THE U VISA: A REMEDY FOR VULNERABLE IMMIGRANTS SCAMMED BY UNSCRUPULOUS ATTORNEYS

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INTRODUCTION

As of 2018, the Department of Homeland Security (DHS) estimates that there are eleven million unauthorized immigrants[†] living in the United States.[1] Due to limited resources, DHS has taken the position that it "cannot respond to all immigration violations or remove all persons unlawfully [residing] in the United States."[2] Congress has failed to enact comprehensive immigration reform, despite numerous attempts, since the Reagan administration.[3] This leaves the unauthorized population in a limbo often characterized as "living in the shadows"[4]—relegated to fading

†† In this Note, the term "unauthorized immigrant" refers to any noncitizen who is present in the United States without lawful immigration status, and, consequently, unauthorized to reside and work in the United States.

1 Bryan Baker, DEP'T OF HOMELAND SEC., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015–January 2018* 1 (2021) https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf [https://perma.cc/XTX3-ZALM].

2 *See* David Pekoske, DEP'T OF HOMELAND SEC., *Memorandum from Acting Secretary Pekoske on Immigration Enforcement Policies* 2 (2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/GR7P-787R].

3 Elaine Kamarck & Christine Stenglein, *Can Immigration Reform Happen? A Look Back*, THE BROOKINGS INSTITUTION (Feb. 11, 2019), https://www.brookings.edu/blog/fixgov/2019/02/11/can-immigration-reform-happen-a-look-back [https://perma.cc/5MDE-AVN2] (providing a brief overview of failed immigration legislation since 1986).

4 *See* Andrea Barrientos, *Here Stood My Dreaming Tree: A Proposal to Reform Non-LPR Cancellation of Removal to Bring Undocumented Immigrants Out of the Shadows*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 535, 536 (2021) (describing "the shadow" as "seclusion and oppression because of [] lack of lawful status"). This characterization has also been used in American jurisprudence, executive agency guidance, and political discourse in reference to the unauthorized population. *See* Plyler v. Doe, 457 U.S. 202, 218 (1982) (stating that immigration enforcement issues coupled with the lack of effective deterrents to unauthorized immigrant employment "has resulted in the creation of a substantial 'shadow population' of [] migrants—numbering in the millions—within our borders."); Sec. Jeh Charles Johnson, DEP'T OF HOMELAND SEC., *Memorandum from León Rodríguez on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to*

into the background so as to not draw the attention of immigration enforcement authorities.[5] Immigration status impacts many facets of an individual's life, including subjecting them to substandard wages in terrible work conditions[6] and imposing barriers to obtaining financial aid for higher education.[7] Consequently, an unauthorized immigrant's top priority is often to rectify their status as soon as possible.[8] In their efforts to do so, several factors make unauthorized immigrants susceptible to fraud: the difficulties of unauthorized life driving an urgency to obtain legal status; a complicated immigration legal system; and the limited access to reliable legal counseling (as a consequence of both economic and language barriers).[9] Fraudulent scams exploit the fear of deportation and give false hopes of easy pathways to legalization.[10]

The so-called "ten-year visa" or "ten-year green card" is a common fraud scheme that exploits the aforementioned vulnerability, and whose promised green card is premised on an intentional misrepresentation of the law. Perpetrators of this scam—sometimes including licensed attorneys—offer the "ten-year visa" as an affirmative benefit solicited

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the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents 3 (2014) https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf [https://perma.cc/G2ZH-AF86] (supporting the agency decision for expanding deferred action as a means to "encourage [immigrants] to come out of the shadows" and obtain work authorization); Barack Obama, President of the United States, State of the Union Address (Jan. 25, 2011), https:// obamawhitehouse.archives.gov/the-press-office/2011/01/25/remarks-president-state-union-address [https://perma.cc/3D99-UBZC] (calling for Congress to enact comprehensive immigration reform to "address the millions of undocumented workers who are now living in the shadows.").

5 Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 6 (2013) (explaining that "federal, state, and local laws have created a state of fear among undocumented immigrants that they could be deported from the United States at any time, necessitating that they constantly hide information about their status and avoid the purview of authorities").

6 Jarod S. Gonzalez, *Employment Law Remedies for Illegal Immigrants*, 40 TEX. TECH L. REV. 987, 987 (2008).

7 Unauthorized immigrant youth are barred from federal aid and some state aid. William C. Kidder, *Dreaming with Dreamers When DACA Is at Risk: An Innovative and Legally Defensible Student-Community Partnership Model to Bolster Financial Support for Undocumented College Students*, 36 GEO. IMMIGR. L.J. 571, 584–85 (2021).

8 *See* Ana Gonzalez-Barrera, Jens Manuel Krogstad & Luis Noe-Bustamante, *Path to Legal Status for the Unauthorized is Top Immigration Policy Goal for Hispanics in U.S.*, PEW RESEARCH CENTER (Feb. 11, 2020), https://www.pewresearch.org/fact-tank/2020/02/11/path-to-legal-status-for-the-unauthorized-is-top-immigration-policy-goal-for-hispanics-in-u-s [https://perma.cc/V93M-7VR5].

9 Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 3 (2004).

10 Juan Manuel Pedroza, *Making Noncitizens' Rights Real: Evidence from Immigration Scam Complaints*, 44 LAW & POL'Y 44, 47 (2022) https://onlinelibrary.wiley.com/doi/epdf/10.1111/lapo.12180 [https://perma.cc/EAE8-4UEC].

through the United States Citizenship & Immigration Services (USCIS).[11] In reality, the "ten-year visa" is a misrepresentation of a legal defense that is *only* available in removal proceedings in immigration court, and that is difficult to obtain because of the accompanying high legal standard that requestors must establish.[12] At the conclusion of the scam, victims unknowingly find themselves at risk of imminent removal from the United States.[13]

A conferral of U nonimmigrant status ("U visa") is the best currently available remedy for victims of the ten-year scam. In general, the U visa provides temporary legal status for victims of criminal activity who suffer substantial harm and cooperate with law enforcement on investigation or prosecution of that activity.[14] USCIS has most frequently recognized harm arising from domestic violence as the requisite harm for U visa conferrals.[15] As a result, most legal scholarship has focused on substantial harm in the context of domestic violence.[16] There is limited scholarship proposing that the U visa should be available to immigrants who suffer from scams conducted by unauthorized practitioners of immigration law.[17] This Note will argue that the victims of the ten-year visa scam may be eligible for and deserve the protection that the U visa can offer. Specifically: (1) offenses committed by attorneys who engage in the ten-year visa scam may constitute qualifying crimes for the U visa;[18] and (2) the harm sustained from the scam may qualify for the U visa.[19] The conferral of U visas for victims of this scam will ensure that victims receive a remedy that is best suited for their injury and consistent with the legislative intent behind the U visa.[20]

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11 USCIS is the federal immigration agency that accepts affirmative solicitations for immigration benefits. *See infra* text accompanying notes 33–34, 39. See also *infra* text accompanying notes 38–46 for the distinction between affirmative benefits and defensive relief.

12 See *infra* text accompanying notes 71–79 on cancellation of removal relief.

13 *See infra* text accompanying notes 60–69.

14 Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 § 1513(b), 114 Stat. 1464 (2000).

15 *See infra* text accompanying notes 142–144. Congress later expanded the qualifying crimes to include workplace crime. *See infra* text accompanying note 109.

16 *See* Eunice Hyunhye Cho, Giselle A. Hass & Leticia M. Saucedo, *A New Understanding of Substantial Abuse: Evaluating Harm in U Visa Petitions for Immigrant Victims of Workplace Crime*, 29 GEO. IMMIGR. L.J. 1, 5 (2014).

17 *See generally* Olivia Quinto, Note, *"In A Desert Selling Water": Expanding the U-Visa to Victims of Notario Fraud and Other Unauthorized Practices of Law*, 14 RUTGERS RACE & L. REV. 203 (2013). Quinto's note focuses on unauthorized practitioners of immigration law—when someone who is neither an attorney nor accredited representative provides legal advice on immigration matters. *Id.* at 208. This Note focuses on scams conducted by *licensed attorneys*.

18 *See* discussion *infra* Section II.A.

19 *See* discussion *infra* Section II.B.

20 *See* discussion *infra* Section II.C.

Part I of this Note will discuss the "ten-year visa scam" within the context of the federal immigration system, as well as the conditions from which fraudulent scams may develop.[21] It will also include a discussion of the U visa and statutory eligibility, as well as "categorical analysis"—a tool used in criminal and immigration law alike—which will be used in this Note to determine whether the criminal activity committed against the victims may constitute one or more of the statutorily enumerated qualifying crimes.[22] Part II will provide an analysis of whether the ten-year visa scam and the harm arising from the scam may constitute qualifying criminal activity and substantial harm.[23] Finally, Part III will state a proposal to facilitate the availability of the recommended remedy.[24]

I. BACKGROUND

A. *Federal Immigration System*

A brief overview of the national immigration system permits a better understanding of the intricacies of the ten-year visa scam. Immigration law is reserved for the federal government.[25] Congress enacts legislation determining standards for the admission or removal of certain classes of immigrants,[26] which the executive branch is constitutionally obligated to enforce.[27] The Immigration and Nationality Act (INA) governs federal immigration law and is codified in Title 8 of the U.S. Code under "Aliens and Nationality."[28] Through the Homeland Security Act of 2002 (HSA), Congress established DHS,[29] to which it delegated exclusive authority to administer and enforce the immigration and naturalization laws.[30] There

21 *See* discussion *infra* Sections I.A–C.

22 *See* discussion *infra* Sections I.D–E.

23 *See* discussion *infra* Part II.

24 *See* discussion *infra* Part III.

25 *See* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (holding that "[t]he power to exclude foreigners [is] an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution").

26 *Id.* at 603 ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.").

27 U.S. CONST. art. II, § 3.

28 8 U.S.C. §§ 1101–1537.

29 Homeland Security Act of 2002, Pub. L. No. 107-296, § 1502, 116 Stat. 2135 (2002).

30 8 U.S.C. § 1103(a).

are three sub-agencies under DHS's umbrella:[31] (1) USCIS, which processes applications for immigration visas and benefits; (2) U.S. Immigration and Customs Enforcement (ICE), which handles a vast network of immigration detention facilities and the removal of noncitizens from the U.S.; and (3) U.S. Customs and Border Protection (CBP), which screens admissions into the U.S. at all ports of entry.[32] USCIS is one of two federal agencies that play a role in the ten-year visa scam.[33] The second agency is the Executive Office of Immigration Review (EOIR), housed in the Department of Justice (DOJ).[34] EOIR administers immigration courts nationwide that adjudicate removal proceedings prosecuted by ICE.[35] This court system lies exclusively within the executive branch, completely separate from Article III courts and state civil and criminal courts.[36] Noncitizens may appeal EOIR Immigration Court decisions to the Board of Immigration Appeals (BIA).[37] In summary, the federal immigration system largely sits in two departments of the executive branch—DHS and DOJ.

Immigration applications may be submitted in two manners—affirmative and defensive—depending on the noncitizens' circumstances.[38] Applications for affirmative benefits are submitted to USCIS for administrative processing[39] and generally require that the noncitizen submit evidence that they meet statutory eligibility for the

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31 8 C.F.R. § 100.1 (2024).

32 Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59, 62–63, 72, 75 (2016).

