 (discussing U visa’s helpfulness mandate and
certification).

93. See Victims of Criminal Activity: U Nonimmigrant Status, supra note 4 (detailing required filings for
U visa application); IMMIGRANTS’ RTS. CLINIC OF STAN. L. SCH., GETTING A U-VISA, IMMIGRATION HELP FOR
[https://perma.cc/HN67-H2JH] (explaining I-918 main form required for basic information); see also U.S.
CITIZENSHIP & IMMIGR. SERVS., FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, https://www.uscis.gov/
sites/default/files/document/forms/i-918.pdf [https://perma.cc/3TZP-FAH5] (providing fillable form I-918 for
applicants).

94. See U.S. CITIZENSHIP & IMMIGR. SERVS., FORM I-918, SUPPLEMENT B, U NONIMMIGRANT STATUS
-WTHN] (furnishing Form I-918, Supplement B). Certifying entities include, but are not limited to: federal,
state, and local law enforcement agencies; prosecutors’ offices; judges; family protective services; equal emplo-
ment opportunity commissions; and federal and state departments of labor. See DEP’T OF HOMELAND SEC., U
VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE 2-3, https://www.dhs.gov/xlibrary/assets/privacy/
dhs_u_visa_law_enforcement_certification_guide.pdf [https://perma.cc/623S-T2G4] (defining certifying agen-
cies to include all authorities responsible for investigating and adjudicating qualifying criminal activity).
Supplement B requires the entity to certify that the petitioner is a victim of one of the crimes, has knowledge of the
activity, and has helped or will help in the investigation or prosecution of the crime. See 8 U.S.C. § 1184(p)(1)
describing mandatory certification form).

95. See U.S. CITIZENSHIP & IMMIGR. SERVS., FORM I-918, SUPPLEMENT A, PETITION FOR QUALIFYING
[https://perma.cc/65CX-VRHX] (supplying petition for qualifying family member to achieve benefits).

96. See Victims of Criminal Activity: U Nonimmigrant Status, supra note 4 (breaking down components of
U visa application).

97. See 8 U.S.C. § 1184(p)(4) (establishing standard of review Attorney General or consular office exer-
cises).

98. See id. at § 1184(p)(6).
exceptional circumstances. Lawful status may also automatically extend based on
the filing and pendency of an application for adjustment. 100

With regard to adjustment, a noncitizen may become eligible to be a lawful
permanent resident after three years in the United States, provided two elements
are met. 101 First, the U visa holder must be physically present in the United States
for a continuous period of 90 days or 180 days in total over three years since the
date of admission. 102 Second, the Secretary of Homeland Security must deter-
mine that the noncitizen’s continued presence in the United States is justified on
humanitarian grounds, is necessary to ensure family unity, or is in the public
interest. 103 In making this determination, the Secretary of Homeland Security
weighs adverse factors against favorable factors, such as family ties, hardship,
and length of residence in the United States. 104 To demonstrate, in Matter of
Arai, 105 these favorable factors consisted of the fact that the applicant was young,
healthy, and exhibited qualities indicating good moral character. 106 Additionally,
the BIA noted that USCIS issued the applicant a labor certification and he would
therefore be of potential benefit to the United States. 107 In contrast, in Guyadin

99. See id. (providing extension guidelines); Victims of Criminal Activity: U Nonimmigrant Status, supra
note 4 (listing potential circumstances warranting extension of lawful status under U visa). Considering the four-
year average applicants remain on the waitlist prior to final adjudication of their U visa, many necessitate an
extension to avoid negative consequences like deportation. See Abrams, supra note 19 (highlighting uncertainty
of U visa wait list).

100. See Victims of Criminal Activity: U Nonimmigrant Status, supra note 4 (explaining impact of applica-
tion for adjustment on lawful status). Adjustment of status essentially permits an individual with U visa nonim-
migrant status to get a green card without having to return to their home country to complete the processing. See
of status for noncitizens). If a U visa applicant meets all the requirements for adjustment, they must file an
immigrant petition, file a Form I-485, attend an appointment at an Application Support Center, participate in an
interview, and respond to any requests made for additional evidence, if needed. See id. (providing breakdown of
steps required to adjust status to lawful permanent resident).

101. See 8 U.S.C. § 1255(m) (enumerating requirements to obtain green card).

102. See If My U Visa Application Gets Approved, When Can I Get Lawful Permanent Residence (A Green
u-visa-crime-victims/after-you-apply-u-visa/if-my-u-visa-application-gets [https://perma.cc/23S3-M9HJ] (list-
ing steps to obtain green card).

