

# Illegal Aliens or Deserving Victims?: The Ambivalent Implementation of the U Visa Program

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## ABSTRACT

The U visa potentially provides legal status to immigrant crime victims who assist law enforcement. To the detriment of petitioners, however, the government delayed the U visa's full implementation—the Department of Homeland Security released regulations seven years after the program's passage in 2000. Visa programs effectively define those immigrants who are deemed deserving of legal membership within the United States from those perceived to be undeserving, often imagined as economic migrants who illegally enter the country and abuse social services. In granting visas to the undocumented, the federal government uses guiding narratives of iconic figures that serve to validate deserving characteristics, while excluding undeserving traits. The use of a clear iconic figure is evident with the T visa, which the government enacted parallel to the U visa. In contrast, no such iconic figure propelled passage of the U visa statute. Without this guidance, the government delayed the implementation of the visa. The government and practitioners should, however, promote the U visa because it is an important tool to protect undocumented immigrants, assist law enforcement agencies, and develop a more flexible understanding of citizenship.

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## INTRODUCTION

Fredi Garcia and his coworkers are undocumented immigrants.<sup>1</sup> They arrive in New Orleans to work as manual laborers, helping in the reconstruction of the city after Hurricane Katrina.<sup>2</sup> They find jobs with Audubon Communities Management.<sup>3</sup> In exchange for the men's manual labor renovating houses, the company promises wages and housing at the worksite.<sup>4</sup> The housing, though, is incomplete and substandard.<sup>5</sup> Audubon routinely underpays Garcia and his coworkers, delays payments by nearly a month, or fails to pay at all.<sup>6</sup> The lack of wages forces them to dig through trash for food.<sup>7</sup> Garcia and his coworkers complain to Audubon.<sup>8</sup> Sometimes they organize work stoppages.<sup>9</sup>

Audubon responds with threats to call U.S. Immigration and Customs Enforcement (ICE) to apprehend their employees.<sup>10</sup> Audubon further retaliates by locking Garcia and his coworkers out of their employer-provided housing, evicting them without any notice or due process.<sup>11</sup> They are left homeless in New Orleans.<sup>12</sup> Garcia sends a demand letter for wages in accordance with the Fair Labor Standards Act.<sup>13</sup> Audubon responds by threatening to call law enforcement to detain them if they do not return to work, albeit for no pay.<sup>14</sup> On the day the employees return to work, ICE raids the workplace and apprehends them, sending them to Orleans Parish Prison.<sup>15</sup> Garcia and his coworkers must now confront the terror that many other undocumented workers face—deportation.

However, a legal services agency intervenes.<sup>16</sup> The agency seeks to file an application with the U.S. Citizenship and Immigration Services (USCIS) for a U visa—a visa intended to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens . . . and other crimes

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1. See Complaint at 16-17, *Garcia v. Audubon Communities Mgmt., L.L.C.*, No. 08-cv-01291-HGB-KWR (E.D. La. 2008) [hereinafter *Garcia* Complaint].

2. *Id.* at 9.

3. *Id.* at 10.

4. *Id.* at 10.

5. *Id.* at 11.

6. *Id.* at 11-13.

7. *Garcia v. Audubon Communities Mgmt., L.L.C.*, Civ. No. 08-1291-HGB-KWR, 2008 WL 1774584, at \*4 (E.D. La. Apr. 15, 2008).

8. *Garcia* Complaint, *supra* note 1, at 14.

9. *Id.* at 14.

10. *Id.* at 14-15.

11. *Garcia*, 2008 WL 1774584 at \*3.

12. *Garcia* Complaint, *supra* note 1, at 15.

13. *Id.*

14. *Id.* at 15-16.

15. *Id.* at 16.

16. See *Garcia*, 2008 WL 1774584.

while offering protection to victims of such offenses.”<sup>17</sup> To receive a U visa, Garcia and his coworkers must demonstrate that they have been victims of an enumerated crime and certify that an agency testifies to their willingness to help in an investigation.<sup>18</sup> The workers testify that Audubon’s threats and actions forced them to work against their will—involuntary servitude—causing them substantial mental and physical abuse.<sup>19</sup> A judge agrees to sign the certification form and the workers file their U visa applications with the USCIS.<sup>20</sup> The filing will stay their deportation proceedings and if the USCIS grants their applications, Garcia and his coworkers can remain in the United States for three years, petition for legal status for their family members, and later apply for permanent residency.<sup>21</sup>

This story is not fictional. Garcia and his coworkers were fortunate. Their story highlights the vulnerability of undocumented immigrants, the terror that others may inflict upon them through exploitation, and the possible ameliorative effect of the U visa. The successful application of the U visa in this story, however, has been the exception. Rather than acting as a dependable remedy, the U visa has remained idle and undeveloped due to government delays in implementation.

### *The U Visa*

In 2000, Congress enacted the Victims of Trafficking and Violence Protection Act (VTVPA).<sup>22</sup> The VTVPA created both the T visa, which applies to victims of trafficking, and the U visa, which applies to victims of a wide variety of crimes.<sup>23</sup> Despite Congress passing the VTVPA in 2000, the Department of Homeland Security (DHS) did not issue interim regulations for the U visa until seven years later in 2007.<sup>24</sup> The government’s failure to release timely regulations led to insufficient law enforcement cooperation, which further delayed the U visa implementation. The absence of formal guidelines forced the USCIS to delay its decisions on most of the applicants.<sup>25</sup> The results of this inaction are striking—in

17. Victims of Trafficking and Violence Protection Act of 2000 § 1513, Pub. L. No. 106-386, 114 Stat. 1464, 1533 [hereinafter VTVPA] (codified as 8 U.S.C. § 1101 (2000)).

18. See *Garcia*, 2008 WL 1774584 at \* 2-4.

19. *Id.* at \*4.

20. *Id.*

21. See Immigration and Nationality Act § 101(a)(15)(U), Pub. L. No. 82-414, 66 Stat. 163 [hereinafter INA] (codified as 8 U.S.C. § 1101(a)(15)(U) (2000)) (outlining the U visa program).

22. Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 22 U.S.C., 8 U.S.C., 18 U.S.C., 42 U.S.C., 28 U.S.C. & 20 U.S.C.).

23. *Id.* § 1513(b)(3), 8 U.S.C. §§ 1101(a)(15)(T)-(U).

24. See *New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status*, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a & 299).

25. See Memorandum from William R. Yates, Assoc. Dir. of INS Operations, U.S. Dep’t of Homeland Security, to Director, Vt. Serv. Ctr. (Oct. 8, 2003) (describing delays and inconsistencies in

October 2008, 12,151 immigrants had filed U visa applications since the USCIS enacted the visa,<sup>26</sup> but by January 2009, the USCIS had only formally approved fifty U visa applications, while nine had been denied or withdrawn.<sup>27</sup> The USCIS had put the other 12,092 applications on hold, granting temporary benefits while it either made its decisions or waited for guidance from the DHS on basic issues such as fee waivers.<sup>28</sup>

Any delay in making final determinations has a significant impact on undocumented immigrant victims. Applicants waiting for a final outcome cannot leave the country and oftentimes cannot legally work, which leaves them vulnerable to the underlying crimes that caused them to file their applications.<sup>29</sup> This is particularly harmful for victims of domestic abuse, as they may continue to face imminent danger from their aggressors.<sup>30</sup>

The government's lethargic implementation of the U visa program reflects upon the government's broader treatment of undocumented immigrants. While approximately ten to twelve million undocumented immigrants live in the United States, the government rarely grants undocumented immigrants legal status.<sup>31</sup> The government establishes visa programs available to undocumented immigrants based upon a framework that classifies petitioners as either deserving or undeserving of legal status.<sup>32</sup> These visa programs help define and maintain the border between aliens deemed illegal and legal.<sup>33</sup>

Within this framework, the government has developed policies that enshrine archetypes of undocumented immigrants it believes deserve status,

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the provision of interim relief] [hereinafter *Memorandum from the Assoc. Dir. of INS Operations to the Director, VI. Serv. Ctr.*], available at <http://www.asistahelp.org/Uvisa/centrlization.pdf>.

26. See Memorandum from Ombudsman, Citizenship & Immigration Servs., U.S. Dep't of Homeland Security, to Director, Citizenship & Immigration Servs., U.S. Dep't of Homeland Security 7 (Jan. 29, 2009) (providing suggestions and statistics regarding both programs) [hereinafter *Recommendation from the CIS Ombudsman to the Director, USCIS*].

