UNITED STATES DEPARTMENT OF HOMELAND SECURITY

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES

VERMONT SERVICE CENTER

75 Lower Welden Steet
St. Albans City, VT 05479

In the Matter of:

Brief of Amici Curiae

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INTEREST OF THE AMICI CURIAE

This amicus brief is filed in support of Petitioner [redacted] on behalf of [redacted]

[redacted] Amici curiae submit this brief because United States Citizenship and Immigration Services ("USCIS") has rendered a decision that denies important protections to immigrants who are victims of domestic violence and creates a dangerous precedent for the use of uncorroborated and unreliable evidence in immigration proceedings. Each amicus curiae is identified, along with their individual statements of interest, in the Appendix.

SUMMARY OF THE ARGUMENT

USCIS should reconsider its previous decision and grant [redacted] waiver of inadmissibility and U Nonimmigrant status. In denying [redacted] application based on dispositive weight given to uncorroborated arrest records and a non-criminal conviction and ignoring factors weighing in her favor, USCIS improperly applied binding Board of Immigration Appeals ("BIA") precedent. USCIS's blanket acceptance of arrest reports as evidence of character and harm is also counterproductive and irresponsible as a policy matter, especially as it relates to victims of domestic violence. Furthermore, the USCIS decision stands in contrast to clear congressional intent to protect victims of domestic violence and exclude specific categories of crimes from preventing admission to the United States. Finally, USCIS's denial of [redacted] application exceeded its authority under the Immigration and Nationality Act ("INA") and Administrative Procedures Act ("APA"). As a result of these errors, USCIS abused its discretion and its decision should be reversed.

BACKGROUND

[REDACTED] ([REDACTED] or "Petitioner") came to the United States in January 2005, at age fifteen, when her mother moved her away from an abusive father in Mexico. See Affidavit of [REDACTED] in Support of I-192 Application for Advance Permission To Enter as Nonimmigrant, at ¶¶ 4-5 ("I-192 Aff."). In 2009, she began dating her future husband [REDACTED], and their relationship developed despite repeated instances of abuse. See Affidavit of [REDACTED] Describing Facts of Victimization Including Substantial Harm Suffered and Cooperation with Law Enforcement, as required by 8 C.F.R. § 214.14(c)(2)(iii), at ¶¶ 2-9 ("U-Visa Aff.").

[REDACTED] Arrests Stemming from Her Status as a Victim of Domestic Violence

On [REDACTED] [REDACTED] was arrested after defending herself against an attack from [REDACTED] See Certificate of Disposition – Misdemeanor/Violation, Case Number [REDACTED] [REDACTED] ("March 2011 Disposition") (noting date of arrest); see also U-Visa Aff. at ¶ 11. After [REDACTED] struck [REDACTED] with his arm, which was in a cast, [REDACTED] slapped him, and called the police. Id. After the police arrived, [REDACTED] was taken into custody. Id. Following an appearance in court, all charges against [REDACTED] were dismissed on [REDACTED] [REDACTED] See id.; March 2011 Disposition. As reflected by the record, the dismissal of charges is a legal decision in favor of [REDACTED] and the arrest and prosecution are deemed legal nullities. Id.; N.Y. Crim. Proc. Law § 215.40. After the incident, [REDACTED] continued to brutally abuse [REDACTED] both physically and emotionally. See U-Visa Aff. at ¶¶ 13-15, 18-19. This included verbally abusing [REDACTED] assaulting her with a screwdriver, and hitting her to the point of losing consciousness. Id.

On [redacted] [redacted] was arrested when she scratched [redacted] in self-defense, leading [redacted] to call the police and threaten to accuse [redacted] of trying to kill him. See id. at ¶ 20. However, [redacted] later informed the Court that he had fabricated his story. As a consequence, all charges against [redacted] were dismissed. Id.; see also Certificate of Disposition – Misdemeanor/Violation, Case Number [redacted] ("February 2012 Disposition") (describing dismissal).

[redacted] Conviction for a Violation Under N.Y. Penal Law § 240.26

On [redacted] [redacted] was arrested after becoming involved in a dispute between her mother and another woman. See Certificate of Disposition – Misdemeanor/Violation, Case Number [redacted] ("August 2011 Disposition") (noting date of arrest); see also U-Visa Aff. at ¶ 16. [redacted] ultimately pled guilty to Harassment in the Second Degree, a non-criminal violation. See August 2011 Disposition. A conviction of Harassment in the Second Degree is a violation, id., with a maximum penalty of fifteen days' incarceration. See N.Y. Penal Law § 70.15(4). A violation is a non-criminal disposition under New York law. See N.Y. Penal Law § 10.00(6) (defining "crime" as a misdemeanor or felony).

[redacted] Request to the Police for Protection, and Application to Immigration Authorities for U Nonimmigrant Status

Between May and September 2012, [redacted] contacted police on three separate occasions to report domestic violence incidents, two of which were due to [redacted] violation of a lawfully entered Order of Protection. See U-Visa Aff. at ¶¶ 23-29. In that time period, [redacted] bought a gun, punched [redacted] in the face while in public, and beat [redacted] with a beer bottle in front of her son. Id. at ¶¶ 23-25. [redacted] continued to harass [redacted] by phone even while he was incarcerated. Id. at ¶ 31. Seeking additional protection, [redacted] [redacted] submitted an application for U Nonimmigrant status ("U-Visa") on December 16,

2013. As part of her application, [redacted] submitted an I-192 Application for Advance Permission to Enter as Nonimmigrant ("I-192 App."), to waive the sole ground of inadmissibility that applied to her, INA § 212(a)(6)(A)(i) (aliens present without admission or parole). On December 9, 2014, USCIS requested additional information about [redacted] arrest. USCIS Request for Evidence [redacted] provided a description of the arrest, as well as information confirming the statute of conviction and maximum penalties.