103. See id. (explaining factors considered in determining appropriateness of continued presence in United
States); see also Medina v. Beers, 65 F. Supp. 3d 419, 425 (E.D. Pa. 2014) (reiterating standard used for status
ordinarily granted absent adverse factors). Even if these requirements are met, the Secretary may deny the noncit-
izen lawful permanent residence if affirmative evidence exists showing that the noncitizen unreasonably refused
to assist in a criminal investigation or prosecution. See Green Card for a Victim of a Crime (U Nonimmigrant),
of-a-crime-u-nonimmigrant [https://perma.cc/3266-2C5V] (requiring applicant to continue to assist law en-
forcement).

104. See Matter of Arai, 13 I & N at 496 (listing examples of equities meriting favorable exercise of admin-
istrative discretion).

105. Id.

106. See id. at 495 (explaining absence of adverse factors and highlighting positive factors).

107. See id. (noting petitioner’s employment and lack of dependents).
v. Gonzales, the BIA concluded that the petitioner’s nonpayment of taxes was an adverse factor that precluded a favorable exercise of discretion.

Deferred action also allows USCIS to provide the noncitizen with a work permit. Noncitizens who wish to work in the United States must have express authorization from USCIS before obtaining and beginning employment. With a U visa, USCIS will automatically issue an employment authorization document (EAD), allowing the individual to lawfully earn income. The privileges extended to the U visa holder may also be given to their qualifying family members. Depending on the age of the principal U visa holder, spouses, children, parents, and unmarried siblings under the age of eighteen can obtain derivative benefits.

3. Application Approval and Waitlist

Pursuant to the statute, Congress placed a cap on the number of immigrants who could be granted U visas in any fiscal year. Once 10,000 individuals have been provided status as nonimmigrants through the U visa, the remainder of the applicants for the fiscal year are considered for a waitlist. In determining

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109. See id. at 467 (reciting immigration judge’s determination and factor weighing).
113. See id. (clarifying when derivatives have U visa protections). Derivatives are not included in the 10,000 U visa cap. See id. (distinguishing between principal petitioners and derivatives in regard to limitation on visas); 8 U.S.C. § 1184(p)(2)(B) (setting limit on petitioners, excluding derivatives from calculation).
114. See 8 U.S.C. § 1184(p)(2)(A) (providing cap on number of noncitizens who receive U visas or otherwise provided nonimmigrant status).
115. See POLICY MANUAL, supra note 9, ch. 6, at 416 (describing waitlist for U visa and benefits conferred during interim). USCIS must conduct an analysis of the application and preliminarily adjudicate the individual’s
eligibility for a waitlist placement, USCIS officers evaluate the requirements under a preponderance of the evidence standard.\textsuperscript{116}

If approved for the waitlist, USCIS will provide notice to the applicant, along with information on deferred action and work authorization benefits.\textsuperscript{117} The waitlist placement entitles eligible applicants to four years of deferred action, during which the noncitizen cannot be subject to removal from the United States.\textsuperscript{118} Additionally, waitlist applicants may achieve employment authorization so that they may lawfully work while waiting for nonimmigrant status.\textsuperscript{119} If the applicant is on the waitlist for longer than the four-year period, they can request a renewal of the deferred action and employment authorization for another four years or until the U visa adjudication.\textsuperscript{120}

Due to the limit on the number of applications reviewed, the waitlist has grown insurmountable as the years pass.\textsuperscript{121} For example, in 2014, the cap was

\textsuperscript{116} See id. at 416 (stating preponderance of evidence standard required for U visa waiting list adjudications). Once the applicant survives the waitlist adjudication, they will remain on the waitlist until the final U visa adjudication. See Liz Robbins, \textit{Immigrant Crime Victims Seeking Special Visas Find a Tough Path}, \textit{N.Y. TIMES} (Mar. 8, 2016), http://www.nytimes.com/2016/03/09/nyregion/immigrant-crime-victims-seeking-special-visas-find-a-tough-path.html? r=0 [https://perma.cc/R82K-BC2Y] (retelling U visa applicant’s long journey on waiting list). Courts have recognized the extensive wait process, such as in \textit{Quecheluna v. Garland}, where the court determined that the U visa backlog and slow processing time was not sufficient to justify the denial of a continuance. 9 F.4th 585, 589 (8th Cir. 2021) (acknowledging immense wait period plaguing U visa system).