27. *Id.*

28. *Id.*

29. See *id.*

30. The Deputy City of Attorney of Los Angeles County explained that domestic abuse is a "crime that is occurring, it's crime that is going to reoccur and it's crime that is probably going to escalate." See Anna Gorman, *Victims' U-visa Program Falts*, L.A. TIMES, Jan. 29, 2009, <http://articles.latimes.com/2009/jan/26/local/mc-crimevisa26>. Legal Momentum, a women's advocacy organization, explains that undocumented immigrants are eight times more likely to suffer abuse from their domestic partner when there are immigration-related threats, such as deportation. See Bill Reiter, *Silent, Scared Prisoners*, DES MOINES REGISTER, Feb. 27, 2005, <http://www.ncdsv.org/images/SilentScaredPrisonersImmigrantWomen.pdf> (quoting Leslye Orloff, Director of the Immigrant Women Program at Legal Momentum).

31. Seventy-five percent come from Latin America, thirteen percent from Asia, and the remainder from other origins. See JEFFREY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* 1-2, 4 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

32. See Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 276-79 (1997).

33. Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 187-195 (2007).

while effectively excluding petitioners who do not fall into these narrow categories. These deserving archetypes broadly label immigrants as “victims” or as “informers.”<sup>34</sup> In regards to asylum applications and self-petitions for battered women, for instance, the government only rescues certain undocumented victims of persecution and marital abuse while excluding economic migrants.<sup>35</sup> The S visa, additionally, allows the government to provide legal status to undocumented immigrants who serve as informers.<sup>36</sup>

The relatively new T and U visas are hybrids. They require the petitioners to be both victims of specified crimes and willing to serve as informers.<sup>37</sup> Unlike the U visa, the government released T visa regulations shortly after the passage of the VTVPA.<sup>38</sup> These regulations effectively narrowed the applicability of the T visa to an iconic figure—a victim of sex trafficking whom the federal government rescues and who is willing to testify on behalf of the federal government.<sup>39</sup>

This iconic figure guides government and law enforcement agencies in maintaining the boundary between illegal and legal aliens by providing legal status only to immigrants deemed worthy.<sup>40</sup> The visa programs that correspond to the iconic figure receive acceptance and endorsement only because they narrowly define the categories of immigrants considered deserving, thereby preserving the government’s binary framework.

However, unlike the aforementioned visas, an iconic figure neither guided passage of, nor emerged from, the U visa statute.<sup>41</sup> The U visa statute is unusually broad in its potential application, applying to victims of a variety of crimes beyond domestic abuse and sex trafficking and permitting a multitude of law enforcement agencies to certify the applicant’s helpfulness.<sup>42</sup> Such broad statutory language threatens the closely guarded distinction between illegal and legal aliens, because the U visa statute could potentially grant legal status to many undocumented immigrants who possess “undeserving” qualities. Ultimately, without the guidance that a permissible and deserving iconic figure provides to navigate this boundary, the government delayed releasing regulations and

34. *Id.* at 191-99.

35. See Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee’s Narrative*, 53 RUTGERS L. REV. 127, 131-37 (2000); Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 ST. THOMAS L. REV. 135, 145-48 (1993).

36. See 8 U.S.C. § 1101(a)(15)(S) (2000) (defining the “S” nonimmigrant classification).

37. See INA §§ 101(a)(15)(T)-(U), 8 U.S.C. §§ 1101(a)(15)(T)-(U).

38. See Press Release, Dep’t of Justice, Department of Justice Issues T Visa to Protect Women, Children and All Victims of Human Trafficking (Jan. 24, 2002), available at [http://www.justice.gov/opa/pr/2002/January/02\\_crt\\_038.htm](http://www.justice.gov/opa/pr/2002/January/02_crt_038.htm).

39. See Srikantiah, *supra* note 33, at 184-87.

40. *Id.* at 187-97.

41. *See id.*

42. See INA §§ 101(a)(15)(U)(i)-(iii), 8 U.S.C. §§ 1101(a)(15)(U)(i)-(iii).

fully implementing the U visa program.<sup>43</sup>

In Part I, I will discuss the U visa's potential application to undocumented immigrants, including Asians. In Part II, I will discuss the government's failure to fully implement the U visa. In Part III, I will discuss the government's desire to patrol the boundary between illegal and legal aliens by establishing limited visa programs to benefit only undocumented immigrants deemed deserving. In Part IV, I will discuss these other limited visa programs in further details. In Part V, I will explore and contrast the structure and implementation of the T visa, which accompanied the passage of the U visa. Finally, in Part VI, I will examine the possible direction of future U visa implementation.

## I. THE U VISA AND UNDOCUMENTED IMMIGRANTS

### A. *The U Visa Statute*

Congress recognized that immigrant victims may be reluctant to help in the investigation or prosecution of criminal activity for fear of deportation.<sup>44</sup> The statutory purpose of the U visa was two-fold: to assist law enforcement agencies and to regularize the immigration status of crime victims.<sup>45</sup> By promising immigrant victims of certain crimes legal status, undocumented immigrants would be more likely to report crimes and to assist law enforcement agencies.<sup>46</sup> Due to its broad statutory language covering numerous crimes, the U visa could be critical for protecting immigrant victims that prior visas did not target.<sup>47</sup>

To be successful, a U visa applicant must: (1) allege that he or she is a victim of a criminal activity listed in the statute or of "any similar activity;"<sup>48</sup> (2) allege that he or she suffered "substantial physical or mental abuse" as the result of this criminal activity;<sup>49</sup> (3) allege that he or she possesses information concerning the criminal activity alleged;<sup>50</sup> and (4) provide a certification form completed and signed by law enforcement stating that the applicant is being, has been, or is likely to be helpful to an investigation or prosecution of the qualifying criminal activity.<sup>51</sup>

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43. See *Recommendation from the CIS Ombudsman to the Director, USCIS, supra* note 26.

44. The statute explains that the visa "will strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other [enumerated] crimes while offering protection to victims of such crimes." *Id.* at 5.

45. See *id.*

46. VTPA §1513(a)(2)(b).

47. See generally Leticia Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008) (describing the potential broad application of U visas).

48. The applicant must also allege that the criminal activity took place in the United States, or if not, that it violated U.S. law. Under certain circumstances, indirect victims of the qualifying criminal activities may also apply for a U visa. 8 U.S.C. §§ 1101(a)(15)(i)-(iii).

49. *Id.* § 1101(a)(15)(U)(i)(I).

50. *Id.* § 1101(a)(15)(U)(i)(II).

51. 8 C.F.R. § 214.14(c)(2)(i) See also *New Classification for Victims of Criminal Activity*;

The statute defines “underlying crimes” and “helpfulness” broadly. Underlying crimes include violent crimes such as rape or involuntary servitude, but also lesser offenses such as obstruction of justice and perjury.<sup>52</sup> Qualifying criminal activities can also involve any attempt, conspiracy, or solicitation to commit any of these crimes or any activities similar to the ones enumerated.<sup>53</sup> An applicant, similarly, does not have to be currently involved in an investigation, but rather simply needs to show that she or he “has been helpful, is being helpful, or is likely to be helpful” in a criminal investigation.<sup>54</sup>

The workers in Audubon Communities, for instance, alleged involuntary servitude and human trafficking as qualifying criminal activity.<sup>55</sup> The court held that the applicants provided sufficient evidence showing that the employer coerced them to work without pay, and that they alleged adequate abuse, reasoning that the intermittent wages compelled them into shameful and harmful living conditions.<sup>56</sup> Many immigrants who work for unscrupulous employers experience similar abuses and theoretically could apply for U visas.

The benefits of a U visa for an undocumented immigrant are substantial. U visas permit aliens who are victims of certain crimes to legally remain and work in the country if they help with the investigation of the underlying crime to which they fell victim.<sup>57</sup> A U visa holder and his or her accompanying family members can each stay in the United States for up to four years with work authorization.<sup>58</sup> After three years of holding the U visa, the immigrant can begin the application for permanent residence.<sup>59</sup>

### *B. The U Visa and Asian Immigrants*

The U visa is particularly relevant to Asians in the United States, who are primarily an immigrant population—approximately sixty-two percent of Asian Americans were born outside the United States.<sup>60</sup> Differing cultural norms, police misconduct, and language barriers serve to increase

Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,023-24.

52. 8 U.S.C. § 1101(a)(15)(U)(iii).

53. *Id.*

54. *Id.* § 1101(a)(15)(U)(i)(III).

55. *Garcia*, 2008 WL 1774584 at \*2 n.5.

56. *Id.* at \*2-4.

57. 8 U.S.C. §§ 1101(a)(15)(U), 1255(b)(3)(B).