33 See discussion *infra* Part I.C. on the ten-year visa scam.

34 *Id.*

35 8 C.F.R. §§ 1003.9(a), (d); *see also* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *Immigration Court Practice Manual* §1.1 (last updated November 14, 2022) https://www.justice.gov/eoir/book/file/1528921/download [https://perma.cc/6CMA-TT82].

36 The EOIR was created by the DOJ in 1983 and is accountable to the Attorney General. *See* Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* 33 GEO. IMMIGR. L.J. 261, 269 (2019). The EOIR operates under different court procedures from the judicial branch court systems. *See* 8 C.F.R. § 1003.12. These regulations are distilled into the DOJ-issued Immigration Court Practice Manual. *See generally* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *Immigration Court Practice Manual* (last updated November 14, 2022) https://www.justice.gov/eoir/book/file/1528921/download [https://perma.cc/6CMA-TT82].

37 8 C.F.R. § 1003.1(b). BIA decisions are binding on immigration judges and all DHS employees and, therefore, are given precedential weight in immigration law practice. *Id.* at § 1003.1(g)(1).

38 Elissa Bookbinder, *The Importance of Being Earnest . . . (ly) Supporting the Categorical Analysis*, 55 WILLAMETTE L. REV. 47, 55 (2018).

39 U.S. CITIZENSHIP & IMMIGR. SERV., *Our History*, DEP'T OF HOMELAND SEC. (last visited Feb. 2, 2024), https://www.uscis.gov/about-us/our-history [https://perma.cc/5NGQ-HJFX].

solicited benefit.[40] Requests for defensive relief are made in adversarial removal proceedings before an Immigration Judge (IJ).[41] Significantly, some forms of immigration relief are *only* made available to individuals in removal proceedings.[42] In these proceedings, DHS is represented by ICE,[43] and the noncitizen (now "Respondent") may appear *pro se* or with a legal representative, at their own expense, since the Sixth Amendment right to assistance of counsel does not extend to noncitizens in removal proceedings.[44] The Respondent may present an application for relief as a defense against removal;[45] however, if an IJ determines that the Respondent is not eligible for relief, the IJ will enter an order of removal from the United States.[46] The distinction between the function of USCIS and EOIR with regard to immigration benefits is critical to understanding the deception underlying the ten-year visa scam.

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40 8 C.F.R. § 103.2(b)(1); *id.* § 103.2(b)(16)(ii). The federal regulations confer an element of discretion to agency officers in their adjudication that could substantially change the outcome of the case, in spite of the applicant's demonstrated statutory eligibility. *See id.* § 103.2(b)(8)(i); *id.* § 103.2(b)(16)(iii).

41 EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL §1.4(a) (June 1, 2023), https://www.justice.gov/eoir/book/file/1528921/download [https://perma.cc/6CMA-TT82].

42 For example, cancellation of removal (as suggested by its name) is only available in removal proceedings. *See* 8 U.S.C. §§ 1229b(a)–(b)(1). Other forms of relief, like asylum, are available both affirmatively and as defense relief. U.S. CITIZENSHIP & IMMIGR. SERV., *Obtaining Asylum in the United States*, DEP'T OF HOMELAND SEC. (last updated Sept. 13, 2023), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states [https://perma.cc/M4PD-7KSE].

43 EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL §1.2(d) (June 1, 2023), https://www.justice.gov/eoir/book/file/1528921/download [https://perma.cc/6CMA-TT82].

44 *See* 8 C.F.R. § 1240.10(a)(1) ("[T]he immigration judge shall: Advise the respondent of his or her right to representation, at *no expense to the government*, by counsel of his or her own choice . . . ." (emphasis added)). Constitutionally guaranteed counsel is limited to defendants in criminal prosecutions. U.S. CONST. amend. VI; *see also* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment guarantees the right to assistance of counsel in criminal prosecutions). Removal proceedings have long been classified as "civil" rather than "criminal." INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country . . . .").

45 *See* 8 U.S.C. § 1229a(b)(4)(B)("[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government . . . in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter . . . ."). Depending on the form of relief, the IJ may have an element of discretion in determining whether to grant or deny the relief. 8 C.F.R. § 1240.1(a).

46 8 C.F.R. § 1240.1(a).

B. *Immigration Scams*

There is no data to determine the prevalence of the ten-year visa scam, or, for that matter, any immigration scams at all.[47] In 2011, the Federal Trade Commission (FTC) began tracking incidents such as *notario* scams and related crimes,[48] but these efforts cannot account for the fraud that goes unreported. *Notario* scams, one of the most prevalent types of scams, are carried out by unauthorized providers who deceive immigrants under the guise of their "notary public" title, which, to some unauthorized populations including Latinos, has the cultural connotation of an official license to practice law.[49] Although prevalent in Latino communities, similar scams are seen across many ethnic groups[50] and are sometimes spearheaded by members of their own community.[51] *Notarios* provide inaccurate or false information regarding an immigrant's eligibility for temporary or permanent status, charge higher filing fees than those required by USCIS under the guise of expedited processing, and then disappear before the immigrant receives a notice of denial from USCIS.[52] *Notario* fraud is widely studied in legal scholarship;[53] therefore, this Note will focus on scams conducted by licensed attorneys.

Other types of immigration scams include telemarketers impersonating immigration authorities and demanding payment under threat of deportation, and online scammers selling green card lotteries

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47 Pedroza, *supra* note 10, at 46.

48 *Id.*

49 *About Notario Fraud*, A.B.A. (Nov. 28, 2023), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud/ [https://perma.cc/RED4-ZAYN]. Fraudulent providers exploit the cultural understanding of what a *notario* represents to Latin American immigrants. *See* Mary Dolores Guerra, *Lost in Translation: Notario Fraud-Immigration Fraud*, 26 J. CIV. RTS. & ECON. DEV. 23, 36 (2011). In Latin America, *notarios* are seen as private attorneys who hold official public quasi-judicial positions. *Id.* at 26. *Notarios* are subject to rigorous examinations, regulations, and codes of professional responsibility. Jean C. Han, *The Good Notario: Exploring Limited Licensure for Non-Attorney Immigration Practitioners*, 64 VILL. L. REV. 165, 170 (2019). In short, *notarios* are respected public figures who hold legal authority in Latin American countries. *See* Guerra, *supra*, at 26. The Latino population makes up half of the foreign-born population in the United States, which may account for the higher prevalence of this scam. *See* Abby Budiman et al., *Facts on U.S. immigrants, 2018*, PEW RESEARCH CENTER (Aug. 20, 2020), https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants/ [https://perma.cc/BU5P-X6YA] ("Mexicans (25%) and other Latin Americans (25%) each make up about a quarter of the U.S. immigrant population.").

50 *See* Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 LAW & INEQ. 425, 432 (2011) ("[T]argets of reported fraud include Chinese, Vietnamese, Indian, Bangladeshi, Romanian, Haitian, Jamaican, and Trinidadian immigrants.").

51 Quinto, *supra* note 17, at 211.

52 *Id.* at 210–11; *see also infra* text accompanying notes 66–69 (discussing the impact of USCIS denials).

53 *See generally supra* note 49.

and misrepresenting services as immigration benefits.[54] These schemes target and weaponize the victims' lack of knowledge of the immigration legal system, fear of deportation, and strong willingness to correct their legal status—all of which often lead victims to rely on incompetent or misleading advice regarding their legal options.[55] These vulnerabilities make immigrants susceptible to losing thousands of dollars and risking their lives in the United States, based on the hope of the ten-year visa.[56]

C. *The Ten-Year Visa Scam*

In a typical ten-year visa scam, an attorney perpetuates the myth that an immigrant who has lived in the United States for more than ten years and has an American-born child can obtain a green card.[57] American immigration law does not make such a visa available.[58] In reality, the attorney is offering a form of relief from removal called "Cancellation of Removal," which, unless the client is already in removal proceedings, is not available.[59]

The attorney begins the scam by preparing an application and instructing the client to sign USCIS forms without any explanation or translation.[60] The attorney intentionally withholds an explanation because the client is signing—unbeknownst to them—an attestation on an asylum application.[61] The attorney either chooses to forgo conducting

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54 Pedroza, *supra* note 10, at 47.

55 *Id.*

56 *See infra* Section I.C.

57 Quinto, *supra* note 17, at 229.

58 This section explains that attorneys inaccurately convey a form of defensive removal relief, Cancellation of Removal, as an affirmative immigration benefit.

59 *See infra* text accompanying notes 71–79.

60 *See, e.g.*, Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime, 2013 WL 8117526, at *3 (A.A.O. Nov. 15, 2013) (involving applicants who confronted their representative—unclear if *notario* or attorney—about a notice for an asylum interview). Without further elaboration, the applicants' representative responded that the asylum interview was "normal procedure" and that he would withdraw the application. *Id.*; *see also* DEP'T OF JUST., *Fraud and Abuse Prevention Program* (last updated Sept. 8, 2022), https://www.justice.gov/eoir/fraud-and-abuse-prevention-program [https://perma.cc/C2XD-8A8J].

61 DEP'T OF JUST., *supra* note 60. Asylum is humanitarian relief intended to protect noncitizens from dangerous conditions in their country of origin. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B). In order to be eligible for asylum, an applicant must establish either past persecution or a well-founded fear of future persecution in their home country on account of the applicant's race, religion, nationality, membership in a particular social group, or political opinion, and that the government is unable or unwilling to protect them. 8 U.S.C. § 1158(b)(1)(B)(i). Individuals must apply for asylum within one year of entering the United States unless the individual meets one of two exceptions: "changed circumstances which materially affect the applicant's eligibility for

basic eligibility screening or does so insufficiently, and subsequently submits the application regardless of eligibility.[62] Attorneys may maintain the façade by submitting an employment authorization card (EAD) application and presenting the USCIS-issued card to the client as evidence that they are diligently working to obtain the promised visa.[63] This, too, is a misrepresentation because USCIS may grant an EAD while an asylum application is pending adjudication, regardless of the merits of the case.[64] Later, at the requisite Asylum Office interview, the client's application is denied because they are ineligible for asylum or lack supporting documentation.[65] Under USCIS policy, the agency will refer applicants to immigration court for removal proceedings after an asylum denial if the applicant lacked underlying legal status.[66] This is precisely the objective of the scam—to have the client placed into removal proceedings in order to request cancellation of removal relief.[67] Due to years-long backlogs in immigration courts, it may take as many as five years or more before clients realize they were scammed out of thousands of dollars and are at risk of deportation.[68] Throughout this entire process, the client is unaware they essentially signed themselves up (as well as their

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asylum or extraordinary circumstances relating to the delay in filing an application." 8 U.S.C. §§ 1158(a)(2)(B), (D). This is a highly nuanced field of law, and as such, it is imperative that clients be sufficiently screened for asylum requests. The California Supreme Court quoted an attorney who noted that "'[a]sylum cases are probably the most sensitive cases that the field of immigration deals with. They are like death penalty cases.'" Gadda v. State Bar, 787 P.2d 95, 101 (Cal. 1990).

62 In *State ex rel. Counsel for Discipline v. Villarreal*, the Nebraska disciplinary committee found that an attorney, whose course of action closely resembles aspects of the ten-year scam, "engaged in a 'long, repeated pattern' of filing asylum claims on behalf of his clients that were unwarranted under existing law" and "failed to develop his clients' cases, either factually or legally . . . ." 673 N.W.2d 889, 893 (Neb. 2004). As a result of sixty violations of disciplinary rules, in addition to violating his temporary suspension, the Nebraska Supreme Court determined that disbarment was appropriate. *Id.* at 896. Due to the lack of scholarship covering this scam and the limited fact recitation in the appellate decisions on this topic, there are no specific sources discussing the nature of screening techniques for clients. In general, the fact that these applications are submitted without the client's consent or knowledge and are later rejected, paired with the objective to get noncitizens into removal proceedings, raises the strong inference there was either insufficient or no screening at all regarding the client's eligibility for asylum.