\textsuperscript{117} \textit{See Policy Manual}, supra note 9, ch. 6, at 417 (explaining award of deferred action granted to U visa eligible applicants on waitlist).


\textsuperscript{119} \textit{See Policy Manual}, supra note 9, ch. 6, at 417 (describing employment authorization for U visa applicants on waiting list). Principal petitioners who file an application for employment authorization must submit a fee or a Request for Fee Waiver. See id. at 418 (highlighting process to achieve employment authorization); see also U.S. CITIZENSHIP & IMMIGR. SERVS., FORM I-912, REQUEST FOR FEES WAIVER, https://www.uscis.gov/sites/default/files/document/forms/i-912.pdf [https://perma.cc/XVU8-HL4C] (providing fillable fee waiver request form).

\textsuperscript{120} \textit{See Victims of Criminal Activity: U Nonimmigrant Status, supra note 4 (providing information on work authorization and deferred action extension). In addition to work authorization and deferred action, USCIS will grant parole to eligible U visa petitioners by facilitating entry into the United States in the interim between filing the application and final U visa adjudication. See LEÓN RODRÍGUEZ, \textit{PAROLE FOR ELIGIBLE U VISAS, PRINCIPAL AND DEROGATIVE PETITIONERS}, U.S. CITIZENSHIP & IMMIGR. SERVS. (2016), https://www.dhs.gov/sites/default/files/publications/2016-0818_cisomb_formal_recommendation_on_u_parole_signed.pdf [https://perma.cc/45K-BX2U] (highlighting recommendations on parole for U visa applicants on waiting list and derivative petitioners).

exceeded by 46,000 applicants.\textsuperscript{122} More than tripling from 2012, 2015 brought a queue of 64,000 pending petitions waiting to be reviewed.\textsuperscript{123}

In response to the rising numbers of applicants on the waitlist, USCIS began reviewing U visa petitions in 2016 at its Nebraska and Vermont service centers.\textsuperscript{124} USCIS commented that the workload share would give them the opportunity to better balance the influx of applications and to work towards improving processing times and efficiency.\textsuperscript{125} An initial 3,000 U visa petitions transferred from the Vermont center to the Nebraska center, with both sites working on completing the oldest cases first to lessen the backlog.\textsuperscript{126}

\subsection*{E. Bona Fide Determination Process}

The Bona Fide Determination Process is an alternative to remaining in the United States without benefits until placement on the waiting list, which currently averages sixty months.\textsuperscript{127} A Bona Fide Determination can be made if an initial review of the U visa application demonstrates that the application was properly filed and a criminal background check does not raise any concerns; being placed on the waitlist, by comparison, requires that the U visa application meet all of the eligibility requirements, demanding a lengthier review process before waitlist benefits are granted.\textsuperscript{128} USCIS created the Bona Fide Determination Process pursuant to a statutory grant of authority which states that the Secretary of Homeland Security may grant work authorization to any noncitizen who has a pending, Bona Fide Determination application for nonimmigrant status.\textsuperscript{129} Despite the fact that this power vested many years ago, USCIS did not begin


\textsuperscript{123} See id. (graphing trajectory of U visa procedures, specifically identifying buildup of applicants waiting).


\textsuperscript{125} See July 2016 Work Share Plan: Form I-918, Petition for U Nonimmigrant Status, supra note 124 (providing USCIS reasoning for workshare).

\textsuperscript{126} See id. (noting 3,000 older petitions moved from Vermont to Nebraska for faster adjudication).


\textsuperscript{128} See Know Your Rights: New U Visa Bona Fide Determination Procedure, supra note 13 (emphasizing differences in review required for waitlist placement versus Bona Fide Determination).

