

LEFT BEHIND: AVAILABILITY OF SPECIAL IMMIGRANT VISAS FOR AFGHAN TRANSLATORS

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This Article is written to provide an analysis of the hardships Afghan translators face in obtaining a United States immigration visa despite years of aiding the United States government in a deepening sectarian conflict. This Article will discuss stories of brave Afghan allies, give an overview of the United States immigration process, and provide recommendations to better support Afghan translators in their attempts to escape the Taliban's threats by obtaining legal permanent residency status in the United States.

INTRODUCTION

The United States must honor its promises.¹ Over America's strained twenty-year presence in Afghanistan, tens of thousands of Afghan translators served integral roles in the United States' counterterrorism mission—all while facing threats of torture and death from the Taliban. It is beyond dispute that the Afghan translators showed immense bravery in times of conflict. And in return for their service, they were repeatedly promised sanctuary. When President George W. Bush signed the Afghan Women and Children Relief Act of 2001, he stated that while the Taliban regime has ended, “our responsibilities to the people of Afghanistan have not . . .”² In 2012,

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¹ In the 2023 film *Guy Ritchie's The Covenant*, actor Jake Gyllenhaal plays United States Army Sergeant John Kinley who was rescued from the Taliban by his Afghan translator, Ahmed. While these characters are fictional, the movie portrays the story of numerous service members and their translators. Specifically, John Kinley spends months trying to bring Ahmed to the United States. Enraged over the shortcomings of the Special Immigrant Visa process, John Kinley screams at the immigration officer to “pay your debts!” This author echoes Jake Gyllenhaal's statement—the United States must pay its debts.

² George W. Bush, Remarks on Signing the Afghan Women and Children Relief Act of 2001 (Dec. 12, 2001), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE W. BUSH, BOOK II, 1506, 1506 (U.S. GOV'T PUBL'G OFF., 2001).

President Obama reiterated that the agreement signed between the United States and Afghanistan “sends a clear message to the Afghan people: [a]s you stand up, you will not stand alone.”³ And finally, as America began withdrawing its troops from Afghanistan in July of 2021, President Biden promised our allies that “[t]here is a home for you in the United States, if you so choose, and we will stand with you just as you stood with us.”⁴ The day that the capital of Kabul, Afghanistan fell to the Taliban, of the approximately 81,000 Afghans who had Special Immigrant Visa (SIV) applications pending—78,000 were left behind.⁵ The overwhelming majority of these Afghans worked for the United States Armed Forces as translators.⁶ The inefficient and rigid Special Immigrant Visa process breaks America’s promises to support Afghan allies and tarnishes our nation’s integrity.

Protecting Afghan translators—American allies—is more than an immigration issue. It is a national security issue.⁷ The United States’ use of local translators has been an integral component to the success of “every major military campaign over the past two centuries.”⁸ Major Tom

³President Barack Obama, Remarks by President Obama in Address to the Nation from Afghanistan, in OBAMA WHITE HOUSE ARCHIVES (May 1, 2012).

⁴President Joe Biden, Remarks by President Biden on the Drawdown of U.S. Forces in Afghanistan, (July 8, 2021) (transcript available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/08/remarks-by-president-biden-on-the-drawdown-of-u-s-forces-in-afghanistan/>) [hereinafter Remarks by President Biden]; Up First, *Left Behind, A War Story*, NPR (Mar. 20, 2022), <https://www.npr.org/transcripts/1087658063>.

⁵Kim Staffieri et al., *The Left Behind Afghans*, ASSOC. OF WARTIME ALLIES 1 (Feb. 2022), https://www.wartimeallies.co/_files/ugd/5887eb_6334755bb6f64b009b629f3513a16204.pdf.

⁶See Kim Staffieri et al., *The Left Behind Afghans—One Year Later*, ASS’N OF WARTIME ALLIES 5 (Aug. 15, 2022), <https://iava.org/wp-content/uploads/2022/08/AWA-Aug-2022-Withdrawal-Survey-Results.pdf>.

⁷See J. Sayre Payne, *A Duty Owed: The Failure of the Special Immigrant Visa Program and Its Message to Allies and Enemies*, 44 U. DAYTON L. REV. 631, 635 (2019) (noting that translators are a vital link between American goals and the success of the mission); Katherine Gypson, *US Lawmakers Fail to Pass Afghan Adjustment Act by Year’s End*, VOICE OF AM. (Dec. 20, 2022), <https://www.voanews.com/a/us-lawmakers-fail-to-pass-afghan-adjustment-act-by-year-s-end/6884480.html> (“As military professionals, it was and remains our duty to prepare for future conflicts. We assure you that in any such conflict, potential allies will remember what happens now with our Afghan allies.”).

⁸2020 *Recommendations to the Department of State Office of Inspector General*, NO ONE LEFT BEHIND 1 (Jan. 29, 2020), https://www.nooneleft.org/_files/ugd/c1b522_acce6167ee434fa3b8948b9dcb7b3c5d.pdf; see also Payne, *supra* note 7, at 636 (“Army Major Cory Schulz, a former U.S. commander of tactical team embedded with Afghan troops, stated: ‘[y]our interpreter is . . . more important than your weapon . . . you can command hundreds of Afghan soldiers; with a gun, you can only defend yourself.’”).

Schuelman, in describing his experience in Afghanistan, acknowledges that “[i]f there were advances made in selling our side of the story to the people of Sangin, the victories lay with [the Afghan translator, Zak].”⁹ Zak’s story will be discussed in greater detail throughout the Article. The United States’ withdrawal from Afghanistan and abandonment of its allies has made translators regret working with the United States.¹⁰ As Major Schuelman explains, “[a] country without honor will find it difficult to enlist young men and women to fight for it and even more challenging to find allies to fight alongside us.”¹¹

This Article proceeds in three parts. Part I addresses the danger that Afghan translators face due to their service to the United States. Part II details the paths Afghan translators may take to obtain legal permanent residency status in the United States. Part III recommends changes to the Special Immigrant Visa process to better support Afghan translators.

I. THE DANGERS AFGHAN TRANSLATORS FACE

If the Taliban discover that an Afghan worked as a translator, that Afghan is as good as dead. After a near twenty-year presence in Afghanistan, on July 8, 2021, President Biden announced that the United States would completely withdraw its troops from the country by August 31, 2021.¹² On August 15, 2021, the Taliban seized control of the Afghan government in Kabul, facing little to no resistance.¹³ In just two years under the Taliban’s rule, Afghanistan’s decades of progress in education, civil rights, and healthcare has come to a screeching halt.¹⁴ In the past year, Afghanistan has experienced a drastic increase in extrajudicial killings of civilians and former government officials, women are no longer allowed to attend school or leave their homes

⁹TOM SCHUEMAN & ZAINNULLAH ZAKI, *ALWAYS FAITHFUL: A STORY OF THE WAR IN AFGHANISTAN, THE FALL OF KABUL, AND THE UNSHAKABLE BOND BETWEEN A MARINE AND AN INTERPRETER* 130 (HarperCollins Publishers Inc. 2022) [hereinafter *ALWAYS FAITHFUL*].

¹⁰*See id.* at 209; Emmarie Huetteman, *‘They Will Kill Us’: Afghan Translators Plead for Delayed U.S. Visas*, N.Y. TIMES (Aug. 9, 2016), <https://www.nytimes.com/2016/08/10/us/politics/afghan-translators-military-visas.html> (“‘I wish I have never worked with them,’ he said. ‘I destroyed my life.’”).

¹¹*ALWAYS FAITHFUL*, *supra* note 9, at 318.

¹²Remarks by President Biden, *supra* note 4.

¹³*See* Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELS. (last updated Jan. 19, 2023), <https://www.cfr.org/background/taliban-afghanistan>.