63 *See, e.g.*, Press Release, Nassau County District Attorney (June 14, 2021), https://www.nassauda.org/CivicAlerts.aspx?AID=1321 [https://perma.cc/MK4U-8HQ6].

64 8 U.S.C. § 1158(d)(2); 8 C.F.R. § 208.7(a)(1) (2024).

65 *See, e.g.*, *infra* text accompanying note 91. Asylum interviews are required to determine whether applicants meet the well-founded fear criteria. 8 C.F.R. § 208.30(d).

66 *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states [https://perma.cc/QRB8-37JG] (Sept. 13, 2023).

67 Quinto, *supra* note 17, at 229.

68 PROTECTING IMMIGRANT NEW YORKERS TASK FORCE, COLLABORATING TO PROTECT NEW YORKERS FROM IMMIGRATION FRAUD 14 (2016), https://www.nyic.org/wp-content/uploads/2018/07/PINY-Resource-Guide-1st-Edition.compressed.pdf [https://perma.cc/4KTE-RX8R].

noncitizen spouse and/or children, if they were included as derivative applicants)[69] for removal proceedings because they were convinced that the attorney was helping them obtain the ten-year visa. In short, the ten-year visa scam constitutes advising clients that they are eligible for a visa that does not exist, subsequently submitting an asylum application with the goal of pushing clients into removal proceedings, and then requesting cancellation of removal—all without the client's consent or knowledge. This scheme has been described as "not creative lawyering," but instead as "dishonest and deceitful conduct."[70]

Cancellation of Removal for Non-Lawful Permanent Residents—the attorney's actual objective[71]—is discretionary relief from removal that may only be raised as a defense in removal proceedings in EOIR immigration courts; thus the adjudication takes place in a completely separate part of the federal government from USCIS.[72] To be eligible, the client must demonstrate continuous presence in the United States for at least ten years, have good moral character, not have been convicted of certain enumerated crimes, and establish what their removal would cause to the qualifying American citizen or permanent resident family member (spouse, parent, or child).[73] If the client meets the necessary hardship threshold and is granted cancellation, their status is adjusted to permanent resident status.[74]

Cancellation of removal is generally difficult to obtain, both because of the hardship threshold and the statutory cap of 4,000 grants per fiscal

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69 *Questions and Answers: Affirmative Asylum Eligibility and Applications*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 11, 2023), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-frequently-asked-questions/questions-and-answers-affirmative-asylum-eligibility-and-applications [https://perma.cc/572K-2ADN] ("If you are referred to the Immigration Court, your family members will also be referred to court for removal proceedings if they are not in legal status.").

70 State *ex rel.* Couns. for Discipline v. Villarreal, 673 N.W.2d 889, 893 (Neb. 2004). The attorneys in this case were disbarred for their conduct. *Id.* at 896. This practice has numerous ethical dilemmas and unfortunately has been taken to be "widely accepted just because other lawyers 'got away with it' before." *See* MATTHEW BLAISDELL & MICHELE CARNEY, ETHICAL CONSIDERATIONS RELATED TO AFFIRMATIVELY FILING AN APPLICATION FOR ASYLUM FOR THE PURPOSE OF APPLYING FOR CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR A NONPERMANENT RESIDENT 17 (2020), https://www.aila.org/aila-files/9A9E850C-8E03-4B83-812F-733890242E50/16110105.pdf?1697589931 [https://perma.cc/BD9E-W6BX].

71 *See supra* text accompanying note 67.

72 8 U.S.C. § 1229a(a)(1). *See also supra* notes 35–36 and accompanying text.

73 8. U.S.C. §§ 1229b(b)(1)(A)–(D).

74 § 1229b(b)(1) ("The Attorney General may *cancel removal of, and adjust to the status* of an alien . . . ." (emphasis added)). Adjustment of status into permanent residence is colloquially known as a "green card." *See* Emira-Habiby Browne, *Issues in Representing Immigrant Victims*, 29 Fordham Urb. L.J. 71, 90 (2001) ("'Green card' is the popular phrase [for permanent residence], because for many years the card showing you were a lawful permanent resident was green. It is no longer green.").

year.[75] The "exceptional and extremely unusual hardship" threshold is notoriously difficult to reach, and is so by design.[76] Factors that courts should consider for individuals in removal proceedings and seeking relief are the following: age; family and community ties in the United States and abroad; length of residence; the health of the Respondent and qualifying family members; political and economic conditions in their home country; any alternatives the Respondent has for adjusting status; and the Respondent's immigration history.[77] This standard requires hardship "substantially beyond that which ordinarily would be expected to result" from a person's deportation.[78] This may present a greater challenge for scam victims because they are not aware of these high standards they must meet.[79]

There are no currently available statistics to understand the prevalence of the ten-year visa scam, but several governmental entities have issued warnings about the scam. The DOJ's Fraud and Abuse Prevention Program received complaints regarding attorneys or unauthorized practitioners filing asylum applications for individuals without their knowledge or consent and posted a scam alert on the program's website.[80] New York City's Mayor's Office of Immigrant Affairs posted a similar advisory, warning that scammers fail to explain that victims must be in removal proceedings and meet the hardship threshold in order to obtain a green card.[81] The most thorough governmental warning thus far was issued by the New York City

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75 § 1229b(e)(1).

76 *See* IMMIGRANT LEGAL RES. CTR., NON-LPR CANCELLATION OF REMOVAL: AN OVERVIEW OF ELIGIBILITY FOR IMMIGRATION PRACTITIONERS 8 (2018), https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf [https://perma.cc/V8GV-GAAR]; *see also* Monreal-Aguinaga, 23 I. & N. Dec. 56, 60–62 (B.I.A. May 4, 2001) (interim decision) (explaining that the Respondent must show more than extreme hardship but need not show that hardship would be unconscionable). The hardship standard was raised from the former "extreme hardship" to "exceptional and extremely unusual hardship" after Congress intentionally narrowed the scope for eligibility. *Id.* at 58. This change was enacted by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, in which Congress intentionally narrowed the scope for eligibility for relief in light of BIA decisions that "weakened" the standard. *See* H.R. REP. NO. 104-828, at 213–14 (1996) (Conf. Rep.).

77 *Monreal-Aguinaga*, 23 I. & N. Dec. at 63.

78 *Id.* at 59 (quoting H.R. REP. NO. 104-828, at 213).

79 Without the knowledge of these high standards and representation by an attorney who fails to conduct the necessary fact-gathering and legal arguments, Respondents in this position are likely to experience a denial. *See infra* text accompanying notes 89–94.

80 Exec. Off. for Immig. Rev., *Fraud and Abuse Prevention Program*, U.S. DEP'T OF JUST. (Feb. 8, 2024), https://www.justice.gov/eoir/fraud-and-abuse-prevention-program [https://perma.cc/BT82-WQQD].

81 N.Y.C. Mayor's Off. of Immigrant Affs., *Avoid Becoming the Victim of Immigration Fraud*, NYC.GOV, https://www.nyc.gov/site/immigrants/legal-resources/avoid-fraud.page [https://perma.cc/8ZQU-D7QT].

Department of Consumer Affairs (DCA) in 2017.[82] These warnings signal that the scam occurs with enough frequency to raise alarm and warrant scam alerts to susceptible populations.

There are several reports of the scam in New York. A Long Island woman allegedly mispresented herself as an attorney, advised immigrants on the ten-year visa, submitted fraudulent asylum filings, and received more than $30,000 from her clients.[83] She was arrested following a joint investigation by the Nassau County District Attorney and DHS's Fraud Detection and National Security Unit, and subsequently charged with "ten counts of grand larceny in the third degree . . . one count of grand larceny in the fourth degree . . . and one count of scheme to defraud in the first degree."[84] In another case, a New York City-based formerly licensed attorney advised clients on the ten-year visa both before and after his bar suspension.[85] In total, the suspended attorney collected more than $140,000 from his clients.[86] He was sentenced to one to three years in state prison for Scheme to Defraud in the First Degree, and one year (running concurrently with the previous sentence) for Practice of Law by an Attorney who has been Disbarred, Suspended, or Convicted of a Felony.[87] These two recent examples suggest that this scam is an ongoing problem and presents a significant risk to unauthorized immigrants.

In another recent example, the New York Appellate Division, First Department suspended an attorney for professional misconduct related to his representation of six clients on their immigration matters, specifically, in filing asylum applications and/or cancellation of removal relief.[88] The facts of the case suggest a correlation with elements of the ten-year visa scam. According to the decision, six clients paid between nearly $3,000 and $7,500 to legalize their immigration status.[89] For all but one client, Respondent attorney filed affirmative asylum applications: three clients were not informed that their attorney filed the application, nor were they advised on the risk of being placed in removal proceedings because of the filing and the two clients who were informed about the

82 Press Release, N.Y.C. Consumer & Worker Prot., Consumer Warning: Department of Consumer Affairs Warns Immigrant New Yorkers about the "10-Year Visa Scam" (July 7, 2017), https://www1.nyc.gov/site/dca/media/pr060717.page [https://perma.cc/65FL-89U3].

83 Press Release, Nassau Cnty. Dist. Att'y, *supra* note 63.

84 *Id.*

85 Press Release, Manhattan Dist. Att'y's Off., D.A. Bragg: Immigration Lawyer Sentenced to 1–3 Years in State Prison (Aug. 3, 2022), https://www.manhattanda.org/d-a-bragg-immigration-lawyer-sentenced-to-1-3-years-in-state-prison [https://perma.cc/3NSA-BDKE].

86 *Id.*

87 *Id.*

88 *In re* Sofer, 181 N.Y.S.3d 86, 86–87 (App. Div. 1st Dep't 2023).

89 *Id.* at 88.

filing were not advised on the risk of being removed.[90] Of these five clients, four clients were placed into removal proceedings following their asylum interview because their applications lacked supporting documentation.[91] One client terminated Respondent's representation after they were placed in removal proceedings.[92] In the remaining three cases, Respondent appeared at the Master Calendar Hearing (the initial immigration court hearing in removal proceedings) and filed cancellation of removal applications.[93] Those, too, lacked supporting documentation and resulted in denial.[94] One client terminated Respondent's representation and thus the outcome of their case is unknown; Respondent attorney accepted voluntary departure[95] on behalf of one client; and one client was deported.[96] The court acknowledged that the clients were "considered vulnerable individuals since they are immigrants who have little or no understanding of English."[97] The Appellate Division, First Department ultimately ordered a one-year suspension for the attorney,[98] after taking into account both aggravating and mitigating factors, such as three letters of admonition involving immigration matters issued to the attorney,[99] as well as the Respondent attorney's health issues and remorse for his misconduct.

The consequences arising from the ten-year visa scam can be severe for victims. Victims not only suffer a financial loss, but end up in a worse position than before they sought legal counsel—facing imminent or actual deportation.[100] The scam does not impact only the client; any noncitizen family members that were included in the asylum application as derivative applicants are also placed in removal proceedings.[101] Moreover, nearly twenty-two million people in the United States live in mixed-status households; that is, at least one unauthorized person lives with a combination of American citizens, green card holders, or other

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 Voluntary departure is another form of relief from removal. *See generally* 8 U.S.C. § 1229c.