\textsuperscript{129} See 8 U.S.C. § 1184(p)(6) (conferring ability to Secretary to grant work authorization to bona fide applicants).
implementing said authority until June 2021, instead relying solely on waiting list adjudications to grant work authorization and deferred action.¹³⁰

1. Bona Fide Determination Procedures and Requirements

To be considered for Bona Fide Determination, the petitioner must only submit the documents required for a U visa—no additional filings are required.¹³¹ USCIS will conduct an initial review of the Form I-918, law enforcement certification, personal statement describing the facts of the crime, and principal petitioner’s biometrics, which entails criminal background and security checks.¹³² Based off of this review, USCIS will determine if the petitioner has complied with initial evidence requirements and cooperated with the mandatory background checks.¹³³ Once USCIS deems the petition bona fide, it considers if the petitioner poses a risk to national security or public safety.¹³⁴ If USCIS ultimately decides that the petitioner merits a favorable exercise of discretion, the petitioner will be entitled to benefits prior to the full-scale waitlist adjudication, which takes years.¹³⁵

2. Work Authorization and Deferred Action With Bona Fide Determination

A Bona Fide Determination does not guarantee final U visa approval—rather the determination is only a brief review of the petition.¹³⁶ Upon a finding that a petition is bona fide, the applicant will be able to obtain a BFD EAD.¹³⁷ This

¹³⁰ See Gonzalez v. Cuccinelli, 985 F.3d 357, 361 (4th Cir. 2021) (emphasizing agency’s decision to refrain from exercising its discretion to make Bona Fide Determination); see also Bronstein, supra note 12 (highlighting significant time between grant of authority and implementation of Bona Fide Determination Process). The current administration put the Bona Fide Determination Process in place, but they may choose to rescind it in the future. See Garcia v. United States Dep’t of Homeland Sec., 14 F.4th 462, 473 (6th Cir. 2021) (contemplating nature of policy manual guidelines and possibility of impermanence).

¹³¹ See Know Your Rights: New U Visa Bona Fide Determination Procedure, supra note 13 (enumerating requirements for determination of bona fide application).

¹³² See POLICY MANUAL, supra note 9, at 409 (listing process USCIS follows in making Bona Fide Determination).

¹³³ See id. at 408 (stating mere compliance necessary to meet bona fide standard).

¹³⁴ See id. at 409-10 (listing categories rendering applicant ineligible for Bona Fide Determination benefits). Public safety concerns may include: murder; rape; sexual assault; offenses involving firearms, possession of explosive materials, or destructive devices; offenses relating to peonage, slavery, involuntary servitude, or human trafficking; aggravated assault; offenses relating to child pornography; and offenses involving the manufacturing, distributing, or selling of narcotics. See id. (defining and providing examples of public safety concerns); see also USCIS Issues Policy Providing Further Protections for Victims of Crime, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 14, 2021), https://www.uscis.gov/newsroom/news-releases/uscis-issues-policy-providing-further-protections-for-victims-of-crime [https://perma.cc/DYC5-TK5K] (noting petitioners must not pose risk to national security or public safety).

¹³⁵ See POLICY MANUAL, supra note 9, at 408 (emphasizing advantages of Bona Fide Determination Process if approved).

¹³⁶ See BROWN & KAMII, supra note 10, at 4 (distinguishing between initial Bona Fide Determination review stage and final U visa adjudication).

¹³⁷ See 8 U.S.C. § 1184(p)(6) (providing statutory grant of authority allowing USCIS to issue BFD EADs); see also USCIS Issues Policy Update to Better Protect Victims of Crime, WBIW.COM (Jun. 14, 2021), http://www
document provides the applicant with work authorization for four years, which is identical to the benefit the waiting list provides, but the applicant can lawfully work significantly earlier in the process. The Bona Fide Determination Process only applies to petitions that have not yet reached waitlist adjudication (in order of the petition’s filing date) and those filed after June 14, 2021. Individuals who have previously completed the waitlist adjudication will not be entitled to this process as they already have access to deferred action and employment authorization. But, like the waitlist, there are also derivative benefits for qualifying family members that become available once the principal petitioner receives their employment authorization and deferred action.

3. Goals of the Policy Change and Implementation of the Bona Fide Determination Process

USCIS implemented the Bona Fide Determination Process in an attempt to more rapidly distinguish between legitimate and illegitimate applications, providing those sound applicants with some immediate benefits. The
Secretary of Homeland Security opined that the Bona Fide Determination Process is a necessary step to aid victims and promote public safety, recognizing that the applicants are coming forward to help law enforcement protect society from perpetrators of crime and, thus, deserve a measure of protection for themselves.\textsuperscript{144} Based off the previously prolonged waitlist adjudication and the negative consequences from the delay, the Bona Fide Determination Process simultaneously seeks to promote criminal justice and more efficiently provide solace for those noncitizens who choose to come forward to assist in the investigation and prosecution of their abusers.\textsuperscript{145}

