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THE SCANDAL OF REFUGEE FAMILY REUNIFICATION

Abstract: Headlines have highlighted the plight of unaccompanied children seeking asylum at our southern border. Some political pundits have called this a “crisis,” casting blame for the migrant influx on our outdated and confusing immigration policies. Yet further away from the border, another group of migrants—all of whom have already resettled here—confronts a more routine crisis perpetrated by our bureaucracy. Refugees, who are legally resettled in the United States by the tens of thousands each year, often arrive without intact family units. Many have been forced to leave spouses or children behind in conflict zones or refugee camps. To reunite with these loved ones, refugees must petition to bring them through the U.S. immigration system via special processes meant to accommodate a refugee’s status as a victim of persecution. Yet through stringent documentation requirements and bureaucratic inertia, these processes often end up penalizing refugees for their lack of resources. Ironically, refugees’ vulnerability and past persecution—which form the very basis for their status in the United States—subsequently prevent them from navigating an immigration process specially designed for them. This Note provides an overview of this complex system and identifies many of the flaws that keep refugee families apart. It then offers a number of reforms designed to streamline this cumbersome bureaucracy and protect refugees’ family members seeking to be reunited on American soil.

INTRODUCTION

Esther, a refugee from the Democratic Republic of the Congo, was forcibly separated from five of her children during civil conflict in the early 2000s.¹ She spent several years in a refugee camp and was eventually resettled to North Carolina without her children. Upon arrival in the United States, she petitioned the U.S. Citizenship and Immigration Services (“USCIS”) to bring her children here. USCIS required that Esther provide birth certificates to prove her relationship to her children, all minors, but these documents did not exist. Incurring months of extra delay, Esther contacted relatives in the Congo who procured retroactive documentation of the relationship.

USCIS then approved the petition and transferred the file to the U.S. Embassy in Kinshasa, Congo’s capital. In order to continue processing, the children had to travel to Kinshasa for visa interviews. But the children lived on the

¹ Andrew Haile, *Esther’s Story* (2012) (unpublished notes) (on file with author) [hereinafter *Esther’s Story*]. This narrative describes the true story of a client of the Humanitarian Immigration Clinic at Elon Law School in Greensboro, N.C., where the author previously worked. *See id.* Names have been changed to protect confidentiality. *See id.*

other side of the country, hundreds of miles away, and the journey to Kinshasa was extremely dangerous. Esther had no choice, however, and raised money from her church to fly them to the capital in a small plane.

The children, however, had never been to Kinshasa before, and could not find a stable place to stay. They had no parent or guardian with them. On the day of their interview, they were turned away from the embassy because they lacked the requisite paperwork, which was in the United States with Esther. Rescheduling the interview took months. During this time, the youngest child, Florence, went missing. She is presumed kidnapped or dead, and did not accompany her siblings to the United States to be reunited with their mother.

When the remaining four children received a new interview, they were unaccompanied by adults, attorneys, or translators (the oldest child was sixteen). Despite this, and against all odds, their visas were approved—nearly two years after Esther filed the original petition. At last, they were granted permission to travel to the United States to be reunited to their mother. It was, understandably, a bittersweet reunion: to this day, no one knows what happened to Florence, a child in pursuit of a visa.²

Each year, the United States resettles tens of thousands of refugees from all over the world.³ Many of these refugees arrive, like Esther, without intact family units due to dangerous circumstances in their home countries.⁴ Upon arrival, they may petition the U.S. government to immigrate their spouses and children through the federal immigration bureaucracy.⁵

Although in place, this system poses significant challenges to refugees, many of whom lack formal education and the documentation needed to success-

² *Id.*

³ Daniel C. Martin & James E. Yankay, *Refugees and Asylees: 2013*, U.S. DEP'T OF HOMELAND SEC.: OFFICE OF IMMIGRATION STATISTICS, ANN. FLOW REP., Aug. 2014, at 3, available at http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2013.pdf, archived at <http://perma.cc/466G-Q42T>. The United States admitted 69,909 refugees in 2013, 58,179 in 2012, and 56,384 in 2011. See *id.*