96 *In re* Sofer, 181 N.Y.S.3d at 88.

97 *Id.* at 90.

98 *Id.* at 90.

99 *Id.* at 89–90. One letter stated that "[Respondent attorney] engaged in dishonesty, fraud, deceit, or misrepresentation by including false information on an asylum application and intentionally prejudiced and damaged his client during the professional relationship." *Id.* at 89.

100 *See supra* text accompanying notes 91–96.

101 Quinto, *supra* note 17, at 238.

lawful temporary immigrants.[102] Members of mixed-status families could face separation from one or several family members by either mandatory detention or deportation.[103] American-born children "display depression, anxiety, rule-breaking conduct, attention problems, and social withdrawal" after an immigrant parent has been deported, and if both parents and/or main caregivers are deported, American children are placed into the foster care system.[104] In sum, this scam impacts entire family units.[105] This result is far from what clients hope to achieve by obtaining legal status "the right way"—by hiring a licensed attorney instead of a *notario*. On a larger scale, this practice is also harmful to the legal system because it contributes to "the burgeoning caseload in an already overworked immigration system."[106]

D. *The U Visa*

1. Legislative Purpose

Congress created the U visa as part of the Battered Immigrant Women Protection Act of 2000 (BIWPA).[107] The stated purpose of BIWPA was to "(1) to remove barriers to criminal prosecutions of persons who commit acts of battery or extreme cruelty against immigrant women and children; and (2) to offer protection against domestic violence occurring in family and intimate relationships."[108] Through the passage of the Violence Against Women Act Reauthorization of 2013, Congress added extortion, forced labor, and fraud in foreign labor

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102 *Immigration Reform Can Keep Millions of Mixed-Status Families Together*, FWD.US (Jan. 18, 2024), https://www.fwd.us/news/mixed-status-families/ [https://perma.cc/G4DL-6NCU].

103 Eloisa P. Haynes, *Mixed-Status Families and the Threat of Deportation*, 44 J. OF SOCIOL. & SOC. WELFARE 99, 102 (2017) https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=3864&context=jssw [https://perma.cc/4EGP-8DUE].

104 *Id.* at 109–10.

105 *See supra* text accompanying notes 101–104.

106 State ex rel. Couns. for Discipline v. Villarreal, 673 N.W.2d 889, 893 (2004) (quoting the referee in the disciplinary action at issue).

107 The BIWPA is Title V of the Violence Against Women Act of 2000 (VAWA), which in turn is a component (Division B) of the Victims of Trafficking and Violence Protection Act of 2000. *See* Victims of Trafficking and Violence Protection Act of 2000, PUB. L NO. 106–386 § 1513(b), 114 STAT. 1464 (2000). The U visa is a colloquial term for "U nonimmigrant status," which is named after the amended subsection of the INA that established the nonimmigrant classification. 8 U.S.C. § 1101(a)(15)(U).

108 Battered Immigrant Women's Protection Act, PUB. L. NO. 106–386, § 1502(b), 114 STAT. 1464 (2000).

contracting to the statutory list of qualifying crimes.[109] The U visa is reserved for victims of criminal activity who suffer substantial harm and cooperate with law enforcement to report the crime.[110] Congress intended to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute . . . crimes . . . committed against" immigrants and "offer[] protection to victims of such offenses in keeping with the humanitarian interests of the United States."[111] In exchange for their cooperation, victims are eligible for protection through the conferral of temporary status[112] and, after three years, are allowed to become permanent residents.[113] Congress understood that the fear of deportation serves as a deterrent from reporting crimes and, when a perpetrator of criminal conduct wields that threat over their victims, it is an effective shield of immunity from prosecution.[114] Removing that shield thus advances Congress' goal of facilitating cooperation between unauthorized immigrants and law enforcement.

2. Statutory Requirements

Prospective U visa petitioners must have: (1) suffered substantial physical or mental abuse as a result of qualifying criminal activity; (2) possessed information concerning the qualifying criminal activity;

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109 Violence Against Women Reauthorization Act of 2013, PUB. L. NO. 113-4, 127 STAT. 54 (2013). *See also DOL to Expand Support of U and T Visa Applicants*, 91 NO. 46 INTERPRETER RELEASES 2195 (2014); *Fact Sheet: The Department of Labor's Wage and Hour Division Will Expand Its Support Of Victims of Human Trafficking and Other Crimes Seeking Immigration Relief from DHS*, (last visited Jan. 30, 2024), https://www.dol.gov/general/immigration/u-t-visa [https://perma.cc/8E6K-ZGKX].

110 *See* Battered Immigrant Women's Protection Act § 1513(a)(2)(A).

111 *Id.*

112 *Id.* at § 1513(a)(2)(B).

113 *Id.* at § 1513(f).

114 In a report studying, among other things, deterrents to victims' cooperation with law enforcement, law enforcement officials listed fear of deportation as one of the top reasons victims gave when they failed to cooperate. RAFAELA RODRIGUES ET AL., PROMOTING ACCESS TO JUSTICE FOR IMMIGRANT AND LIMITED ENGLISH PROFICIENT CRIME VICTIMS IN AN AGE OF INCREASED IMMIGRATION ENFORCEMENT: INITIAL REPORT FROM A 2017 NATIONAL SURVEY 48–50 (2018), https://niwaplibrary.wcl.american.edu/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf [https://perma.cc/PA76-ZUA2]. Fifty-one percent of victims who chose not to report identified this fear as a primary reason for not reporting. *See id.* at 49. *See also* Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL'Y REV. 587, 588–89 (2011) (noting fear of removal that could result in separation from family and support networks makes immigrant crime victims reluctant to report their attackers to authorities); Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273, 306 (2018) (noting abusers exploit their partners' fear of deportation to exert power and coerce them into staying in the abusive relationship).

and (3) helpfully assisted or be likely to helpfully assist a federal, state, or local law enforcement official, prosecutor, judge, or any kind of legal authority with investigating or prosecuting criminal activity.[115] Prospective U visa petitioners must obtain a certification from a law enforcement official or agency which confirms their likelihood of assistance with the detection, investigation, or prosecution of a qualifying criminal activity.[116] Thus, two major prongs may be drawn from the statutory language on eligibility for the U visa: (1) victim of a qualifying criminal activity, and (2) substantial harm suffered as a result of the qualifying criminal activity.

a. Qualifying Criminal Activity

The statute enumerates the following crimes, among others, as "qualifying criminal activit[ies]": "rape; torture; trafficking; incest; domestic violence; . . . slave trade; kidnapping; abduction; . . . extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting . . . ."[117] To demonstrate qualifying criminal activity, petitioners must submit Form I-918, "Petition for U Nonimmigrant Status," to USCIS along with Supplement B, "U Nonimmigrant Status Certification" (hereinafter "certification form").[118] The certification form confirms the victim's cooperation with law enforcement on the investigation and/or prosecution of the qualifying criminal activity,[119] and must be issued and signed by a certifying agency[120] within the six months immediately preceding the petition filing.[121] The importance of cooperation with law enforcement is underscored by the expectation that the victim will continue to assist law enforcement even after the certification form is

115 8 U.S.C. §§ 1101(a)(15)(U)(i)(I)–(III).

116 8 C.F.R. § 214.14(c)(2)(i) (2024).

117 8 U.S.C. § 1101(a)(15)(U)(i)(IV)(iii).

118 U.S. Citizenship & Immigr. Servs., *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. DEP'T OF HOMELAND SEC. (Feb. 28, 2022), https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status [https://perma.cc/3UM3-SV3M].

119 8 C.F.R. § 214.14(a)(12).

120 A certifying agency is any "Federal, State, or local law enforcement agency, prosecutor, judge . . . that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity." *Id.* § 214.14(a)(2).

121 *See id.* § 214.14(c)(2)(i).

signed,[122] and may be revoked if the victim ceases to cooperate with law enforcement.[123]

Prospective U visa petitioners must also demonstrate they have suffered direct and proximate harm as a result of the commission of the qualifying criminal activity.[124] However, the U visa necessarily encompasses certain indirect victims because the enumerated crimes include witness tampering, obstruction of justice, and perjury, "which are not crimes against a person;"[125] hereinafter "non-targeted crimes." In an interim rule, USCIS explained, with regard to non-targeted crimes, "the interpretive challenge for USCIS was to determine whom the BIWPA was meant to protect, given that these criminal activities are not targeted against a person."[126] To resolve the challenge, the agency identified two categories of individuals who would suffer from the commission of those non-targeted crimes and merit protection: (1) "individuals who are harmed when a perpetrator commits one of the three crimes in order to avoid or frustrate the efforts of law enforcement authorities"; and (2) "individuals who are harmed when the perpetrator uses the legal system to exploit or impose control over them."[127] The relevant federal regulation was updated to reflect this conclusion:

> (ii) A petitioner may be considered a victim of witness tampering, obstruction of justice, or perjury, including any attempt, solicitation, or conspiracy to commit one or more of those offenses, if:
>
> (A) The petitioner has been directly and proximately harmed by the perpetrator of the witness tampering, obstruction of justice, or perjury; and

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122 *See* DEP'T OF HOMELAND SEC., *U Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges and other Government Agencies* 8 (May 3, 2022) [hereinafter *DHS U Visa Law Enforcement Resource Guide*], https://www.uscis.gov/sites/default/files/document/guides/U_Visa_Law_Enforcement_Resource_Guide.pdf [https://perma.cc/9B9C-D9MV] (explaining that "[a] victim seeking a U visa must provide ongoing assistance with the investigation or prosecution . . . [and] [t][he] responsibility continues even after the U nonimmigrant status is granted to the victim"); *see also* 8 C.F.R § 214.14(b)(3).

123 *DHS U Visa Law Enforcement Resource Guide*, *supra* note 122, at 14 (indicating that a certifying agency may revoke a certification by "notifying USCIS when a victim refuses or fails to provide assistance when reasonably requested"); *see also* 8 C.F.R § 214.14(h)(2).

124 8 C.F.R. § 214.14(a)(14).

125 New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014-01 (Sept. 17, 2007) (codified at 8 C.F.R. §§ 214.14(a)(14)(i)–(ii) (2020)).

126 *Id.*

127 *Id.* (codified at 8 C.F.R. § 214.14(a)(14)(ii) (2020)).

> (B) There are reasonable grounds to conclude that the perpetrator committed the witness tampering, obstruction of justice, or perjury offense, at least in principal part, as a means:
>
> (1) To avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity; or
>
> (2) To further the perpetrator's abuse or exploitation of or undue control over the petitioner through manipulation of the legal system.[128]

There are no federal court of appeals or BIA decisions interpreting this regulation; however, non-precedential decisions from the Administrative Appeals Office (AAO)[129] indicate that 8 C.F.R. § 214.14(a)(14)(ii) should be interpreted as an additional requirement which victims of witness tampering, obstruction of justice, and perjury must prove to establish qualifying criminal activity.[130]

b. Substantial Harm

Prospective U visa petitioners must also demonstrate that they have suffered "substantial physical or mental abuse" as a result of having been victim to a qualifying criminal activity.[131] "Physical or mental abuse" is defined as "injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim."[132] USCIS makes the determination on whether the petitioner has suffered substantial physical or mental harm.[133] The agency may consider

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128 8 C.F.R. § 214.14(a)(14)(ii)(A)–(B) (2024).