58. *Id.* § 1255(b)(1). Extensions are permitted if the immigrant is required to assist in the related criminal investigation or prosecution. *Id.* § 1101(a)(15)(H)(i).

59. *Id.* § 1101(a)(15)(H)(i).

60. Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women’s Movement and the Asian American Community*, 3 *ASIAN AM. L.J.* 151, 162 (1996). See also Nimish R. Ganatra, *The Cultural Dynamic in Domestic Violence: Understanding the Additional Burdens Battered Immigrant Women of Color Face in the United States*, 2 *J.L. SOC’Y* 109, 111-12 (2001). Due to the congressional immigration law reforms of the mid-1960s, there has been a dramatic increase in Asian immigration to the United States. *Id.* at 111.

Asian mistrust of law enforcement. The U visa program may not only serve as a critical incentive to encourage effective cooperation, but also provide specific relief because Asians are particularly susceptible to certain crimes covered by the program, such as domestic abuse and gang violence.

### *1. Distrust of Police and Other Authority*

Like other undocumented immigrants, Asian undocumented immigrants face the fear that officials may report them to ICE if they become visible by reporting a crime.<sup>61</sup> However, the U visa may be particularly useful to the Asian community, as the community is traditionally more likely to distrust law enforcement, to hesitate in seeking police protection, or to report crimes.<sup>62</sup> Many Asian immigrants, particularly recent ones, hail from countries where law enforcement and government were corrupt or ineffectual.<sup>63</sup> Rather than involve authorities, Asians in some countries merely cope with crime. One American gang detective explained the intractability of extortion in Asian countries, noting that “[I]n Asian culture, you pay the butcher, you pay the grocer, and you pay the gang member. It’s a way of doing business.”<sup>64</sup> Similarly, the director for the New York Asian Women’s Center, which primarily works with battered women, explains that “Chinese people—believe me—do not go to court, do not go to police, do not want to deal with authority.”<sup>65</sup>

Police misconduct or insensitivity towards Asians in America may further lead to community and individual distrust of law enforcement in the United States.<sup>66</sup> In some communities, routine mistreatment of innocent Asians and harassment of Asian youths suspected of belonging to criminal gangs have led to distrust of law enforcement.<sup>67</sup>

Language barriers also increase the hesitancy of Asians to reach out to law enforcement.<sup>68</sup> Police departments frequently lack bilingual officers or interpreters, which leaves Asians with limited English-speaking ability to encounter great challenges when explaining their issues to law enforcement.<sup>69</sup> In many cases, the belief that the police will fail to carefully investigate a dispute or even actually side with the perpetrator as a result of miscommunication only exacerbates reluctance to report crime.<sup>70</sup>

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61. See Wang, *supra* note 60, at 162-76.

62. See *id.*

63. *Id.* at 172; see also Ganatra, *supra* note 60, at 121-22.

64. See Hong H. Ticu, *Picturing the Asian Gang Member Among Us*, 11 ASIAN PAC. AM. L.J. 41, 42 (2006).

65. *Overcoming Barriers in Communities*, 29 FORDHAM URB. L.J. 159, 172 (2001) (quoting Angela Lcc).

66. See Wang, *supra* note 60, at 172-73; see also Ganatra, *supra* note 60, at 125-27.

67. See Wang, *supra* note 60, at 172-73; see also Ganatra, *supra* note 60, at 125-27.

68. See Ganatra, *supra* note 60, at 112-18.

69. See *id.*

70. See *id.* at 125-27.



By not reporting a crime, victims may be harmed, beyond the lack of criminal investigation.<sup>71</sup> For example, the lack of reporting may bar a domestic abuse victim from accessing police protection and other social services such as medical care, shelter, legal advice, counseling, public assistance, and child care.<sup>72</sup>

## 2. *Susceptibility to Certain Crimes*

Asians are particularly susceptible to certain crimes, such that the U visa's broad coverage of criminal activity may afford previously unobserved relief and protection. For example, certain gangs target Asians by exploiting their reluctance to report their victimization to the police; but these victims, if undocumented, would likely qualify for the U visa. A New York City Vietnamese street gang exclusively targeted Asian victims because the gang believed that their victims would be afraid to cooperate with the police.<sup>73</sup> The gang committed numerous heinous crimes until the federal government intervened to stop their criminal activity.<sup>74</sup> The protection from deportation in the U visa program could increase interaction and trust between the largely immigrant Asian community and law enforcement.

Asian women, who are often raised in male-dominated cultures that pressure females to refrain from reporting domestic abuse, may also be particularly susceptible to crimes covered by the U visa. Although difficult to generalize, Asian cultures are often family oriented.<sup>75</sup> Families measure an individual's worth in relation to the family, and expect individuals to subjugate their individual needs to family interests.<sup>76</sup> Further, to maintain the family's respectability, individuals minimize public attention to their problems.<sup>77</sup> Women are typically subordinate to men and expected to be dependent and to persevere through personal hardship—even if it includes domestic abuse.<sup>78</sup> Publicly admitting domestic violence would only result in the family ostracizing the individual reporter.<sup>79</sup> The U visa program can potentially provide Asian women greater confidence to prosecute domestic abuse because the U visa would provide them protection from deportation and greater independence.

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71. See Wang, *supra* note 60, at 172-73.

72. See *id.*; see also Ganatra, *supra* note 60, at 125-27.

73. See Alan Vinegrad, *The Role of the Prosecutor: Serving the Interests of All the People*, 28 HOFSTRA L. REV. 895, 899-900 (2000); see also Sally J. Greenberg, *The Massachusetts Hate Crime Reporting Act of 1990: Great Expectations Yet Unfulfilled?*, 31 NEW ENG. L. REV. 103, 130-31 (1996) (discussing distrust of police by minorities based upon past discriminatory experiences).

74. Vinegrad, *supra* note 73, at 899-900.

75. See Wang, *supra* note 60, at 174.

76. See *id.* at 168.

77. See *id.* at 168-70.

78. See *id.* at 169-72.

79. See *id.* at 168-72.

## II. GOVERNMENT IMPLEMENTATION OF THE U VISA

Although the U visa could provide much-needed protection to undocumented immigrants, the program's implementation has suffered due to the federal government's seven-year delay in releasing formal regulations and its paltry efforts to promote and explain the program to law enforcement organizations.

### *A. Delay in Releasing Requisite Implementing Regulations*

The government's delay in releasing U visa regulations was unusually long in comparison with the two years needed to release the T visa's regulations.<sup>80</sup> Without formal U visa guidelines, the USCIS could not issue formal decisions or even application forms.<sup>81</sup> In August 2001, the Immigration and Naturalization Service (INS) released a six-page memo that provided interim guidance on both the T and U visas.<sup>82</sup> The memo explained that because no official regulations existed, INS should not institute deportation proceedings for possible victims of crimes, but should instead use agency mechanisms such as deferred action, stays, and parole.<sup>83</sup>

In 2003, USCIS emerged from the new DHS.<sup>84</sup> Because U visa regulations had still not been released, USCIS released a seven-page memo in October of that year indicating that the agency would grant "interim relief" to those applicants deemed prima facie eligible for U visa nonimmigrant status.<sup>85</sup> The USCIS placed these applicants in deferred action status, which protects applicants from deportation, and provides them with the opportunity to apply for a one-year work visa and public services.<sup>86</sup> However, if an applicant receiving interim relief left the country, the government would deny applicants reentry.<sup>87</sup> Potential U visa applicants may have bore the greatest costs, as many were reluctant to apply for interim relief because they feared removal in the absence of clear

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80. See Press Release, Dep't of Justice, Department of Justice Issues T Visa to Protect Women, Children and All Victims of Human Trafficking, (Jan. 24, 2002), available at [http://www.justice.gov/opa/pr/2002/January/02\\_crt\\_038.htm](http://www.justice.gov/opa/pr/2002/January/02_crt_038.htm) (announcing the release of regulations).

81. See Memorandum from Michael D. Cronin, Acting Executive Assoc. Comm'r, Dep't of Justice, Immigration & Naturalization Service, to Michael A. Pearson, Executive Assoc. Comm'r, Office of Field Operations, Dep't of Justice, Immigration & Naturalization Service (Aug. 30, 2001) (describing procedures).

82. *Id.*

83. *Id.* at 2.

84. In March 2003, U.S. Citizenship and Immigration Services (USCIS) officially assumed responsibility for the immigration service functions of the federal government, including parts of the former Immigration and Naturalization Service (INS), which handled benefit applications. ICE handles immigration enforcement and border security functions. See USCIS, Our History, available at <http://www.uscis.gov/portal/site/uscis> (follow "About Us" hyperlink; then follow "Our History" hyperlink) (last visited Mar. 22, 2010).

