

## RESTORING THE STATUTORY SAFETY-VALVE FOR IMMIGRANT CRIME VICTIMS: PREMIUM PROCESSING FOR INTERIM U VISA BENEFITS

*Jason A. Cade & Mary Honeychurch*

**ABSTRACT**—This Essay focuses on the U visa, a critical government program that has thus far failed to live up to its significant potential. Congress enacted the U visa to aid undocumented victims of serious crime and incentivize them to assist law enforcement without fear of deportation. The reality, however, is that noncitizens eligible for U status still languish in limbo for many years while remaining vulnerable to deportation and workplace exploitation. This is in large part due to the fact that United States Citizenship and Immigration Services (USCIS) has never devoted sufficient resources to processing these cases. As a result, the potential benefits of the U visa remain underrealized and communities are left less safe. In an era of sustained focus on enforcement and increased instability within immigrant communities, the situation becomes ever more urgent. This Essay introduces and defends a simple administrative innovation that would dramatically improve the process: a premium processing route for interim approvals and employment authorization. Although our proposal cannot resolve all the underlying problems, it is pragmatic, easily implemented, and superior to the status quo.

**AUTHORS**—Jason A. Cade is an Associate Professor of Law at the University of Georgia School of Law, where he also directs the Community Health Law Partnership Clinic. Mary Honeychurch is a 2018 graduate of the University of Georgia School of Law and a Staff Attorney at Seyfarth Shaw. Thanks to David Baluarte, Warren Binford, Gillian Chadwick, Laila Hlass, Liz Keyes, Nickole Miller, Emily Robinson, Russell Gabriel, and the UGA Law Clinical Faculty for helpful comments on a draft. Dan Vo (UGA Law '20) provided excellent research assistance. Thanks also to TJ Striepe and the UGA Law Library for additional research help, and to the Northwestern University Law Review for editorial support.

INTRODUCTION .....	121
I. PURPOSE AND LIMITATIONS OF THE U VISA .....	125
II. AGENCY PARALLELS AND PRECEDENTS .....	129
A. <i>Premium Processing for Nonimmigrant- and Employment-Based Visa Categories</i> .....	130
B. <i>Fee-Based Adjudication of Deferred Action for Childhood Arrivals</i> .....	131
C. <i>Authority for Fee-Based Interim Processing</i> .....	132
III. DESIGN OPTIONS FOR PREMIUM PROCESSING OF INTERIM U BENEFITS .....	133
A. <i>Timeline</i> .....	133
B. <i>Fee Amount</i> .....	135
C. <i>Level of Scrutiny</i> .....	135
IV. BENEFITS AND DRAWBACKS OF PREMIUM PROCESSING .....	136
A. <i>Potential Benefits</i> .....	136
B. <i>Potential Drawbacks</i> .....	141
CONCLUSION .....	144

## INTRODUCTION

This Essay addresses an important statutory measure designed to protect crime victims and communities that thus far has failed to live up to its potential. Congress enacted the “U” nonimmigrant category in 2000 to provide humanitarian aid to noncitizen crime victims residing in the United States and to encourage them to assist local, state, or federal law enforcement without fear of deportation.<sup>1</sup> The statutorily-imposed cap of 10,000 annual U visas<sup>2</sup> per year, however, has proven severely inadequate to address the number of noncitizens eligible for relief, resulting in a waitlist that will likely take more than ten years to clear.<sup>3</sup> This deep backlog, which grows exponentially each year, leaves U applicants in a precarious state and

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<sup>1</sup> Jason A. Cade & Meghan L. Flanagan, *Five Steps to a Better U: Improving the Crime-Fighting Visa*, 21 RICH. PUB. INT. L. REV. 85, 90–91 (2017) (describing the legislative history and purposes of the U visa); Lisa Locher, “U Visa” Relief for Undocumented Victims of Crime, 61 Bos. B.J. 24 (2017); see also 8 U.S.C. § 1101(a)(15)(U) (2018); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464, 1533–37 (2000) (amended 2006).

<sup>2</sup> In this Essay, we follow convention by using the terms “U status” and “U visa” more or less interchangeably. More precisely, U status is a nonimmigrant status that allows particular noncitizen victims of crime to stay in the United States for a temporary but renewable period and obtain employment authorization. U visas, on the other hand, permit persons outside the United States who qualify for U status (and who are not found inadmissible) to process through a U.S. consulate and lawfully enter the country.

<sup>3</sup> See *infra* Part I.

significantly undercuts the protection that Congress intended the legislation to provide.

Fortunately, Congress recognized this problem and in 2008 amended the U visa statute to authorize the United States Citizenship and Immigration Services (USCIS) to “grant work authorization to any alien who has a pending, bona fide application” for U status.<sup>4</sup> In other words, for over a decade, § 1184(p)(6) has empowered the agency to provide applicants and their family members with permission to work at any point in the interim before their visa numbers become current, at which time a final adjudication will be made.<sup>5</sup> Federal regulations, in turn, authorize deferred action for noncitizens on the U visa waitlist.<sup>6</sup> Federal law thus provides a safety-valve to compensate for the oversubscribed annual quota on U visas, ensuring that undocumented noncitizens who report crime and cooperate with law enforcement are protected.

The problem, however, is that USCIS has never allocated sufficient resources to adjudicate these interim benefits in a timely fashion.<sup>7</sup> In fact, in recent litigation the agency conceded that it never implemented the statutory safety-valve at all.<sup>8</sup> Instead, agency workers do virtually nothing with a U visa application until it has been pending for approximately four years, at which time it receives a full merits adjudication, resulting in either a denial or placement on a waitlist.<sup>9</sup>

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<sup>4</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended at 8 U.S.C. § 1184(p)(6) (2018)).

<sup>5</sup> See 8 U.S.C. § 1184(p)(6) (“The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 1101(a)(15)(U) . . .”). The sponsors of the statutory amendment expressed hope that USCIS would apply § 1184(p)(6) to adjudicate interim employment authorization within sixty days of filing the U application. See 154 CONG. REC. 24,603 (2008).

<sup>6</sup> See 8 C.F.R. § 214.14(d)(2) (2018) (“USCIS will grant deferred action or parole to U–1 petitioners and qualifying family members while . . . on the waiting list. USCIS, in its discretion, may authorize employment for such petitioners and qualifying family members.”).

<sup>7</sup> See, e.g., *Rodriguez v. Nielsen*, No. 16-CV-7092, 2018 WL 4783977, at \*4 (E.D.N.Y. Sept. 30, 2018) (discussing the Department of Homeland Security’s contention that “section 1184(p)(6) is a ‘discretionary statute’ which they ‘have never implemented.’”).

<sup>8</sup> *Id.* (“‘USCIS does not grant work authorization to U-visa petitioners based on their petitions prior to adjudicating their petitions for the waitlist,’ even though section 1184(p)(6) EAD Pending Petition provides USCIS authority to do so.”)

<sup>9</sup> *Id.* at \*13 (“USCIS only adjudicates EAD applications from petitioners whose petitions have been deemed meritorious and placed on the [wait]list.”); see also Dustin J. Stubbs, Section Chief, Declaration to USCIS, at ¶¶ 5, 8 (Dec. 5, 2017) (on file with author) (explaining that USCIS only grants employment authorization and deferred action after an application is determined to be approvable but for the statutory cap and placed on the waitlist). *But cf.* Cecelia Friedman Levin et al., *Notes and Practice Pointers, Vermont Service Center Stakeholder Event*, ASISTA (Sept. 18, 2015), reprinted in SALLY KINOSHITA ET AL., IMMIGRANT LEGAL RESOURCE CENTER, THE U VISA: OBTAINING STATUS FOR IMMIGRANT VICTIMS OF CRIME, App. C-6 (5th ed. 2016) (reporting that USCIS has “stated that waitlisted cases are not ‘pre-

Although the government has made little effort to justify this wholesale disregard of § 1184(p)(6), the issue appears to be a matter of how the agency allocates resources.<sup>10</sup> According to Dustin Stubbs, the Section Chief who oversees the U visa team, in recent years “USCIS has devoted 100% of its U visa resources to moving the next 10,000 petitions from the waiting list through the approval process” at the point that visas are available.<sup>11</sup> Thus, not only has the agency declined to allocate resources to implement Congress’s intended statutory safety-valve, it has fallen even further behind on the bifurcated merits reviews that finally places pending cases on the waitlist.<sup>12</sup>

Why has USCIS failed to implement the statutory safety-valve for U applications (and dragged its feet on the waitlist)? In large part, the reasons may be financial. There is no fee associated with the primary component of a U visa application.<sup>13</sup> Moreover, the statute requires USCIS to permit U applicants to request fee waivers for any associated forms (i.e., employment authorization and waivers of inadmissibility), which historically have been granted to those with low income.<sup>14</sup> For all applicants, whether fees are waived or not, the conditional approval stage of the process does not generate any additional revenue for the agency.