129 The AAO is a sub-agency within DHS which "conducts administrative appellate review of USCIS officers' decisions regarding immigration benefit requests under its jurisdiction in order to promote consistency and accuracy in the interpretation of immigration law and policy. . . . The AAO applies USCIS policies and legal interpretations to matters before it." *See AAO Practice Manual*, U.S. CITIZENSHIP & IMMIGR. SERV. § 1.2 (Apr. 18, 2018), https://www.uscis.gov/book/export/html/77620 [https://perma.cc/EB99-WNS4].

130 *See* Matter of V-K-S-, ID# 894089, at 3 (A.A.O. Feb. 16, 2018) ("The *additional criteria for perjury victims*, as defined in 8 C.F.R. § 214.14(a)(14)(ii) . . . ") (emphasis added); *see also* Matter of N-V-D-L-S-, ID# 14352, at 5 (A.A.O. Nov. 2, 2015) (citing 8 C.F.R. § 214.14(a)(14)(ii) (2020) as an additional requirement to prove that the Petitioner was a victim of the qualifying crime of witness tampering); *In re* 9166899, ID# 9166899, at 3–4 (A.A.O. July 24, 2020) (stating that, by satisfying the requirements of 8 C.F.R. § 214.14(a)(14)(ii), the Petitioner met the burden of establishing she was victim of witness tampering).

131 8 C.F.R. § 214.14(b)(1).

132 *Id.* § 214.14(a)(8).

133 *Id.* § 214.14(c)(2)(ii); *see also* DHS U Visa Law Enforcement Resource Guide *supra* note 122, at 7 ("USCIS is responsible for determining whether a person meets [the substantial harm] eligibility requirement. USCIS will consider all supporting evidence the certifying agency provides when determining whether a person is eligible for U nonimmigrant status . . . .").

the following factors to determine whether the abuse rises to a substantial level under the statute:

> The nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.[134]

The regulations make clear that "[n]o single factor is a prerequisite to establish that the abuse suffered was substantial."[135] Further, "[a] series of acts taken together may . . . constitute substantial physical or mental abuse even where no single act alone rises to that level."[136] These regulations, therefore, require that the adjudicating officer take a holistic view of the purported harm and, if necessary, consider such harm in the aggregate.[137]

To substantiate mental or physical abuse, the USCIS Ombudsman[138] confirmed the following documents may be considered: "reports and affidavits from police, judges, other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel."[139] Evidence of impairment to emotional or psychological soundness must be tied to the qualifying criminal activity and *not* to the fear of deportation.[140] The AAO has stated that "while [it does] not discount the serious consequences of removal from the United States," psychological and emotional harm arising from a fear of deportation was not a demonstration that the *offense* caused harm to the Petitioner.[141] Therefore, Petitioners must demonstrate harm that is caused by the crime(s) committed against them, and the harm must be independent from that which arises from the fear of removal from the United States.

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134 8 C.F.R. § 214.14(b)(1).

135 *Id.*

136 *Id.*

137 *See supra* text accompanying notes 135–136.

138 The USCIS Ombudsman "serves as a liaison between the public and U.S. Citizenship and Immigration Services." *Office of the Citizenship and Immigration Services Ombudsman*, DEP'T OF HOMELAND SEC. (Feb. 14, 2024), https://www.dhs.gov/topics/cis-ombudsman [https://perma.cc/H4X5-M4VV].

139 The agency pointed to the supplementary information of Federal Register, Vol. 72, No. 179 for guidance. DEP'T OF HOMELAND SEC., Q & AS FROM THE CIS OMBUDSMAN'S TELECONFERENCE ON U VISAS 6 (Am. Immigr. Laws. Ass'n 2008), https://www.aila.org/aila-files/F44DA1AF-DFF1-4D68-83FA-B82E1D47EE0F/08090567.pdf?1697589273 [https://perma.cc/AJ2N-WHKK].

140 *See e.g.*, [Redacted], 2009 WL 1742300, at *9–10 (A.A.O. Mar. 5, 2009).

141 *Id.* This finding was likely further compounded by the fact that the Petitioner submitted a psychological evaluation six years after the criminal activity occurred. *Id.* at *10.

Due to the originating statute's intention to protect against crimes targeted at immigrant women[142] and the large volume of U visa petitions based on domestic violence and related crimes,[143] USCIS adjudicators have more experience identifying substantial harm in the context of domestic violence. Adjudicators have received extensive training on domestic violence, sexual assault, and human trafficking.[144] This presents a challenge for "non-targeted" crimes (*i.e.*, witness tampering, obstruction of justice, and perjury) because these do not necessarily result in the same or adjacent harm as targeted crimes like domestic violence and sexual assault. This is a critical aspect in the scam victims' eligibility for the U visa.

E. *The Categorical Approach*

Prospective U visa petitioners must prove that they were victims of qualifying criminal activity. The INA only provides generic labels of enumerated crimes that qualify for the U visa, not detailed definitions.[145] Therefore, to determine whether the victim suffered qualifying crime, one must compare the state law under which the certifying agency conducted its investigation with the federal equivalent crime.[146] The AAO has employed the "categorical approach" to make determinations on qualifying criminal activity, and therefore, this Note will similarly use this tool.[147]

The categorical approach compares state and federal statutes by their respective elements to measure whether the statutes criminalize the same conduct.[148] The methodology was initially used in the criminal law context to assess whether the nature of a prior conviction is subject to a

142 *See supra* note 108 and accompanying text.

143 A national survey of legal professionals assisting U visa petitioners found that, from 2008 to 2011, over 75% of U visa recipients were domestic violence, sexual assault, or human trafficking victims. *See* LESLYE E. ORLOFF & PAIGE E. FELDMAN, AM. UNIV. WASH. COLL. OF L., NATIONAL SURVEY ON TYPES OF CRIMINAL ACTIVITIES EXPERIENCED BY U-VISA RECIPIENTS 1–2 (2013), https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/National-Survey-on-Types-of-Criminal-Activities-Updated2011.pdf [https://perma.cc/Y5FD-6NS3].

144 Nicole Taykhman, *Defying Silence: Immigrant Women Workers, Wage Theft, and Anti-Retaliation Policy in the States*, 32 COLUM. J. GENDER & L. 96, 128 (2016).

145 *See supra* note 117 and accompanying text. The INA does not provide definitions for these generic crimes. *See infra* notes 175–176 and accompanying text.

146 *See e.g.*, [Redacted], 2011 WL 10878504 (A.A.O. Nov. 3, 2011). In this case, the A.A.O. officer used categorical analysis to determine whether the Petitioner suffered qualifying criminal activity under the federal offenses of obstruction of justice and perjury. *Id.* at *3–5.

147 *See id.*

148 Bookbinder, *supra* note 38, at 49.

sentencing enhancement under federal law.[149] It serves a parallel purpose within the immigration context[150]—to assess whether an offense meets the definition of a criminal offense within the INA, constituting grounds for inadmissibility or deportability removal from the United States.[151] The categorical approach is especially helpful when such severe legal consequences hinge on an inconsistent legal landscape.[152] The lack of uniformity across the nation on state criminal offenses makes it impractical for federal sentencing enhancement and deportation laws to cross-reference specific state criminal laws.[153] Furthermore, "states sometimes use different labels for the same offense," and even when the labels are consistent, the elements may differ.[154] The Supreme Court's first articulation of the categorical approach in *Taylor v. United States* established the Court's view that generic crimes "must have some uniform definition independent of the labels employed by the various

149 For example, this approach would account for disparities in state laws when someone could face a potential fifteen-year mandatory minimum sentencing enhancement under the Armed Career Criminal Act (ACCA). *Id.* at 55.

150 Since immigration law is largely governed by federal law, the categorical analysis is required to determine whether state convictions are categorical matches to the federal equivalent or the federal definition under the INA. *See* Silva-Trevino, 26 I. & N. Dec. 826, 830–31 (B.I.A. Oct. 12, 2016) (interim decision) (concluding that the categorical and modified categorical approaches is an appropriate methodology for determining whether particular criminal offenses are equivalent to generic crimes in the INA).

151 Rebecca Sharpless, *Finally, A True Elements Test:* Mathis v. United States *and the Categorical Approach*, 82 BROOK. L. REV. 1275, 1276 n.8 (2017) ("The statutory grounds for removal include both the grounds of inadmissibility and deportation. *See* 8 U.S.C. § 1182(a)(2) (2012) (criminal grounds of inadmissibility governing the admission of noncitizens into the United States); *id.* § 1227(a)(2) (criminal grounds of deportation governing the expulsion of noncitizens out of the United States)."). Immigration law premises grounds for removal from the United States "on prior criminal convictions for, among other generic crimes, 'a crime involving moral turpitude,' 'an aggravated felony,' a 'controlled substance' offense, '[c]ertain firearm offenses,' 'trafficking,' '[d]omestic violence, stalking, and child abuse.'" Shannon M. Grammel, *Chevron Meets the Categorical Approach*, 70 STAN. L. REV. 921, 939 (2018) (quoting 8 U.S.C. § 1227(a)(2)).

152 In addition to constituting grounds from removal, criminal convictions also bar individuals from most forms of relief on the basis on inadmissibility and/or deportability. For example, conviction of an offense under inadmissibility or deportability grounds bars an individual from Cancellation of Removal for Non-Permanent Residents relief. *See* 8 U.S.C. § 1229b(b)(1)(C). Aggravated felonies (grounds for deportability under 8 U.S.C. § 1227(a)(2)(A)(iii)) bar individuals from asylum, withholding of removal and cancellation of removal). *See id.* § 1158(b)(2)(B)(i); *id.* § 1231(b)(3)(B)(ii); *id.* § 1229b(a)(3); *id.* § 1229b(b)(1)(C). IJs and the BIA make determinations on whether noncitizens are removable or eligible for relief, and use the categorical approach to do so. *See* Esquivel-Quintana v. Sessions, 581 U.S. 385, 389 (2017).

153 Sharpless, *supra* note151 151, at 1280.

154 *Id.*; *see also* Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1720–21 (1999) (describing how states use different labels for crimes and "define the requisite elements . . . differently").

States' criminal codes"[155] to advance Congress' intention of promoting fairness.[156] The categorical approach thus accounts for differences in state and federal law, and in turn "promote[s] fairness and predictability in high-stakes contexts."[157]

Under the strict categorical approach, one must compare the state statute of conviction to the federal generic crime by analyzing the elements of each and determining whether those elements criminalize the same conduct, or if one criminalizes a broader set of conduct.[158] The analysis involves two steps: (1) define the federal generic crime[159] and (2) compare the elements of that generic crime to those of the prior offense.[160] If the state statute falls entirely within the generic definition, then the offense qualifies as the generic crime at issue.[161] But if, on the contrary, the state statute criminalizes any conduct the generic definition would not—i.e., is broader—then there is no match.[162]

The following section employs the categorical approach to determine whether the criminal activity that is often committed in the ten-year visa scam could constitute a categorical match to the statutorily enumerated crimes for the U visa.

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155 Taylor v. United States, 495 U.S. 575, 592 (1990).

156 *Id.* at 589 (finding that Congress intended to provide generic definitions of crimes enumerated in the Career Criminals Amendment Act of 1986 to "both prevent[] offenders from invoking the arcane technicalities of the common-law definition of burglary to evade the sentence-enhancement provision, and protect[] offenders from the *unfairness* of having enhancement depend upon the label employed by the State of conviction" (internal citation omitted) (emphasis added)).