85. Memorandum from the Assoc. Dir. of INS Operations to the Director, *Vt. Serv. Ctr.*, *supra* note 25.

86. *Id.* at 2-5.

87. See *id.* at 5.

visa regulations and procedures.<sup>88</sup>

In 2005, several advocacy organizations sued the DHS because the agency still had not issued U visa regulations or even an application form after five years.<sup>89</sup> The plaintiffs dropped the case after USCIS agreed to issue U visa regulations by June 2006 and to provide guidance more favorable to applicants who had already received interim relief.<sup>90</sup> Yet the DHS again failed to release regulations in 2006.<sup>91</sup> Thus, in March of 2007 the same plaintiffs from the first lawsuit formed a nationwide class action of immigrant victims of crime and sued the DHS.<sup>92</sup> The class of aggrieved plaintiffs claimed that the agency's inaction denied them of remedies entitled through the U visa.<sup>93</sup> The lawsuit survived a motion to dismiss with the judge ordering the government to report the development of the U visa's regulations every month.<sup>94</sup> In October 2007, seven years after Congress passed the U visa statute, the DHS finally released interim regulations.<sup>95</sup> The instructions were not comprehensive, forcing the DHS to release additional regulations to address basic provisions such as fees and adjustment of status.<sup>96</sup> The U visa regulations still lack clear answers on key issues.<sup>97</sup> Unfortunately, the prolonged lack of regulations created an enormous backlog of U visa applications that only further hindered adjudications of U visa applications.<sup>98</sup>

### *B. The Delay's Concomitant Harm Upon Law Enforcement Cooperation*

The U visa application requires that a law enforcement agency certify that the applicant is being, has been, or is likely to be helpful to an

88. *Recommendation from the CIS Ombudsman to the Director, USCIS, supra* note 26.

89. *See* Complaint at 3-4, *Rodriquez Ruiz v. Chertoff*, No. EDCV 05-0966 (C.D. Cal. 2005).

90. USCIS agreed to release a policy memorandum stating that when a U visa was approved in the future it would be back-dated to the time when the applicant was granted "interim relief" so that the required three years of U visa status before an applicant may apply for lawful permanent resident (green card) status would commence when the applicant was granted "interim relief," rather than later when U visa was officially granted. *See* Memorandum from Peter Schey, Ctr. for Human Rights and Constitutional Law, to advocates assisting immigrant crime victims (May 5, 2008), available at [http://www.calegaladvocates.org/news/article.193304-CHRCL\\_Update\\_on\\_the\\_U\\_visa\\_litigation\\_immigrant\\_victims\\_of\\_violent\\_crimes](http://www.calegaladvocates.org/news/article.193304-CHRCL_Update_on_the_U_visa_litigation_immigrant_victims_of_violent_crimes).

91. *Id.*

92. *Id.*

93. *Catholic Charities CYO v. Chertoff*, No. C 07-01307-PJH, 1 (N.D. Cal. 2007).

94. *Id.* at 1-3.

95. *Id.* at 8.

96. 8 C.F.R. § 214.14(c)(2)(i); *see also* 72 Fed. Reg. 53,023-24.

97. *See* Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75,540-64 (Dec. 12, 2008) (to be codified at 8 C.F.R. pts. §§ 245.23, 245.24).

98. *See* DHS, Questions & Answers from CIS Ombudsman's Teleconferences, available at [http://www.dhs.gov/xabout/structure/gc\\_1192724755499.shtm](http://www.dhs.gov/xabout/structure/gc_1192724755499.shtm) (last visited Apr. 11, 2010).

99. The failure to fully implement the program caused confusion, uncertainty, and consternation for victims and practitioners. *See generally* Jamie Rene Abrams, *Legal Protections for an Invisible Population: An Eligibility and Impact Analysis of U Visa Protections for Immigrant Victims of Domestic Violence*, 4 MODERN AM. 26 (2008); Karyl Alice Davis, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-visa as a Remedy*, 56 ALA. L. REV. 557 (2004).

investigation or prosecution of the qualifying criminal activity.<sup>99</sup> Rather than actively training law enforcement agencies about their role in the U visa application process, however, the USCIS continues to provide only assistance on demand.<sup>100</sup> The result is that some law enforcement agencies are crucially misinformed. In one case, a county district attorney refused to sign a U visa petition for a woman victimized by domestic abuse, believing that the husband had to be convicted for the agency to sign.<sup>101</sup> In another example, a Texas sheriff refused to sign several U visa petitions only until one of the applicants—a victim of sexual abuse—sued him.<sup>102</sup> The sheriff explained that he felt unqualified as a result of the USCIS's failure to clarify his role in the process: "I felt like [USCIS] hung us out to dry. . . The statute is very vague. It makes it clear that this is an optional thing, and I didn't feel like I had much support from [USCIS]."<sup>103</sup> Ultimately, he signed the form to avoid court fees.

More importantly, local law enforcement agencies struggle with determining precisely which of the many undocumented immigrant crime victims deserve visas. The Chief of Detectives at the Los Angeles Police Department refused some U visa petitions, reasoning that "Not everybody who applies is entitled to one. . . [J]ust being a victim is certainly not enough."<sup>104</sup> Similarly, one sheriff in another case could not fathom why a domestic abuse victim should get a U visa "[j]ust because she was beaten up[.]"<sup>105</sup>

### III. THE FRAMEWORK OF DESERVING AND UNDESERVING IMMIGRANTS

The sheriff's hesitation to assist in providing legal status to undocumented victims reflects America's persistent concerns of excessive immigration and of lost control in regulating its territorial borders. These concerns have historically and still currently animate immigration policy. Agencies determine whether an applicant deserves legal status in relation to the competing narrative of an "illegal alien." An applicant for a U visa will be successful only if she or he can articulate a victimhood that not only fits within the language of the statute, but also comports with criteria that a law enforcement agency deems necessary to justify legal recognition.<sup>106</sup>

By determining whether an undocumented immigrant should receive or be denied a visa, the government defines the boundary between legal and illegal aliens. In making this decision, the government awards visas to

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99. 8 C.F.R. § 214.14(c)(2)(i).

100. See Abrams, *supra* note 98, at 32.

101. See Kevin Sieff, *Elusive Protection: Immigrant endures violence despite law*, BROWNSVILLE HERALD, Aug. 30, 2008, available at <http://www.brownsvilleherald.com/news/beatings-89628--.html>.

102. *Id.*

103. *Id.*

104. Gorman, *supra* note 30.

105. Sieff, *supra* note 101.

106. See Srikantiah, *supra* note 33, at 184-87.

undocumented immigrants deemed deserving of legal status, while denying those deemed undeserving. Visas are therefore implemented in a manner that conforms the visa to acceptable narratives of immigrants who are deserving of legal status. To understand the government's delay in properly implementing the U visa, we must first explore the United States' immigration policy and understand how the narrative of the "illegal alien" affects whom the public considers to be deserving of legal status.

### *A. Immigration Policy and Undocumented Immigrants*

The United States has consistently approached immigration with caution, shifting its policies to reflect desires to include and exclude. In the 1880s, fears about an invasion of Asians led to the passage of the Chinese Exclusion Act and other race-based restrictions.<sup>107</sup> However, public sentiment changed after World War II when widespread dislocation led to the grant of asylum to more refugees.<sup>108</sup> The United States' trend of welcoming immigrants continued into the Cold War as the country sought to project its image as the leader of the "free new world" against communism;<sup>109</sup> the government even loosened its restrictions against Asian immigrants as further proof.<sup>110</sup>

Undocumented immigrants form a key part of the labor market, but lack the protections of their legal counterparts.<sup>111</sup> The result is what Justice Brennan explained in *Plyler v. Doe*: "the existence of a large number of employed illegal aliens . . . whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject them."<sup>112</sup>

Concerns about the rising number of undocumented immigrants, and particularly undocumented employees, led to the Immigration Reform and Control Act (IRCA) in 1986.<sup>113</sup> Again reflecting both inclusionary and exclusionary desires, IRCA both legalized some 2.3 million formerly undocumented immigrants, but also attempted to seal the borders by heightening border enforcement with Mexico and imposing sanctions on employers of undocumented immigrants.<sup>114</sup> Despite this attempt to stem the increase in immigration, however, the number of unauthorized immigrants

107. Belinda I. Reyes, *The Impact of U.S. Immigration Policy on Mexican Unauthorized Immigration*, 2007 U. CHI. LEGAL F. 131, 134. (2007).

108. *Id.* at 134-35.

109. *Id.* at 135.