USCIS Denies [redacted] Applications

On April 7, 2015, USCIS denied both the I-192 waiver of inadmissibility and application for U Nonimmigrant status. See USCIS decision, File No. [redacted] ("USCIS Decision"); see also USCIS decision, File No. [redacted] ("I-918 Decision"). In denying the I-192 application, USCIS applied Matter of Hranka, 16 I. & N. Dec. 491 (BIA 1978), and found that because [redacted] had demonstrated a "pattern of behavior" and "created a victim," she did not merit a discretionary waiver of inadmissibility. See USCIS Decision, at 2-4. USCIS further stated that based on [redacted] arrest history she "appear[ed] to pose a risk to society based on [her] pattern of behavior." Id. at 4. Without further explanation, USCIS found [redacted] description of the arrests and her reasons for wishing to remain in the United States (which included continued education, fear of abuse and violence upon removal, and medical treatment for her son) insufficient to overcome her "pattern of behavior." Id. Although USCIS conceded its inability to determine the severity of the harm inflicted by [redacted] as the basis for arrest, the decision concluded that "[b]oth the assault, which you were arrested for, and the harassment, which you were ultimately convicted of (after a plea), involved substantial physical and/or emotional harm, in nature." Id. at 3.

Based upon this "pattern of behavior" and "creat[ion] of a victim," USCIS denied ████ ████████ I-192 application for a waiver of inadmissibility. Id. at 4. Relying on ███ ████████ inadmissible status, USCIS denied her I-918 application for U Nonimmigrant Status.[1] See I-918 Decision, at 1-2.

ARGUMENT

I. USCIS FAILED TO PROPERLY APPLY BINDING BIA PRECEDENT

USCIS contravened BIA precedent when it improperly placed dispositive weight on ███ ████████ three arrests, which resulted in only one conviction for a non-criminal violation. Additionally, USCIS's reliance on the arrests to support a finding of a "pattern of behavior" and refusal to consider evidence in ██████████ favor, USCIS Decision at 2-5, also violates BIA precedent and is fundamentally unfair, infringing on ██████████ due process rights. Furthermore, applying BIA precedent in the manner used by USCIS effectively turns arrests, regardless of circumstances or adjudication, into convictions.

A. USCIS's Reliance on Arrests Lacking Probative Value Contravenes BIA Precedent and Abuses Its Discretion by Turning Arrests Into Convictions

USCIS is bound by BIA precedent, which establishes that arrest records without additional corroboration are neither probative of an applicant's character nor entitled to significant weight. In relying exclusively on the existence of ██████████ arrests and a sole conviction for a non-criminal violation in drawing negative conclusions about her character, USCIS improperly exercised its discretionary authority.

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[1] Although ██████████ I-192 application was denied on the basis of her arrests, the I-918 U Nonimmigrant application denial was based on her inadmissible status as an Alien Present Without Being Admitted. See I-918 decision. ██████████ status as an Alien Present Without Being Admitted was not considered by USCIS when it denied her I-192 waiver.

1. BIA precedent establishes that uncorroborated arrests are not probative and should not be afforded significant weight in an immigration decision

When USCIS failed to adequately consider the circumstances or adjudication of [REDACTED] arrests, it violated BIA precedent and abused its discretion. Evidence under consideration in an immigration proceeding must "be probative and its use fundamentally fair, so as not to deprive an alien of due process of law." In re Velasquez, 19 I. & N. Dec. 377, 380 (BIA 1986). Fairness is determined in large part by the "reliability and trustworthiness" of evidence. Felzcerek v. I.N.S., 75 F.3d 112, 115 (2d Cir. 1996). For arrests and their attendant circumstances to be considered and accorded substantial weight in immigration decisions, they must be otherwise corroborated by the record. See In re Arreguin De Rodriguez, 21 I. & N. Dec. 38, 42 (BIA 1995) ("[W]e are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein."); see also In re Sotelo-Sotelo, 23 I. & N. Dec. 201, 205 (BIA 2001) ("[I]n the absence of a conviction, we find that the outstanding warrant should not be considered an adverse factor in this case."). Such evidence is not probative, thus its use is not fundamentally fair and does not comport with the principles of due process. See In re Thomas, 21 I. & N. Dec. 20, 24-25 (BIA 1995).[2] In reaching its conclusory findings and denying [REDACTED] application, USCIS relied almost exclusively on her arrest record, which it improperly concluded "demonstrated a pattern of behavior" that "pose[s] a risk to society." USCIS Decision, at 2. In granting substantial weight to [REDACTED] uncorroborated arrest record, the decision is contrary to BIA precedent. By

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[2] Precedential decisions, such as Arreguin, are "binding on the [BIA] when it issues a non-precedential decision . . . ." Avila-Ramirez v. Holder, 764 F.3d 717, 724 (7th Cir. 2014) (citing 8 C.F.R. § 1003.1, titled "Organization, jurisdiction, and powers of the Board of Immigration Appeals").

basing its decision on non-probative, uncorroborated evidence of arrests, USCIS violated BIA precedent and acted contrary to principles of fundamental fairness.

2. Courts reviewing BIA decisions do not give substantial weight to arrest reports absent additional evidence or corroboration

The Circuit Courts of Appeals have routinely interpreted BIA precedent as requiring that arrest details be substantiated to be afforded significant weight in an immigration adjudication. These courts have routinely overturned BIA decisions relying on uncorroborated arrest records. See Avila-Ramirez v. Holder, 764 F.3d 717, 725 (7th Cir. 2014) (overturning an immigration agency for failing to follow Arreguin by giving arrest reports "significant weight" where no prosecution or conviction followed arrest and where there was no additional evidence); see also Padmore v. Holder, 609 F.3d 62, 69 (2d Cir. 2010) (expressing concern over "BIA's apparent willingness to accept unproven and disputed allegations as true merely because they exist in the record" without distinguishing Arreguin).