¹⁴*See* Rep. of the Special Rapporteur on the Situation of Human Rights in Afghanistan, at 3, U.N. Doc. A/HRC/51/6 (Sept. 9, 2022).

without a male supervisor, and economic conditions are rapidly deteriorating.¹⁵

Afghan translators who were left behind are at extreme, if not almost certain, risk of Taliban retaliation¹⁶ and financial hardship.¹⁷ The plight of Afghan translators can best be understood by humanizing the oft-misunderstood foreigner through the story of Zaninullah “Zak” Zaki, an Afghan interpreter for the United States Marine Corps. His story resembles the struggles of many other Afghan translators.¹⁸

Zak served as a combat interpreter for the Third Battalion, Fifth Marines in Helmand Province, Afghanistan from September 2010 to April 2011.¹⁹

¹⁵ *Id.* at 4.

¹⁶ ALWAYS FAITHFUL, *supra* note 9, at 249 (noting that over the war in Afghanistan, the Taliban assassinated between 300 and 1,000 Afghan interpreters).

¹⁷ Staffieri et al., *supra* note 5, at 2 (“In the six months since the evacuation, of those surveyed, nearly 30% have been imprisoned by the Taliban at some point and 52% have been stopped and questioned. Nearly all have faced diminished economic opportunity because of the evacuation with 88% reporting loss of job and 94% reporting economic hardship. Over 70% reported going without food at least once in the last month—nearly 20% reported going without meals 10+ times in the last month.”).

¹⁸ See, e.g., NPR, *supra* note 4 (Khan is an Afghan interpreter who worked for the United States for four years, but now lives in hiding as he awaits a Special Immigrant Visa.); Quil Lawrence, *Waiting for U.S. Visas, Afghan Interpreters Fear the Taliban*, NPR (July 29, 2021), <https://www.npr.org/2021/07/29/1021235878/waiting-for-u-s-visas-afghan-interpreters-fear-the-taliban> (Frida was an Afghan translator who worked for the United States Special Forces, USAID, Marines, and State Department. Frida was approved for a Special Immigrant Visa after numerous rejections, but was murdered by a Talib gunmen in front of his ten-year-old son before he was able to enter the United States.); Huettman, *supra* note 10 (Mohammad Nasim Hashimary is an Afghan translator who worked for the American Special Forces for three years before being forced into hiding after receiving threats against himself and his family. At the time of Huettman’s article, he was awaiting a Special Immigrant Visa, which he believed was unlikely to be granted.); The Daily, *The Interpreters the U.S. Left Behind in Afghanistan*, N.Y. TIMES, at 28:43–46:13 (Aug. 19, 2021), <https://www.nytimes.com/2021/08/19/podcasts/the-daily/afghanistan-interpreters-special-immigrant-visas-taliban.html> (Abdul is a translator who was placed in a Taliban firing line and witnessed every person who admitted to working with the United States government be murdered.); D. Parvaz, *Since the Taliban Takeover, Afghans Hoping to Leave Afghanistan Have few Ways Out*, NPR (Oct. 3, 2022), <https://www.npr.org/2022/10/03/1121053865/afghanistan-refugees-visas#:~:text=World-,Since%20the%20Taliban%20takeover%2C%20Afghans%20hoping%20to,Afghanistan%20have%20few%20ways%20out&text=Bronstein%2FGetty%20Images-.Afghan%20Special%20Immigrant%20Visa%20applicants%20crowd%20into%20the%20Herat%20Kabul,over%20Afghanistan%20a%20week%20later> (Sanaullah is an Afghan translator who escaped a Talib kidnapping attempt by jumping out of a window. He now waits in hiding as he hopes to obtain a SIV.); Payne, *supra* note 7, at 636–37.

¹⁹ ALWAYS FAITHFUL, *supra* note 9, at 161.

Zak was more than a conduit between English and Dari or Pashto. He served an integral role in the United States' mission by bridging the gap between the people of Sangin and the United States.²⁰ While there, Zak faced Talib gunfire, navigated territory infested with improvised explosive devices (IED), and saw fellow platoon members die.²¹ As a translator, Zak faced the same danger as the Marines.²² Zak quickly formed a brotherhood with Major Schueman, the Third Battalion, Fifth Marines Platoon commander, as they shared their fears and hopes for the future.²³

Once while on patrol searching for IEDs in civilian-occupied areas, Zak heard a member of the Taliban directing other Talibs to ambush the Marines.²⁴ Knowing the Marines would not reach him fast enough, Zak ran ahead of the IED sweep, entered the Taliban occupied building, and tackled the man to the ground—saving countless lives.²⁵ On another patrol, an IED exploded and knocked Major Schueman unconscious.²⁶ The first thing Schueman saw when he woke up was Zak kneeling over him with Schueman's rifle in his hand, ready to protect him.²⁷ “[Zak] was not a soldier, but he was there to fight.”²⁸ Unlike the United States government today, no Marine took Zak's heroism for granted.

Because of Zak's extreme bravery on the front lines, the Taliban's threats against his life came almost immediately. When the Taliban knew Zak was listening, they would say to him “God willing, we will catch you, infidel! We know your name Zainullah Zaki! We know you are from Kunar! We condemn you for helping Americans, infidel! We will cut off your head after we torture you!”²⁹ The Taliban routinely posted pictures on Facebook of the bodies of translators that they had kidnapped, tortured, and killed.³⁰ In 2016, the Taliban began delivering letters to Zak's home demanding that he turn

²⁰ *Id.* at 130 (“If there were advances in selling our side of the story to the people of Sangin, those victories lay with Zak.”).

²¹ *Id.* at 129–130.

²² *Id.*

²³ *Id.* at 131.

²⁴ *Id.* at 105.

²⁵ *Id.* at 106.

²⁶ *Id.* at 124.

²⁷ *Id.*

²⁸ *Id.* at 125.

²⁹ *Id.* at 105.

³⁰ *Id.* at 205.

himself in for punishment for his “crimes.”³¹ Later in 2016, Zak fell ill, and a doctor discovered that he had been poisoned.³² The doctor acknowledged that many of those who worked with the United States government were being poisoned by the Taliban.³³ Zak was the only person who the doctor had seen survive.³⁴ The doctor was forced to remove Zak’s pancreas to treat the effects of the Taliban’s assassination attempt.³⁵ Zak is now a diabetic, meaning that he must take daily medication and carefully monitor his diet for the rest of his life.³⁶ After the death threats and assassination attempt, Zak knew that the only way to ensure the safety of his family was to leave Afghanistan, the only home he had ever known.³⁷ He decided to claim the employment benefit that he earned and apply for a Special Immigrant Visa.³⁸ Thousands of Afghan translators have found themselves in a similar position and now turn to the United States for its promised refuge.

II. PATHS TO LEGAL PERMANENT RESIDENCY FOR AFGHAN TRANSLATORS

Navigating the United States immigration system is not easy. The Immigration and Nationality Act (INA) is considered “second only to the Internal Revenue Code in complexity.”³⁹ There are two paths for a non-citizen to obtain Legal Permanent Residency (LPR) status in the United States: (1) applying for an immigration visa and (2) requesting asylum.

A. Immigration

The first avenue for a non-citizen to obtain LPR status is through the immigration process.⁴⁰ Under the immigration process, non-citizens may

³¹ *Id.* at 209.

³² *Id.* at 210.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 211.

³⁶ *Id.* at 211–12.

³⁷ *Id.* at 204.

³⁸ *Id.* at 205.

³⁹ *Castro-O’Ryan v. U.S. Dep’t of Immigr. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting ELIZABETH HULL, *WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS* 107 (1985)).

⁴⁰ LPR visas are commonly referred to as “green cards.” *Green Card*, U.S. CITIZENSHIP AND IMMIGR. SERVS. <https://www.uscis.gov/green-card> (last visited Oct. 4, 2023).

petition the United States government to obtain a green card based on certain family sponsored preferences, employment-based preferences, or through the diversity lottery.⁴¹ The Employment-Based Immigration: Fourth Preference (EB-4) category includes the Special Immigrant Visa (SIV).