110. In 1965, Congress eliminated the immigration quota system based on national origin and instead set an annual immigration ceiling of 170,000 persons. Since 1965, immigration has increased dramatically, bringing along a concomitant rise in undocumented immigrants. *Id.*

111. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

112. 457 U.S. 202, 219 n.18 (1982) (quoting *Doe v. Plyler*, 458 F. Supp. 569 (E.D. Tex. 1978)).

113. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

114. Reyes, *supra* note 107, at 136.

is at an all-time high and their labor continues to remain essential in many labor markets.<sup>115</sup>

*B. The Slippery Narrative of the “Illegal Alien”*

These inclusionary and exclusionary desires are based on the popular opinion that immigrants are distinctly good or bad. “Good immigrants” are perceived as entering the country legally, working hard, learning English, raising respectable families, and following the law.<sup>116</sup> The Statue of Liberty captures this ideal by symbolizing America as a beacon of democracy and hope across the world, celebrating the parable of the new immigrant.<sup>117</sup>

In contrast to “good immigrants,” “bad immigrants” are imagined as entering illegally for economic gain, failing to learn English, refusing assimilation, and committing crimes.<sup>118</sup> The public brands these immigrants using the label “illegal alien,” a designation that evokes frightful images of a foreigner taking jobs from U.S. residents and draining welfare and other social services.<sup>119</sup> The “illegal alien,” rather than conjuring hope, is seen as abusing America’s generosity and riches, causing fear that the government is losing control over its sovereignty and success.<sup>120</sup> The term “illegal alien,” therefore, connotes criminality in a linguistic and allegorical sense, suggesting to the public that the trespassers and invaders must be stopped and punished.<sup>121</sup>

The “illegal alien” narrative has powerful implications for undocumented immigrants. Narratives follow a general structure: an individual breaches a norm resulting in a crisis; the goal of the story is to heal the breach of the social norm and to bring resolution and closure.<sup>122</sup> Here, an immigrant breaches the norm of being law-abiding by illegally entering the country. The story of the “illegal alien” resolves itself with punishment or deportation.<sup>123</sup> As Kevin Johnson notes, the term “illegal

115. *Id.*

116. Peter H. Schuck, *Immigration at the Turn of the New Century*, 33 CASE W. RES. J. INT’L L. 1, 7 (2001).

117. *Id.* at 10.

118. *Id.* at 7.

119. *Id.* at 8-10. For example, a leading anti-immigrant organization, Federation for American Immigration Reform (FAIR), depicts illegal and “guest” immigrants as lacking education and English proficiency, being unable to earn high wages, and burdening the government by increasing the costs associated with public education, medical services, incarceration, and other social services. See Fairus.org, *The Costs of Illegal Immigration*, [http://www.fairus.org/site/News2?page=NewsArticle&id=16861&security=1601&news\\_iv\\_ctrl=1007](http://www.fairus.org/site/News2?page=NewsArticle&id=16861&security=1601&news_iv_ctrl=1007) (last visited Jan. 15, 2009).

120. Schuck, *supra* note 116, at 7-9.

121. *See id.*

122. Christopher J. Meade, *Note: Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732, 736-37 (1996) (“Narrative provides a link between the daily reality of violence in which law traffics and the normative ideal—justice—to which law aspires.”); *see generally* Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353 (1996) (describing the importance of shaping and controlling narratives in legal advocacy).

123. Johnson, *supra* note 32, at 276-79.

alien” is nowhere to be found in the Immigration and Nationality Act, yet it is the operative term in debates surrounding immigration.<sup>124</sup> Although not legally defined, the narrative of the “illegal alien” helps rationalize the distinctions in treatment between citizens and noncitizens.<sup>125</sup> Because “illegal aliens” are neither citizens nor invited guests, they therefore can be denied the rights and dignities that legal aliens or citizens possess.

Despite public opinion, an immigrant who enters the country illegally is not entirely excluded from society.<sup>126</sup> For example, the law permits undocumented workers certain rights that citizens hold, such as the right to public education.<sup>127</sup> These inclusive tendencies reflect the nation-state defining membership through formal democratic membership, a project that parallels and works in tandem with formal border exclusion to clarify the concept of citizenship and membership within the nation-state.<sup>128</sup> Undocumented immigrants are obvious targets of the border exclusion project, but once they cross into the country, there is uncertainty as to the level of rights that must be afforded to them.<sup>129</sup>

Undocumented immigrants, therefore, frequently hold simultaneous and contradictory insider and outsider statuses.<sup>130</sup> The state, for instance, may dislike an undocumented immigrant who illegally enters the country, but will still provide the immigrant with legal asylum if she proves that she fled political persecution.<sup>131</sup> The legal rights that the state grants undocumented immigrants are a product of the interaction between border regulation and internal democratic membership, an interaction that ultimately defines how the state views its own citizenship and nationhood.<sup>132</sup> By constituting the “other”—a foreigner devoid of power, as opposed to a citizen with rights—the undocumented immigrant helps to reinforce the state’s own social identity.<sup>133</sup>

Legal narratives, though, oftentimes conflict, challenging a society’s established norms and ultimately the identities of its citizens.<sup>134</sup> In the case of *Garcia*, the government could cast Garcia and his coworkers as aliens illegally crossing the border to find work inside the United States, or

124. *Id.*

125. *Id.*

126. See Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 961-67 (1988). See generally Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994).

127. See *Plyler*, 457 U.S. at 231.

128. See Bosniak, *Exclusion and Membership*, *supra* note 126 at 961-87.

129. *Id.*

130. See generally *id.*

131. See Durst, *supra* note 35, at 131-37.

132. See generally, Bosniak, *Membership Equality*, *supra* note 126.

133. See Johnson, *supra* note 32, at 264.

134. See Naomi R. Cahn, *Critical Theories and Legal Ethics: Inconsistent Stories*, 81 GEO. L.J. 2475, 2481-82 (1993).

alternatively, as vulnerable workers at the mercy of a ruthless employer. These subjective frames affect the remedy chosen to heal the breached norm. Should there be a remedy, punishment, or mere inaction? The difficulty with narratives is that they set precedents: once the public “let[s] a thousand powerful stories be told,” is the state then responsible for accepting and validating all of them?<sup>135</sup> The government’s decisions in the U visa context not only determine who deserves to be within the territorial community, but also serve to reaffirm or to challenge the dominant narratives regarding the “legal” and “illegal” alien.

#### IV. PRECEDENT VISAS AND PERMISSIBLE ICONIC FIGURES

By formally admitting and denying certain undocumented immigrants, visa programs both enact the border exclusion project and reflect some, if not muted, desires of democratic membership.<sup>136</sup> Visa programs must strike a balance by allowing entry only to immigrants who are deemed deserving, while excluding all immigrants who are considered undeserving. To be effective, advocates, policymakers, and practitioners construct an acceptable petitioner narrative that highlights the undocumented immigrant’s impetus for inclusion, while disqualifying characteristics deemed undeserving.<sup>137</sup> Such iconic figures and narratives guide the promotion and direction of visa programs, amidst a backdrop of disdain for the “illegal alien.”

Reflecting the government’s desire to permanently exclude “illegal aliens,” the USCIS offers scant options for undocumented immigrants present inside the United States to regularize their status. Prior to the passage of the TVPA, the government permitted undocumented immigrants a narrow path to legalization through targeted visa programs: asylum for refugees, self-petitions for battered immigrant spouses, and S visas for alien informants.<sup>138</sup> These programs enshrine broad archetypes of deserving undocumented immigrants as being “victims” or “informers.” With asylum applications and self-petitions for battered women, the government rescues only certain undocumented victims of persecution and marital abuse. With the S visa, the government has sole discretion to trade legal status for undocumented immigrants who serve as informers.<sup>139</sup> Common characteristics emerge from these programs: they target specific populations, provide the government broad discretion to deny visas, and operate to exclude economic migrants. These programs and archetypes serve to establish the precedent narratives that underlie the T and U visas.

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135. *Id.* at 2481.

136. Linda Bosniak, *Universal Citizenship and the Problem of Alienage*, 94 NW. U. L. REV. 963, 971-974 (2000).

137. See Johnson, *supra* note 32 at 276-79.

138. See INA §§ 208-09, 212 (codified as 8 U.S.C. §§ 1158-59, 1182); 8 U.S.C. 1101(a)(15)(S).

139. See 8 U.S.C. § 1101(a)(15)(S).



More importantly, these archetypes and their corresponding visa programs receive acceptance and endorsement only because they narrowly define the categories of immigrants considered deserving, thereby preserving the government's binary framework of inclusion and exclusion.