4. Bona Fide Determination Wait Time

The Bona Fide Determination Process, similar to the traditional waitlist, does not provide interim benefits immediately.\textsuperscript{146} To demonstrate, Beatriz Torres, a mother of five, applied for a U visa in 2017 after her 16-month-old son died in a tragic hit-and-run car accident.\textsuperscript{147} She anticipated that she would be placed on a waitlist or receive benefits from the Bona Fide Determination Process following its enaction in June 2021; but, as of November 17, 2021, she had not yet received either.\textsuperscript{148} This date marked nearly four years of no work authorization, deferred action, or other benefits reserved for those with legal noncitizen status, despite the “more efficient” Bona Fide Determination Process.\textsuperscript{149} In Texas, immigrants who do not have work authorization cannot obtain a driver’s license, illustrating the urgent nature of receiving the interim benefits.\textsuperscript{150}

\textsuperscript{144} See USCIS Issues Policy Providing Further Protections for Victims of Crime, supra note 134 (reiterating reasons for implementation of Bona Fide Determination Process).


\textsuperscript{147} See id. (detailing family of hit-and-run victim’s struggle obtaining U visa).

\textsuperscript{148} See id. (highlighting uncertainty facing U visa applicants awaiting placement on waiting list); see also Yu, supra note 2 (affirming fears of U visa applicants in United States without deferred action).

\textsuperscript{149} See Chávez, supra note 146 (providing timeline of U visa applicant in North Texas).

\textsuperscript{150} See id. (noting implications of lack of work authorization for noncitizens in Texas); TEX. DEP’T OF PUB. SAFETY, VERIFYING LAWFUL PRESENCE 1 (2013), https://www.dps.texas.gov/sites/default/files/documents/drive-elicence/documents/verifyinglawfulpresence.pdf [https://perma.cc/9T3J-DPJR] (requiring proof of lawful presence in United States to obtain driver’s license or identification card); see also Deferred Action for U Visa Eligible Clients, supra note 118 (explaining benefit of deferred action for noncitizens in United States); supra note 111 (noting procedure and opportunities of employment authorization in the United States). The median household income in Dallas City, Texas from 2016 to 2020 was $54,747. See U.S. CENSUS BUREAU, U.S. CENSUS BUREAU QUICKFACTS: DALLAS CITY, TEXAS, https://www.census.gov/quickfacts/fact/table/dallascitytexasUS/INC110219 [https://perma.cc/V8W4-38U3 ] (comparing household incomes in Texas and United States). Four years of waiting for work authorization can mean a loss of $218,988 worth of income. See id. (providing census data for average residents of Texas). In comparison, minimum wage in Texas is only $7.25 an hour, meaning
III. ANALYSIS

A. The Bona Fide Determination Process Is a Necessary but Flawed Acknowledgement of the Issues Plaguing the U Visa

USCIS has an obligation to fulfill its promise to aid noncitizen victims of crime in the United States. USCIS put the Bona Fide Determination Process in place to address the excessive wait that plagues the U visa system and has caused many noncitizens to go years without employment authorization or deferred action—rendering them unable to provide for themselves at best, and vulnerable to deportation at worst. In 2020, the average wait to simply get on the U-visa waitlist was 4.24 years. This time does not even account for the additional wait for final U visa adjudication, which averages an additional ten months, culminating in an approximate wait of five years. And this number is merely the average—many petitioners wait even longer and are still demanding permanent relief. The Bona Fide Determination Process was USCIS’s answer that an individual who works 8 hours per day, 5 days a week, will bring in an income of $15,138, not including taxes withheld. See Pamela Comme, Experts Say Texas Minimum Wage of $7.25 an Hour is Not Livable, KVUE (Jan. 28, 2022), https://www.kvue.com/article/news/local/experts-texas-minimum-wage-725-not-livable/269-49011d46-728d-4759-9341-1e8f3d3ae350 [https://perma.cc/45MW-5KDQ] (arguing for minimum $40,000 per year livable wage in Texas).

151. See U.S. DEP’T OF HOMELAND SEC., supra note 83 (detailing USCIS’s ability to investigate crimes and responsibility to protect victims).