1. Special Immigrant Visa

The INA authorizes visas for qualified special immigrants.⁴² Specific, enumerated classes of individuals qualify for a SIV such as: religious workers, special immigrant juveniles, and employees who served in various capacities in foreign countries.⁴³ Congress allocates, at a minimum, 140,000 employment-based visas per year, distributed across five preference categories.⁴⁴ The EB-4 category comprising the SIV makes up 7.1 percent of total employment-based visas.⁴⁵ Afghan translators may qualify for two categories of SIVs: (1) Afghan or Iraqi translator or interpreter (Translator SIV) or (2) Afghans who were employed by the United States government or International Security Assistance Force (Worker SIV).⁴⁶

The Translator Visa is the first SIV category for which Afghan translators may qualify. This visa is specifically designated for Afghan and Iraqi translator and interpreters. The National Defense Authorization Act for Fiscal Year 2006 authorized the issuance of up to fifty SIVs per year for Iraqi and Afghan translators and interpreters.⁴⁷ To qualify, applicants must have worked directly with the United States Armed Forces or under Chief of Mission (COM) authority for at least one year and have obtained a favorable written recommendation from a General or Flag Officer.⁴⁸

The Worker SIV is the second SIV category for which Afghan translators may qualify. This visa is dedicated to Afghan nationals who worked for, or

⁴¹ 8 U.S.C.A. § 1153 (West 2022).

⁴² *Id.* § 1101(a)(27) (West 2022).

⁴³ *Id.*

⁴⁴ Marianne Twu, *A Sanctuary for Those Who Serve: United States Iraqi Special Immigrant Visa Programs*, 35 N.C.J. INT'L L. & COM. REG. 723, 738 (2010).

⁴⁵ *Id.*

⁴⁶ *Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the U.S. Government*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html> (last visited Sept. 2, 2023) [hereinafter *Special Immigrant Visas for Afghans*].

⁴⁷ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1059, 119 Stat. 3136, 3444 (2006); see also Twu, *supra* note 44, at 739.

⁴⁸ National Defense Authorization Act for Fiscal Year 2006 § 1059.

on behalf of, the United States government in Afghanistan.⁴⁹ The Afghan Allies Protection Act of 2009 created the Worker SIV.⁵⁰ To qualify for a Worker SIV, the Afghan national must have: (1) been employed in Afghanistan on or after October 7, 2001 for not less than one year by, or on behalf of, the United States government or the International Security Assistance Force; (2) have “provided faithful and valuable service . . . which is documented in a positive recommendation or evaluation . . . from the employee’s senior supervisor;” and (3) have “experienced or is experiencing an ongoing serious threat as a consequence of the [non-citizen]’s employment.”⁵¹ Congress has authorized a total of 38,500 Worker SIVs since December 19, 2014, including authorizing an additional 4,000 visas in 2022.⁵² Once all 38,500 visas are issued, the program will expire.⁵³ As of October 2022, only 14,122 Worker SIVs remained.⁵⁴

Obtaining a SIV is an arduous task. The requirements for a Translator SIV are less burdensome than a Worker SIV, but there are substantially fewer Translator SIVs available every year.⁵⁵ Given the overwhelming number of translators who apply for a SIV, Congress must make more Translator SIVs available. Allocating more Translator SIVs will fulfill the legislative purpose of the Translator SIV, reduce the burdens on translators in obtaining a SIV, and allow more qualified applicants to obtain Worker SIVs. This Article will focus on the Worker SIV because it is far more common than the Translator SIV.

⁴⁹ ANDORRA BRUNO, CONG. RSCH. SERV., R43725, IRAQI AND AFGHAN SPECIAL IMMIGRANT VISA PROGRAMS 6 (2021).

⁵⁰ Afghan Allies Protection Act of 2009, Pub. L. No. 111–8, § 602(b), 123 Stat. 807; Emergency Security Supplemental Appropriations Act, Pub. L. No. 117–31, 135 Stat. 309, 310 (2021).

⁵¹ Afghan Allies Protection Act § 602(b).

⁵² *Special Immigrant Visas for Afghans*, *supra* note 46.

⁵³ *Id.*

⁵⁴ *Report to Congress on Posting of the Afghan Special Immigrant Visa Quarterly Report on the Department of State’s Website Section 1219 of the National Defense Authorization Act for Fiscal Year 2014 1 (P.L. 113-66)*, U.S. DEP’T OF STATE (Oct. 2022), <https://travel.state.gov/content/dam/visas/SIVs/Report%20of%20the%20Afghan%20SIV%20Program%20-%20October%202022.pdf> [hereinafter *Report to Congress on Posting of the Afghan SIV Quarterly Report*].

⁵⁵ ALWAYS FAITHFUL, *supra* note 9, at 205.

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Obtaining a Worker SIV is an extremely complicated process⁵⁶—requiring thirteen steps across four phases and multiple administrative bodies.⁵⁷

Phase	Step	Description
Phase 1— Chief of Mission (COM) Approval ⁵⁸	1	The applicant must compile and submit the necessary documentation, including a letter from their employer’s human resource department confirming their employment in Afghanistan, a letter of recommendation from a direct, senior supervisor, a Form DS-157 Petition for Special Immigrant Classification for Afghan SIV Applicants, and evidence of Afghan nationality. ⁵⁹
	2	The National Visa Center (NVC) reviews the COM documents for completeness.
	3	The NVC sends the COM application to the Afghan Chief of Mission for review.
	4	COM staff review the application and “conduct a risk assessment of the [non-citizen] and an independent review of records maintained by the United States government or hiring organization or entity to <i>confirm employment and faithful and valuable service</i> to the United States government.” ⁶⁰
	5	Applicants submit a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant,

⁵⁶Nine Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Kerry, 168 F. Supp. 3d 268, 275 (D.D.C. 2016).

⁵⁷Report to Congress on Posting of the Afghan SIV Quarterly Report, *supra* note 54, at 3–5.

⁵⁸The COM application is the most important and daunting part of the SIV process. *How to Apply for Chief of Mission Approval*, U.S. DEP’T OF STATE, 6 https://travel.state.gov/content/dam/visas/SIVs/Afghan_SIV_Guidelines_and_DS157_Instructions_03-16-2021.pdf (last visited Nov. 1, 2023).

⁵⁹*Afghan SIV Guidelines - DS-157 Instructions*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov/afghan-siv-guidelines-ds-157-instructions.html> (last visited Sept. 2, 2023).

⁶⁰Afghan Allies Protection Act, H.R. 1105, 111th Cong. § 602(b)(2)(D) (2009) (emphasis added). Step four requires COM staff to communicate and confirm information with third parties. Many applications remain in COM processing for months, if not years.

Phase 2— Form I-360 Adjudication		with United States Citizenship and Immigration Services (USCIS) for approval.
	6	USCIS adjudicates the I-360 petition and, if approved, sends the petition to the NVC.
Phase 3— Visa Interview	7	The NVC sends an instruction packet to the applicant and requests documentation.
	8	Applicant completes Form DS-260, Application for Immigration Visa and Alien Registration, online. Applicant submits the required documentation to the NVC, including copies of the applicant's passport, birth certificate or tazkera, any other civil documents showing the applicant's familial relationships (e.g. marriage certificate, divorce certificate, and adoption decrees), a Refugee Benefits Election Form, and Form DS-0234, Special Immigrant Visa Biodata Form.
	9	The NVC reviews the documents for completeness and corresponds with the applicant when additional documentation is needed.
	10	The NVC schedules an interview at a United States embassy or consulate. ⁶¹
	11	A consular officer interviews the applicant and collects biometrics. Applicants must undergo a medical examination—at their own expense—unless they prove that they cannot obtain a medical exam without undue hardship or risk to personal safety. ⁶²
	12	The application enters administrative processing in which applicants undergo “a variety of security,

⁶¹If an applicant is applying for a SIV while already living in the United States, they will go through a slightly different process in which they apply for adjustment of status and are interviewed by USCIS in the United States. *Report to Congress on Posting of the Afghan SIV Quarterly Report*, *supra* note 54, at 4 n.13.