157 Grammel, *supra* note 151, at 936. *See also Taylor*, 495 U.S. at 601 ("[T]he practical difficulties and potential *unfairness* of a factual approach are daunting.") (emphasis added).

158 Bookbinder, *supra* note 38, at 49.

159 *Taylor*, 495 U.S. at 599–600, 602 (1990). *See also* Moncrieffe v. Holder, 569 U.S. 184, 190 (2013) ("By 'generic,' we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison.").

160 *Moncrieffe*, 569 U.S. at 190 ("Under this approach we look . . . to whether the 'state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding [federal crime].").

161 *Id.* ("[A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense 'necessarily involved . . . facts equating to [the] generic [federal offense].'") (quoting Shepard v. United States, 544 U.S. 13, 24 (2005) (plurality opinion)).

162 *See e.g.*, Descamps v. United States, 570 U.S. 254, 275–76 (2013).

II. ANALYSIS

Victims of the ten-year scam often experience qualifying criminal activity and suffer substantial harm as a result. AAO decisions[163] suggest that the adjudicators have interpreted 8 C.F.R. § 214.14(a)(14)(ii), the relevant federal regulation, in a counterintuitive manner with respect to victims of non-targeted criminal activity and have misapplied the evidentiary standard for substantial harm for those victims.

A. *The Ten-Year Visa Scam Constitutes Qualifying Criminal Activity*

1. The Ten-Year Visa Scam Inherently Involves the Commission of Perjury

The ten-year visa scam requires the commission of perjury. The United States Code defines perjury as: "Whoever . . . in any declaration . . . under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury . . . ."[164] Section 1746 defines perjury as:

> Wherever . . . any matter is required . . . to be supported . . . by the sworn declaration . . . such matter may . . . be supported . . . by the unsworn declaration . . . in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form: . . . (2) . . . I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).[165]

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163 This Note relies on AAO decisions involving attorneys and non-attorneys alike. Due to redactions on AAO decisions, it is sometimes difficult to discern whether the criminal conduct at issue was committed by a *notario* or attorney. *See e.g.*, *supra* case cited note 60. Although the research conducted for this Note mostly revealed AAO decisions involving *notario*-conducted scams, there is ample evidence that attorneys also engage in this conduct. *See supra* notes 85–99 and accompanying text. *See also supra* case cited note 62. The higher incidence of *notario*-related cases and decisions might be attributed to the relative ease with which criminal prosecutors can pursue charges against them for engaging in the unauthorized practice of law, as opposed to prosecuting attorneys for fraudulent misrepresentation. *See* Quinto, *supra* note 17, at 230–31 (explaining that every state has consumer protection statutes that may be used to prosecute *notarios*). Nevertheless, the adjudicators' determinations on qualifying criminal activity and substantial harm are relevant and do not turn on whether the perpetrator was a *notario*, and were therefore included.

164 18 U.S.C. § 1621.

165 28 U.S.C. § 1746.

Attorneys initiate the scam with the submission of an asylum application which propels the client into removal proceedings.[166] Asylum application forms, like standard USCIS forms, require the signature of the applicant (client) and "preparer" (attorney) as an attestation that the enclosed information is truthful, and that the application was submitted at the request of the applicant.[167] The USCIS Policy Manual states that signatures on forms "certif[y] *under penalty of perjury* that the request and any other supporting documents are true and correct."[168] In many (if not most) cases, clients were unaware that asylum applications were submitted on their behalf, and therefore, the applications could not have been submitted with their consent and adequately supported.[169] Although qualifying criminal activity must be analyzed on a case-by-case basis, there is a strong likelihood that occurrences of the ten-year visa scam involve at least one commission of perjury because the scam necessitates the submission of a government application with a sworn declaration and knowingly false information (i.e., the false affirmation on the applicant's consent) that is material to the approval of the application. Additionally, to further the credibility of the scam, attorneys sometimes filed EAD applications and used approvals as proof of their continued efforts toward obtaining the ten-year green card.[170] In such cases, it may be determined that there were two commissions of perjury since the application requires

166 The client must be in removal proceedings in order to request Cancellation of Removal relief—this is central to the scam. *See* discussion *supra* Section I.C.

167 *See* U.S. CITIZENSHIP & IMMIGR. SERV. & DEP'T OF JUST., *Form I-589, Application for Asylum and for Withholding of Removal*, DEP'T OF HOMELAND SEC. & DEP'T OF JUST. 9 (ed. Oct. 12, 2022), https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf [https://perma.cc/B2AK-4C95] ("Part D. [Applicant] Signature: I certify, *under penalty of perjury* . . . that this application and the evidence submitted with it are all true and correct.") (emphasis added); *Id.* ("Part E. Declaration of [Preparer]: I declare that I have prepared this application *at the request* of the [applicant] . . . that the completed *application was read to the applicant* . . . . I am aware that the *knowing placement of false information on the Form I-589* may also subject me to civil penalties under 8 U.S.C. 1324c and/or criminal penalties under 18 U.S.C. 1546(a).") (emphasis added). For examples of similar language, *see* U.S. CITIZENSHIP & IMMIGR. SERV., *Form I-765, Application for Employment Authorization*, DEP'T OF HOMELAND SEC. 4, 6 (ed. Oct. 13, 2022), https://www.uscis.gov/sites/default/files/document/forms/i-765.pdf [https://perma.cc/VVE2-YAWU]; *see also* U.S. CITIZENSHIP & IMMIGR. SERV., *Form I-485, Application for Permanent Residence or Adjust Status*, DEP'T OF HOMELAND SEC. 17, 19 (ed. Dec. 23, 2022), https://www.uscis.gov/sites/default/files/document/forms/i-485.pdf [https://perma.cc/2BN8-GVJF]. This is standard language on immigration forms submitted to USCIS for adjudication.

168 *Policy Manual*, U.S. CITIZENSHIP & IMMIGR. SERV., at Part 1, Chapter 2 (Mar. 7, 2024), https://www.uscis.gov/policy-manual/volume-1-part-b-chapter-2 [https://perma.cc/NQ2F-TLJG] (emphasis added).

169 *See supra* text accompanying note 90; *see also infra* note 199.

170 *See supra* text accompanying notes 63–64.

a separate immigration form which may or may not similarly include false information and attestations.[171]

2. Perjury is a Categorical Match

The examples provided of the ten-year scam took place in New York State,[172] therefore, the below analysis will focus on conduct criminalized in New York State as perjury.

The first step of the categorical approach is to define the federal generic crime for perjury.[173] The authority on how to execute this step is sparse.[174] Sometimes Congress provides a definition in the relevant statute itself, or cross-references another federal statute.[175] The statute at issue here, the INA, does neither.[176] Since BIA decisions are binding on DHS, in some instances, that provides a strong starting point for the analysis.[177]

In the case *In re Alvarado*, the BIA addressed whether a perjury conviction under California law constituted perjury under the INA.[178] To determine the generic definition of perjury, the BIA sought to understand how Congress contemplated "perjury" when it added the offense to the INA in 1996.[179] The agency surveyed definitions of perjury codified in state and federal statutes, referenced the common law and the Model Penal Code, and considered scholarly commentary.[180] On that basis, the BIA concluded that the generic definition of the term perjury under the INA consists the following elements: (1) a material (2) false statement (3) made knowingly or willfully (4) while under oath, affirmation, or penalty of perjury.[181]

The BIA's generic definition of perjury may be compared against N.Y. PENAL LAW § 210.10, Perjury in the Second Degree, which states that:

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171 U.S. CITIZENSHIP & IMMIGR. SERV. & DEP'T OF JUST., *Form I-765*, *supra* note 167, at 6 (Part 5 Preparer's Certification: "I certify, under penalty of perjury, that I prepared this application at the request of the applicant . . . I completed this application based only on information that the applicant provided to me or authorized me to obtain or use.").

172 *See* discussion *supra* Section I.C.

173 *See* Moncrieffe v. Holder, 569 U.S. 184, 190 (2013); discussion *supra* Section I.E.

174 Grammel, *supra* note 151, at 940.

175 *Id.*

176 Alvarado, 26 I. & N. Dec. 895, 896–97 (B.I.A. 2016).

177 *See* 8 C.F.R. § 1003.1(g)(1) (2024).

178 *Alvarado*, 26 I. & N. Dec. at 895–97.

179 *Id.* at 897.

180 *Id.* at 898–99.

181 *Id.* at 901.

> A person is guilty of perjury in the second degree when he swears falsely and when his false statement is (a) made in a subscribed written instrument for which an oath is required by law, and (b) made with intent to mislead a public servant in the performance of his official functions, and (c) material to the action, proceeding or matter involved.[182]

The statute criminalizes narrower conduct than the generic definition of perjury in two regards: the statute only criminalizes *written* perjury[183] and ties the *mens rea* element to an effort to mislead a public servant in the performance of their official functions.[184] The other elements requiring the presence of a sworn declaration required by law and materiality are present in both the generic definition and the New York State statute.[185] Since the state statute criminalizes narrower conduct, it falls entirely within the federal generic definition and is a categorical match.[186]

Victims of the ten-year scam who assist certifying agencies with the investigation and/or prosecution of unscrupulous attorneys under N.Y. PENAL LAW § 210.10 could be statutorily eligible for the U visa, so long as they prove the additional criteria of 8 C.F.R. § 214.14(a)(14)(ii),[187] and show that they suffered substantial harm as a result of this qualifying criminal activity.[188]

3. Unscrupulous Attorneys Commit Perjury to Further their Exploitation of or Undue Control Over the Victim Through Manipulation of the Legal System

Under 8 C.F.R. § 214.14(a)(14)(ii), victims of witness tampering, obstruction of justice, and perjury must prove that they were "directly and proximately harmed by the perpetrator" and there are reasonable grounds to conclude that the offense was committed as a means "(1) [t]o avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity; or (2) [t]o

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182 N.Y. PENAL LAW § 210.10 (McKinney 2024).

183 Oral testimony is criminalized by perjury in the first degree. See N.Y. PENAL LAW § 210.15 (McKinney 2024) ("A person is guilty of perjury in the first degree when he swears falsely and when his false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made.").

184 *See* N.Y. PENAL LAW § 210.10.

185 *Compare Alvarado*, 26 I. & N. Dec. at 901, *with* N.Y. PENAL LAW § 210.10.

186 *See* Moncrieffe v. Holder, 569 U.S. 184, 190 (2013).

187 *See e.g.*, V-K-S-, ID# 894089, at 3 (A.A.O. Feb. 16, 2018) ("The *additional criteria for perjury victims*, as defined in 8 C.F.R. § 214.14(a)(14)(ii) . . . "); *supra* text accompanying note 129–130.

188 *See* 8 C.F.R. § 214.14(b)(1) (2024).

further the perpetrator's abuse or exploitation of or undue control over the petitioner through manipulation of the legal system."[189] Both prongs are highly case-specific; for example, the former might be satisfied when attorneys threaten victims with exposing them to immigration enforcement authorities to deter them from reporting the scam;[190] and the latter might be satisfied if an attorney filed an EAD application to further the exploitation through manipulating the immigration legal system.[191] Nevertheless, a unifying thread underlying reports of the ten-year visa scam is the attorneys' exploitation of their client through manipulation of the legal system—that is, the conveyance of defensive removal relief as an affirmatively requested green card.[192] AAO decisions suggest a slightly flawed inquiry arising from the agency's interpretation of the second prong, but still provide hope that at least some scam victims could make out a successful argument for qualifying criminal activity.