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approved’ nor ‘conditional approvals’ and practitioners should be prepared to receive requests for additional evidence or notices terminating the case’s placement on the waitlist when appropriate.”).

<sup>10</sup> *Rodriguez*, 2018 WL 4783977, at \*15 (reporting USCIS’s claim that its failure to grant interim benefits to bona fide applications until placement on the waiting list after merits adjudication is “reasonable in light of the exponential increase in U filings” and the “complexity and time-consuming nature of the two-step adjudication process.”).

<sup>11</sup> Stubbs, *supra* note 9, at ¶ 6.

<sup>12</sup> *Id.* at ¶ 10 (“Through FY2016, the ‘cap processing’ step took approximately three months at the beginning of each fiscal year, and because the entire U visa adjudicative team was devoted to that process, during that period each year no subsequently-filed cases were reviewed for placement on the waiting list.”). Although the agency claims to have taken “several recent steps to reduce processing times and ensure petitioners are placed on the waiting list as quickly as is feasible,” *id.* at ¶ 13, only marginal and temporary improvements to the waitlist time adjudication time have resulted. *See id.* at ¶ 14 (indicating that USCIS’s efforts in 2018 achieved only a seventy-seven-day progression of the waitlist, from June 9, 2014 to August 25, 2014).

<sup>13</sup> *Filing Fee, I-918, Petition for U Nonimmigrant Status*, USCIS <https://www.uscis.gov/i-918> [<https://perma.cc/HF5V-MHZM>] (indicating no filing fee for the U visa application).

<sup>14</sup> *See* 8 U.S.C. § 1255(i)(7) (providing that DHS “shall permit aliens to apply for a waiver of any fees associated with” various applications including U visas); DEP’T OF HOMELAND SEC., USCIS, PM-602-0011.1, FEE WAIVER GUIDELINES ESTABLISHED BY THE FINAL RULE OF THE USCIS FEE SCHEDULE: REVISIONS TO ADJUDICATOR’S FIELD MANUAL (*AFM*) CHAPTER 10.9, *AFM* UPDATE AD11-26 (2011) [hereinafter FEE WAIVER GUIDELINES] (describing eligibility criteria for fee waiver requests, including evidence of very low-income). Advocates have reported that in the latter part of 2018 USCIS began denying more fee waiver requests in the U visa context, but as of this writing it is not clear whether this represents a substantive change in policy or rather just stricter evidentiary requirements. *See infra* note 40.

This generous approach with U visa fees is commendable, and likely necessary to ensure that impoverished crime victims are not prohibited from pursuing U status on the basis of income. At the same time, the lopsided resource-revenue dynamic has not incentivized the agency to move quickly at the interim stage, and thus far litigation has been ineffective in coercing more timely consideration of work authorization.<sup>15</sup> In the absence of financial incentives or congressional pressure, USCIS has allowed the backlog of unreviewed applications to grow ever larger, leaving a massive number of crime victims and their families languishing for years.<sup>16</sup>

The upshot is that U applicants and their family members remain in a multi-year limbo, despite Congress's wish that those with "bona fide" applications be considered for interim benefits.<sup>17</sup> As a result, many victims of serious crimes may be deterred from cooperating with law enforcement out of fear that negative immigration consequences will result before they receive deferred action.<sup>18</sup> When crime is unreported, perpetrators may remain at large, free to offend again. And those who nevertheless do come forward to assist law enforcement will for years remain unauthorized to work, unable to obtain driver's licenses, and vulnerable to detention and deportation despite having bona fide applications for U status. These consequences are detrimental for individuals, their families, and communities.

But a workable solution—one likely to be attractive to any administration—is within easy reach: a premium processing route for interim U benefits. Much like premium processing for certain nonimmigrant and employment-based visa categories, the U visa program could incorporate a fee-based expedited route, in which applicants could opt to pay for timely consideration of interim benefits. Ultimately, the U visa itself would be

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<sup>15</sup> See, e.g., *Calderon-Ramirez v. McCament*, 877 F.3d 272 (7th Cir. 2017) (holding that year-and-a-half agency delay in processing work authorization for pending U application was reasonable and rejecting petitioner's writ of mandamus to compel agency action). But see *Rodriguez*, 2018 WL 4783977, at \*18 (ruling that U applications for employment authorization filed before the revision of 8 C.F.R. § 274a.13(d) in January, 2017 have a "vested right" to adjudication within ninety days or the issuance of a temporary interim work document).

<sup>16</sup> The total backlog of pending U visa applications currently exceeds 110,000 (not including family member applications). *Number of Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status 2009–2017*, USCIS (last visited Nov. 29, 2018), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u\\_visastatistics\\_fy2017\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2017_qtr4.pdf) [https://perma.cc/Z8JD-3VAW]. The government has not been clear about how many of the total backlog of cases have been approved and placed on the waitlist, but at best its current processing time for this stage is four years. *Rodriguez*, 2018 WL 4783977, at \*2. By contrast, the agency has processed the analogous fee-based work authorization offered to applicants under Deferred Action for Childhood Arrivals (DACA) in a comparatively brief 120-day timeframe. See *infra* Part II.B.

<sup>17</sup> See *infra* Part I.

<sup>18</sup> See *infra* notes 28, 41 and accompanying text.

granted according to the date of initial receipt. Our proposed solution would merely expedite the conditional approval stage. Importantly, the agency could implement this expedited route as an administrative rule without legislative authorization. Indeed, as we discuss, Deferred Action for Childhood Arrivals (DACA) provides a recent model for a similar fee-based structure for deferred action.<sup>19</sup> But unlike that much-litigated program, however, the authority for conditional approval and interim work authorization in U visa applications is clearly provided in the statute.

This proposal promises many benefits, although it also portends some drawbacks. Chief among the likely downsides would be a timeliness-of-processing division along socioeconomic status lines. While acknowledging the seriousness of this concern, we ultimately conclude that it is outweighed by the gains over the status quo, especially since the proposed reform is focused on the interim stage and would not affect the queue for final adjudication. Moreover, we recommend across-the-board improvements in processing times and anticipate positive spillover effects even for those who cannot afford the premium fee. Ultimately, our primary aspiration is to jumpstart a serious conversation between advocates and the agencies tasked with implementing the U process, ideally leading to necessary improvements that much time and litigation have failed to achieve.

The Essay unfolds as follows. In Part I, we briefly explain the stages of the U visa process and the lengthy delays that currently plague the program. In Part II, we lay some of the groundwork for our proposal by discussing analogous features of employment-based premium processing and the DACA program. We also address USCIS's authority to set fees. In Part III, we sketch a few salient design features that the government and the relevant stakeholders might consider, although we leave most programmatic details to the agency to work out in dialogue with advocates and others. Finally, in Part IV, we more fully address the benefits and potential downsides of expedited processing for U visa conditional approvals.

## I. PURPOSE AND LIMITATIONS OF THE U VISA

Congress created the U visa in 2000 to provide a pathway to lawful status for immigrant victims of serious crime in this country who cooperate with law enforcement.<sup>20</sup> The dual purposes behind the legislation were to

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<sup>19</sup> See *infra* Part II.B.

<sup>20</sup> Cade & Flanagan, *supra* note 1, at 90–91. U status is a nonimmigrant—or in other words, temporary—status, valid for a period of four years, but recipients can apply for lawful permanent resident status after three years in certain circumstances. See *Green Card for a Victim of a Crime (U Nonimmigrant)*, USCIS (last updated May 23, 2018), <https://www.uscis.gov/green-card/other-ways-get-green-card/green-card-victim-crime-u-nonimmigrant> [<https://perma.cc/X4TQ-8RV6>]. Eligible crimes

“enhance law enforcement’s ability to investigate and prosecute crimes” and to “further humanitarian interests by providing assistance to crime victims.”<sup>21</sup> The legislation has long enjoyed bipartisan support under both Republican and Democratic administrations.<sup>22</sup>

Once a noncitizen has obtained the necessary law enforcement form certifying the criminal activity and the victim’s helpfulness, the agency’s current process consists of two stages: waitlist approval and final processing. Initially, the noncitizen submits the required application forms and supporting evidence of eligibility.<sup>23</sup> Because the U visa category is subject to an annual cap of 10,000, each new application begins at the back of a very long line.<sup>24</sup> Indeed, applications have exceeded that statutory cap every year since 2010.<sup>25</sup> In fiscal year 2017, for example, the USCIS received 36,531 principle applications.<sup>26</sup> As a result, the backlog of pending U visa applications currently exceeds 110,000 (not including family member applications), and therefore, a new application filed today could take ten years or more to become current.<sup>27</sup>

In 2008, Congress recognized that the applicants in the U category would run up against the annual cap, and accordingly delegated to USCIS the authority to grant employment authorization to U visa applicants whose cases appear to be “bona fide” but cannot yet be adjudicated due to the

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include those that occur in the United States and violate United States law. *Visas for Victims of Criminal Activity*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/us-visas/other-visa-categories/visas-for-victims-of-criminal-activity.html> [<https://perma.cc/SU7U-VAN2>].