⁶²Emergency Security Supplemental Appropriations Act, Pub. L. No. 117-31, 135 Stat. 309, 310 (2021) (Even if applicants receive a medical examination waiver, they must undergo a medical examination within thirty days of arriving in the United States.).

		fraud, or criminal background checks that are required before the visa may be issued.” ⁶³
Phase 4— Visa Issuance	13	Finally, the weary, select few applicants are issued a visa and may begin their trek to the United States.

This tedious bureaucratic process happens while translators who remain in Afghanistan live in constant fear of the Taliban’s retaliation. Many applicants wait one to four years for their application to be adjudicated.⁶⁴ In October of 2022, the Department of State reported that the average processing time for a SIV application was approximately twenty-one months,⁶⁵ down from the January 2021 processing time of thirty-two months.⁶⁶ The processing time during the critical COM approval phase is over *one year* alone, despite the statutory requirement that the COM application be adjudicated within *nine months* of filing.⁶⁷ And still, the twenty-one month average processing time does not include the processing time for four of the thirteen steps that are reported as either “N/A” or “applicant-controlled.”⁶⁸ Nor does the twenty-one month average include the amount of time applicants spend compiling the documentation required to submit the COM application—the most time consuming task.⁶⁹ It is difficult for translators to obtain a letter of recommendation and verification of employment, as required by the COM application, for numerous reasons: records are not adequately maintained in the middle of a war zone, the employer may not be operating anymore, let alone in Afghanistan, and translators lose contact with their supervisors. Preparing the necessary paperwork to submit the initial COM application may take six years alone.⁷⁰ In total, translators may live in fear and uncertainty for ten years.

⁶³ *Report to Congress on Posting of the Afghan SIV Quarterly Report*, *supra* note 54, at 5 n.18.

⁶⁴ See *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S.* v. Kerry, 168 F. Supp. 3d 268, 276–79 (D.D.C. 2016).

⁶⁵ *Report to Congress on Posting of the Afghan SIV Quarterly Report*, *supra* note 54, at 5.

⁶⁶ *Joint Department of State/Department of Homeland Security Report: Status of the Afghan Special Immigrant Visa Program*, U.S. DEP’T OF STATE 3 (Jan. 2021), <https://travel.state.gov/content/dam/visas/SIVs/Afghan-Public-Quarterly-Report-Q1-Jan-2021.pdf>.

⁶⁷ *Id.* at 2; Kerry, 168 F. Supp. 3d at 285.

⁶⁸ *Report to Congress on Posting of the Afghan SIV Quarterly Report*, *supra* note 54, at 2.

⁶⁹ *Id.*

⁷⁰ ALWAYS FAITHFUL, *supra* note 9, at 300.

When Zak began his SIV application, he had no way to contact his former employers, two Department of Defense third-party contractors, other than a general email address that was not monitored.⁷¹ He knew only the nicknames of his former employers and had no means to identify them, other than an old photograph.⁷² Only after Major Schueman leveraged his network of Marines and social media followers, was a retired military officer able to identify the individual in Zak's photo.⁷³ This individual was then able to provide Zak with a verification of employment.⁷⁴ It took Zak six years to compile the necessary documents and reach the first of thirteen steps in the SIV application process.⁷⁵ Every second spent jumping through bureaucratic hoops places the lives of Afghan translators and their families in danger.

Two recent federal district court cases have addressed the inefficiencies of the SIV process. In *Nine Iraqi Allies*, a group of Afghan and Iraqi nationals filed suit against the United States government, challenging the SIV application processing times.⁷⁶ There, two Afghans submitted SIV applications in 2011 that remained in "administrative processing" in 2016.⁷⁷ The court found that the plaintiffs "suffered an injury in fact: the failure to receive final decisions on their SIV applications within a reasonable period" of nine months.⁷⁸ After the court's ruling, the parties reached a settlement in which the government agreed to process the applications.⁷⁹ Other Afghan and Iraqi nationals made a similar argument in *Afghan and Iraqi Allies*.⁸⁰ There, the court granted summary judgment for the plaintiffs, finding that the government egregiously delayed the processing of SIV applications.⁸¹ The court ordered the government to develop an adjudication plan within 30 days

⁷¹ *Id.* at 208.

⁷² *Id.*

⁷³ *Id.* at 299.

⁷⁴ *Id.*

⁷⁵ *Id.* at 300.

⁷⁶ See *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Kerry*, 168 F. Supp. 3d 268, 273 (D.D.C. 2016).

⁷⁷ *Id.* at 278.

⁷⁸ *Id.* at 282.

⁷⁹ *Nine Iraqi Allies v. Kerry: Challenging Delays in Deciding Special Immigrant Visa Applications*, INT'L REFUGEE ASSISTANCE PROJECT, <https://refugeerights.org/news-resources/9-iraqi-allies-v-kerry-seeking-adjudication-of-special-immigrant-visa-applications-pending-for-over-nine-months> (last visited Mar. 24, 2023).

⁸⁰ See Complaint at 2, *Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Pompeo*, 2019 WL 4575565 (D.D.C. Sept. 20, 2019) (No. 18-CV-01388).

⁸¹ *Pompeo*, 2019 WL 4575565, at *12.

of the court's class certification decision.⁸² The court then granted class certification for all individuals who applied for a SIV and "whose applications have been awaiting government action for longer than 9 months."⁸³ As of the date of this Article, the case is ongoing.⁸⁴ Hopefully its outcome will provide recourse for Afghans whose lives suffer due to bureaucratic inefficiencies.

2. Humanitarian Parole

After the fall of Kabul in August 2021, thousands of Afghan translators were immediately in danger of the Taliban's retaliation. In the chaotic withdrawal from Afghanistan, the United States evacuated more than 120,000 individuals, including 76,000 Afghan nationals.⁸⁵ Of these evacuees, only 6,840 Afghans had legal status in the United States upon arrival, including 3,259 LPRs, 3,290 SIV holders, and 21 non-immigrant visa holders.⁸⁶ Tens of thousands of Afghans arrived in the United States with no legal status.

In response to the thousands of status-less Afghans, on March 15, 2022, the United States Department of Homeland Security launched Operation Allies Welcome.⁸⁷ Under Operation Allies Welcome, the State Department (1) designated Afghanistan for Temporary Protected Status (TPS) for a period of eighteen months and (2) prioritized humanitarian parole for Afghans.⁸⁸ First, "TPS is intended to provide a safe haven for foreign nationals in the United States as of the designation date—regardless of their

⁸² *Id.* at *11.

⁸³ *Id.* at *1.

⁸⁴ Afghan and Iraqi Allies v. Blinken: *Challenging Systemic Delays in Deciding Special Immigrant Visa Applications*, INT'L REFUGEE ASSISTANCE PROJECT, <https://refugeerights.org/news-resources/afghan-and-iraqi-allies-v-pompeo-challenging-the-systematic-delay-in-processing-of-special-immigrant-via-applications> (last visited Mar. 24, 2023).

⁸⁵ Glenn Kessler, *Numbers Behind Afghanistan Evacuation Come into Focus*, THE WASH. POST (May 25, 2022 3:00 AM), <https://www.washingtonpost.com/politics/2022/05/25/numbers-behind-afghan-evacuation-come-into-focus/>.