Circuit courts also affirmatively approve of BIA decisions refusing to grant substantial weight to uncorroborated arrest reports. See, e.g., Sorcia v. Holder, 643 F.3d 117, 126 (4th Cir. 2011), as amended (July 21, 2011) ("[I]nsofar as the BIA declined to give substantial weight to [appellant's] charge, it was following, rather than contradicting, precedent."); Henry v. I.N.S., 74 F.3d 1, 6-7 (1st Cir. 1996) ("[T]he lesson of Arreguin is that . . . [the BIA] will accord virtually no weight to an arrest record . . . unsupported by corroborating evidence."); cf. Lanzas-Ramirez v. U.S. Attorney Gen., 508 F. App'x 885, 889 (11th Cir. 2013) (Immigration Judge properly considered a deposition of the arresting officer corroborating the arrest and attendant details). Here, USCIS drew sweeping, dispositive conclusions about [redacted] character, her purported "violent" nature, and "substantial harm" caused without properly evaluating her police contacts. See USCIS Decision, at 3-5. USCIS sought no corroboration of [redacted] two

arrests arising out of domestic violence incidents, despite knowing that one of her arrests was the result of a drunken fabrication.[3] See USCIS Decision, at 3. In denying [redacted] waiver application based solely on uncorroborated information from unreliable arrest records, USCIS committed fatal error by abusing its discretion and failing to follow binding BIA precedent.

3. USCIS's actions effectively turn arrests into convictions

According significant weight to arrests without additional evidence or corroboration circumvents the judicial process and punishes those who may have done nothing wrong. It is axiomatic that in our justice system there can be no punishment without a finding of wrongdoing. However, USCIS's decision punishes [redacted] as if she had three convictions for assault. Although [redacted] two domestic violence-related arrests were affirmatively dismissed, USCIS effectively judged her guilty and punished her for these "crimes" by denying her application, ignoring the factual circumstances of the arrests and the consequences of its decision. Furthermore, USCIS found [redacted] harassment conviction to have "created a victim" and evidenced a "pattern of behavior" because of the arrest charges she faced rather than the conviction itself. See USCIS Decision, at 2-5. Even if USCIS had the discretion under BIA precedent to give such weight to [redacted] arrests, application of that discretion without adherence to precedent or meaningful checks undermines the discretionary process, and is an imprudent exercise of the agency's authority. In substituting its judgment for that of the courts, USCIS has effectively and impermissibly convicted [redacted] of several crimes and entered a punishment against her.

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[3] As discussed at Section II.A, infra, it is highly unlikely that arrest reports themselves would have provided any significant evidentiary information given the generally limited reliability of such reports.

B. In Contravention of BIA Precedent, USCIS Failed to Properly Weigh the Myriad Factors Favoring [redacted] Petition

In rendering its decision, USCIS failed to fully evaluate the factors necessary to decide [redacted] application for a waiver of inadmissibility. USCIS looked to three criteria established by the BIA. USCIS Decision, at 2-3 (citing Hranka, 16 I. & N. Dec. 491, 492 (BIA 1978)). "The first is the risk of harm to society if the applicant is admitted. The second is the seriousness of the applicant's prior immigration law, or criminal law, violations, if any. The third factor is the nature of the applicant's reasons for wishing to [remain in] the United States." Hranka, 16 I. & N. Dec. at 492. Because USCIS focused only on the first two criteria, relying almost exclusively on evidence lacking probative value and all but ignoring the necessary third factor, its decision should be reversed and [redacted] application granted.

1. [redacted] lone conviction for a violation is not sufficient to establish "a risk of harm to society" and serious past violations

Hranka first requires that USCIS consider "the risk of harm to society" upon admission, and "the seriousness of . . . prior immigration law, or criminal law, violations, if any." Id. Waivers have been granted even with a significant risk of harm to society in cases involving more serious categories of criminal activity. See, e.g., Hranka, 16 I. & N. Dec. at 492 (prostitution charges); In re Yann Daniel Darevic, 2008 WL 2938431, at *1 (BIA July 7, 2008) ("[two] charges of possession of a narcotic for the purpose of trafficking"); In re Kuldip Singh Delhon, 2007 WL 2299659, at *2 (BIA July 18, 2007) (sexual assault charges). Here, the only potentially probative evidence relied upon by USCIS in denying [redacted] waiver of inadmissibility was her conviction for harassment. As discussed in Part I.A, supra, USCIS cited only to this conviction and to the two dismissed arrests that stem directly from [redacted] cycle of violence with [redacted] her abuser. See U-Visa Aff. at ¶¶ 11, 16, 20; see also March

2011 Disposition; February 2012 Disposition. Unlike situations where the existence of an arrest or arrest report is the only available information, each of [redacted] arrests were reviewed in a court of law and finally decided. Two sets of charges were dismissed and the third resolved with a non-criminal disposition. It is difficult to see how these cases lead USCIS to conclude that [redacted] displayed a "pattern of behavior" that "pose[s] a risk to society." USCIS Decision at 4; accord Avila-Ramirez, 764 F.3d at 725 (overturning a finding of "repeated aggressive displays" with only one conviction and one uncorroborated arrest). Given that USCIS failed to adequately consider the evidence before it and drew conclusions at odds with existing precedent, its decision should be reconsidered.