<sup>21</sup> See Cade & Flanagan, *supra* note 1, at 87–88, 90–91 (discussing the legislative history and purposes of the U visa); see also Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 919–29 (2015).

<sup>22</sup> See Cade & Flanagan, *supra* note 1, at 91 (discussing the enactment of the U category and subsequent amendments expanding eligibility).

<sup>23</sup> To qualify for U status, a noncitizen must establish that he or she “has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity” and provide a certification for law enforcement that he or she was helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity. 8 U.S.C. §§ 1101(a)(15)(U)(i)(I)–(III) (2018); 8 C.F.R. §§ 214.14(a)(2)–(3) (2018).

<sup>24</sup> 8 U.S.C. § 1184(p)(2)(A) (2018). Derivative family member U applications do not count towards the 10,000 annual cap. *Id.*

<sup>25</sup> Note that although Congress enacted the U visa provision in 2000, USCIS did not issue implementing regulations or begin adjudicating visas until October 2007. The first year that the agency released data about the number of cases received and approved was 2009. *Number of Form I-918*, *supra* note 16.

<sup>26</sup> See *id.*

<sup>27</sup> *Id.*; see also Cade & Flanagan, *supra* note 1, at 92 n.32 (“Some of these pending applications will be denied or abandoned, and noncitizens sometimes are in a position to submit more than one U visa application. Thus, it is not possible to predict exactly how long it will take to clear the backlog, though it will likely verge on a decade.”); *Check Case Processing Times*, USCIS (last visited Sept. 30, 2018), <https://egov.uscis.gov/processing-times/#mainContent> [<https://perma.cc/9PRF-BN7T>].

backlog.<sup>28</sup> The sponsors of the bill expressed hope that USCIS would issue work authorization to bona fide U applicants within sixty days, and that, in any event, applicants “should not have to wait for up to a year before they can support themselves and their families.”<sup>29</sup> As enacted, however, the provision does not specify a timeline for this critical interim relief.

The agency, it turns out, has never allocated resources to implement the statutory safety-valve, which it interprets as entirely discretionary. Instead, USCIS eventually conducts a full-merits adjudication of pending applications, at which time the application is either denied or placed on a waitlist.<sup>30</sup> Those placed on the waitlist receive deferred action (a form of prosecutorial discretion)<sup>31</sup> and consideration for employment authorization. Unfortunately, due to the agency’s failure to allocate resources commensurate with the U visa category’s demand, the current delay for waitlist adjudication is estimated to be around four years but could be even longer.<sup>32</sup>

The conditional approval stage of the U visa process therefore needs an upgrade. Thus far, litigation has failed to correct agency policy on a broad scale under both the Obama and Trump administrations.<sup>33</sup> The statute does

<sup>28</sup> 8 U.S.C. § 1184(p)(6) (2018) (“The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U) of this title.”); *see also* 8 C.F.R. § 214.14(d)(2) (2018) (“USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while . . . on the waiting list. USCIS, in its discretion, may authorize employment for such petitioners and qualifying family members.”).

<sup>29</sup> *See* 154 CONG. REC. 24,603 (2008).

<sup>30</sup> *Rodriguez v. Nielsen*, No. 16-CV-7092, 2018 WL 4783977, at \*13 (E.D.N.Y. Sept. 30, 2018) (“USCIS only adjudicates EAD applications from petitioners whose petitions have been deemed meritorious and placed on the [wait]list.”); *Stubbs*, *supra* note 9, at ¶¶ 5, 8 (explaining that USCIS only grants employment authorization and deferred action after it is determined to be approvable but for the statutory cap and placed on the waitlist).

<sup>31</sup> Deferred action is a form of prosecutorial discretion rather than a full-fledged form of nonimmigrant status. 8 C.F.R. § 274a.12(c)(14) (2018).

<sup>32</sup> *Check Case Processing Times*, *supra* note 27 (indicating a 48 to 48.5 month wait for Vermont Service Center adjudication of I-918 interim immigration benefits); *see also* Sarah Bronstein, *Changes to U Visa Processing in Fiscal Year 2017*, CATHOLIC IMMIGRATION NETWORK, INC. (last visited Aug. 7, 2018), <https://cliniclegal.org/resources/immigration-and-nationality-act-limited-number-u-visas-fiscal-year-2017> [<https://perma.cc/EL44-L89Z>] (noting an approximately 2.5-year processing delay as of September 15, 2016, when the backlog was significantly smaller than it is at present); *see also* *Stubbs*, *supra* note 9, at ¶¶ 6, 10 (noting that in recent years all available U visa resources were consumed with processing applicants already on the waitlist, such that no new cases were being considered for addition to the waitlist).

<sup>33</sup> *See* *Calderon-Ramirez v. McCament*, 877 F.3d 272 (7th Cir. 2017) (holding that a year-and-a-half agency delay in processing work authorization for pending U application was reasonable and rejecting petitioner’s writ of mandamus to compel agency action); *Solis v. Cissna*, No. CV-9-18-00083-MBS (D.S.C. Aug. 9, 2018) (denying government motion to dismiss Administrative Procedure Act complaint that delay of thirty-seven months for U waitlist adjudication was unreasonable agency action); *Haus v. Nielsen*, No. 17 C 4972, 2018 WL 1035870, at \*5 (N.D. Ill. Feb. 23, 2018) (denying government motion

not specify a timeline for interim adjudication, as noted, and admittedly there is some ambiguity about whether the authority is discretionary.<sup>34</sup> Thus far Congress has declined to exert further pressure on the agency to improve the implementation of § 1184(p)(6).

As we have suggested, a central problem with the scheme is that USCIS lacks financial incentive to promptly adjudicate conditional approvals. The application itself (Form I-918) does not require a filing fee, likely in recognition of the fact that many immigrant crime victims are very low-income.<sup>35</sup> To be sure, this does not mean the U process is cost-free. In addition to expenditures associated with preparing the evidentiary support for the application (often including attorney's fees, psychological evaluations, passport fees, and other materials), several associated agency forms do require fees, unless waived by the agency. For instance, most applicants and qualifying family members request employment authorization on the basis of both anticipated interim deferred action and U status,<sup>36</sup> and each application currently requires a fee of \$410 per individual.<sup>37</sup> Additionally, USCIS may waive many grounds of inadmissibility for U visa applications if doing so would be "in the public or national interest."<sup>38</sup> This waiver currently requires a filing fee of \$930.<sup>39</sup> At the same time, however, many U visa applicants are eligible for and historically have received fee waivers based on low-income status.<sup>40</sup> Thus, the entire U visa category

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to dismiss motion to compel action after three year delay in processing interim work authorization); *Rodriguez*, 2018 WL 4783977 (denying government motion to dismiss APA complaint to compel adjudication on U application pending for over three years and proceeding to discovery on question of reasonableness).

<sup>34</sup> See 8 U.S.C. § 1184(p)(6) (2018) ("The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 1101(a)(15)(U)."). *But see Rodriguez*, 2018 WL 4783977, at \*12 (concluding that Congress made adjudication of interim employment authorization mandatory and only intended approvals to be discretionary).

<sup>35</sup> 8 C.F.R. § 103.7(b)(1)(i)(VV) (2018).

<sup>36</sup> See Levin et al., *supra* note 9 (suggesting this course of action). While principle applicants historically only needed to submit one application for employment authorization, in February of 2017 the U visa application was revised to no longer allow a built-in request for a work document. See *Rodriguez*, 2018 WL 4783977, at \*8.

<sup>37</sup> 8 C.F.R. § 103(b)(1)(i)(II) (2018).

<sup>38</sup> 8 U.S.C. § 1182(d)(14) (2018).

<sup>39</sup> 8 C.F.R. § 103.7(b)(1)(i)(P) (2018).