⁸⁶ ANDORRA BRUNO, CONG. RSCH. SERV., R47165, PERMANENT IMMIGRATION OPTIONS FOR AFGHANS WITH IMMIGRATION PAROLE 2 (2022), <https://crsreports.congress.gov/product/pdf/R/R47165/1>.

⁸⁷ Press Release, Secretary Mayorkas Designates Afghanistan for Temporary Protected Status, U.S. Dep't of Homeland Sec., (March 16, 2022), <https://www.dhs.gov/news/2022/03/16/secretary-mayorkas-designates-afghanistan-temporary-protected-status>.

⁸⁸ *Id.*

immigration status—whose home countries are experiencing armed conflict, natural disaster, or other extraordinary circumstances that prevent their safe return.”⁸⁹ Afghans granted TPS were eligible for work authorization and were protected from removal from the United States.⁹⁰

Second, Operation Allies Welcome prioritized humanitarian parole for Afghans to “provide additional protections and assurances to trusted partners and vulnerable Afghans who supported the U. S. military, diplomatic, and humanitarian missions in Afghanistan over the last 20 years.”⁹¹ Humanitarian parole allows a non-citizen to temporarily enter the United States for a compelling humanitarian reason or for the significant public benefit of the United States.⁹² Afghans paroled into the United States were granted legal status for two years, authorized to work, and became eligible to receive certain limited government benefits.⁹³ From July 2021 to June 2022, the government paroled 75,898 Afghans into the United States.⁹⁴ During that same time, over 46,000 Afghans applied for parole from outside of the United States.⁹⁵ Of those, only 5,000 applications were fully adjudicated, and ninety percent were denied.⁹⁶ Between July 2021 and August 2022, USCIS collected nearly \$20 million from the 66,000 parole applications filed through the Form I-131.⁹⁷ USCIS required each applicant to pay \$575 in fees, only to ultimately

⁸⁹ ANDORRA BRUNO, CONG. RSCH. SERV., R47165, PERMANENT IMMIGRATION OPTIONS FOR AFGHANS WITH IMMIGRATION PAROLE 3 (2022), <https://crsreports.congress.gov/product/pdf/R/R47165/1>; 8 U.S.C.A. § 1254a (West 1996) (granting the Attorney General the power to declare TPS).

⁹⁰ BRUNO, *supra* note 89, at 2.

⁹¹ Press Release, Secretary Mayorkas Designates Afghanistan for Temporary Protected Status, U.S. Dep’t of Homeland Sec., (March 16, 2022), <https://www.dhs.gov/news/2022/03/16/secretary-mayorkas-designates-afghanistan-temporary-protected-status>.

⁹² 8 U.S.C.A. § 1182(d)(5) (West 2013).

⁹³ *Benefits for Afghan Humanitarian Parolees*, ADMIN. FOR CHILD. & FAMS. OFF. OF REFUGEE RESETTLEMENT (Jan. 2023), <https://www.acf.hhs.gov/sites/default/files/documents/orr/Benefits-for-Afghan-Humanitarian-Parolees-English.pdf>.

⁹⁴ *Department of Homeland Security Operation Allies Welcome Afghan Parolee and Benefits Report*, U.S. DEP’T OF HOMELAND SEC. 6 (Nov. 10, 2022), <https://www.dhs.gov/sites/default/files/202212/DMOPLCY%20%20DHS%20Operation%20Allies%20Welcome%20Afghan%20Parolee%20and%20Benefits%20Report%20-%20Update%202022.pdf>.

⁹⁵ Camilo Montoya-Galvez, *U.S. is Rejecting Over 90% of Afghans Seeking to Enter the Country on Humanitarian Grounds*, CBS (June 20, 2022), <https://www.cbsnews.com/news/afghan-refugees-rejected-us-entry-humanitarian-grounds/>.

⁹⁶ *Id.*

⁹⁷ Najib Aminy & Dhruv Mehrotra, *The US Has Approved Only 123 Afghan Humanitarian Parole Applications in the Last Year*, REVEAL NEWS (Aug. 19, 2022), <https://revealnews.org/>

deny almost all applicants residing outside of the United States⁹⁸—forcing those translators to remain in Afghanistan and face the Taliban.

Operation Allies Welcome—and humanitarian parole—ended on October 1, 2022.⁹⁹ As of that date, any Afghan who had not yet applied for parole lost the opportunity to do so. Now, our Afghan allies must wait for the inefficient SIV process to enter the United States. On September 1, 2022, the White House announced that it would enact Operation Enduring Welcome to replace Operation Allies Welcome.¹⁰⁰ The Department of Homeland Security no longer prioritizes humanitarian parole for Afghans but instead focuses on providing a “long-term durable status” to Afghan allies under SIV and refugee programs.¹⁰¹

Humanitarian parole and TPS are thin Band-Aids on a gaping wound—short-term, quick fixes. Neither humanitarian parole nor TPS provide a path to legal permanent residency or citizenship in the United States. Recipients of humanitarian parole and TPS must independently apply and qualify for LPR status to remain in the country indefinitely.¹⁰² Importantly, parole expires after two years, and once a non-citizen’s legal status expires, they must return to Afghanistan.¹⁰³ As previously noted, the SIV processing time is almost two years, with some applicants waiting up to four years for final adjudication. Many Afghan translators risk losing legal status before their

article/the-us-has-approved-only-123-afghan-humanitarian-parole-applications-in-the-last-year/.

⁹⁸ *Id.*

⁹⁹ Jonathan Landay, *U.S. to Revise Afghan Resettlement Policy—U.S. Official*, REUTERS (Sept. 1, 2022), <https://www.reuters.com/world/us-revise-afghan-resettlement-policy-us-official-2022-09-01/>.

¹⁰⁰ Leo Shane III, *US Ending Operation Allies Welcome, Shift to New Afghan Refugee Help*, MILITARY TIMES (Sept. 1, 2022), <https://www.militarytimes.com/flashpoints/afghanistan/2022/09/01/us-ending-operation-allies-welcome-shift-to-new-afghan-refugee-help/>.

¹⁰¹ Press Release, Press Briefing by Press Secretary Karine Jean-Pierre, The White House (Sept. 1, 2022), <https://www.whitehouse.gov/briefing-room/press-briefings/2022/09/01/press-briefing-by-press-secretary-karine-jean-pierre-7/>.

¹⁰² See *Humanitarian Parole*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/forms/explore-my-options/humanitarian-parole> (last visited Feb. 11, 2023).

¹⁰³ See BRUNO, *supra* note 89, at 2. On May 5, 2023, the Department of Homeland Security announced that Afghan nationals who arrived in the United States under Operation Allies Welcome may apply for re-parole so that they may continue living in the United States for an additional two years. Re-parole applications will be considered on a case-by-case basis. *DHS Announces Upcoming Re-Parole Process for Afghan Nationals*, U.S. DEP’T OF HOMELAND SEC. (May 5, 2023), <https://www.dhs.gov/news/2023/05/05/dhs-announces-upcoming-re-parole-process-afghan-nationals>.

SIV application is granted and therefore are at risk of deportation. An Afghan translator being forced to return to Afghanistan is a Talib death sentence.

B. Asylum

The second avenue for obtaining LPR status in the United States is through the asylum process. Refugees may petition the government to obtain asylum because they have suffered persecution or fear that they will suffer persecution due to their race, religion, nationality, membership in a particular social group, or political opinion.¹⁰⁴ If an Afghan translator's SIV application is denied, they may be eligible for asylum.