USCIS also failed to properly evaluate the second Hranka factor in [redacted] case, the "seriousness of the applicant's prior immigration law, or criminal law, violations." USCIS's decision is entirely out of step with BIA practice, which attaches adverse immigration consequences primarily to more serious criminal and immigration law. See, e.g., In re Ryan Andrew Grassi, 2008 WL 5244699, at *1 (BIA Nov. 26, 2008) (assault and two counts of narcotic trafficking); In re Ronald James Duffus, 2007 WL 4699914, at *1 (BIA Nov. 13, 2007) (sexual assault and driving under the influence). Here, [redacted] contacts with police cannot independently create a ground of inadmissibility. [redacted] two dismissed cases are, by definition, not violations of criminal law, and therefore cannot be held against her. See N.Y. Crim. Proc. Law § 215.40.[4,5] If [redacted] lone, non-criminal conviction for harassment is deemed sufficiently "serious" to prevent a waiver of inadmissibility, almost any

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[4] Courts have instructed immigration decisions not to include arrests deemed to be nullities in making their decisions. See Garces v. U.S. Attorney Gen., 611 F.3d 1337, 1344 (11th Cir. 2010) (when a conviction is vacated for constitutional, statutory, or procedural reasons, "there is no longer a conviction for immigration purposes").

[5] Notably, USCIS does not appear to believe that [redacted] *actual* ground of inadmissibility, her presence without being admitted, constitutes a negative factor in her petition, as it is not addressed at any point in the decision.

arrest or violation, no matter how small, could be sufficient to prevent admission. Based on the evidence before USCIS, the second Hranka factor should not significantly impact [redacted] application.

2. USCIS failed to properly weigh [redacted] reasons for wishing to remain in the United States

In addition to exaggerating and mischaracterizing the factors weighing against [redacted] USCIS paid mere lip service to factors favoring her application. Hranka requires that USCIS consider "the applicant's reasons for wishing to [remain in] the United States." 16 I. & N. Dec. at 492. There is no requirement that those reasons be "compelling." Id. After discussing non-probative arrests, repeating that [redacted] "created a victim" five times, demonstrated a "pattern of behavior" three times, and lamenting the failure to submit a non-probative police report, USCIS spends only two sentences summarily dismissing [redacted] reasons for wishing to remain in the United States. USCIS Decision, at 4. [redacted] seeks to stay in the United States to protect herself from possible abuse at the hands of her father if returned to Mexico, to continue medical care for her U.S. citizen son who suffers from a chronic disease requiring treatment, and to continue her own education. See I-192 Aff. at ¶ 9-13. [redacted] also believes that she will not be able to obtain counseling in Mexico, a significant problem for a victim of prolonged abuse. Id. Finally, [redacted] fears retribution from her estranged husband or his family for her complaints. Id. [redacted] reasons for wishing to remain in the United States are substantial, and fulfill the third Hranka criterion. See, e.g., In re [Applicant], 2012 WL 8504119 (DHS Jan. 6, 2012) (granting a waiver of inadmissibility to applicant with two convictions for crimes of moral turpitude where applicant desired admission to reside in the same country as his spouse and daughter); In re [Applicant], 2012 WL 8593832 (INS May 21, 2012) (granting waiver for inadmissible applicant seeking to reside in the United

States to assist his psychologically fragile mother); see also In re Kenneth Lawrence Aiken, 2007 WL 2825183, at *1 (BIA Aug. 30, 2007) (approval to enter granted "to vacation and visit friends" despite a conviction for assault with a weapon); Duffus, 2007 WL 4699914, at *1 (BIA Nov. 13, 2007) (desire to take his family to Disneyland). [REDACTED] fear for her life from her abuser in Mexico and her desire to provide for her son in the United States substantially outweigh her one violation, weighing heavily in favor of granting a waiver of inadmissibility.

II. THE USE OF ARRESTS AND THEIR RECORDS IS IRRESPONSIBLE AS A POLICY MATTER BECAUSE THEY ARE INHERENTLY UNRELIABLE AND LACK PROBATIVE VALUE, PARTICULARLY IN THE DOMESTIC VIOLENCE CONTEXT

Even if USCIS possessed the authority to consider [REDACTED] arrests, its actions were improper because uncorroborated arrest records lack probative value. Problems with arrest reports are exacerbated in the domestic violence context. Furthermore, USCIS's use of a domestic violence victim's arrest as a means of denying her petition undermines the congressional intent to protect immigrant victims of domestic violence.

A. Uncorroborated Arrest Reports Are Not a Reliable Measure of Severity of Conduct or Lack of Character

USCIS was bound to require corroboration before relying on [REDACTED] arrest records, and its failure to do so was ill-advised as a policy matter given the unreliability of arrest reports. Arrests and their attendant documents lack probative value because they "often contain little more than unsworn witness statements and initial impressions." Prudencio v. Holder, 669 F.3d 472, 483 (4th Cir. 2012); see also Olivas-Motta v. Holder, 746 F.3d 907, 918-19 (9th Cir. 2013) (Kleinfeld, J., concurring) (while useful for some purposes, arrest documents are "not especially useful instruments for finding out what persons charged actually did"). USCIS honed in on three arrests nominally alleging assault, and unilaterally determined that these arrests

"demonstrated a pattern of behavior" that "pose[s] a risk to society" and is a "negative factor." USCIS Decision, at 2, 4. In reaching this conclusion, USCIS did not justify choosing to believe the hearsay records of arrests over the court's ultimate dispositions of the charges. Because those arrests reports do not reliably portray [REDACTED] behavior, they should not serve as the basis for denying her application.