<sup>40</sup> See 8 U.S.C. § 1255(l)(7) (requiring the agency to consider fee waiver requests in U cases); FEE WAIVER GUIDELINES, *supra* note 14, at § 10.9(a)(4) (indicating that USCIS may waive any fees associated with the filing of any benefit request by a U visa applicant, including filings that are not otherwise eligible for a fee waiver or are eligible only for a conditional fee waiver). In the summer of 2018, "[n]umerous practitioners . . . reported a significant increase in fee waiver denials from the Vermont Service Center in . . . U visa . . . applications." Letter to Maureen Dunn, Chief, Family Immigration and Victim Protection Division, USCIS, Dep't of Homeland Sec. (July 30, 2018), available at [https://drive.google.com/file/d/1Sq\\_CtrhuAiiKGayzsT9wQld3ZglmFfFK/view](https://drive.google.com/file/d/1Sq_CtrhuAiiKGayzsT9wQld3ZglmFfFK/view) [https://perma.cc/N8PQ-DPPN]. It is unclear as of this writing whether the substantive criteria for adjudicating fee waivers

appears to generate very little revenue for USCIS. The adjudication and processing of interim benefits in this scheme equates to additional agency work for no additional revenue.

In light of this resource-revenue imbalance, it is unsurprising (though not excusable) that multiple administrations have neglected to promptly adjudicate interim U visa benefits. Section 1184(p)(6), from the agency's perspective, is essentially an unfunded mandate. Nevertheless, the backlog is problematic because it undermines Congress's goals with both the U visa and the safety-valve. Under these circumstances, many noncitizens who are eligible for U status will not risk contact with law enforcement.<sup>41</sup> Those who do apply remain in a precarious limbo for many years, vulnerable to exploitation by unscrupulous employers and without safeguards against removal from the country for unlawful presence, despite Congress's wish that victims of serious crime who assist law enforcement be protected.<sup>42</sup>

## II. AGENCY PARALLELS AND PRECEDENTS

The preceding discussion suggests the need for program modifications that would increase agency incentives and ensure more timely consideration of interim benefits in the U process. If litigation continues to fail to produce corrective action, a reasonably structured fee-based expedited processing route for interim adjudication would benefit many noncitizens. In this Part, we begin to lay the groundwork for our proposal. In particular, we hope to demonstrate that our suggestion is highly workable in practice by discussing

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has become stricter, however, or if the issue is rather that the agency is now requiring all U applicants to utilize the standardized form for waiver requests, with supporting documentation, which had not been mandatory previously. *See, e.g., Practice Advisory: Fee Waivers for VAWA Self-Petitions, U and T Visa Applications*, ASISTA, at 7 (Aug. 2018) (“[A]lthough we recognize that many applicants have been able to receive fee waivers without using the I-912 form in the past, ASISTA suggests it is now prudent to use the I-912 Fee Waiver form.”); USCIS Response to ASISTA Fee Waivers, ASISTA (reporting preliminary statement from USCIS that fee waivers in U visa applications will be “adjudicate[ed] using USCIS regulation and policy as written[,] to be consistent across the agency” and referring applicants to the official fee waiver form).

<sup>41</sup> *See* Cade & Flanagan, *supra* note 1, at 86–87 (collecting examples); Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 293 (2000) (reporting on a study showing that fear of being deported is “either the first or second most intimidating factor that kept battered immigrants from seeking the services they needed to end the abusive relationship.”); Stacey Ivie & Natalie Nanasi, *The U Visa: An Effective Resource for Law Enforcement*, FBI LAW ENFORCEMENT BULLETIN, Oct. 2009, at 10, 10 (“[T]he fear of deportation has created a class of silent victims . . . .”); *US: Immigrants ‘Afraid to Call 911’: States Should Reject Corrosive ‘Secure Communities’ Program*, HUMAN RIGHTS WATCH (May 15, 2014) <https://www.hrw.org/news/2014/05/14/us-immigrants-afraid-call-911> [<https://perma.cc/TRQ4-JRBS>].

<sup>42</sup> *See, e.g.*, 146 CONG. REC. 22,048 (2000) (“These and other important measures will do a great deal to protect battered immigrants and their children from domestic violence and free them from the fear that often prevents them from prosecuting these crimes.”).

two recent agency programs that pursued analogous objectives through similar means. First, we discuss the USCIS's premium processing program for certain nonimmigrant and employment visas. We then turn to the DACA program, which, despite ample resistance and criticism, successfully implemented a process for fee-based adjudication of deferred action and employment authorization on a much faster timetable than the current U process. The final section of this Part clarifies the agency's authority to set fees for our proposed program.

*A. Premium Processing for Nonimmigrant- and Employment-Based Visa Categories*

In June 2001, responding to frustrations from the business community regarding the “snail-like pace of INS action on visa petitions for executives and critical employees,” the agency launched the premium processing program.<sup>43</sup> For certain nonimmigrant visa categories, the agency offered expedited service, or “premium processing,” for an additional fee of \$1,410.<sup>44</sup> Cases filed through this route are processed within fifteen calendar days; USCIS is required to issue an approval, denial notice, notice of intent to deny, or request for evidence within that time frame (or refund the filing fee).<sup>45</sup> In 2006, the program was expanded to encompass certain employment-based immigrant visa petitions as well as the nonimmigrant categories already covered.<sup>46</sup>

The premium processing program has generally been regarded as successful, creating a regime in which an employer or attorney can call or email the agency officer and receive a prompt response.<sup>47</sup> The employment-visa expansion of the program has also been regarded as a worthwhile expense for employers willing and able to afford the additional cost.<sup>48</sup> Moreover, processing times for employers who chose not to pay the additional fee for premium processing have not significantly increased.<sup>49</sup>

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<sup>43</sup> Leigh Polk Cole, *Progress Report on Customer Service Program Adopted by INS*, 6 VT. EMP. L. LETTER 7, 7 (2002).

<sup>44</sup> 8 C.F.R. § 103.7(e) (2018). Note that this fee increased on October 1, 2018 from the prior \$1,225 amount. See *Adjustment to Premium Processing Fee*, DEP'T OF HOMELAND SEC. (Aug. 31, 2018), <https://www.federalregister.gov/documents/2018/08/31/2018-19108/adjustment-to-premium-processing-fee> [<https://perma.cc/6BGX-WXDW>].

<sup>45</sup> 8 C.F.R. § 103.7(e)(2) (2018).

<sup>46</sup> Jesse Goldstein, *USCIS Expands Premium Processing Service*, 17 MICH. EMP. L. LETTER 6 (2006).

<sup>47</sup> Cole, *supra* note 43.

<sup>48</sup> Goldstein, *supra* note 46.

<sup>49</sup> Cole, *supra* note 43.

*B. Fee-Based Adjudication of Deferred Action for Childhood Arrivals*

DACA provides another analogue, demonstrating that USCIS is capable of expediently processing deferred action and employment authorization requests. On June 15, 2012, the Secretary of the Department of Homeland Security announced that the agency would consider discretionary deferred action for qualifying individuals who came to the United States as children and met other criteria.<sup>50</sup> USCIS began accepting DACA applications on August 15, 2012.<sup>51</sup> The combined agency fees for deferred action and employment authorization requests initially amounted to \$465.<sup>52</sup> Later, the total fee increased to \$495.<sup>53</sup>

Although actual processing times have fluctuated over the years, the agency has largely met its goal of processing all requests within 120 days, a relatively quick timeline in comparison to the years-long wait in the U visa process.<sup>54</sup> From the outset, DACA has been subject to litigation and controversy, due in part to its passage as an Executive Order rather than through congressional legislation.<sup>55</sup> On September 5, 2017, Donald Trump announced that the USCIS would no longer accept initial or renewal applications for DACA after October 5, 2017, and that renewals would only be accepted for applicants whose DACA expired by March 5, 2018.<sup>56</sup> However, on January 9, 2018, U.S. District Court Judge William Alsup issued a nationwide injunction ordering USCIS to continue processing DACA renewals (though not initial applications).<sup>57</sup> In the meantime, USCIS

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<sup>50</sup> PHILIP HORNIK, NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, 1 IMMIGRATION LAW AND DEFENSE § 8:52 (C. Boardman et al. eds., 3d ed. 2018). To qualify for DACA, applicants must have: (1) come to the United States before the age of sixteen and been under the age of thirty-one on June 15, 2012; (2) been present in the United States on June 15, 2012; (3) been continuously residing in the United States for at least the prior five years; (4) been enrolled in school, graduated from high school, obtained a GED, or been honorably discharged from the United States military or Coast Guard; and (5) not posed a threat to national security or public safety.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (\$380 for work authorization plus \$85 for biometrics).

<sup>53</sup> *Form I-765, Instructions for Application for Employment Authorization*, USCIS, <https://www.uscis.gov/i-821d> [<https://perma.cc/42D8-37DD>] (indicating \$410 fee for work authorization plus \$85 for biometrics).

<sup>54</sup> *Frequently Asked Questions*, USCIS, <https://www.uscis.gov/archive/frequently-asked-questions#renewal%20of%20DACA> [<https://perma.cc/LAH2-EGGN>].