### *A. The Immigrant as a Victim*

#### *1. Victim of Persecution*

The narrative of the government rescuing an immigrant victim emerges to a certain degree from asylum law.<sup>140</sup> An asylum applicant must show the government a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>141</sup> Although generally there is no duty to rescue under American law, asylum is anomalous—it is one area where a duty to rescue is present. Unlike the T and U visas, the government must accept an applicant that proves his or her statutory persecution, even without law enforcement corroboration or assistance.<sup>142</sup> The INS may not deny refugee status merely because there is no evidence corroborating a refugee's narrative.<sup>143</sup> Once the applicant proves a subjective well-founded fear, the inquiry simply becomes whether a reasonable person in the applicant's shoes would fear persecution if returned to his native country.<sup>144</sup> This victimhood is thus central to the eligibility of the applicant because it structures a role for the government—the rescuer. The narrative that emerges is of an immigrant harmed by criminal activity, facing continuing danger, and the government rescuing the immigrant.

Even with this duty to rescue, the government still prioritizes exclusion of economic migrants, who are deemed undeserving of status.<sup>145</sup> The government maintains latitude to deny an applicant who has a credible fear of political persecution if his or her economic need was an even greater motivation for seeking asylum.<sup>146</sup>

#### *2. Victim of Domestic Abuse*

The government also provides immigration relief to spouses caught in abusive marriages. In 1994, Congress passed the Violence Against Women

140. See Durst, *supra* note 35, at 131-37 (explaining the government's desire not to have a duty to rescue or take action in immigrant cases).

141. *Id.* at 129.

142. *Id.* at 133.

143. *Id.*

144. See *id.* at 134-35.

145. Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 ST. THOMAS L. REV. 135, 145-148 (1993).

146. For example, the denial of refugee rights to Haitians during the 1980s and 1990s manifested this overwhelming concern. Immigration officials stressed the poverty of potential immigrants, not their lack of political rights and the violence conducted by authorities. *Id.* at 149.

Act (VAWA), which provides a remedy to battered immigrant spouses whose partners have legal status, but refuse to file a petition for residency on their behalf.<sup>147</sup> Similar to legal asylum, VAWA emphasizes the women's victimhood, precluding any inquiry that she may initially have come for economic reasons.<sup>148</sup> VAWA permits women married to citizens or permanent residents to apply for permanent residency independent of their abusive partners.<sup>149</sup> A successful VAWA applicant must clearly demonstrate unequivocal victimhood—in addition to mental or physical abuse, she must show that she resided in the United States with the abuser and that she has good moral character.<sup>150</sup> The design and focus of the program reaffirms that the government only considers certain victims of specific crimes as deserving of legal status.

### *B. Immigrant as Informer: Cooperating with Law Enforcement*

The S visa represents an alternative method for undocumented immigrants to seek status—by serving as informers. Following the 1993 bombing of the World Trade Center in New York City, Congress amended the Immigration and Nationality Act (INA) to establish the S visa for alien witnesses and informants.<sup>151</sup> Under the S visa, the USCIS has no duty to assist an undocumented immigrant, but the USCIS will grant the applicant legal status if he provides the government essential cooperation in a criminal investigation and demonstrates to the government that he would face abuse if he returned home.<sup>152</sup> The Attorney General tightly controls the program with unreviewable discretion to provide an S visa.<sup>153</sup> Even before receiving an S visa, the applicant must waive his right to a removal hearing and the right to contest any removal action, including detention.<sup>154</sup> The

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147. See Violent Crime Control and Law Enforcement Act of 1994 § 40701(a), Pub. L. No. 103-322 [hereinafter VAWA]. VAWA also created cancellation of removal provisions, which are especially important for battered spouses who do not meet the requirements for self-petitioning. If a woman establishes that she is deportable, that she has resided in the United States for three years, that she is the victim of battery or extreme cruelty, that she has good moral character, and that deportation would result in extreme hardship, then her deportation may be suspended and she may be granted legal status. *Id.* § 40703.

148. See INA §§ 212(a)(1), 245(a).

149. 8 U.S.C. § 1101(a)(15)(S).

150. *Id.* Battered immigrant women who self-petition may include their undocumented children in their application. Children who are abused by citizen or resident parents also may apply for this remedy. Finally, a woman who has not been abused herself also can self-petition to become a permanent resident if she is a parent of a battered child abused by the woman's citizen or permanent resident husband. See generally Leslye E. Orloff & Janice Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95 (2001) (detailing VAWA).

151. See 8 U.S.C. § 1101(a)(15)(S).

152. See *id.* See also Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1081-82 (2002).

153. 8 U.S.C. § 1101(a)(15)(S).

154. *Id.*

government has used the program sparingly and most notably to assist undocumented trafficking victims who sought to testify against their perpetrators.<sup>155</sup> The S visa's requirements and usage reflect the government's reluctance to provide legal status—it is not enough that the informer has valuable information, but the informer must additionally face abuse if he or she returns home.

## V. THE T VISA PROGRAM VERSUS THE U VISA PROGRAM

### *A. T Visa Program*

Congress established the U visa and T visa programs as part of the VTVPA, which had the purpose of “combat[ing] trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”<sup>156</sup> The VTVPA provided undocumented immigrant victims with the possibility of remaining in the United States, and law enforcement agencies with tools to pursue the prosecution of traffickers.<sup>157</sup>

The T visa's implementation stands in contrast to the government's implementation of the U visa, even though it was enacted under the same statutory section. In the enacting legislation, Congress explained that “immigrant women and children are often targeted to be victims of crimes committed against them in the United States,” and that “[a]ll women and children who are victims of these crimes . . . must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes.”<sup>158</sup>

As a result of developing from similar legislative purposes, both visas share the same hybrid structure, requiring the petitioner to be both a victim of specified crimes and also willing to serve as an informer for law enforcement organizations.<sup>159</sup> However, unlike with the U visa, the

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155. The program is limited in quantity, with only 250 S visas granted each year. Demleitner, *supra* note 152 at 1078. See Jennifer Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3024-27 (2006). In the late 1990s, stories of forced immigrant labor highlighted the existence of a trafficking problem in the United States. In particular, in 1995, the police department in El Monte, California raided a garment sweatshop, finding seventy-two Thai nationals. The workers filed a civil lawsuit against the operators and retailers. However, because INS had not authorized these immigrants to remain or work in the United States, they had to first fight deportation before they could advance their claims. Organizations lobbied the Department of Justice, which agreed to provide them with S visas. See Julie Su, *Corporations and Economic Justice*, 4 *SEATTLE J. SOC. JUST.* 237 (2005).

156. VTVPA § 102 (codified as 8 U.S.C. § 1102). See 8 U.S.C. §§ 1101(a)(15)(T), (U) (2000) (detailing the T and U visas).

157. 8 U.S.C. § 1531(a)(2)(A).

158. VTVPA § 1513(a)(1).

159. *Id.* § 1513; see also 8 U.S.C. §§ 1101(a)(15)(T)-(U).

government rapidly implemented the T visa program, releasing implementing regulations shortly after the passage of the VTVPA;<sup>160</sup> the T visa program has also approved far more visas than the U visa—1,308 compared to fifty, between 2000 and 2008.<sup>161</sup>

### 1. *The T Visa's Statutory Language*

A clear iconic figure—a passive victim, trafficked across the border for sex, and then rescued by the federal government—animated the passage of the T visa. This narrative was reflected in the regulations, which limited the scope of the statute away from labor trafficking towards sex trafficking. This iconic figure was critical to the T visa's expeditious implementation, for it created a palatable distinction from the “illegal alien” who willfully crosses the border for economic benefit. The T visa is similar to VAWA and asylum relief in that the statute conditions relief on the applicant's demonstration of his victim status.<sup>162</sup> Yet unlike VAWA and asylum, the T visa also requires cooperation with law enforcement.<sup>163</sup> The visa holder is both an informant and victim.

The statute states that an applicant for a T visa must be a victim of a “severe form of trafficking in persons.”<sup>164</sup> Although the VTVPA defines trafficking broadly to include labor and sex trafficking,<sup>165</sup> the public image that propelled the legislation specifically focused on the latter, centering upon the narrative of traffickers fraudulently luring an “innocent [female] victim” and then coercing her into sex work.<sup>166</sup> This narrative of the female sex trafficking victim reflected popular imagination of trafficking.<sup>167</sup> During congressional debate, members discussed labor trafficking much less extensively, noting only a few stories illustrating labor trafficking on the congressional floor.<sup>168</sup> The central focus on sex trafficking perturbed

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160. See Press Release, Dep't of Justice, Department of Justice Issues T Visa to Protect Women, Children and All Victims of Human Trafficking (Jan. 24, 2002), available at [http://www.justice.gov/opa/pr/2002/January/02\\_crt\\_038.htm](http://www.justice.gov/opa/pr/2002/January/02_crt_038.htm).