⁴ See, e.g., Ben Dobbin, *Vietnam Refugee, Long-Lost Son Reunite*, PHILLY.COM (Nov. 22, 2011), http://articles.philly.com/2011-11-22/news/30429351_1_vietnam-refugee-thailand-pirate, archived at <http://perma.cc/Y9TE-8SQJ> (describing the reunification of a Vietnamese father and son after nearly thirty-four years apart); Joe Gamm, *Family Torn Apart by War Reunited in Triad*, GREENSBORO NEWS & REC., Nov. 6, 2013, http://www.news-record.com/news/local_news/article_984d5732-46a6-11e3-917c-001a4bcf6878.html, archived at <http://perma.cc/JKP4-3PXW> (detailing the reunification of a refugee family from the Central African Republic who was forcibly separated when a rebel group stormed their village and burned their house); *Refugee Mother and Daughter Reunited After 11 Years Apart*, INT'L RESCUE COMM., (Aug. 8, 2013), <http://www.rescue.org/blog/refugee-mother-and-daughter-reunited-after-11-years-apart>, archived at <http://perma.cc/92QU-GMQM> (outlining the story of the reunification of an Eritrean mother and daughter after being apart for over a decade).

⁵ See 8 U.S.C. §§ 1157(c)(2), 1158(b)(3) (2012) (providing the statutory framework for reunification); SARAH B. IGNATIUS & ELISABETH S. STICKNEY, IMMIGRATION LAW & THE FAMILY § 14:57 (2013) (outlining the procedure for refugee family reunification).

fully navigate the process and be reunified with their loved ones.⁶ Like Esther, many refugees face similar delays, frustrations, and bureaucratic hurdles when immigrating their family members.⁷ Rather than providing refugees with extra support and protection, the system often penalizes them for their vulnerability and lack of resources.⁸ This exacerbates refugees' suffering and keeps many families apart.⁹

This Note argues that these administrative hurdles make it too hard to reunite refugee families, and that simple changes can be made to streamline the process and fix a broken system.¹⁰ Part I discusses the refugee family reunification system and lays out the process refugees must comply with to immigrate their relatives.¹¹ Part II identifies the flaws within the system, including the adjudication of family petitions and the consular process at U.S. Embassies abroad.¹² Finally, Part III offers solutions to these problems by advocating reform at different stages of the family reunification process.¹³

⁶ See Devon A. Corneal, *On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous Than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV. 609, 613–14 (2004) (noting that child refugees are extremely vulnerable and lack the skills to navigate the “labyrinth of immigration law”); Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159, 162 (1990) (exploring both the complexity and difficulty of the refugee family reunification process). Immigration is a complicated process and many refugees face challenges in obtaining affordable counsel. Olivas, *supra* at 162. Indeed, one scholar notes that congressional testimony revealed that “a substantial number of asylum seekers filed claims that had been completed by taxi drivers who drove them to their hearings.” *Id.*

⁷ See Gamm, *supra* note 4, at 1; Jeri Rowe, *Happy Endings Are Goal for Immigration Law Clinic*, GREENSBORO NEWS & REC., Nov. 29, 2013, http://m.news-record.com/news/local_news/article_06773707-ad79-59f1-9742-d8093f5d5a49.html?mode=jqm, archived at <http://perma.cc/4YM8-TE75> (detailing the work of the Elon Humanitarian Immigration Law Clinic and highlighting the significant struggles that all refugees face in being reunified with family members, even those with legal counsel).

⁸ See 8 U.S.C. §§ 1157(c)(2), 1158(b)(3); DAVID A. MARTIN, THE UNITED STATES REFUGEE ADMISSIONS PROGRAM: REFORMS FOR A NEW ERA OF REFUGEE RESETTLEMENT 82 (2006), available at <http://www.rcusa.org/uploads/pdfs/DavidMartinReport.pdf>, archived at <http://perma.cc/RZ9R-KKXV> (noting that consular officers may allow refugee reunifications to “languish”); Corneal, *supra* note 6, at 113–14 (showing that refugees are extremely vulnerable).

⁹ See Rowe, *supra* note 7 (“We’ve had some [refugee family reunification cases] where we’ve worked on reunifications for five years and nothing is ever resolved, and we’ve had reunifications where children die . . . They are in harm’s way. They’re in a bad place, and unfortunately, it happens more than one time.”) (quoting Heather Scavone, Dir., Elon Humanitarian Immigration Clinic).

¹⁰ See *infra* notes 181–309 and accompanying text.

¹¹ See *infra* notes 14–88 and accompanying text.

¹² See *infra* notes 89–180 and accompanying text.

¹³ See *infra* notes 181–309 and accompanying text.