<sup>55</sup> HORNIK, *supra* note 50.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* The Ninth Circuit affirmed the District Court's ruling in November 2018. *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018); *see also* Melissa Quinn, *DACA Case Could Hit the Supreme Court in a Matter of Months, Experts Say*, WASH. EXAMINER (Mar. 5, 2018), <https://www.washingtonexaminer.com/daca-case-could-hit-the-supreme-court-in-a-matter-of-months-experts-say> [<https://perma.cc/5J6V-PE8K>]. There are a number of additional pending lawsuits in connection to DACA, including one District Court decision issued in April 2018 reinstating the original DACA program (so new applications would be accepted in addition to renewals), but the court stayed its

has continued to accept and process DACA renewal applications.<sup>58</sup> As of this Essay's publication, the program remains in limited effect.

Irrespective of the pending litigation, the relevant takeaway is that a similar timeline for agency consideration of deferred action and employment authorization would significantly benefit U applicants who opt-in to expedited processing (and possibly also benefiting those who cannot do so, as we explain below). Notably, as of September 2017, roughly 800,000 applicants had received deferred action under DACA since it was enacted in 2012.<sup>59</sup> That is roughly 160,000 DACA applications processed per year—a figure that far exceeds the number of annual U visa applications, which tend to hover around 25,000 to 35,000 per year.<sup>60</sup> Moreover, it bears emphasizing that there is clear statutory and regulatory authority for interim benefits in the U visa process.<sup>61</sup> Thus, a premium processing option in this context should trigger little of the controversy that plagued DACA.

### C. Authority for Fee-Based Interim Processing

In this final subsection, we pause to offer a few additional points regarding the authority for instituting a premium processing regime for interim U benefits. The agency would likely face few legal hurdles to implementing such a program. First, Congress directly provided in the statute

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own order for 90 days to allow the government to provide a better explanation of why it ended DACA. The District Court reaffirmed its April decision in a new decision issued in August 2018 but stayed its new decision for twenty days. The government has filed an appeal within the twenty-day period. *See* NAACP v. Trump, 315 F. Supp. 3d. 457 (D.D.C. 2018), *appeal docketed*, No. 18-5243 (D.C. Cir. Aug. 10, 2018). In light of the pending appeal, the court has stayed its requirement that the government process initial DACA applications. However, the stay does not affect the government's requirement to process DACA renewals. *See* NAACP v. Trump, 321 F. Supp. 3d. 143 (D.D.C. 2018). For updates on pending DACA litigation, see *Status of Current DACA Litigation*, NAT'L IMMIGR. LAW CTR. (last updated Feb. 7, 2019), <https://www.nilc.org/issues/daca/status-current-daca-litigation/> [<https://perma.cc/J7XM-6V8V>].

<sup>58</sup> *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, USCIS, <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> [<https://perma.cc/EX2W-VQMD>]. Legal challenges to the DACA program continue. *See* Tal Kopan & Jason Morris, *Texas Judge Hears Arguments on DACA Challenge*, CNN (Aug. 8, 2018), <https://www.cnn.com/2018/08/08/politics/daca-hearing-texas/index.html> [<https://perma.cc/8CHN-K4TF>]. On August 31, 2018, Judge Hanen denied the plaintiffs' request for a preliminary injunction. *See* Texas v. United States, 328 F. Supp. 3d 662, 742 (S.D. Tex. 2018). Plaintiffs' motion for summary judgment is currently pending before the district court. *State of Texas v. United States*, CT. LISTENER (last updated Feb. 14, 2019), <https://www.courtlistener.com/docket/6382288/state-of-texas-v-united-states-of-america/?page=4> [<https://perma.cc/NPL2-WE6Z>].

<sup>59</sup> *Approximate Active DACA Recipients: Country of Birth (as of Sept. 4, 2017)*, USCIS [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_population\\_data.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_population_data.pdf) [<https://perma.cc/LA7P-7V65>].

<sup>60</sup> *Number of Form I-918*, *supra* note 16.

<sup>61</sup> 8 U.S.C. § 1184(p)(6) (2018).

that the agency may determine “bona fide” applicants and adjudicate employment authorization requests while they wait for their visa number to become current.<sup>62</sup>

Second, Congress has unequivocally delegated to USCIS the authority to set fees for nonimmigrant visas.<sup>63</sup> Exercising this authority, the agency routinely sets or modifies fees for various applications. To implement the nonimmigrant premium processing regime described above, for instance, the agency issued regulations establishing the timeline and the fee for submitting applications through the expedited route.<sup>64</sup> Thus, there would appear to be no statutory obstacles to our proposal.

### III. DESIGN OPTIONS FOR PREMIUM PROCESSING OF INTERIM U BENEFITS

Before we turn to a discussion of the potential benefits and drawbacks of premium processing in the U visa context, it might be helpful to consider a few potential design features. Our discussion is not intended to be comprehensive, as the programmatic details are best left to the agency in consultation with others. Rather, we endeavor only to get the discussion started with suggestions that might be attractive to both the agency and a diverse coalition of stakeholders.

#### *A. Timeline*

A central design question will concern the appropriate timeline for premium adjudication of interim U benefits. Here again it is helpful to refer back to recent agency precedents. The nonimmigrant- and employment-based premium processing program requires adjudication within fifteen days, but the fees in such cases are considerably higher than would be appropriate in the U context. In the case of deferred adjudication and employment authorization through DACA, the agency’s processing goal has long been 120 days or less.<sup>65</sup>

These benchmarks suggest that something in the range of 15 to 120 days would be both possible and appropriate in the U context. Notably, U visa conditional approvals are not significantly more complex than DACA or Premium Processing applications. Two additional points may be helpful for narrowing to a more precise timeline within that range.

First, until it was revised on January 17, 2017, a regulation provided that the agency would adjudicate applications for employment authorization

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* § 1351; 8 C.F.R. § 103.7(b) (2018).

<sup>64</sup> 8 C.F.R. § 103.7(b)(1)(i)(SS) (2018).

<sup>65</sup> *Frequently Asked Questions*, *supra* note 54.

within 90 days, and that failure to do so would “result in the grant of an employment authorization document for a period not to exceed 240 days.”<sup>66</sup> Although the government disputes that this regulation applied to pre-waitlist U applicants seeking interim employment authorization pursuant to § 1184(p)(6), at least one federal court determined that it did.<sup>67</sup> In any event, the point is that in recent history the agency implemented a scheme that promised a 90-day adjudication of work authorization across a broad range of eligibility categories, or, where that timeline was not met, automatic issuance of an interim work document.<sup>68</sup> A new regulation or policy could adopt the same framework to implement the U statutory safety-valve.

Perhaps the most relevant timeline to apply in this context can be gleaned from the legislative record of the bill that created the statutory safety-valve in the first place. The bill’s sponsors indicated that USCIS should “strive to issue work authorization and deferred action in most instances within 60 days of filing.”<sup>69</sup> While the legislators clearly intended this expedience to apply to all U applicants, at the least it provides an easily defended benchmark for fee-based premium processing.

These precedents suggest that something in the range of 60 to 90 days would be appropriate for expedited consideration of interim benefits on the basis of a pending U application. This would be a marked improvement on the multi-year limbo currently endured by all U applicants awaiting conditional approval. Further, for reasons discussed below, we suggest that the agency also adopt a clear and relatively prompt timeframe for interim approval in non-premium cases.<sup>70</sup> Ideally, this “normal processing” timeframe would be less than 365 days.<sup>71</sup> In any event, “victims of domestic violence, sexual assault and other violent crimes should not have to wait for up to a year before they can support themselves and their families.”<sup>72</sup>

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<sup>66</sup> 8 C.F.R. § 274a.13(d) (revised Jan. 17, 2017); *Rodriguez v. Nielsen*, No. 16-CV-7092, 2018 WL 4783977, at \*15 (E.D.N.Y. Sept. 30, 2018).

<sup>67</sup> *Rodriguez*, 2018 WL 4783977, at \*16–\*22.

<sup>68</sup> *Id.* at \*15.

<sup>69</sup> See 154 CONG. REC. 24,603 (2008).

<sup>70</sup> See *infra* Part IV.B.1.

<sup>71</sup> One federal circuit court has held that an agency delay of 1.5 years in the conditional approval stage was reasonable. See *Calderon-Ramirez v. McCament*, 877 F.3d 272, 276 (7th Cir. 2017) (“USCIS is dealing with an exponentially increasing number of U-Visa applications . . . Due to the circumstances USCIS faces and the agency’s recent changes to alleviate the backlog, we do not find Ramirez’s wait to be unreasonable at this time.”). Cf. Immigrant Witness and Victim Protection Act of 2018, H.R. Res. 5058, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/5058/text> [<https://perma.cc/7BVY-UVQT>] (bill introduced by Reps. Jayapal & Panetta that would, *inter alia*, require agency adjudication of employment authorization within six months of filing for U status).

<sup>72</sup> See 154 CONG. REC. 24,603 (2008).