The dependability of an arrest record is often nullified by the circumstances surrounding the arrest itself. Records of arrest and the reports detailing them lack reliability in part because of the adversarial relationship between police officers and those they arrest. See United States v. Bell, 785 F.2d 640, 643-44 (8th Cir. 1986). Although the Federal Rules of Evidence do not apply in immigration proceedings, it is instructive that Congress specifically excluded police reports from Fed. R. Evid. 803's hearsay exceptions because "observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases." See Fed. R. Evid. 803 advisory committee's note. Additionally, those reporting information to the police may be unable or unwilling to provide complete and truthful information to law enforcement. See Olivas-Motta, 746 F.3d at 918-19 (Kleinfeld, J., concurring) ("[P]eople may speak to the police despite lack of personal knowledge and lack of adequate observation, may be misunderstood, and . . . . [p]eople sometimes lie or exaggerate when they talk to the police."). Here, two of [REDACTED] arrests were prompted by statements made by her abuser during domestic violence incidents. See U-Visa Aff. at ¶¶ 11, 20 Her third arrest was the result of a complaint by a woman involved in a dispute with [REDACTED] [REDACTED] mother. See U-Visa Aff. at ¶ 16. Given these inherent shortcomings, the arrest report requested by USCIS for the August 2011 incident would have had minimal evidentiary

value even if provided. ██████ arrest records also lose probative value because her cases were adjudicated by a court. USCIS therefore should have focused on the dispositions themselves rather than the existence of the arrests or ██████ failure to provide arrest reports.

In addition, arrest records and reports are often incomplete and thus fail to provide sufficient information to create reliability or probative value. Arrest documents "are generated early in an investigation, [thus] they do not account for later events, such as witness recantations, amendments, or corrections." Prudencio, 669 F.3d at 483-84. For example, one of ██████ three arrests was dismissed after her husband-assailant came to her hearing and "explained that he was drunk the night of [the arrest] and that he did not remember what happened." USCIS Decision, at 3. In light of the unreliability of arrest records both generally and here, where there is such disparity between the stated reasons for arrest and ultimate outcomes, USCIS erred in placing such significant weight on ██████ arrests.

B. Domestic Violence-Related Arrests of U-Visa Applicants are Particularly Devoid of Probative Value

USCIS's flawed reasoning is compounded by its reliance on arrests stemming from abuse ██████ perpetrated against ██████ Regardless of actual culpability, domestic violence victims (and particularly immigrant women) are often arrested after acting in self-defense or otherwise reacting to violence at the hands of their partners. Furthermore, abusive partners often exploit the opportunity to maintain control over their victims by threatening to file, and actually filing, false charges against them. Arrests resulting from self-defense and arrests founded upon fabricated allegations have no probative value as to the character of the victim and whether that victim poses a risk to society.

1. Female victims of domestic violence are commonly arrested despite being the victims, not the perpetrators, of domestic violence

While male abusers use violence to exert control over their partners, the vast majority of women who use force against their partners do so either in self-defense, or more generally in reaction to a partner's violence. See Leigh Goodmark, When is a Battered Woman Not a Battered Woman? When She Fights Back, 20 Yale J.L. & Feminism 75, 92-96 (2008); Hanna R. Shapiro, Battered Immigrant Women Caught in the Intersection of U.S. Criminal and Immigration Laws: Consequences and Remedies, 16 Temp. Int'l & Comp. L.J. 27, 34 (2002). Indeed, *ninety-five percent* of the women arrested for domestic assaults in one study had used violence in reaction to a partner's violence. Goodmark, supra, at 92 (citing Susan L. Miller, Victims as Offenders: The Paradox of Women's Violence in Relationships, 116-20 (2005)). Additionally, a 1993 study found that *ninety-six percent* of women arrested for domestic violence offenses were acting in self-defense, while the remaining four percent were slightly more likely to be mutual combatants than primary aggressors. Joan Zorza, Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies, 28 New Eng. L. Rev. 929, 980 (1994) (citing Tina M. Busey, Woman Defendants and Reactive Survival Syndrome, The Catalyst 6-7 (Winter 1993) (Domestic Violence Resource Center Newsletter, Littleton, CO)). Similarly, domestic violence advocates involved in court-ordered domestic violence programs report that most female "perpetrators" in those programs were acting in self-defense. Cecelia M. Espenoza, No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections, 83 Marq. L. Rev. 163, 194 (1999) (collecting studies). Overall, as the research shows, a woman *very rarely* uses violence against her partner without any connection to the abuse she experiences as a victim of domestic violence.

Where a hopeful immigrant is applying for immigration status as a trauma survivor, it is reckless for an agency to deny status wholly on an arrest record stemming from a domestic violence incident without any recognition of the specific circumstances, as USCIS did here. Two of [REDACTED] arrests were unambiguously connected to the abuse she suffered. The first arrest occurred after her abuser had hit her in the face and refused to accept her desire to leave him. See U-Visa Aff. at ¶ 11. The second came after [REDACTED] attacked and struck [REDACTED] and she scratched him to fend him off. Id. at ¶ 20. Had USCIS properly evaluated and understood these two arrests and [REDACTED] harassment conviction, USCIS would not have determined that [REDACTED] displayed a *pattern* of behavior indicating a risk to society.