Zak's story highlights the challenges Afghan translators face in obtaining LPR status in the United States. In 2016, Zak decided to apply for a SIV after numerous Talib threats against his and his family's lives.¹⁰⁵ As the United States began to withdraw from Afghanistan in 2021, Major Schueman and Zak made plans for Zak and his family to leave the country, knowing their survival depended on escaping the Taliban.¹⁰⁶ Zak's family faced unspeakable horrors during their three trips to the Kabul airport: a suicide bomber that killed thirteen American servicemembers and 170 Afghan civilians,¹⁰⁷ physical inspections at Taliban checkpoints, day-long waits in the Afghan heat, and an eight mile walk.¹⁰⁸ Zak and his family arrived in the United States on October 15, 2021 after spending three weeks in Qatar and five weeks in a German tent camp.¹⁰⁹ When Zak arrived in the United States, his SIV application was still pending, so he was granted parole under Operation Allies Welcome.¹¹⁰ On March 22, 2022, Zak's SIV application was denied by the COM.¹¹¹ On November 30, 2022, Zak's sole appeal was denied because of his "[i]nsufficient [l]ength of employment."¹¹² To qualify for a

¹⁰⁴ 8 U.S.C.A. § 1158 (West 2009).

¹⁰⁵ ALWAYS FAITHFUL, *supra* note 9, at 204.

¹⁰⁶ *Id.* at 254.

¹⁰⁷ Statement by Secretary of Defense Lloyd J. Austin III Marking Two Years Since the Attack at Abbey Gate, U.S. DEP'T OF DEF. (Aug. 26, 2023), <https://www.defense.gov/News/Releases/Release/Article/3506394/statement-by-secretary-of-defense-lloyd-j-austin-iii-marking-two-years-since-th/>.

¹⁰⁸ ALWAYS FAITHFUL, *supra* note 9, at 281–98.

¹⁰⁹ *Id.* at 299–300.

¹¹⁰ Tom Schueman (@kill.z0n3), INSTAGRAM (Dec. 6, 2022), <https://www.instagram.com/p/Ci2Kp55p67y/>.

¹¹¹ ALWAYS FAITHFUL, *supra* note 9, at 314.

¹¹² Schueman, *supra* note 110.

SIV, applicants must be employed by or on behalf of the United States government for at least one year.¹¹³ Zak submitted two letters of verification of employment proving that he was employed as a translator on behalf of the United States government from September 2010 to July 2011 and January 2012 to December 2013.¹¹⁴ These letters prove well over a year of employment, yet his application was rejected because the date and location in the second letter conflicted.¹¹⁵ As the end of Zak's parole status approaches, Zak fears being deported to Afghanistan.¹¹⁶ Now, he must apply for asylum and attempt to prove that he was persecuted while in Afghanistan or likely will be persecuted if returned to Afghanistan on account of a protected ground.¹¹⁷ This outcome, in light of Zak's service to the United States, exemplifies the failure of the SIV process.

II. RECOMMENDED CHANGES TO THE SPECIAL IMMIGRANT VISA PROCESS

The SIV process is inefficient and routinely reaches outcomes based on bureaucratic rigidity rather than the merits of applicants. Afghan translators risked their lives for the United States's mission. The United States promised that if at any point, they no longer wished to—or were able to safely—remain in Afghanistan, they would be provided refuge.¹¹⁸ The United States must streamline and expedite the SIV process to uphold its promises to our brave Afghan allies. First, the United States Armed Forces should train every servicemember on the SIV process. Second, bureaucratic barriers to the SIV process should be lessened by providing Pashto and Dari translations, conducting interviews virtually, and accepting more forms of personal identification. Third, Congress should create an equitable exception to the COM requirements based on the extreme hardship servicemembers or the Afghan translator will face if the translator is denied a SIV.

A. Train Servicemembers on the SIV Process

Each branch of the United States Armed Forces should train its servicemembers on the SIV process so that they may guide their translators

¹¹³ Afghan Allies Protection Act, H.R. 1105, 111th Cong. § 602(b) (2009) (enacted).

¹¹⁴ Schueman, *supra* note 110.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ ALWAYS FAITHFUL, *supra* note 9, at 314.

¹¹⁸ Remarks by President Biden, *supra* note 4.

through the visa application. Servicemembers should presume that every translator will apply for a SIV to ensure that each translator receives adequate instruction. The servicemember directly supervising the translator is in the best position to guide the translator through the application process because they have an established, trusting relationship.¹¹⁹ Servicemembers should instruct their translators to maintain all employment documents, ask supervisors for their long-term contact information, and avoid any behavior that would adversely affect their letters of recommendation. The supervising servicemember may also be able to provide a letter of recommendation for their translator or connect the translator with their former employer. Servicemembers should instruct their translators to maintain communication with their supervisors. Many years may pass before the translator applies for a SIV. To provide a favorable letter of recommendation, the servicemember must be confident in attesting that the translator currently poses no risk to national security.

No One Left Behind is the leading organization that ensures the United States, through the SIV program, keeps its promise to Afghan translators.¹²⁰ In its *2020 Recommendations to the Department of State Office of Inspector General*, No One Left Behind recommended that the United States “[p]rovide formal training to U.S.G. personnel about how to help their interpreters through the process.”¹²¹ It included an example Standard Operating Procedure titled “Easy and fast steps to apply and get an approved SIV.”¹²² A United States Marine Special Operations Command Gunnery Sergeant, who helped his interpreter receive a SIV in just over a year, wrote the Standard Operations Procedure.¹²³ It lists the seven documents needed to submit a SIV application and includes practical tips for completing the application.¹²⁴ Widespread distribution of instructions such as these will enable servicemembers to proactively expedite their translator’s SIV process.

In addition to benefitting the translator, training members of the United States Armed Forces on the SIV process will benefit the servicemembers themselves. As Major Schueman describes, American servicemembers have “become the face of deceit and [are] bearing the burden of a lie. The

¹¹⁹ALWAYS FAITHFUL, *supra* note 9, at 130.

¹²⁰NO ONE LEFT BEHIND, <https://www.nooneleft.org/> (last visited Mar. 24, 2023).

¹²¹*2020 Recommendations to the Department of State Office of Inspector General*, *supra* note 8, at 19.

¹²²*Id.* at 20.

¹²³*Id.* at 19.

¹²⁴*Id.* at 20–21.

collective guilt of our nation has fallen on [their] heads. [They] bear an invisible scarlet letter—Betrayed and Betrayed—one more moral injury to add to the collection.”¹²⁵ Helping translators find safety in the United States would greatly reduce the moral guilt servicemembers experience from leaving allies behind. Had Zak and Major Schueman understood the SIV process from the beginning, Zak might have received a SIV years ago, and Major Schueman would feel less moral injury.

B. Reduce Unnecessary Bureaucratic Barriers

The Special Immigrant Visa process should be streamlined and expedited by removing unnecessary bureaucratic hurdles. As of September 30, 2022, the State Department estimated that 131,049 principal SIV applications were pending.¹²⁶ But, in reaching this estimation, the State Department calculated the number of SIV applications pending in only *five out of the thirteen steps* of the SIV process.¹²⁷ Any application falling in one of the other eight steps was not included in the estimation of pending SIV applications.¹²⁸ Therefore, as of September 30, 2022, there were *many* more than 131,049 SIV applications pending.¹²⁹ Each minute an Afghan translator is restricted by a bureaucratic procedure is another minute that their life is in danger.

First, to make the SIV application process more accessible to Afghan translators, the application forms and instructions should be written in Pashto and Dari—the official languages of Afghanistan—in addition to English.¹³⁰ Even though Afghan translators can read base-level English, the SIV application contains detailed requirements that would be better understood in the applicant’s native languages. USCIS regularly provides forms and

¹²⁵ ALWAYS FAITHFUL, *supra* note 9, at 318; Geoff Ziezulewicz, *A Year Later, Vets Accept that They Can’t Save Every Afghan Ally*, MILITARY TIMES (Aug. 30, 2022), <https://www.militarytimes.com/flashpoints/afghanistan/2022/08/30/a-year-later-vets-accept-that-they-cant-save-every-afghan-ally/> (a recent survey found that forty-one percent of veterans who helped evacuate Afghans in August 2021 “have ongoing problems with moral injury”).