161. See *Recommendation from the CIS Ombudsman to the Director, USCIS*, supra note 26 (noting that 709 were denied or withdrawn, and 212 remained pending).

162. 8 U.S.C. § 1101(a)(15)(T).

163. See *id.*

164. *Id.*

165. 8 U.S.C. § 1101(a)(15)(T)(i)(I). The definition includes sex trafficking, which is defined as “a commercial sex act...induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age;” and also labor trafficking, “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” VTVPA §§ 103(a)(8)(A)-(B).

166. See VTVPA § 102(b).

167. The Coalition Against Slavery and Trafficking explained that “sex trafficking gets a lot of attention simply because it's sexy.” Jennifer Block, *Why the Faith Trade is Interested in the Sex Trade*, CONSCIENCE, Summer/Autumn 2004, available at [http://www.catholicsforchoice.org/conscience/archives/c2004sum\\_sextrafficking.asp](http://www.catholicsforchoice.org/conscience/archives/c2004sum_sextrafficking.asp).

168. On the House floor, Senator Wellstone discussed the then-recent high profile raids of sweatshops and an additional story involving workers subjected to mental abuse at an egg farm, which

some legislators, causing those such as Congressman John Conyers to express his belief that “[W]e should be doing far more to protect not just the victims of sex traffickers and involuntary servitude but also the victims of other forms of abuse such as battered immigrants and sweatshop laborers.”<sup>169</sup>

Similar to the S visa, the trafficking victim must also serve as an informer to the government’s benefit. The victim must demonstrate that she: (1) is physically inside the United States because of the trafficking; (2) has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking; and (3) would suffer extreme hardship involving unusual and severe harm upon removal.<sup>170</sup>

## 2. *The T Visa’s Narrowly Tailored Implementing Regulations*

Rather than reflecting the broad policies of the VTVPA, the USCIS released regulations that mirrored the trafficking victim’s public image just two years after the VTVPA was promulgated, narrowing the statute’s broader language along the way. The regulations gave prosecutors large amounts of control over the visa process by allowing them to determine whether an immigrant is a victim of trafficking crime, cooperating with law enforcement, and ultimately deserving of a T visa.<sup>171</sup> The T visa regulation imposes two crucial restrictions that extend beyond the statute.

First, although the statute does not specify the method and level of cooperation, the regulations direct T visa applicants to obtain a law enforcement agency’s (LEA) endorsement. The certification affirms that they were victims of a severe form of trafficking and that they assisted in the subsequent investigation or prosecution.<sup>172</sup> A T visa may be revoked if “the LEA providing the LEA endorsement withdraws its endorsement.” Effectively, these regulations force T visa applicants to get the support of the Department of Justice (DOJ) because it is the primary agency charged with investigating and prosecuting trafficking crimes.<sup>173</sup> Without the DOJ’s signature, an applicant must go through the onerous process of providing credible secondary evidence.<sup>174</sup>

Second, the regulations require that a victim must have attempted to

eventually burned down and killed one of the workers. These workers could not seek redress with existing involuntary servitude laws. The VTVPA would solve this. “No longer in the United States of America are we going to turn our gaze away from this kind of exploitation, to this kind of murder of innocent people.” 106 CONG. REC. S10181 (Oct. 11, 2000).

169. 106 CONG. REC. H2687 (daily ed. May 9, 2000).

170. 8 U.S.C. § 1101(a)(15)(T).

171. See Srikantiah, *supra* note 33, at 180-87; Dina F. Haynes, *(Not) Found Chained to Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 338-41 (2007).

172. Srikantiah, *supra* note 33, at 176.

173. See *id.* at 176-77.

174. *Id.* at 176.

leave the United States once she escaped.<sup>175</sup> A victim must show that “she did not have a clear chance to leave the United States in the interim” between her escape from her traffickers and law enforcement involvement.<sup>176</sup> A survivor whom law enforcement “liberates,” however, does not have to satisfy this requirement.<sup>177</sup> With the power to determine whether a victim has cooperated and falls within the Department’s preference for liberated victims, the DOJ can—and often—frames itself as the rescuer.<sup>178</sup> However, the DOJ remains under no duty to rescue “illegal” immigrants.

### 3. *The T Visa’s Iconic Figure, Deconstructed*

The T visa’s regulations and DOJ actions enshrine the iconic figure that propelled the T visa’s legislative debate: a female victim of sex trafficking, trapped by her traffickers, who passively awaits rescue; and after law enforcement frees her, reanimates as a compliant witness against her oppressors.<sup>179</sup> This iconic figure crosses the border against her free will while the “illegal alien” crosses consensually for economic purposes and is free to leave.<sup>180</sup> In reality, economic reasons also push many trafficking victims to the United States. While many exert some free will in their situations, others may be trapped by fear of their traffickers’ retribution.<sup>181</sup> By constructing regulations that grant T visas to these iconic figures, the government reinforces the boundary between the “legal alien” and the “illegal alien.”<sup>182</sup> In situating trafficking victims farther from the latter stereotype, the government reinforces that it is under no duty to rescue, and more importantly, will not rescue those who are simply poor.<sup>183</sup>

#### B. *U Visa*

Iconic figures and narratives help regulators implement the statute by navigating the visa towards admitting deserving petitioners while excluding undeserving applicants. In contrast to the T visa, a clear iconic figure neither propelled passage nor emerged from the U visa statute. Ultimately, the lack of guidance that an iconic figure would provide hampered U visa implementation because the statutory language of the U visa was broadly inclusive, and the government was reluctant to promote an open-ended visa that could assist immigrants considered undeserving.

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175. *Id.* at 177.

176. *Id.* at 179.

177. *Id.*

178. *See id.* at 187-91.

179. *See id.* at 187.

180. *Id.* at 187-92.

181. *See id.* at 187-98.

182. *See id.* at 187-206. *See generally* Haynes, *supra* note 171.

183. *See* Durst, *supra* note 35, at 131-37.

### *1. An Absent Preexisting Prototypical Victim*

Unlike with the T visa, legislators did not debate the U visa program based on a clear preexisting stereotype. In fact, Congress did not debate the U visa legislation on the floor, but merely adopted it as part of the VTVPA, resulting in sparse legislative history.<sup>184</sup> The U visa's stated purpose is broad, making it difficult to discern a prototypical victim. As provided in the statute, the U visa is intended to "encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens" by strengthening the ability of law enforcement to investigate and prosecute cases of the enumerated crimes, "while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States."<sup>185</sup> This purpose serves both humanitarian and investigative purpose and does not identify a target population.<sup>186</sup>

No clear iconic figure emerges from the language of the statute itself.<sup>187</sup> Although the T visa statute covered both labor and sex trafficking, the regulations and implementation narrowed the visa primarily to sex trafficking.<sup>188</sup> The U visa's language appears to straddle both the VTVPA's concerns about trafficking and VAWA's anxieties about domestic abuse, resulting in an expansive list of crimes that lack a focused target. In the realm of trafficking, the U visa covers: prostitution, sexual exploitation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, and false imprisonment.<sup>189</sup> However, the statute also covers a number of domestic abuse crimes: rape, torture, incest, domestic violence, sexual assault, abusive sexual contact, and female genital mutilation.<sup>190</sup> Ultimately, advocates for both domestic abuse and trafficking victims claim the U visa as a remedy precisely because it embraces a wide range of crimes that other visa programs do not.

The U visa embraces even additional crimes beyond the areas of trafficking and domestic abuse, making it further difficult to determine a specific victim. Victims of felonious assault may also seek U visas,<sup>191</sup> as may family members of victims of murder or manslaughter.<sup>192</sup> In addition, the U visa covers attempts to commit crimes such as blackmail, extortion, witness tampering, obstruction of justice, perjury, or attempt, conspiracy,

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184. Most of the debate concerning the bill merely highlighted atrocities that occurred as a result of trafficking. *See* 106 CONG. REC. S10167-81 (October 11, 2000).

185. VTVPA § 1513(a)(2).

186. *See id.*

187. *See* INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U).

188. *See* INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T).

189. INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U).

190. *Id.*

191. *Id.*

192. 8 C.F.R. §§ 214.14(c)(2)(i)-(ii), 72 Fed. Reg. 53,023-24.

or solicitation to commit any of the aforementioned crimes.<sup>193</sup> Most importantly, the statute is open-ended, permitting victims of “any similar activity” to also apply for the U visa.<sup>194</sup>

Ultimately, the U visa is relevant to a wide swath of the undocumented immigrant population because they are oftentimes victims of the enumerated crimes against which the program protects. This broad applicability stands in contrast not just to the T visa, but also to the other visa programs that target very specific populations.