While women are rarely the primary aggressors in domestic violence incidents, their efforts to protect themselves often result in their own arrests due to law enforcement's inability to identify the wrongful party. When a woman has acted in self-defense, her partner—despite being the primary aggressor—may exhibit some discernible injuries, making it difficult for responding officers to properly identify the primary aggressor. Erin L. Han, Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases, 23 B.C. Third World L.J. 159, 175-77 (2003); see also U-Visa Aff. at ¶ 20. Additionally, many law enforcement officials, likely influenced by long-standing societal gender expectations, are less likely to recognize a woman that fights back as a "victim" because she does not conform to their view as "innocent, passive, and under the total control of [their] abuser." Alizabeth Newman, Reflections on VAWA's Strange Bedfellows: The Partnership Between the Battered Immigrant Women's Movement and Law Enforcement, 42 U. Balt. L. Rev. 229, 268-69 (2013). Compounding the problem are mandatory arrest policies, like that in New York where [REDACTED] was arrested, which limit police discretion by generally requiring an arrest if there is

any evidence of an assault, leading to more "dual arrests" where both the abuser and the victim are arrested. Han, supra, at 176; Adeola Olagunju & Christine Reynolds, Domestic Violence, 13 Geo. J. Gender & L. 203, 235-37 (2012); see N.Y. Crim. Proc. Law § 140(a)(4). Indeed, research shows that mandatory arrest policies have led to dramatic increases in the number of females arrested for domestic violence. See Shapiro, supra, at 33-34; see also Laurie S. Kohn, The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim, 32 N.Y.U. Rev. L. & Soc. Change 191, 217-18 (2008).

Additional obstacles make battered immigrant women particularly susceptible to this confluence of factors. First, law enforcement's actions can be influenced not merely by gender expectations but also embedded notions of race that unfavorably portray immigrant women. Espenoza, supra, at 185-86. As a result, police are more likely to perceive immigrant women of color as being angry or aggressive and are thus less likely to view them as innocent victims of domestic abuse. Id. Police might readily relate to the victim's male partner, who may speak better English and will likely be the first to speak to the officer after arriving on the scene. Newman, supra, at 269. Also, many immigrant women are not English-proficient and thus cannot interact with law enforcement in a meaningful way. Deanna Kwong, Removing Barriers for Battered Immigrant Women: A Comparison of Immigration Protections Under VAWA I & II, 17 Berkeley Women's L.J. 137, 141-42 (2002). And even if the victim can communicate with the police, she may be hesitant to challenge her partner's version of the events or to fully detail the extent of abuse because of cultural attitudes that may disfavor and inhibit challenges to male domination. Id. at 140-41.

For all of these reasons, an immigrant woman can be arrested for simply protecting herself. Such an arrest cannot possibly have any probative value as to the victim's character or

whether she poses a risk to society. Paradoxically, consideration of such arrests while ignoring their context—cycles of domestic violence and control—denies a woman protected lawful status *because* she is a victim of domestic violence.

2. Research reveals that abusers use the legal process as a further means of controlling their victims, resulting in false arrests of domestic violence victims

At its core, domestic violence is a crime predicated on control. Abusers can and do use the legal process as a means of furthering that control, including lodging false accusations against victims that can result in unfounded arrests. Obviously such arrests can have no probative value as to the character of the victim or whether that victim poses a risk to society.

Domestic violence is predominantly a means by which one partner uses a pattern of physical and/or psychological abuse to instill fear and assert power and control over the other partner. Olagunju & Reynolds, supra, at 204; Goodmark, supra, at 93. Immigrant women are particularly susceptible to the control of their partners, due to a combination of linguistic, cultural, and economic barriers. Kwong, supra, at 139-43. Perhaps the most significant obstacle is a set of immigration laws that have traditionally provided men with an even greater ability to control their victims, given that many women depend on their partner for their immigration status, making it even more difficult for them to leave an abusive relationship. Id.; Janet Calvo, A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, But Not its Demise, 24 N. Ill. U. L. Rev. 153, 165-66 (2004).

Seizing on this control, abusers can and do falsely accuse women of criminal conduct either in retaliation for the victim's attempt to leave the abusive relationship or as a way to thwart her immigration efforts and ensure she remains dependent on the abuser. See Espenoza, supra, at 198-201 (providing examples of retaliatory and obstructionist filing of false charges by male abusers). Because women can face deportation and bars to lawful status if convicted of a

crime, this provides abusers with a powerful means of control. See 8 U.S.C. §§ 1227(a)(2), 1229b(b)(1)(C) (2012). Knowing the mere fact that an immigrant woman was arrested (not even convicted) could prevent her from successfully petitioning for legal status, abusers may be more emboldened to threaten, and follow through on, making false accusations.

For years, [redacted] was subjected to threats of false charges from [redacted] as he repeatedly told her that "he would call the police and [she] would be arrested and would never see [her] son again." See U-Visa Aff., at ¶¶ 19-20. It was [redacted] call to the police falsely accusing her of trying to kill him and injuring him that led to yet another arrest. Id. Indeed, after [redacted] was arrested in connection with that domestic violence incident, [redacted] told the judge that he had lied and the charges were withdrawn. Id. By affording significant weight to an arrest that [redacted] admitted was founded upon false accusations, USCIS abused its discretion, as that arrest could not possibly inform whether [redacted] poses a risk to society.

C. The USCIS Decision Undermines Congress's Efforts to Protect Battered Immigrant Women and Evaluate Their Arrests in the Context of the Abusive Relationship

By giving significant weight to [redacted] domestic violence-related arrests, USCIS directly undercut Congress's decades-long effort to afford *greater* protections to battered immigrant women, and to provide them with additional tools to facilitate their departure from abusive relationships. USCIS's consideration of the arrests in a vacuum also ignored "Congress's intent that domestic violence be evaluated in the context of professional and clinical understandings of violence within intimate relationships." Hernandez v. Ashcroft, 345 F.3d 824, 828 (9th Cir. 2003). More specifically, the decision overlooked a number of statutes and regulations manifesting a clear concern of Congress and the U.S. Dept. of Homeland Security that the interplay of domestic violence and the legal process can prevent a victim from

successfully obtaining legal status and can push the victim further under the control of an abusive partner.