In cases where petitioners argued eligibility under the second prong of 8 C.F.R. § 214.14(a)(14)(ii), adjudicating officers have determined that the commission of "perjury *initiated* the harm, [but] did not *further* any existing abuse or exploitation of the petitioner."[193] While this outcome might be the result of lacking supporting documentation, the determination misses a crucial aspect of the ten-year visa scam. Attorneys advance the false promise of a green card for the very purpose of exploiting clients for large sums of money—this constitutes the existing exploitation of the client.[194] In many cases, attorneys set up payment plans[195] or continue demanding legal fees under the pretext of filing an EAD application or requesting translation services.[196] Perjury—either only with the fraudulent asylum filing or coupled with an EAD application filing—*furthers* that existing exploitation of the client.[197] In

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189 8 C.F.R. § 214.14(a)(14)(ii)(A)–(B).

190 *See, e.g.*, [Redacted], 2011 WL 7790262, at *3 (A.A.O. June 10, 2011). Although this AAO case involved *notario* fraud, it is an example of how some victims receive deportation threats from the perpetrator of the scam upon the victim's realization that they were scammed. These threats are made to deter the victim from reporting fraud, and therefore should qualify as an act to "avoid or frustrate efforts . . . to bring [them] to justice . . . ." 8 C.F.R. § 214.14(a)(14)(ii).

191 *See supra* note 63–64 and accompanying text.

192 *See supra* Section I.C. (noting several instances of clients losing thousands of dollars to this scam).

193 [Redacted] 2011 WL 7790262, at *5 (A.A.O. June 10, 2011) (emphasis added). *See also* [Redacted], 2011 WL 10878512, at *5 (A.A.O November 4, 2011); *see also* [Redacted], 2011 WL 7068667, at *8 (A.A.O Apr. 18, 2011).

194 *See generally supra* Section I.C.

195 *See, e.g.*, [Redacted], 2011 WL 10845074, at *3 (A.A.O. Sept. 14, 2011).

196 *See, e.g.*, [Redacted], 2011 WL 7790262, at *3 (A.A.O. June 10, 2011).

197 A note to practitioners and advocates: it may be helpful if the certifying agency conducted investigations on attorney conduct under a state visa fraud statute (and thus, lists the statute on the

other words, the qualifying criminal activity inquiry need not begin exactly with the perjury, but instead should begin with the misleading offer for legal services.

A recent AAO decision suggests that it is increasingly more receptive to this understanding.[198] The AAO determined that (1) the commission of perjury in the falsified asylum application, (2) continued payments for additional immigration filings, and (3) a subsequent EAD filing[199] were sufficient to conclude that the attorney "continued to commit perjury[] and exploited the Petitioner by taking funds to further the commission of this perjury for the purpose of manipulating the legal system."[200] The deception and exploitation in this case are nearly identical to the ten-year scam.[201] Therefore, this decision suggests that the commission of perjury, when accompanied by additional payments or another government filing, may be found to fulfill 8 C.F.R. § 214.14(a)(14)(ii), thus establishing qualifying criminal activity.

Victims of the ten-year visa scam may establish the requisite qualifying criminal activity for the U visa: the ten-year visa scam requires the commission of perjury, the New York statute for perjury is a categorical match to the federal generic crime, and there are reasonable grounds to conclude that attorneys who engage in this conduct commit perjury to further their exploitation of victims through manipulation of the legal system.

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certification form) to make clear that the perjury itself did not initiate the harm, but the commission of perjury furthered the client's exploitation.

198 *See generally* Matter of 23250500, ID# 23250500 (A.A.O. Dec. 16, 2022).

199 The attorney submitted an asylum application on behalf of the Petitioner without his knowledge or consent. *See id.* at 3–4. On the application, the attorney affirmed that he was in good standing on immigration applications even though he was disbarred and suspended from practice before the Board, the Immigration Courts and DHS. *Id.* at 3. To meet the additional requirement imposed by 8 C.F.R. § 214.14(a)(14)(ii) (2024), the Petitioner argued that he was both directly harmed by the perjury, and that the scammer committed perjury in order to further the attorney's exploitation over him through manipulation of the legal system. *Id.* at 4. The record showed that the Petitioner paid "a nonrefundable retainer [for] legal services" and "continued to pay [] for the filing of additional immigration forms" even though the attorney was disbarred before the Board, Immigration Courts, and DHS, the attorney never informed Petitioner that he was disbarred, and an EAD receipt notice confirmed the continued immigration filings on Petitioner's behalf. *Id.* Further, at trial, the Petitioner testified that he had not made the statements entered on an asylum application and the disbarred attorney did not discuss the form with him or tell him that he was signing an asylum application. *Id.*

200 *Id.*

201 The decision does not say for certain whether the disbarred attorney offered the ten-year visa, but the fact that the Petitioner hired the attorney to "obtain legal status" and the attorney subsequently filed the asylum application makes it substantially similar to the ten-year visa scam. *Id.*

B. *The Ten-Year Visa Scam Inflicts Substantial Harm*

Prospective U visa petitioners must also demonstrate that they have suffered the requisite harm as a result of the qualifying criminal activity.[202] This presents more of a challenge (as compared to demonstrating qualifying criminal activity) because the harm inflicted by the visa scam is different from the type of harm that USCIS traditionally recognizes: physical harm inflicted on a person, such as domestic violence.[203] This "targeted harm" is more aligned with what the originating statute, BIWPA, intended to cover.[204] The harm arising from the ten-year visa scam should nonetheless be sufficient. Congress would not have included crimes "not targeted against a person"[205] such as witness tampering, obstruction of justice, and perjury if it did not intend to protect victims of those crimes, despite the different nature of harm.[206]

Evidence of harm or impairment to emotional or psychological soundness should be substantiated by "reports and affidavits from police, judges, other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel."[207] Although facts will vary on a case-by-case basis, as a general matter, victims of the ten-year visa scam are likely to suffer the requisite harm to qualify for the U visa. There is no scholarship, studies, or data that examines the harm that may arise from the ten-year visa scam, but adjacent fraudulent schemes may provide some insight into that harm.

A study conducted by the National Association of Social Workers examined clients of Bernard L. Madoff Investment Securities, LLC. (BLMIS) on whether sudden and dramatic personal financial loss was a risk factor for post-traumatic stress disorder (PTSD).[208] The study found that the scammed clients were adversely affected by the "sudden and devastating financial event," meeting the level of trauma required for a

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202 *See* discussion *supra* Section I.D.2.b.

203 Domestic violence cases account for nearly half of U visa petitions. Cho, *supra* note 16, at 10–11. *See also* discussion *supra* Section I.D.2.b.

204 *See* discussion on legislative purpose *supra* Section I.D.1.

205 This is the language that USCIS used in its interim rule. *See supra* note 126 and accompanying text.

206 *See supra* notes 125–127 and accompanying text.

207 *See supra* note 139 and accompanying text.

208 *See* Audrey Freshman, *Financial Disaster as a Risk Factor for Posttraumatic Stress Disorder: Internet Survey of Trauma in Victims of the Madoff Ponzi Scheme*, 37 HEALTH AND SOC. WORK 39, 42 (2012).

diagnosis of PTSD.[209] The scam-induced trauma could be considered akin to that of criminal robbery and sexual assault, stressors that have long been established as associated with a higher risk of PTSD.[210] In other words, the trauma was comparable to the harm traditionally recognized in the U visa context.[211] The study also stated that PTSD can be especially severe when the stressor is caused by a human rather than a natural disaster.[212] Certain victims suffered trauma because of "affinity fraud"—when fraudulent schemes target members of similar affinities, such as religion and ethnicity—as a consequence of the greater trust placed in the perpetrator because of the shared identity.[213] There was a "trend toward a prolonged and chronic response to PTSD" which could be attributed to "massive communal and personal betrayal by a trusted perpetrator."[214] Finally, a strong sense of betrayal (based on the fact that investors falsely believed their investments were insured) correlated with PTSD.[215]

There is a significant overlap between victims of the Madoff Ponzi scheme and those of the ten-year visa scam: financial fraud conducted by a human stressor, a strong potential for affinity fraud where the attorney speaks the same language or shares the client's racial or ethnic background[216] and a strong sense of betrayal. It is widely recognized that attorneys owe their clients a fiduciary duty,[217] a breach of which would not only have profound legal consequences, but would catalyze mental distress. Fiduciary relationships "involve a crucial component of entrustment"[218] because the client is delegating control over sensitive decision-making to a professional.[219] Victims of the visa scam reasonably trusted their immigration attorney to advance their best interest as part

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209 *Id.* at 39. The study found that the trauma experienced met criterion A of trauma as required for the *Diagnostic and Statistic Manual of Mental Disorders* diagnosis of PTSD. *Id.* The investors who qualified for a diagnosis of PTSD reported anxiety, depression, obsession, increased consumption of alcohol, increased use of prescription medications, and health-related problems arising from their harm. *Id.* at 43.

210 *Id.* at 39–40.

211 See *supra* text accompanying notes 142–144.

212 Freshman, *supra* note 208, at 40.

213 *Id.*.

214 *Id.* at 44.

215 *Id.* at 46.

216 *See supra* text accompanying notes 49–51.

217 *See* Restatement (Third) of the Law Governing Lawyers § 16 cmt. b (2000) ("A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted [to] . . . [a]ssurances of the lawyer's competence, diligence, and *loyalty are therefore vital.* Lawyers often deal with matters most confidential and vital to the client." (emphasis added)).

218 Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 B.U. L. REV. 1289, 1293 (2011).

219 Justin Sevier & Kelli Alces Williams, *Consumers, Seller-Advisors, and the Psychology of Trust*, 59 B.C. L. REV. 931, 944 (2018).

of the fiduciary duty they are owed and would likely experience a similar sense of betrayal as the Ponzi scheme victims. Moreover, financial abuse is a recognized form of abuse under the law within the context of elder abuse and domestic violence.[220] The sense of betrayal, along with the financial abuse, could plausibly make victims of the ten-year visa scam susceptible to sustaining mental and emotional distress tantamount to PTSD and comparable to that of the Ponzi scheme victims.[221]

The AAO's practice appears to be that a petitioner does not establish sufficient harm if supporting documents indicate that the victim's purported harm does not directly arise from the purported qualifying criminal activity.[222] That is, for cases in which the medical evaluation and certification form stated that the harm resulted from the fraudulent scheme instead of the qualifying crime itself (like perjury or witness tampering, for example), the AAO determined that the petitioner failed to establish the requisite physical or mental abuse.[223] This practice, although consistent with the relevant regulations,[224] is flawed and

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220 The National Coalition of Domestic Violence states that "[s]tealing from the victim, defrauding their money or their assets, and/or exploiting the victim's financial resources or property for personal gain" is a form of economic abuse. Quinto, *supra* note 17, at 238.

221 It must be acknowledged that there are clear differences between the two groups in this discussion—affluent investors who lost lifelong savings in the largest financial Ponzi scandal in history, compared to working class immigrants who lost several thousands of dollars. *See* Freshman, *supra* note 208, at 39. Both groups suffered major losses. Nonetheless, victims of the ten-year scam are significantly more disadvantaged as compared to the affluent investors because the investors likely had resources and support systems to get them back on their feet, in addition to eventual remissions flowing from DOJ's investigative efforts. Press Release, Justice Department Announces Total Distribution of Over $4 Billion to Victims of Madoff Ponzi Scheme, DEP'T OF JUSTICE (Sept. 28, 2022), https://www.justice.gov/opa/pr/justice-department-announces-total-distribution-over-4-billion-victims-madoff-ponzi-scheme [https://perma.cc/PZH9-4X65]. These are reasonable grounds to assume that the mental and emotional repercussions that victims of the green card scam suffer could be more severe than that of the Ponzi scheme victims.