## 2. *The U Visa's Preference for Dispersed Prosecutorial Control*

Similar to the S and T visas, the U visa requires certification from a law enforcement agency indicating that the applicant cooperated. For the S and the T visas, the Attorney General and DOJ, respectively, maintain primary discretion to certify.<sup>195</sup> This requirement enables the Attorney General and the DOJ to maintain strict control over the visa programs. However, the U visa is distinct because the statute provides for a multitude of law enforcement agencies to provide certification: any federal, state, or local law enforcement official, prosecutor, judge, or other authority investigating the underlying crime can sign the form.<sup>196</sup> These entities have the discretion to control individual access to the U visa.

Although the federal government can make final determinations, it is in a weaker position to act as a gatekeeper because it does not have sole control to determine witness cooperation at the initial point. Instead, any investigating agency can sign the certification form and independently determine who deserves U visas.<sup>197</sup> This potentially permits a greater number of undocumented immigrants to apply for the U visa, forcing the government to either accept these applicants or more clearly define which of these applicants deserve status.

Without the guidance that an acceptable iconic figure provides, the government delayed releasing regulations and fully implementing the U visa program.<sup>198</sup> An aggressive application of the broad statute could potentially legalize many undocumented victims, including those like Fredi Garcia who immigrated to the United States partly due to economic motivations. Approving a multitude of visas would validate the positive

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193. See INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U).

194. See *id.*

195. 8 U.S.C. § 1101(a)(15)(S); see Srikantiah, *supra* note 33, at 176-84.

196. See also 8 C.F.R. § 214.14(c)(2)(i), 72 Fed. Reg. 53,023-24 (interim regulations).

197. 8 C.F.R. § 214.14(c)(2)(i). See also 72 Fed. Reg. 53,023-24 (the regulations permit a “Federal, State, or local law enforcement agency, prosecutor, judge, or other authority” to sign a certification form). Further, these determinations can be made without any analysis of the conditions in the country of origin because, unlike the T visa, the U visa does not require applicants to “suffer extreme hardship involving unusual and severe harm upon removal.” See INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T).

198. See *Recommendation from the CIS Ombudsman to the Director, USCIS, supra* note 26.



narrative and ultimately blur the critical boundary between “legal alien” and “illegal alien.”<sup>199</sup> Alternatively, an exclusive U visa program would run counter to the broadness of the statute itself, but sustain the state’s justifications for limiting immigration. Although the government is suspicious of undocumented victims who seek legalization, it remains that victims of some serious crimes may deserve status as seen with the implementations of the T visa and VAWA.

## VI. THE U VISA GOING FORWARD

Rather than expressing hesitation, the federal government should abide by the U visa’s policy and the statutory language to actively promote the U visa. In addition to assisting law enforcement, the purpose of the U visa is to encourage “law enforcement officials to better serve immigrant crime victims” and to offer “protection to victims of such offenses in keeping with the humanitarian interests of the United States.”<sup>200</sup> These aims are each distinctly important, as the titling of the enacting section refers to the U visa as the “Humanitarian/Material Witness” nonimmigrant classification.<sup>201</sup>

The aims go hand-in-hand. Congress recognized that undocumented immigrant victims may be very reluctant to help in the investigation or the prosecution of criminal activity for fear of deportation.<sup>202</sup> However, undocumented immigrant victims would be more likely to report crimes and be helpful to law enforcement agencies if they believed that law enforcement would effectively investigate and prosecute the underlying crime, and that they would not be deported for their actions or continued presence in the country.<sup>203</sup> This belief and trust in law enforcement will strengthen only after the U visa becomes more widely promoted and used.

Moreover, the U visa should actively serve as a critical and advantageous bridge to improve upon and repair the relations between law enforcement and immigrant communities. Immigrant victims who have suffered serious abuse should feel comfortable reporting the underlying crimes to law enforcement. This would be particularly helpful in Asian immigrant communities where language and cultural barriers serve to create mistrust of and distance from law enforcement, leaving the communities vulnerable to crime.<sup>204</sup> Promoting the U visa and its benefits to undocumented immigrants would achieve the statute’s humanitarian purpose.

Extensive application of the U visa may encounter opposition from

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199. See generally Cahn, *supra* note 134 (discussing the difficulties of conflicting narratives).

200. VTVPA § 1513(a)(2)(a).

201. *Id.* § 1513(b).

202. See *id.* § 1513(a)(2)(b).

203. See *id.*

204. See Wang, *supra* note 60, at 172-73; see also Ganatra, *supra* note 60, at 111-30.

those who fear that “undeserving illegal aliens,” like economic migrants, are receiving status. Such opposition would likely argue that the U visa, if used at all, should be particularly limited to apply only to undocumented victims of heinous crimes, where legal status is almost essential for exchange of their testimony. The effect of such a proposal would be to mirror the T visa by also restricting the U visa’s application to a limited one-dimensional iconic figure and narrative.

Moreover, such a suggestion runs counter to the explicit humanitarian purposes of the statute, which outlines a wide list of underlying crimes. Narrowing implementation only reaffirms a faulty, rigid demarcation between “deserving” and “undeserving” undocumented immigrants. The demarcation is elusive. Although people agree that the country cannot have unchecked borders, there is no national consensus as to which undocumented immigrants should be given paths to legalization and which should be deported. This lack of agreement is reflected in the legislative stalemates regarding policy reform and the hodgepodge of responses to immigration concerns across the country. Some cities are “sanctuaries” that actively discourage federal authorities from conducting immigration raids,<sup>205</sup> while others attempt to bar undocumented immigrants from even renting within their boundaries.<sup>206</sup>

Rather than ignoring the U visa as being disfavored or unworkable without an iconic figure or guiding narrative, the government should embrace the flexible design of the program. In addition to federal agencies like the DOJ or Department of Labor, the U visa permits any number of the local law enforcement agencies to certify U visa applications.<sup>207</sup> So long as the federal government approves an appropriately completed visa application, the lower level law enforcement agency becomes the gatekeeper for a successful U visa, as it only needs to certify a petitioner’s willingness to assist.<sup>208</sup> Suddenly, local police departments and other law enforcement outposts may become potential immigration intermediaries. These localized entities may be more likely to make decisions that reflect the needs and opinions of the communities that they respectively serve. Thus, rather than permit the federal government to struggle in developing an iconic figure that simply cannot comport with an expansive immigration statute, the localized agencies can utilize their more advantageous position to expedite the purpose of better serving immigrant victims.

The federal government and practitioners must prioritize promoting

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205. See Press Release, Office of Mayor San Francisco, Mayor Newsom Launches Sanctuary City Outreach Campaign (Apr. 2, 2008), available at [http://www.sfmayor.org/archives/PressRoom\\_NewsReleases\\_2008\\_78378/](http://www.sfmayor.org/archives/PressRoom_NewsReleases_2008_78378/).

206. See David Fried, *Escondido Council Approves Illegal Immigrant Rental Ban*, NORTH COUNTY TIMES (Oct. 5, 2006).

207. See 72 Fed. Reg. 53,014-15.

208. See *id.*

and educating law enforcement of the unique visa's process and purpose. Local law enforcement agencies will invariably be reluctant to sign certifications so long as they are unfamiliar with the U visa process and purpose. Although undocumented victims who live in areas more politically inclined to exclude undocumented immigrants may find it harder to secure certification, the U visa statute and regulations permit certifications from a variety of agencies, including the federal branch. These other agencies are more likely to effectuate the U visa program if they are aware of the purpose of the U visa and their authority under it. For example, when the local police presumably refused to sign Garcia's certification, a judge signed it.<sup>209</sup>

Although the government's delay in releasing the U visa's implementing regulations and promoting the program has left many undocumented immigrant victims without remedy, the program nonetheless represents an opportunity to revise the state and public's understanding of immigration. Discussions with law enforcement would invariably touch upon the diverse struggles and motivations of immigration, which will impact the deserving-undeserving framework. Thus, highlighting these stories of immigrant victims ideally will challenge rigid perceptions of undocumented immigrants as good or bad. Rather than unilaterally punishing undocumented immigrants as "undeserving," the U visa presents an opportunity to protect undocumented immigrants, assist law enforcement agencies, and ultimately develop a more flexible and nuanced understanding of immigration and citizenship.

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209. See *Garcia*, 2008 WL 1774584 at \*4.