152. See Know Your Rights: New U Visa Bona Fide Determination Procedure, supra note 13 (describing elements and purpose of Bona Fide Determination Process); see also Yu, supra note 2 (telling story of woman deported during delay in U visa processing); POLICY MANUAL, supra note 9, ch. 6, at 417 (explaining deferred action and employment authorization permitted upon approval for waitlist). Rosa Maria Perez, a U visa applicant, was so overwhelmed by emotion once she heard the news of the Bona Fide Determination work permit that she laughed and cried. See Morrissey, supra note 110 (recounting stories of crime victims who waited years for work authorization and deferred action). Her application had been pending since 2019 with no progress due to the backlog. See id. (providing background of Rosa Maria’s U visa process). While waiting for work authorization, she worked as a fieldworker at a succulent farm, but she has hopes to obtain better wages and a job with benefits. See id. (noting difference in quality of jobs available to noncitizens with work authorization). Rosa Maria was especially relieved, as her daughter’s friend’s mother had been deported while waiting. See id. (highlighting risk of deportation while waiting for U visa benefits). Another woman opined,

To be legal here is to have more opportunity to look for work, have a good place to live and not have the worry that they’re going to deport us [. . . It terrorizes me to imagine that something could happen to me and that I’ll have to return to Mexico with my children.

Id.

153. See U.S. CITIZENSHIP & IMMIGR. SERVS., supra note 18, at 4 (providing average wait from receipt of U visa petition until placement on waiting list).

154. See id. (noting processing time from waitlist until final adjudication averages almost another year).

155. See Shaw, supra note 18 (explaining victims wait more than ten years to receive U visa protections); see also Cade & Flanagan, supra note 121 (stating number of noncitizens victimized consistently outstrips number of U visas available per year); Quecheluno v. Garland, 9 F.4th 585, 589 (8th Cir. 2021) (discussing excessive wait times for U visa). The perpetual waitlist is not a new problem, as the waits have been consistently lengthy. See U.S. CITIZENSHIP & IMMIGR. SERVS., supra note 18, at 4-5 (listing waiting period statistics for each fiscal quarter since 2017). In 2017, the average wait from the time of filing a petition to the issuance of a U visa was
to this severe problem, but it only provides relief during the initial review processing times—not in final U visa adjudication. 156

The Department of Homeland Security’s Office of Inspector General (OIG) conducted an audit in January 2022 and determined that USCIS failed to manage the U visa program effectively. 157 USCIS pushed back by arguing that the Bona Fide Determination Process is an appropriate remedy, but this has been disproven as waits continue to frustrate the Bona Fide Determination Process. 158 The average wait time for a Bona Fide Determination is approximately three to eleven months, which, although better than the wait list, is still a significant period to be unable to work lawfully, obtain a driver’s license, and live in a normal manner. 159 This lack of permanency has the capacity to perpetuate the trauma suffered by the victims and deters them from bothering to come forward, compromising the very purpose of the U visa. 160

B. The Bona Fide Determination Process Is Merely a Temporary Solution to a Much Larger Flaw in U Visa Procedures: The Cap and Backlog

1. The Cap Is Far Exceeded Every Year, Leaving Many in Limbo Waiting for Final Adjudication

To better aid victims of crime and law enforcement investigations, the cap needs to be removed and an increase in funding must be given to the U visa program. 161 The cap is debilitating for USCIS and directly contravenes the

42.7 months. See id. (noting significant wait). In 2018, it increased to 45.7 months. See id. (demonstrating increase in wait from 2017 to 2018). Then, continuing its upward trend, in 2019, the wait averaged 52.5 months from receipt of petition to final adjudication. See id. (graphing rapid growth of U visa wait times).

156. See POLICY MANUAL, supra note 9, at 408, 411 (explaining Bona Fide Determination Process alternative to waiting list adjudication, providing quicker interim benefits); Bielby, supra note 145 (describing purpose of Bona Fide Determination Process).

157. See Bielby, supra note 145 (highlighting OIG’s critiques of U visa processes under USCIS). OIG alleged that the mismanagement of the U visa program led to legitimate victims waiting more than ten years to receive U visas, leaving the applicants without any sense of permanency or security. See OFF. OF INSPECTOR GEN., supra note 18, at 5-14 (providing OIG findings regarding handling of U visas).

158. See OFF. OF INSPECTOR GEN., supra note 18, at 17 (detailing USCIS’s response following audit); Chávez, supra note 146 (explaining wait for Bona Fide Determination Process remains lengthy).

159. See Chávez, supra note 146 (providing estimated wait since USCIS issued Bona Fide Determination Process in June 2021). Cf. supra note 155 (noting increased waitlist delays, averaging years without benefits).