### *B. Fee Amount*

DACA also provides a useful analogue regarding premium processing fees in the U context. That program suggests that a total fee of around \$500 would be cost-effective for the agency and appropriate in light of the need for the U program to continue providing access to critical protections for crime victims fleeing abusive situations.<sup>73</sup> As mentioned, the applications are not materially different in terms of complexity, especially since the authority to award interim U benefits does not require a full and final adjudication of eligibility.<sup>74</sup> USCIS could apply expedited processing to any U application for which the employment authorization and biometrics fees are paid—whether or not the applicant would in fact be eligible for a fee waiver.

Ultimately, the fee should be set at the minimal amount necessary to achieve the processing speeds that we propose. Anything in the vicinity of \$500 would generate significantly increased revenue for the agency, warranting allocation of more resources to the issuance of interim benefits. Since fiscal year 2016, including derivative family members, over 60,000 applications were filed for U status annually, and as of the most recently published data, the USCIS was on track to receive as many in fiscal year 2018.<sup>75</sup> Conservatively assuming that only one third of U applicants each year would request expedited processing through the \$500 work authorization fee, the program could generate approximately \$10 million in expedited processing fees annually. Moreover, many of those who filed applications previously and are currently waiting in the queue would also likely wish to submit the premium fee (and find the funds to do so), injecting a great deal of cash to the operation. These prior applicants would retain their spot in line for final adjudication of the U visa itself while expediting their interim benefits. All considered, even a relatively low premium fee should therefore result in substantially increased revenue for the agency.

### *C. Level of Scrutiny*

Congress did not define the term “bona fide” when it enacted the U visa safety-valve.<sup>76</sup> To be sure, however, Congress intended that interim

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<sup>73</sup> Although the INA lists twenty-nine or so qualifying categories of crime for purposes of U visa eligibility, claims brought by noncitizens fleeing domestic violence undoubtedly make up an extremely large percentage of U applications. *See* 8 U.S.C. § 1101(a)(15)(U)(iii); *see, e.g.*, Natalie Nanasi, *The U Visa’s Failed Promise for Survivors of Domestic Violence*, 29 *YALE J.L. & FEMINISM* 273, 280 (“Although the U visa is available to victims of a wide range of crimes, Congress’ intent to connect the visa to the fight against domestic violence, and violence against women more generally, is unmistakable.”).

<sup>74</sup> *See infra* Part III.C.

<sup>75</sup> *Number of Form I-918*, *supra* note 16.

<sup>76</sup> 8 U.S.C. § 1184(p)(6) (2018).

adjudication in this context would involve a threshold determination short of full merits review.<sup>77</sup> Furthermore, the agency has already promulgated a regulatory definition for the bona fide standard in the T visa scheme, which is a related statutory provision that provides benefits and protection for victims of human trafficking. In that context, the bona fide threshold is satisfied once the agency has conducted an initial review and “determined that the application does not appear to be fraudulent, is complete and properly filed, includes completed fingerprint and background checks, and presents prima facie evidence of eligibility . . . .”<sup>78</sup> While the agency might well prefer to adopt a different definition of “bona fide” for purposes of implementing premium processing for U applicants, the T visa regulation is, at the least, instructive as to what the standard might look like.

Since the agency principally defends its failure to implement § 1184(p)(6) on the grounds that the U visa officers’ limited resources are consumed with the complex task of adjudicating the merits of U applications (including associated waivers of any inadmissibility grounds), application of an appropriately preliminary bona fide standard will considerably relieve the pressure. At this early stage in the U process, to satisfy congressional intent, agency workers need only determine that applications are complete, present prima facie evidence of eligibility, and do not appear to be fraudulent. The agency already generates biometrics appointments within a month or so of filing, which would reveal whether applicants or their derivative family members have outstanding warrants or significant criminal histories. As explained above, the introduction of a premium processing fee, even if modest, should easily provide the agency with sufficient resources to conduct this level of review.

Having sketched these considerations for development of the main components of our proposal, we will now turn to a more detailed discussion of the benefits and drawbacks of our proposal in the final Part.

#### IV. BENEFITS AND DRAWBACKS OF PREMIUM PROCESSING

##### *A. Potential Benefits*

The implementation of expedited interim consideration in the U visa process portends a number of benefits. Most importantly, this innovation would provide much more timely protection for crime victims willing to help

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<sup>77</sup> *Rodriguez v. Nielsen*, No. 16-CV-7092, 2018 WL 4783977, at \*13 (E.D.N.Y. Sept. 30, 2018) (“The parties agree that section 1184(p)(6) EAD Pending Petition requires a preliminary determination short of a full adjudication on the merits of a U Visa application—pending petitions need only be bona fide, not meritorious.”).

<sup>78</sup> 8 C.F.R. § 214.11(a) (2018).

law enforcement while also helping to reduce crime. As mentioned previously, a new applicant for a U visa today might wait four years or more before receiving even temporary relief; many might not see any benefits until final adjudication after a decade. This lengthy and uncertain period of limbo deters many victims of serious crime from coming forward, out of fear that their interactions with law enforcement could result in negative immigration consequences long before they receive interim deferred action and employment authorization, let alone official U status.<sup>79</sup>

Indeed, Immigration and Customs Enforcement (ICE) has clarified that a pending U application generally will not stave off removal proceedings.<sup>80</sup> As a result, even noncitizens courageous enough to assist law enforcement and file U applications often continue to find themselves in crisis situations.<sup>81</sup> The government's failure to promptly process interim benefits for U applications thus undercuts the essential goals of the program: reducing crime and providing aid to victims. Measures that reinforce noncitizens' incentives to report serious crime benefit not only those individual victims but also communities more broadly, because reporting and cooperation increases the likelihood that perpetrators will be brought to justice, rather than remain free to harm again.

The excessive delay in these preliminary adjudications also means that applicants must continue working unlawfully to support themselves or their families while awaiting adjudication of employment authorization requests. If an expedited processing line was available, crime victims with bona fide U applications would be able to work with permission much sooner. This would generate broad economic gains, as individuals who are present in or working unlawfully in the United States are far more vulnerable to abuse by employers.<sup>82</sup> Lawfully authorized employees face fewer obstacles in filing

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<sup>79</sup> See *supra* note 41 and accompanying text.

<sup>80</sup> See, e.g., AILA/ICE Liaison Meeting Minutes, AILA Doc. No. 18011132, ¶¶ 2–3, 4 (Oct. 26, 2017) (on file with author) (official statement from ICE that its trial attorneys “should not administratively close cases where applications are pending with other agencies” including U visas). Where USCIS does not indicate prima facie eligibility for U status within five days, “ICE will generally proceed with removal.” *Id.* In addition, “[o]n a case-by-case basis in extraordinary circumstances, the Chief Counsel may—with the concurrence of the NTA issuing agency (i.e. USCIS, CBP, ICE ERO or ICE HSI)—agree to administratively close or dismiss a case.” *Id.* at ¶ 2.

<sup>81</sup> See, e.g., Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. 433, 434–35 (2018) (discussing the government's attempt to deport Jeanette Vizguerra despite her pending U application and lack of significant criminal history).

<sup>82</sup> This point is particularly salient for work-related U visa crimes, where the glacial pace of the process often allows continued workplace exploitation or abuse. See, e.g., Michael Grabell, *Exploitation and Abuse at the Chicken Plant*, NEW YORKER (May 8, 2017), <https://www.newyorker.com/magazine/2017/05/08/exploitation-and-abuse-at-the-chicken-plant> [<https://perma.cc/Q4D9-LBY8>]; KQED News Staff, *Undocumented Immigrants Still Mistreated by Employers Despite New Laws*, KQED NEWS (Sept. 8, 2014), <https://www.kqed.org/news/146984/undocumented-immigrants-still-mistreated->

personal income tax returns, while their employers, conversely, face greater hurdles should they endeavor to shirk payroll taxes and other workplace obligations. Relatedly, lawful employees benefit from increased purchasing power, since they can avail themselves of minimum wage protections and other worker protection laws.

Because inadmissibility grounds related to unlawful employment typically are waived for U visa applicants, the agency's failure to provide timely employment authorization does little to curb unlawful employment.<sup>83</sup> Instead, delayed authorization just makes it more likely that workers continue to be exploited through under-payment or poor conditions of employment.<sup>84</sup> This, in turn, can have negative spillover effects for other workers including United States citizens and lawful permanent residents.