¹²⁶ *Report to Congress on Posting of the Afghan SIV Quarterly Report*, *supra* note 54, at 6.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See ANDORRA BRUNO, CONG. RSCH. SERV., R43725, IRAQI AND AFGHAN SPECIAL IMMIGRANT VISA PROGRAMS 20 (2021), <https://crsreports.congress.gov/product/pdf/R/R43725/17> (“The fact that pending application data are provided for only some of the processing steps means that the actual numbers of pending applications are likely higher than the reported numbers.”).

¹³⁰ *Languages of Afghanistan*, BRITANNICA, <https://www.britannica.com/place/Afghanistan/Languages> (last visited Mar. 25, 2023).

instructions in other languages such as Spanish.¹³¹ This simple solution will make an extremely tedious process easier for Afghans.¹³²

Second, USCIS should allow applicants to conduct interviews virtually, as it did during the COVID-19 pandemic.¹³³ Currently SIV applicants must complete an interview at a United States Embassy. But, the United States Embassy in Kabul, Afghanistan has been closed since the Taliban regained power.¹³⁴ The Department of Homeland Security instructs applicants to find a United States Embassy in a third country to complete the interview but states that it cannot facilitate transportation or help applicants secure a visa to enter the third country.¹³⁵ To make matters worse, the Taliban have issued regulations requiring Afghans to seek express approval to leave the country.¹³⁶ One Afghan translator, Sanaullah, served as a combat interpreter for the United States military in Afghanistan for two years.¹³⁷ Since 2018, he has experienced pervasive threats against his life, narrowly escaping the Taliban by jumping out of a window and going into hiding.¹³⁸ In October 2022, his SIV application had been completed for three months, and his interview was scheduled for November 2022.¹³⁹ Because there is no longer a United States Embassy in Kabul, Sanaullah had to find a way to Pakistan on his own—including paying \$600 for a visa to enter the country.¹⁴⁰ Conducting interviews in person is an enormous burden on Afghan translators because of the closure of the United States Embassy in Afghanistan, the Taliban's restrictions on movements, and the price of visas to enter other countries. The United States government has shown that virtual interviews are sufficiently thorough by using virtual interviews during the

¹³¹ See *I-485, Solicitud de Registro de Residencia Permanente o Ajustar Estatus*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 26, 2023), <https://www.uscis.gov/es/i-485>.

¹³² *2020 Recommendations to the Department of State Office of Inspector General*, *supra* note 8, at 14; BRUNO, *supra* note 129, at 15.

¹³³ *USCIS Response to COVID-19*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 24, 2023), <https://www.uscis.gov/about-us/uscis-response-to-covid-19>.

¹³⁴ U.S. Embassy in Afghanistan, *Visas*, U.S. DEP'T OF STATE, <https://af.usembassy.gov/visas/> (last visited Feb. 11, 2023).

¹³⁵ *Special Immigrant Visas for Afghans*, *supra* note 46.

¹³⁶ NPR, *supra* note 4; Charlotte Greenfield, *Taliban Restrict Afghans Going Abroad, Raises Concern from U.S. and U.K.*, REUTERS (Mar. 1, 2022 12:42 AM), <https://www.reuters.com/world/asia-pacific/taliban-restrict-afghans-going-abroad-draws-criticism-uk-envoy-2022-02-28/>.

¹³⁷ Parvaz, *supra* note 18.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

COVID-19 pandemic. Importantly, virtual interviews do not require translators to venture outside their homes and risk the Taliban.

Third, the SIV's accepted forms of personal identification should be broadened to include military Common Access Cards, driver's licenses, and other government-issued identification cards that display personal photographs. Currently, the SIV application requires applicants to submit a photocopy of their tazkera (i.e. Afghan identity card) or passport.¹⁴¹ "Obtaining a valid passport in a war zone is an extraordinary challenge on its own"¹⁴² Many Afghans do not have passports.¹⁴³ Acquiring a passport may require paying the Taliban up to \$2,000 in bribes.¹⁴⁴ The Taliban have acknowledged that corruption stains the passport process, and, within their first year of control, arrested numerous passport department employees for corrupt practices.¹⁴⁵ Additionally, the Taliban issued no passports in the first few months of obtaining power.¹⁴⁶ The Taliban have since resumed issuing passports but faced a backlog of over 100,000 applications.¹⁴⁷ To remedy these issues, USCIS should accept other forms of applicant identification, such as a Common Access Card. Translators who work for the United States military are eligible to receive Department of Defense Common Access Cards.¹⁴⁸ To receive a Common Access Card, individuals must identify themselves with two forms of acceptable identification which includes a passport, driver's license, Employment Authorization Document that

¹⁴¹*How to Apply for Chief of Mission Approval*, U.S. DEP'T OF STATE, https://travel.state.gov/content/dam/visas/SIVs/Afghan_SIV_Guidelines_and_DS157_Instructions_03-16-2021.pdf (last visited Apr. 6, 2023).

¹⁴²Nadia Abramson, *Wasting My Time Waiting in Line: Solutions for Improving the Afghanistan and Iraq Special Immigrant Visa Programs*, 55 VA. J. INT'L L. 483, 497 (2015).

¹⁴³See ALWAYS FAITHFUL, *supra* note 9, at 258–59.

¹⁴⁴*Id.* at 259 (describing how the Taliban forced Zak to pay \$1,800 in bribes to secure passports for his family).

¹⁴⁵Akmal Dawi, *Taliban Make Millions From Passports Issued to Fleeing Afghans*, VOICE OF AM. (Aug. 24, 2022, 3:53 PM), <https://www.voanews.com/a/taliban-make-millions-from-passports-issued-to-fleeing-afghans/6715133.html>.

¹⁴⁶*Id.*

¹⁴⁷Charlotte Greenfield, *Afghanistan to Start Issuing Passports Again After Months of Delays*, REUTERS (Oct. 5, 2021, 5:42 AM), <https://www.reuters.com/world/asia-pacific/afghanistan-start-issuing-passports-again-after-months-delays-2021-10-05/>.

¹⁴⁸*Common Access Card (CAC)*, U.S. DEP'T OF DEF., <https://www.cac.mil/common-access-card/> (last visited Mar. 25, 2023) (stating that Department of Defense and non-Department of Defense civilian employees are eligible for a Common Access Card).

contains a photograph, and social security card.¹⁴⁹ An identification card issued by the United States military and verified by two forms of identification should qualify as proper identification for Afghan translators. Eliminating the Afghan passport requirement will allow translators with military-issued identification to avoid paying bribes and being delayed by the Taliban's inefficient processes.

In 2022, Congress recognized many of these issues and attempted to rectify them through the Afghan Adjustment Act.¹⁵⁰ The proposed, bipartisan Afghan Adjustment Act provided a streamlined, prioritized adjustment process for Afghans who supported the United States mission in Afghanistan, including those who were admitted into the country on humanitarian parole since 2021.¹⁵¹ The Afghan Adjustment Act would have expanded the classification of Afghan nationals who qualified for SIV status, required the President to establish an Interagency Task Force on Afghan Ally Strategy, and created a new office in Afghanistan to conduct visa interviews in lieu of the Kabul Embassy.¹⁵² The Afghan Adjustment Act would have directed the Secretary of State to "make a reasonable effort to ensure that [a non-citizen] who is issued a special immigrant visa . . . is provided with the appropriate series Afghan passport necessary to enter the United States," attempting to reduce the difficulties Afghans face in securing a passport.¹⁵³ However, the Afghan Adjustment Act failed to receive the requisite amount of votes necessary to pass in the Senate by the end of 2022, almost guaranteeing that it will not pass in the House of Representatives.¹⁵⁴

C. Create an Equitable Exception

Finally, Congress should create an equitable exception for Afghans who do not meet the SIV requirements. Between October 1, 2021, and September 30, 2022, the Department of State issued 2,646 principal Afghan SIVs.¹⁵⁵ In

¹⁴⁹ *Department of Defense List of Acceptable Identity Documents*, U.S. DEP'T OF DEF. (Aug. 2019), https://www.cac.mil/Portals/53/Documents/List_of_Acceptable_Documents.pdf.