160. See Schuneman, supra note 86, at 465-66, 490 (emphasizing how uncertainty negatively impacts U visa applicants waiting for lawful residency). Neomy Cruz, an attorney with Hurwitz Holt, a firm representing approximately 200 clients with pending U visas, stated,

When we start a U visa case, the one thing I always make sure they understand is you’re going to be waiting for this for a very long time, and it’s going to feel like we’re not doing anything on your case. You file the application, and then we just wait[,] . . . Most of the clients understand that, and they’re frustrated that they can’t have work permit.

Morrisey, supra note 110.

161. See Morrisey, supra note 110 (illustrating negative impact of cap on U visa’s effectiveness).
purposes behind the implementation of the U visa program: to further law enforcement efforts and simultaneously protect those noncitizens willing to provide assistance in punishing crimes. It is oxymoronic that the U visa program is intended to function as a crime prevention method, with the goal to stop as many crimes as possible, but sets the limit at an arbitrary 10,000 victims.

The cap presents an immense and unavoidable hurdle, preventing the U visa program from reaching its full potential. Congress placed the cap at 10,000 applicants, but this number has been far exceeded every year, amounting to a waitlist of over fifteen times the applicants permitted under the cap by 2019. Given the significant increases in the waiting list since 2012, removal of the statutory cap would better further the goals of the program and allow victims a sense of certainty unrestrained by a waitlist.

Removal of the cap is warranted not only because of the enormous number of applications, but also based on the reasons why protection is necessary—these are individuals who have primarily been victims of traumatizing, life-altering crimes. The severity and prevalence of these crimes in society, especially against noncitizens, begs for widespread criminal justice—not just for the first 10,000 applicants adjudicated each year. The immigrants who come forward suffer trauma and bravely seek the assistance of law enforcement despite all of the obstacles pushing against doing so, necessitating quick and effective protections.

162. See supra note 83 and accompanying text (explaining dual goals of U visa program); Ramey, supra note 121 (asserting inadequacy of 10,000 U visa cap). When victims hear that the visas have reached their cap for the year, they may think it’s not worth it to come forward, instead remaining without benefits. See Ramey, supra note 121 (noting cap discourages victims).

163. See Ramey, supra note 121 (determining no better way to prevent crime than encouraging more noncitizen victims to come forward).

164. See supra note 18 and accompanying text (emphasizing struggles U visa applicants face resulting from cap).

165. See U.S. CITIZENSHIP & IMMIGR. SERVS., supra note 18, at 4-5 (tracking U visa applications and growth of backlog since 2012).

166. See Ramey, supra note 121 (emphasizing necessity of reducing or abolishing U visa cap to ameliorate backlog). Any rationales for limiting the number of U visas available to victims are outweighed by the benefits of encouraging immigrants to report the crimes to police and to participate in the investigation and prosecution. See id. (arguing cap benefits minimized by negative impact on victims).

167. See supra note 90 and accompanying text (listing applicable crimes for U visa eligibility). These crimes remain with the victims for life, and come with not only physical consequences, but mental and emotional repercussions. See supra Section II.B.1 (describing noncitizen-specific concerns and long-lasting effects of domestic abuse). Additionally, these victims frequently have close ties to the community in the United States; for instance, they may raise their own families here, a factor which favors greater protections. See Ramey, supra note 121 (arguing role of noncitizens living in United States warrants lack of cap).

168. See Violence Against Women, supra note 31 (highlighting extremely high percentage of domestic abuse among intimate partners). Abuse rates among noncitizen women are 49.8%—nearly three times the national average. See Intimate Partner Violence Undocumented and Immigrant Women, supra note 35 (illustrating vulnerability of immigrant women). In addition, 65% of noncitizens report being subjected to some immigration-related abuse. See id. (affirming increased risk of noncitizens due to lack of permanent status).

169. See supra notes 43-44 and accompanying text (emphasizing barriers between noncitizens and law enforcement).
2. The Other Methods of Relief for Noncitizen Victims of Crime Have No Restrictions on the Number of Applications Permitted

There is no logical reason for treating the U visa differently than other statutory protections that have no limits on the number of individuals who may benefit in a given fiscal year.\(^{170}\) VAWA, for example, has been immensely successful at preventing crime and allowing individuals to seek permanent status without the cooperation of a lawful resident spouse, and it does not have any restrictions on the number of applicants who may seek self-petitions or cancellation and suspension of removal.\(^{171}\) Similarly, the 1990 waiver of the joint filing requirement did not contain any cap on the number of applicants eligible.\(^{172}\) It makes little sense to permit noncitizens to obtain lawful status on their own through these other means, but to impede the U visa with an unnecessary and burdensome cap.\(^{173}\)