Faster interim adjudication would also benefit families and communities. U visa applicants would no longer live under the threat of removal, or, worse, being deported and subject to lengthy reentry bars, only to lawfully reenter the United States when their visas are finally adjudicated many years later. Further, faster processing would reduce the ambiguities for employers, law enforcement, and other stakeholders who might be uncertain how to interpret an individual's pending application for a U visa.<sup>85</sup> For all these reasons, more rapid preliminary adjudication would promote

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by-employers-despite-new-laws [<https://perma.cc/V3XG-DL5A>]. For a good discussion of eligibility and obstacles in seeking U visas for work-related crimes, see Eunice Hyunhye Cho et al., *A New Understanding of Substantial Abuse: Evaluating Harm in U Visa Petitions for Immigrant Victims of Workplace Crime*, 29 GEO. IMMIGR. L.J. 1 (2014).

<sup>83</sup> 8 U.S.C. § 1182(d)(14) (2018).

<sup>84</sup> See, e.g., Grabell, *supra* note 82; KQED News Staff, *supra* note 82.

<sup>85</sup> There are also important ancillary benefits of deferred action in some states, such as the ability to obtain driver's licenses or other state benefits. See, e.g., *Deferred Action for Childhood Arrivals (DACA) Rescission Frequently Asked Questions*, CAL. DEP'T OF HEALTH CARE SERVS., <http://www.dhcs.ca.gov/formsandpubs/publications/Pages/Deferred-Action-for-Childhood-Arrivals-FAQ.aspx> [<https://perma.cc/7MBG-LJU5>] (California allows individuals under deferred action to receive Medi-Cal benefits if they are otherwise eligible); *Deferred Action for Childhood Arrivals*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 25, 2018), <http://www.ncsl.org/research/immigration/deferred-action.aspx> [<https://perma.cc/4ZQG-76R6>] (every state allows issuance of driver's licenses to DACA recipients). These ancillary benefits may have broadly positive economic impact. See, e.g., Zachary Basu, *Report: Dreamers Contribute \$42 Billion to Annual GDP*, AXIOS.COM (Jan. 18, 2018), <https://www.axios.com/daca-economic-contribution-by-the-numbers-9977933d-6313-40a7-b855-5d12ad490cb5.html> [<https://perma.cc/XM2T-HF7Y>] (finding that DACA recipients contribute billions of dollars to the U.S. Treasury and annual GDP); Martin Heinrich, *Dreamers Contribute to Our Economy*, THEHILL.COM (Oct. 4, 2017), <http://thehill.com/blogs/congress-blog/politics/353774-dreamers-contribute-to-our-economy> [<https://perma.cc/T8AV-WAAP>] (finding that DACA recipients increase strength of economy); Tom K. Wong et al., *DACA Recipients' Economic and Educational Gains Continue to Grow*, CTR. FOR AM. PROGRESS (Aug. 28, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/> [<https://perma.cc/S7E6-6SUR>] (reporting on positive economic impact of DACA).

consistency, transparency, fairness, and law-abiding behavior including above-board economic activity.

Increased attention on the conditional approval stage would also benefit the government. As already mentioned, USCIS would garner more revenue.<sup>86</sup> While this would not in itself constitute a benefit for the public good, the government's amplified ability to use the revenue gains to faithfully execute the law would be a positive development. Additionally, through an expedited preliminary consideration process, the agency could promptly identify applications that are incomplete, lacking in prima facie eligibility, or apparently fraudulent.<sup>87</sup> Early identification of cases that fail to meet the bona fide threshold, even if infrequent, would help clear the backlog, thereby speeding up final adjudication of meritorious applications. And in any event, even if a case receives interim employment authorization and deferred action, the agency would retain flexibility to revoke these benefits or deny the application at any point later in the process when more careful scrutiny may reveal an eligibility issue.<sup>88</sup> This, too, was contemplated by Congress's allocation of authority to conditionally approve applications appearing to be "bona fide."<sup>89</sup>

An expedited processing option might also incentivize applicants to pull together funds for the fees more generally, defraying the government's overall cost of the U visa program. Some applicants may be able to receive financial assistance from advocacy organizations or crowd-sourced funding platforms.<sup>90</sup> Additionally, in some states, crime victims' assistance funds

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<sup>86</sup> See *supra* Part III.E.

<sup>87</sup> Because the statutory safety-valve provision envisions threshold determinations solely for the purposes of employment authorization and deferred action, rather than full merit review for U status, it would be inappropriate to deny U applications at this early stage unless they clearly fail to meet the bona fide standard.

<sup>88</sup> Occasionally, applicants with particularly egregious criminal histories may not only fail to qualify for U status but warrant consideration for removal. Under current policy, USCIS has the discretion to issue a Notice to Appear (NTA) once the U application is denied or benefits are terminated. See *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens*, USCIS (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> [<https://perma.cc/5T6H-G4KZ>].

<sup>89</sup> See 8 U.S.C. § 1184(p)(6) (2018) ("The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 1101(a)(15)(U)."); 8 CFR § 214.14(d)(2) (2018) ("USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while . . . on the waiting list. USCIS, in its discretion, may authorize employment for such petitioners and qualifying family members.").

<sup>90</sup> See, e.g., Darlena Cunha & Avi Selk, *These Parents Hoped to Raise \$1,500 for Separated Migrant Families. Pledges Now Total \$15 Million.*, WASH. POST (June 21, 2018), <https://www.washingtonpost.com/news/parenting/wp/2018/06/19/these-parents-hoped-to-raise-1500-for-separated-families-then-their-facebook-fundraiser-went-viral/> [<https://perma.cc/756E-GJN8>] (describing fundraising campaign on Facebook to benefit migrant children separated from their parents).

might be utilized to satisfy the expedited fee for premium processing, as well as other U visa costs.<sup>91</sup> Where necessary, states should consider clarifying or amending their policies to ensure that immigrant victims of serious crime can use criminal justice funds to access these critical benefits.

Importantly, fee-based expedited processing would likely have positive impacts even for individuals who do not request expedited processing. Because every applicant requesting expedited processing would translate to one less applicant waiting in the “regular” line for interim benefits, there would presumably be a spillover effect, accelerating the process for every applicant. Further, the agency would be well-advised to use the increase in revenue to improve the timeliness of U conditional adjudication across the board, thus avoiding litigation, as discussed elsewhere in this essay. For example, if expedited requests are to be processed within 60 days (or some other range not to exceed 120 days), lowering the maximum timeframe for interim benefits to something in the vicinity of 365 days might be appropriate for the rest.

Despite the substantial benefits that would flow from our proposal, there are also significant drawbacks. In the following section, we address the most likely objections.

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that ultimately raised over \$20 million dollars); Ashley Daley, *GoFundMe Started for Dreamer Ineligible for Federal Student Loans*, WCNC (Mar. 9, 2018), <https://www.wcnc.com/article/news/gofundme-started-for-dreamer-ineligible-for-federal-student-loans/275-527417039> [<https://perma.cc/SH54-AC86>] (describing a GoFundMe campaign that raised \$10,000 for DACA recipient to attend college); Kelly Heyboer, *ICE Wanted to Deport This N.J. Man Over an Old Conviction. He Fought Back -- and Won.*, NJ.COM (Sept. 24, 2018), [https://www.nj.com/news/index.ssf/2018/09/ice\\_wanted\\_to\\_deport\\_this\\_nj\\_man\\_over\\_an\\_old\\_convi.html](https://www.nj.com/news/index.ssf/2018/09/ice_wanted_to_deport_this_nj_man_over_an_old_convi.html) [<https://perma.cc/2H7T-Q2KL>] (describing GoFundMe campaign to raise funds for deportation defense legal assistance, naturalization, and in support of organizations that work on similar issues).

<sup>91</sup> See, e.g., Press Release, Office of Senator Leahy, Leahy Announces \$9.3 Million in Grants to Support Vermont Crime Victims And Domestic Violence Survivors (Oct. 4, 2016), <https://www.leahy.senate.gov/press/leahy-announces-93-m-in-grants-to-support-vt-crime-victims-and-domestic-violence-survivors> [<https://perma.cc/LK4J-42BP>] (emphasizing that immigrant crime victims have equal access to state assistance funds); *Application for Vermont Victims Compensation*, VT. CTR. FOR CRIME VICTIM SERVS., [http://www.ccvs.vermont.gov/assets/documents/Comp%20App%205\\_2018.pdf](http://www.ccvs.vermont.gov/assets/documents/Comp%20App%205_2018.pdf) [<https://perma.cc/79FE-E923>] (listing “safety” and “security” as appropriate uses of funds); *Complete Application Packet*, HAW. CRIME VICTIM COMP. COMM’N, <http://dps.hawaii.gov/cvcc/files/2013/01/CVCC-Complete-Application-Packet.pdf> [<https://perma.cc/W67T-Y8EC>] (indicating that funds may be used to compensate for and alleviate suffering); *Emergency Fund*, MINN. DEP’T OF PUB. SAFETY, <https://dps.mn.gov/divisions/ojp/help-for-crime-victims/Pages/emergency-fund.aspx> [<https://perma.cc/JQ6U-QJ6J>] (indicating that funds may be used to obtain critical documents); *Instructions for Completing the Application for Crime Victim Compensation*, ALA. VIOLENT CRIMES COMP. BD., <http://doa.alaska.gov/vccb/pdf/ApplicationInstructions.pdf> [<https://perma.cc/RWJ4-95D2>] (indicating that funds may be used to ensure the victim’s safety).