¹⁵⁰ S. 4787, 117th Cong. (2022).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* § 7(c)(4).

¹⁵⁴ Gypson, *supra* note 7.

¹⁵⁵ See *Report to Congress on Posting of the Afghan SIV Quarterly Report*, *supra* note 54, at 1; *Report to Congress on Posting of the Afghan Special Immigrant Visa Quarterly Report on the Department of State's Website Section 1219 of the National Defense Authorization Act for Fiscal Year 2014 (P.L. 113-66)*, U.S. DEP'T OF STATE 1 (July 2022), <https://travel.state.gov/content/dam/>

that time, however, the Department of State denied 10,440 principal Afghan SIVs—almost *five times* the number of SIVs issued.¹⁵⁶ Applicants are commonly denied because of a “[f]ailure to establish qualifying employment,” “[i]nsufficient documentation,” “[f]ailure to establish at least one year of employment,” or “[f]ailure to establish providing faithful and valuable service to the U.S. government.”¹⁵⁷ It is important to note that none of the common justifications for denial are based on information discovered in background checks or potential threats to national security. SIV applicants go through an extensive screening process that is effective at finding the *very* few individuals who may pose risks to national security.¹⁵⁸ Rather, Afghan translators are denied because they are unable to prove their employment with an organization that stopped operating decades ago. There is no legitimate risk in granting a SIV to a translator who can only verify two weeks of employment. The Taliban are not going to treat a translator differently for serving the United States government for two weeks rather than two years. Afghan translators who risked their lives for the United States should not be barred from safety on procedural technicalities.

The Immigration and Nationality Act is littered with exceptions for “extreme hardships.”¹⁵⁹ For example, the Attorney General may waive certain grounds of inadmissibility if the non-citizen establishes that “denial

visas/SIVs/Afghan-Public-Quarterly-Report-Q3-July-2022.pdf; *Report to Congress on Joint Department of State/Department of Homeland Security Report: Status of the Afghan Special Immigrant Visa Program*, U.S. DEP’T OF STATE 1 (Apr. 2022) [hereinafter *Status of the Afghan Special Immigrant Visa Program (Apr. 2022)*], https://travel.state.gov/content/dam/visas/SIVs/Report%20of%20the%20Afghan%20SIV%20Program_FY2022%20Q2.pdf; *Report to Congress on Joint Department of State/Department of Homeland Security Report: Status of the Afghan Special Immigrant Visa Program*, U.S. DEP’T OF STATE 1 (Jan. 2022) [hereinafter *Status of the Afghan Special Immigrant Visa Program (Jan. 2022)*], <https://travel.state.gov/content/dam/visas/SIVs/Afghan-Public-Quarterly-Report-Q1-January-2022.pdf>.

¹⁵⁶ See *Report to Congress on Posting of the Afghan SIV Quarterly Report*, *supra* note 54, at 7; *Report to Congress on Posting of the Afghan Special Immigrant Visa Quarterly Report on the Department of State’s Website Section 1219 of the National Defense Authorization Act for Fiscal Year 2014 (P.L. 113-66)*, *supra* note 155, at 8; *Status of the Afghan Special Immigrant Visa Program (Apr. 2022)*, *supra* note 1555, at 7–8; *Status of the Afghan Special Immigrant Visa Program (Jan. 2022)*, *supra* note 1555, at 8.

¹⁵⁷ *Report to Congress on Posting of the Afghan SIV Quarterly Report*, *supra* note 54, at 8.

¹⁵⁸ See *Refugee Processing and Security Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees/refugee-processing-and-security-screening> (last visited June 28, 2023).

¹⁵⁹ See, e.g., 8 U.S.C.A. § 1182(a)(9)(B)(v) (West 2013); 8 U.S.C.A. § 1182(h) (West 2013); 8 U.S.C.A. § 1186a(c)(4) (West 2013).

of admission would result in extreme hardship to the citizen or lawfully resident spouse or parent of such [non-citizen].”¹⁶⁰ This waiver applies when a United States citizen, rather than the non-citizen, will face extreme hardship from the non-citizen’s exclusion. Factors that demonstrate extreme hardship include family disruption, social impact, health conditions, and country conditions.¹⁶¹ “Particularly significant factors” include the “qualifying relative’s military service” and “the Department of State travel warnings.”¹⁶²

The SIV should provide a similar extreme hardship exception that states:

The Attorney General has sole discretion to waive any Chief of Mission requirement, if it is established to the satisfaction of the Attorney General that the denial of special immigrant status to such immigrant would result in extreme hardship to a former or current member of the United States Armed Forces, or to the immigrant himself.

In applying the exception, the Attorney General should first consider the extreme hardship that a United States servicemember would experience if the Afghan translator were denied a SIV. United States servicemembers who formed close bonds with their Afghan translators suffer from trauma because of “the failure to assist their left behind Afghans.”¹⁶³ This equitable exception should draw heavily on the recommendations of the servicemember who supervised the applicant because they are in the best position to determine the credibility of the applicant and can be trusted to make decisions that are in the best interest of our nation.¹⁶⁴ Creating an exception to the SIV’s procedural technicalities will alleviate some of the moral blame our servicemembers experience.

If the Afghan translator is unable to prove that a servicemember will face extreme hardship from his denial, the Attorney General should then consider the extreme hardship the translator will experience from his denial. The Attorney General should consider factors such as the threats the Afghan and his family face, the danger the Afghan incurred while serving the United

¹⁶⁰ 8 U.S.C.A. § 1182(a)(9)(B)(v) (West 2013).

¹⁶¹ Gina L. Signorelli, *Immigration Waivers and the Psychological Effects on Family Members Throughout Their Loved One’s Legalization Process*, 46 S.U.L. REV. 195, 212 (2019).

¹⁶² *Id.* at 212–13.

¹⁶³ Staffieri et al., *supra* note 6, at 9.

¹⁶⁴ 10 U.S.C.A. § 502(a) (West 2006) (every servicemember takes an oath upon enlistment to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “obey the orders of the President of the United States”).

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States government, and the reason the applicant failed a Chief of Mission requirement. Notably, this exception provides equitable considerations for COM requirements only. It does not waive the background check, identity confirmation, or interview requirement. This exception, as with other extreme hardship exceptions in the Immigration and Nationality Act, should be a fact-intensive inquiry and exacting standard.¹⁶⁵ This exception is not intended to “open the floodgates” to all SIV applicants. Rather the exception is intended to be an avenue for the United States government to consider special circumstances that cannot be directly addressed in the SIV statute. In applying these factors to Zak, he would establish an extreme hardship. He courageously served as a combat translator for over two years, the Taliban made numerous attempts against his life, and his denial was based on a clerical error in his employment documents.

CONCLUSION

This Article proposes a simple solution. The United States made a promise to our Afghan allies that they would receive sanctuary in the United States if they “provide faithful and valuable service” to the United States for one year.¹⁶⁶ The United States failed our allies and broke its promise when we left behind 78,000 visa-eligible Afghans in the clutches of the Taliban. The United States must honor its promise by reforming the Special Immigrant Visa process. The United States government should proactively train all servicemembers about the SIV process, remove unnecessary bureaucratic hurdles, and create an equitable exception for the COM requirements.

¹⁶⁵ See Signorelli, *supra* note 161, at 212–13.

¹⁶⁶ Afghan Allies Protection Act of 2009, Pub. L. No. 111–8, 123 Stat. 807.