222 *See e.g.*, [Redacted], 2013 WL 8117526, at *5 (A.A.O. Nov. 15, 2013) (finding that Petitioner's miscarriage, anxiety and depression were not directly linked to her victimization in the submitted medical evaluation and instead linked to her immigration status, and therefore did not establish substantial harm); [Redacted], 2013 WL 8216861, at *4 (A.A.O Nov. 21, 2013) (finding that the harm indicated on the certifying form, a letter from the Oregon DOJ, and psychological evaluation was insufficient because it was a result of the *notario* fraud—*not* the qualifying criminal activity of extortion). Absent a detailed explanation of harm on certification form and no medical records, the AAO found the Petitioner's claims of medical conditions (gastritis and high blood pressure) arising from extortion were unsubstantiated, and therefore insufficient. *Id.*

223 Petitioner's asserted emotional distress was dismissed as insufficient harm because it resulted from *notario* fraud instead of the qualifying criminal activity of extortion. [Redacted], 2013 WL 8216861, at *4 (A.A.O. Nov. 21, 2013). Demonstrated harm also may not be solely based in fear of deportation. *See supra* notes 140–141 and accompanying text.

224 This is consistent with the federal regulations because 8 C.F.R. §§ 214.14(a)(14)(ii)(A)–(B) only affects the qualifying criminal activity requirement. The regulation does not indicate that, if a case involves a non-targeted crime, the harm sustained by the victim should arise from the

counterintuitive for cases in which the qualifying criminal activity is a non-targeted crime (witness tampering, obstruction of justice, and perjury). The commission of these crimes cannot inflict harm like the other statutorily enumerated crimes.[225] USCIS accounted for this difference (and, in doing so, furthered congressional intent) by identifying the two circumstances in which non-targeted crimes are likely to inflict the type of harm from which BIWPA was created to protect.[226] It would logically follow that if the applicant successfully established that their case met one of those two circumstances, the harm that they suffered arose from those circumstances—not *solely* and directly from the commission of the non-targeted crime—and as such, they merit protection under BIWPA. Under this proposed approach, demonstrated mental harm arising from the perpetrator's exploitation (instead of specifically arising from perjury) *should not* be dispositive because it is what USCIS envisioned when contemplating the regulation. To construe the regulation otherwise, as the AAO's practice appears to require, is in tension with the congressional intent of the U visa.[227] Thus, under this interpretation of the statutory scheme and corresponding regulations, ten-year visa scam victims should be able to demonstrate that they suffered substantial harm due to their attorney's exploitation.

C. *A Remedy That Appropriately Compensates Victims*

The U visa provides the most appropriate remedy to victims of the ten-year visa scam. In theory, the victims of the ten-year scam may be able to initiate a contract suit for fraudulent misrepresentation and/or unjust enrichment.[228] However, this is unrealistic and impractical because: (1) victims fall prey to scams because they have limited legal knowledge,[229] so they may not know this remedy exists and (2) the victims already have lost potentially several thousands of dollars in the scam,

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circumstances detailed in 8 C.F.R. §§ 214.14(a)(14)(ii). This Note suggests, however, that it should. In other words, the substantial harm threshold *should* be met if the Petitioner demonstrates harm arising from the circumstances detailed in 8 C.F.R. §§ 214.14(a)(14)(ii)(A)–(B).

225 USCIS recognized this conundrum. *See supra* text accompanying notes 125–127.

226 The two circumstances are: (1) where the perpetrator tries to sidestep law enforcement efforts against them or (2) the perpetrator commits the crime to further existing exploitation of their victim(s). 8 C.F.R. §§ 214.14(a)(14)(ii)(A)–(B) (2024).

227 *See supra* text accompanying notes 124–128.

228 *See e.g.*, [Redacted], 2009 WL 1742300, at *10 (A.A.O. Mar. 5, 2009). Petitioners were awarded a court order for $1,700 in restitution. *Id.* Significantly, the case is silent on whether the restitution was ordered pursuant a contract claim or a statutory right of action.

229 Addison Thompson, *The Office of the State Attorney General and the Protection of Immigrant Communities: Exploring an Expanded Role*, 38 COLUM. HUM. RTS. L. REV. 387, 399 (2007).

rendering expensive attorneys out of reach.[230] Notwithstanding the impracticality, a cause of action for misrepresentation or unjust enrichment does not alleviate what is usually the greatest harm: the risk of, or actual, removal from the United States.[231] While the monetary loss is unfair and victims likely want their attorney brought to justice, victims have a removal order looming over their heads with immediate consequences that touch every facet of their lives.[232]

Moreover, it is in the public's interest that attorneys abide by professional codes of ethics and that corresponding disciplinary agencies prosecute fraudulent counseling as a deterrence to unlawful conduct.[233] The first national study of immigration services scams found that immigrant populations are more likely to report scams in "welcoming contexts"—when they receive empowerment through a robust community safety net of social services and non-profit legal aid.[234] Unfortunately, unauthorized immigrants tend to mistrust local law enforcement due to the fear of deportation.[235] This threat serves as a deterrent from reporting crimes or cooperating with law enforcement in any capacity.[236] If victims of the scam had access to U visas, it would provide a sense of security that would incentivize immigrants to report fraudulent conduct,[237] and in turn, assist immigration agencies in rooting out unscrupulous attorneys.[238] This solution both improves the quality of immigration representation and falls squarely into the congressional intent behind the U visa.[239]

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230 *See e.g.*, *supra* text accompanying notes 83–89.

231 *See supra* text accompanying note 100.

232 *See supra* text accompanying notes 100–105.

233 For an extended discussion on ethical concerns and potential professional code of conduct violations that may arise from the ten-year visa scam, see MATTHEW BLAISDELL & MICHELE CARNEY, ETHICAL CONSIDERATIONS RELATED TO AFFIRMATIVELY FILING AN APPLICATION FOR ASYLUM FOR THE PURPOSE OF APPLYING FOR CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR A NONPERMANENT RESIDENT 17 (2020), https://www.aila.org/aila-files/9A9E850C-8E03-4B83-812F-733890242E50/16110105.pdf?1697589931 [https://perma.cc/BD9E-W6BX]. Another public interest consideration is that deterrence from this practice would reduce the number of frivolous asylum claims and removal cases, and consequently relieve at least some burden on the immigration system.

234 Pedroza, *supra* note 10, at 61.

235 *Id.* at 48.

236 Quinto, *supra* note 17, at 231 (quoting an attorney who has monitored *notarios* and unethical attorneys who conduct scams, that "the biggest challenge [in prosecuting fraud committed by immigration consultants] is the unwillingness of victims to come forward and testify. They fear so much to [wind] up being deported").

237 Pedroza, *supra* note 10, at 61.

238 *See supra* note 111 and accompanying text.

239 *Id.*

Courts often warn against "opening the floodgates" of litigation, which suggests a general disposition against overwhelming the judicial system.[240] This Note does not argue that each individual scam victim should have one corresponding state or local prosecution. Instead, much like the examples used in this Note,[241] if one attorney scams several tens or hundreds of victims, those victims may contribute to the same investigation.[242] Even if this recommendation resulted in multiple investigations and prosecutions, the goal of deterring this conduct while also achieving the statutory goal of incentivizing reporting and cooperation with law enforcement outweighs the burden to the judicial system.

III. PROPOSAL

There are two possible solutions that could improve accessibility to the U visa for victims of this scam: (1) improving training for USCIS adjudicators and (2) amending the substantial harm evidentiary requirement to mirror 8 C.F.R. § 214.14(a)(14)(ii).

Eunice Hyunhye Cho, Giselle A. Hass, and Leticia M. Saucedo[243] make the compelling argument that USCIS adjudicators have "erroneously conflated the U visa's 'substantial physical or mental abuse' standard with the standard of 'extreme cruelty' developed in the context of immigration remedies for victims of domestic violence."[244] Since the conception of the U visa, USCIS adjudicators have received "extensive training on domestic violence, sexual assault, and human trafficking issues"[245] and less specialized training for crimes outside of that context.[246] This, combined with the large number of domestic violence-based petitions that USCIS receives,[247] means that USCIS adjudicators are able to better recognize fact patterns in domestic violence or trafficking contexts, and are susceptible to improperly imposing the "extreme cruelty" standard required for immigration relief under BIWPA on less

240 *See generally* Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. OF CONST. L. 377 (2003).

241 *See* discussion *supra* Section I.C.

242 *Id.*

243 These authors are advocates and wrote extensively about workplace crimes as a basis for the U visa. *See generally* Cho, *supra* note 16.

244 *Id.* at 2.

245 *Id.* at 10.

246 *Id.*

247 *See supra* notes 143, 203 and accompanying text on the prevalence of domestic violence-based petitions for U visas.

recognizable fact patterns.[248] Eunice Cho argues that this conflation may explain the increasing denials of workplace-based U visa petitions.[249] U visa petitioners that are victims of the ten-year visa scam also suffer from this lack of training because adjudicators are less equipped to recognize what constitutes "sufficient harm" in this substantially different context, and may inadvertently impose the much higher "extreme cruelty" standard. USCIS has recognized that the harm that flows from witness tampering, obstruction of justice, or perjury is different from the other statutorily enumerated crimes.[250] As such, USCIS adjudicators should be trained to understand that difference and appropriately apply the substantial harm standard.

Additionally, USCIS adjudicators should adjust their substantial harm screening for witness tampering, obstruction of justice, or perjury in a manner that matches the treatment of those crimes under 8 C.F.R. § 214.14(a)(14)(ii). If the regulation requires that those three crimes advance the perpetrator's wrong-doing or that the perpetrator try side-stepping law enforcement authorities in order to suffice as a qualifying crime, then the harm that flows from those circumstances as a whole should be considered as well, not just the specific crime. USCIS should not have to promulgate additional regulations as this interpretation already is within the parameters of the law, but it may choose to do so for clarification purposes.

These solutions are not mutually exclusive, and may in fact prove most effective if implemented together to encourage collaboration with law enforcement and strengthen protections for immigrants.

CONCLUSION

USCIS should honor the congressional intention behind the BIWPA by granting U status to victims of the ten-year visa scam. Victims of the scam suffer from their attorneys' commission of perjury, which furthers exploitation of the victim through a manipulation of the immigration legal system, and results in an infliction of substantial mental harm. As such, scam victims qualify for the U visa under the statute and regulations as written. Making the U visa accessible to victims of this scam advances congressional intent to protect vulnerable immigrants who may be

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248 Cho, *supra* note 16, at 11.

249 Eunice Hyunhye Cho, *U Visas for Victims of Crime in the Workplace: A Practice Manual*, NATIONAL EMPLOYMENT LAW PROJECT 2 (May 2014), https://www.nelp.org/wp-content/uploads/2015/03/U-Visas-for-Victims-of-Workplace-Crime-Practice-Manual-NELP.pdf [https://perma.cc/9U6M-JBAE].

250 *See supra* notes 125–128.

deterred from reporting crimes because of their fear of deportation. The U visa is the best remedy that can appropriately compensate for the harm that victims suffered at the hands of unscrupulous attorneys.