## B. Potential Drawbacks

### I. Expedited Processing Could Exacerbate Class Distinctions and Disadvantage the Most Vulnerable Crime Victims

The U visa was designed to incentivize victims of serious crimes to assist law enforcement and seek aid. Because most U visa applicants are undocumented, interactions with law enforcement are understandably fraught with anxiety. These applicants may well number among the most vulnerable residents in the country. A fast lane that is available only to individuals with resources may particularly disadvantage low-income crime victims who cannot work or are unable to save their earnings. Many would nevertheless find a way to pay the fees, by borrowing if necessary, in light of the potential opportunity for increased security and higher earning power. Crowd-sourced campaigns and crime victims' assistance funds might help others, as we have suggested. But at the end of the day, not everyone would be able to afford the premium fee. These individuals could remain out of status for many years, weathering abusive employment conditions or living under the constant threat of deportation. This is a serious concern, and one that could invite legal challenges and policy critiques.

The USCIS premium processing program again provides a useful analogue to gauge the potential strength of litigation on this front, as it was challenged on equal protection grounds.<sup>92</sup> In *Wilson v. INS*, the plaintiffs alleged that the program unconstitutionally discriminated based on income level.<sup>93</sup> The federal district court hearing the challenge applied rational basis review, noting that the Supreme Court has “rejected the suggestion that statutes having different effects on the wealthy and the poor should, on that account alone, be subjected to strict equal protection scrutiny.”<sup>94</sup> The court found rational the government's stated objectives of raising funds, investigating fraud, implementing customer service initiatives, eliminating adjudication backlogs, reaching a goal of six-month processing times, and supporting the adjudication of applications for all immigration benefits.<sup>95</sup> Accordingly, the court allowed the program to proceed.

Because income level is not a suspect classification, and because the U visa program does not directly impact any judicially-recognized fundamental rights, an applicant-financed expedited process for interim adjudication would also likely receive and survive rational basis review.<sup>96</sup> Furthermore,

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<sup>92</sup> See *Wilson v. INS*, No. 02-CV-71738-DT, 2002 WL 33001241 (E.D. Mich. Sept. 24, 2002).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (citing *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988)).

<sup>95</sup> *Id.*

<sup>96</sup> See *Kadrmas*, 487 U.S. at 457–58; *Harris v. McRae*, 448 U.S. 297, 322–23 (1980); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973).

while a fee-based expedited program for preliminary U benefits would treat applicants who are able to afford the fee more favorably, it would do so only for this limited, short-term purpose. Final merits adjudication in the U process would not be a function of premium processing in any way, but instead would continue to proceed based on the order in which applications are filed with the agency after visas become available.

Although a premium interim U benefit scheme thus would survive litigation, it would remain problematic as a matter of basic fairness. A program that treats wealthier (or better connected) crime victims more favorably leaves a bad taste and resonates with other pay-to-play schemes that, even if not illegal or violative of equal protection doctrine, are inconsistent with the spirit of equality. Nevertheless, a number of factors mitigate this concern. First, it bears reemphasizing, a faster route to conditional approval and deferred action does not guarantee final approval. Rather, the option would alleviate the legal ambiguity facing many U visa applicants while their applications are pending. Further, regardless of wealth, deferred action is entirely revocable if an applicant engages in dangerous behavior, or if, ultimately, the applicant's petition for U status is denied.<sup>97</sup>

Second, as mentioned previously, a faster conditional process would also encourage potential applicants to report crimes and work with law enforcement since the benefits of doing so would be more immediate. The crime-fighting and community-protective goals of the U visa are furthered, though admittedly not fully realized, when the program's mechanics incentivize more individuals to come forward.

Finally, as we have argued, it is also quite possible that an expedited processing line would end up improving the conditional approval stage for the entire pool. Because the expedited processing applicants would be removed from the general line, a spillover effect could result in across-the-board gains. Even a slight acceleration in processing times would be an improvement over the current status quo.

For all these reasons, it seems likely that a premium processing route in the interim U status adjudication process would not run afoul of equal protection mandates and would remain an overall positive innovation despite (lamentably) being inaccessible to some applicants for financial reasons. That said, the agency could mitigate the costs of potential litigation or unequal treatment on this front by simultaneously adopting our

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<sup>97</sup> See, e.g., Jason A. Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661, 694 (2015) ("If favorable action is warranted, DACA applicants receive 'deferred action,' which amounts to a revocable assurance that they are not going to be a priority for deportation for at least two years.").

recommendation to improve interim processing to some significant extent for all applicants—e.g., one year or less.

## 2. *Premium Processing Undercuts Legislative Reforms*

Another possible objection to an expedited processing line is that this approach would reduce congressional incentives to raise the U visa cap or implement other ameliorating legislation. To be sure, if Congress fails to act, the U visa backlog will continue to grow larger over time, and applicants with meritorious cases will be stuck for more than a decade with only deferred action, rather than the comparatively more secure U status.<sup>98</sup> As the backlog of U applicants continues to increase, the category could become less attractive to potential applicants, even if they could obtain deferred action relatively quickly. Thus, this too is a legitimate and weighty concern.

At least two factors are relevant, however. First, the hope that a congressional fix waits in the wings is highly speculative. The path to immigration reform in general is notoriously gridlocked.<sup>99</sup> While two members of the House of Representatives introduced a bill in 2018 that would remove the annual cap on U visas and require the agency to grant employment authorization within six months, there is little indication that this proposal or similar measures will soon find much traction in either house.<sup>100</sup> Indeed, in the current political climate, even the crime-fighting narrative behind the U visa might not save it from reductions should Congress turn its attention to comprehensive immigration legislation in the near future.

The second and more important point is that removal of the annual cap presents a distinct issue. Removing the annual cap could remain part of the legislative agenda even if discretion over the interim-approval timeline remains in the hands of the agency. Indeed, if the U visa process becomes more financially sustainable, that might well encourage Congress to increase the statutory cap, benefiting everyone. In the meantime, many of the problems that flow from the current situation—including applicants' continued vulnerability to exploitation and lack of protection against removal—could be relieved by an expedited processing program.

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<sup>98</sup> Deferred action is actually a form of prosecutorial discretion rather than a full-fledged form of nonimmigrant status. 8 C.F.R. § 274a.12(c)(14) (2018).

<sup>99</sup> See, e.g., Yamiche Alcindor & Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Try Again to Legalize 'Dreamers'*, N.Y. TIMES (Sept. 5, 2017), [https://www.nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html?\\_r=0](https://www.nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html?_r=0) [https://perma.cc/5K2H-ME9S].

<sup>100</sup> Immigrant Witness and Victim Protection Act of 2018, H.R. Res. 5058, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/5058/text> [https://perma.cc/7BVY-UVQT].

## CONCLUSION

In an ideal world, noncitizen victims of serious crime should not have to pay the agency to provide statutorily authorized benefits. But the reality facing U applicants today is far from ideal. The drastically oversubscribed annual U visa quota, along with the agency's failure to implement the statutory safety-valve through timely conditional adjudication, has created an untenable situation for immigrant victims of serious crime. This has significant negative consequences for individual immigrants and immigrant communities, who are more vulnerable than ever to continued exploitation or deportation despite pending U applications. In this moment of crisis, the time has come to seriously consider outside-of-the-box solutions, such as the interim expedited processing option that we propose here.

Although there are palpable downsides to our proposal, we believe that the anticipated benefits outweigh them. Even if some vulnerable crime victims are temporarily disadvantaged in comparison to those who are able to marshal the fee, a spillover effect may result in faster consideration for all applicants. Furthermore, it is possible that advocacy groups, crowd-sourced initiatives, or victims' assistance programs could help fund expedited processing for many applicants who are otherwise unable to pull together the fee, further mitigating this disparity. And in any event, the agency should strive to decrease processing times to a year or less for all applicants, including those who cannot opt for a premium route.

This proposal is a distinctly second-best reform, trailing behind an expansion of the statutory annual cap or an agency willing to implement the statutory safety-valve on its own accord. Nevertheless, it has much to recommend it as a stop-gap measure. At bottom, our proposal is a pragmatic one that incentivizes USCIS to do better by crime victims and communities, whether or not litigation or legislation makes any headway. At the least, we hope this Essay will serve to ignite a dialogue between advocates and the agency that will ultimately result in long-needed programmatic improvements, bringing the U process closer to Congress's intended design.