Congress has specifically identified battered immigrant women as a class requiring special protections against abusive partners. Indeed, the Violence Against Women Act ("VAWA") of 1994, and each of the later reauthorizations of VAWA in 2000, 2005 and 2013, contain particular provisions aimed at helping immigrant women achieve legal residency status and remove themselves from abusive relationships. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322 ("VAWA 1994"), at Title IV, §§ 40701-40703; Violence Against Women Act of 2000, Pub. L. 106-386 ("VAWA 2000"), tit. V; Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. 109-162 ("VAWA 2005") tit. VIII; Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4 ("VAWA 2013") tit. VIII. These efforts stem from Congress's recognition that it is necessary to correct for the fact that immigration laws often serve as a barrier that "ke[eps] battered immigrant women and children locked in abusive relationships." VAWA 2000 § 1502(a)(1).

Congress's 2000 reauthorization of VAWA contained the Battered Immigrant Women Protection Act ("BIWPA"), see VAWA 2000 tit. V, which, in several instances, requires the contextualization of domestic violence and consequently rejects the notion that a battered immigrant woman's convictions for any crime related to her abuse should prevent that woman from achieving lawful residency in the United States. First, given that domestic violence is a deportable crime, see 8 U.S.C. § 1227(a)(2)(E), and battered women, as discussed above, are often wrongfully arrested during domestic violence incidents, Congress ensured that the USCIS and immigration judges have discretion to waive deportation for victims convicted of domestic violence-related crimes if the victim was not the primary perpetrator of violence in the

relationship. See BIWPA § 1505(b) (INA § 237(a)(7), 8 U.S.C. § 1227(a)(7)). Second, while VAWA 1994 required a woman petitioning for legal residency without the support of her partner to demonstrate "good moral character," VAWA 1994 § 40701, Congress made clear through BIWPA that acts or convictions "connected to" the victim having been "battered or subjected to extreme cruelty" *cannot* bar an affirmative finding of good moral character. BIWPA § 1503(d)(2) (INA § 204(a)(1)(C), 8 U.S.C. § 1154(a)(1)(C)); see also Lori Romeyn Sitowski, Congress Giveth, Congress Taketh Away, Congress Fixeth Its Mistake? Assessing the Potential Impact of the Battered Immigrant Protection Act of 2000, 19 Law & Ineq. 259, 279-80 (2001) (noting concern pre-BIWPA that battered immigrants may fail the good moral character test because of dual arrests and vengeful batterers filing false countercharges). The USCIS decision directly undermines Congress's efforts by allowing domestic violence-related arrests—not even convictions—to prevent a battered immigrant woman from receiving legal status. Such a result could not have been intended by Congress when it passed BIWPA.

By providing abusive partners with another mechanism by which to exercise control, the USCIS decision also specifically weakens Congress's effort to change the tragic fact that immigration law for too long "foster[ed] domestic violence in [immigrant] situations by placing full and complete control of the alien spouse's ability to gain permanent legal status in the hands of the citizen or lawful permanent resident spouse," H.R. Rep. 103-395, and kept "immigrant women and children locked in abusive relationships." BIWPA § 1502(a)(1). To frustrate immigration efforts, an abusive partner need only call the police and provide fabricated accusations that lead to an arrest. See Section II.B, supra. Even if the batterer does not go so far as to call the police, the *threat* of calling the police would likely be sufficient to ensure that the victim does not herself report the abuse or make any other attempts to leave the relationship.

To address the problem of false accusations, Congress passed 8 U.S.C. § 1367(a)(1), which prevents an official from making an adverse determination of inadmissibility or deportability using information furnished solely by the victim's abuser. Section 1367 specifically covers U-Visa applicants under 8 U.S.C. § 1101(a)(15)(U). Yet despite Congress's passage of this provision, the USCIS decision entirely contradicts this intent by affirmatively using arrests based strictly on the accusations of a known abuser as a sword to prevent ████ from attaining the very protection Congress sought to provide.

USCIS is also well aware of the possibility of abusers' manipulation of the legal process to exert control over their victims. In defining who can be a victim of witness tampering, obstruction of justice, and perjury so as to be eligible for legal status under the U-Visa statute,[6] USCIS noted that individuals can be harmed by those offenses "when the perpetrator uses the legal system to exploit or impose control over them." New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,017 (Sept. 17, 2007). USCIS thus defined a victim of those crimes for purposes of the statute as an alien harmed when the crime was committed "to further [the perpetrator's] abuse or exploitation of or undue control over the alien through manipulation of the legal system." Id. Unfortunately, by ruling that the victim's arrests bar a waiver of inadmissibility, USCIS's decision encourages this very manipulation of the legal system by making it too easy for abusers to take actions that lead to unfounded, but very consequential, arrests of domestic violence victims.

[6] Congress's decision to allow a victim of witness tampering, obstruction of justice, or perjury to be eligible for a U-Visa, see 8 U.S.C. 1101(a)(15)(U)(iii), is another recognition by Congress that battered immigrant women need to be protected from abuser's misuse of the legal system.

USCIS's decision is a step backward in the government's laudable and overdue efforts to protect victims of domestic violence and specifically battered immigrant women. Because it directly undermines and ignores those efforts, the decision should not stand.

III. THE USCIS DECISION CONTRAVENES CONGRESSIONAL INTENT AND EXCEEDS USCIS AUTHORITY

In fulfilling its legislatively mandated purpose, USCIS is bound both by the will of Congress and the procedural boundaries set forth by the APA. By acting against congressional intent and circumventing the APA, USCIS is exceeding the boundaries of its powers as an executive agent of the United States government.