C. Greater Involvement of All USCIS Service Centers Is Required to Evenly Distribute Petition Adjudications

In addition to removing the statutory cap, USCIS requires additional funding to better spread the workload among service centers and remedy the backlog that has been building for over a decade.\(^{174}\) In 2016, USCIS took a small step toward increasing the number of individuals who adjudicate U visa applications by creating a work share plan.\(^{175}\) After six years, USCIS has failed to extend this program beyond the two service centers, despite the fact that there are additional

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171. See supra Section II.C.3 (detailing VAWA protections and purposes). Since VAWA’s inception, it has created significant positive change: Between 1993 and 2010, the rate of intimate partner violence went down by 67%. See Factsheet: The Violence Against Women Act, supra note 60 (providing statistics on VAWA’s improvement of criminal justice response to violence against women). Additionally, all states reformed their laws regarding rape, stalking, domestic abuse, and other crimes to conform with the policy of encouraging victims to come forward. See id. (noting states’ responses to VAWA). As a senator, Joe Biden recognized the severity of abuse against women in the United States, aiding in VAWA’s creation. See id. (explaining Joe Biden’s role in implementation of VAWA).


173. See Settlage, supra note 17, at 1787-89 (noting lack of cap for VAWA protections compared to 10,000 cap for U visa).

174. See Chávez, supra note 146 (highlighting need for additional funding to efficiently process U visa applications). If there aren’t enough people looking at the applications, the backlog is going to remain, and continue to grow to new heights. Id. (urging distribution of workload).

175. See July 2016 Work Share Plan: Form I-918, Petition for U Nonimmigrant Status, supra note 124 (announcing new work share plan for U visa processing). The work share plan essentially permitted USCIS employees to review applications at the Nebraska service center in addition to the Vermont service center. See id. (explaining expansion of U visa processing facilities).
centers in California, Virginia, and Texas.176 If done on a larger scale, expanding capable service centers could have a significant impact on the wait time and allow USCIS to finally catch up on applications in these highly populated areas.177 With the cap removed and resources properly allocated, USCIS would then have the capacity to tackle the exorbitant waitlist and give well more than 10,000 annual domestic abuse victims the protection they deserve.178

IV. Conclusion

The U visa protections will continue to be counteracted by a crippling wait time until affirmative steps are taken to fully process applications at a faster rate. During the time that these U visa applications collect dust, domestic abuse victims are unable to obtain any sense of stability, constantly having to juggle the hardships facing those without solid legal status in the United States. Though the cap is ultimately at the hands of Congress, USCIS has perpetuated the problem by allowing the backlog to grow to unbelievable heights. If U visa applications had been properly distributed and processed for the past ten years, it is unlikely such a wait would exist today. The Bona Fide Determination Process, while acknowledging the downfalls of the U visa backlog, fails to provide any long-term remedy. Rather than putting into place temporary fixes, USCIS should expand the number of service centers working through the applications that have been sitting stagnant for nearly a decade. This change would not only give individuals employment authorization and deferred action faster, but would also aid in chipping away at the backlog, rather than simply allowing it to continue to grow insurmountably.

The cap can solely be altered by Congress, however, there is a chance for change on the horizon: If Congress considers the proposal to drastically up the cap, it could be increased to 30,000—three times the current limit. The cap is what created a waiting list to begin with; it follows that the cap must be undone, or, at the very least, altered to appropriately fit the influx of applicants. The backlog of over 100,000 applications is nearly impenetrable when compared to a 10,000 U visa cap, and it deters many legitimate applicants from even botheriing to apply. A raise of the cap, in conjunction with efforts by USCIS to distribute the processing, is quintessential to an inclusive U visa. The safety, security, and well-being of battered immigrant women compels this necessary change.

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176. See USCIS Service Centers, U.S. CITIZENSHIP & IMMIGR. SERVS., supra note 124 (detailing five service centers processing and adjudicating immigration applications and petitions).

177. See Chávez, supra note 146 (advocating for greater work distribution to eliminate backlog).

178. See USCIS Service Centers, U.S. CITIZENSHIP & IMMIGR. SERVS., supra note 124 (noting available service centers); see also supra Section III.B (advocating for removal of statutory cap).