A. USCIS's Denial Contravenes Congressional Intent to Delineate Specific Crimes Giving Rise to Inadmissibility

The dispositive weight placed on non-prosecuted arrests and one non-criminal violation is directly at odds with the regulatory scheme surrounding U-Visas and waivers of inadmissibility. The U-Visa was created by Congress as part of its effort "(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 . . . ." BIWPA §1502(b). It is meant to offer "protection to victims of such offenses in keeping with the humanitarian interests of the United States" while "encourag[ing] law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens." Id. § 1513(a)(2)(A).

In creating the U-Visa program for victims of violence such as [redacted] Congress specifically defined the convictions rendering an alien inadmissible. Congress explicitly legislated those crimes that would create inadmissibility. INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A). Further, even for crimes of moral turpitude, Congress carved out an exception

for crimes for which the maximum penalty does not exceed imprisonment for one year and, if the alien was convicted, the alien was not sentenced to more than six months' imprisonment. INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II). [REDACTED] has neither been convicted nor arrested for any crime which would make her inadmissible under the statute.

By codifying an exhaustive list of crimes creating inadmissibility, the statute specifically contemplates that an otherwise deserving applicant may have contact with law enforcement, and intentionally excludes those convictions which do not prevent admissibility. USCIS's reliance on one criminal violation with a maximum penalty of 15 days' incarceration to deny a waiver of inadmissibility clearly contradicts this congressional intent. Although granting of an I-192 application is discretionary, it should not be used as a backdoor to thwart the regulatory scheme. Given that victims of domestic abuse are often arrested when police become involved, <u>see</u> Section II.B, <u>supra</u>, USCIS's decision turns a requirement under the U-Visa program—contact with law enforcement—into a potentially disqualifying action. Since VAWA and BIWPA were designed in part to remedy the harsh impact of immigration policies on victims of abuse and their families, it should be interpreted and applied in a manner deferential to the abused party. <u>See</u> <u>Lopez-Birrueta v. Holder</u>, 633 F.3d 1211, 1215-16 (9th Cir. 2011). Considering [REDACTED] minor arrests and non-criminal conviction to be dispositive of her admissibility is to act in conflict with the statutory purpose.

B. USCIS's Imposition of Invented Admissibility Standards Exceeds Its <u>Authority Under the APA</u>

By basing a denial of a waiver of inadmissibility on a single criminal violation, USCIS's decision constitutes a substantial modification of 8 C.F.R. § 212.17(b) outlining the U-Visa inadmissibility waiver standard. Such substantial modification requires notice and comment rulemaking prior to adoption and enforcement. APA, 5 U.S.C. § 553(b) (2012). A legislative

rule requiring this mandatory notice-and-comment procedures "*modifies* or *adds* to a legal norm," Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 95 (D.C. Cir. 1997) (emphasis in original), while "[i]nterpretive rules . . . merely clarify an existing statute or regulation," United States v. Yuzary, 55 F.3d 47, 51 (2d Cir. 1995) (internal quotation marks omitted). Because USCIS failed to follow these mandatory procedures, its harsh admissibility standard violates the APA and is therefore invalid.

USCIS's choice to place dispositive weight on a single violation and [redacted] uncorroborated arrest reports cannot be characterized as an interpretive rule. As discussed supra, the INA explicitly carves out single convictions for crimes for which the maximum penalty does not exceed imprisonment for one year from its list of crimes creating inadmissibility. Further revealing the statutory scheme, the U-Visa program was developed specifically to help applicant victims of domestic violence, who frequently have multiple interactions with law enforcement. By refusing a waiver of inadmissibility on the grounds of two non-convictions and a violation, USCIS is not interpreting Congress's statute but rather modifying it to establish a more restrictive standard than that dictated by the legislature and acting in conflict with clear congressional intent.

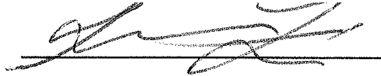
Even if USCIS's choice is construed as interpretive rather than legislative rulemaking, the decision is an improper exercise of administrative authority because it is unsupported by both precedent and the circumstances. Under Skidmore v. Swift & Co., whether an agency's interpretation of a regulation will be accorded "respect" by reviewing courts depends on its "power to persuade," which in turn "depend[s] upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." 323 U.S. 134, 140 (1944). Following the three-pronged Skidmore test for the

deference due an administrative action, USCIS's decision here fails on all counts. As discussed in Part I, supra, it contravenes clear BIA precedent; it rests on invalid reasoning in opposition to the regulatory scheme, addressed supra; and it fails to adequately support its reasons for departing from congressional intent and BIA precedent, as the conclusion that [redacted] is inadmissible based solely on one violation and two uncorroborated arrests fills less than a single page of the USCIS's I-192 denial. See USCIS Decision, at 4.

CONCLUSION

For the foregoing reasons, the denials of [redacted] I-192 Waiver of Inadmissibility and I-918 U Nonimmigrant status should be reconsidered and reversed.

Respectfully submitted,



APPENDIX

Statements of Interest of the Amici Curiae

Immigrant Defense Project. The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. IDP specializes in advising and training criminal defense and immigration lawyers nationwide, as well as immigrants themselves, on issues involving the immigration consequences of criminal convictions. IDP has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens convicted of criminal offenses the full benefit of their constitutional and statutory rights.

[REDACTED] [REDACTED] is an immigration law expert and an Associate Professor of Clinical Law at [REDACTED] where he teaches the Safe Harbor Project overseeing students representing individuals in immigration and entitlement cases. [REDACTED] is an immigration law expert and a Visiting Assistant Clinical Professor at [REDACTED] where her teaching, practice, and scholarship focus on immigration, detention, and civil rights. They have a strong interest in protecting the rights of immigrants in the United States and ensuring the fair and just application of criminal and immigration laws.[7]

[7] Professors' affiliations with listed institutions are provided only for purposes of identification.