I. REUNITING LOST FAMILIES: UNDERSTANDING THE REFUGEE FAMILY REUNIFICATION SYSTEM

Some refugees are lucky to arrive in the United States with their families intact.¹⁴ For others, their arrival on American soil is just the beginning of their journey to reunite with loved ones.¹⁵ This Part explains how the refugee family reunification process works.¹⁶ Section A details how many refugees are initially selected for resettlement and brought to the United States.¹⁷ Section B explains how refugees, once resettled, may petition to bring relatives here.¹⁸

A. The Legal Resettlement Process for Victims of Persecution

The United States grants permanent legal status to immigrants who have suffered persecution in their home countries.¹⁹ These individuals fall into one of two groups: refugees and asylees.²⁰ Although both must prove either past persecution or a well-founded fear of future persecution, refugees are selected for resettlement while still outside the country, whereas asylees arrive in the United States first and then apply for asylum once in the country.²¹ Because asylees manage to travel to the United States on their own, they tend to have more resources than refugees, who generally lack the means to make the journey of their own accord.²² This means that refugees often have more difficulty navigating the

¹⁴ See Martin & Yankay, *supra* note 3, at 3.

¹⁵ See *id.*

¹⁶ See *infra* notes 19–88 and accompanying text.

¹⁷ See *infra* notes 19–34 and accompanying text.

¹⁸ See *infra* notes 35–88 and accompanying text.

¹⁹ 8 U.S.C. § 101(a)(42) (2012); RICHARD STEEL, STEEL ON IMMIGRATION LAW 327–31 (2d ed. 2012). Persecution must be on account of one of five factors: race, religion, political opinion, nationality, or membership in a particular social group. See STEEL, *supra* at 327.

²⁰ See STEEL, *supra* note 19, at 328–29, 332.

²¹ 8 U.S.C. §§ 1101(a)(42); 1158(b)(1) (noting that an alien may be granted asylum if he or she meet the statutory definition of a refugee); Martin & Yankay, *supra* note 3, at 3. In 2013, the United States admitted 69,909 refugees and 25,199 asylees. Martin & Yankay, *supra* note 3, at 3, 6. Refugee admission numbers are statutorily mandated to be determined by the President each fiscal year. STEEL, *supra* note 19, at 328. In 2013, for example, the refugee admission ceiling was set at 70,000 individuals. See Martin & Yankay, *supra* note 3, at 2. There is no cap on asylee admissions, since the number of individuals seeking asylum in a given year may fluctuate dramatically based on current events. See STEEL, *supra* note 19, at 328. For example, the number of Egyptians seeking affirmative asylum in the United States more than tripled between 2011 and 2012, likely because of the civil unrest and events unfolding from the “Arab Spring” revolution. See Martin & Yankay, *supra* note 3, at 6.

²² See Matthew E. Price, *Persecution Complex: Justifying Asylum Law’s Preference for Persecuted People*, 47 HARV. INT’L L.J. 413, 446 (2006) (“Asylum in Western states is available only to those who can make it out of their own country and travel to the West—often by traversing great distances at considerable expense. This group is only a small subset of all those who are in need of membership abroad, and indeed, may not be the most in need.”)

reunification process than asylees because refugees usually lack the resources necessary to negotiate the system.²³

Refugees are all resettled through a centralized process coordinated by a variety of federal agencies, including the Department of Homeland Security (“DHS”), the State Department, and the Department of Health and Human Services (“DHHS”).²⁴ They must undergo health screenings, security clearances, and cultural orientation overseas.²⁵ After this process is finished, refugees are then assigned to one of nine non-profit voluntary agencies, often referred to as “VOLAGs,” that help them upon arrival in the United States.²⁶ VOLAG staff members greet refugee families at the airport, provide them with initial housing, job training, and English classes, and also serve as cultural mediators.²⁷ These staff members quickly become the main points of contact for refugee families navigating a vast array of cultural and economic challenges.²⁸

Once in the United States, refugees are eligible for reunification with their spouses and unmarried children under twenty-one years old.²⁹ These eligible

²³ See STEEL, *supra* note 19, at 332–33 (noting that asylees must already be in the United States to apply for asylum status). This Note focuses primarily on refugees, not because asylees do not also face family reunification challenges, but because the system’s problems generally create more difficulties for refugees than asylees. See Price, *supra* note 22, at 446. Asylees tend to be better educated and better resourced than most refugees, and thus have more skills and tools at their disposal to help their family members navigate the complex immigration bureaucracy. See *id.*; *infra* notes 78–88 and accompanying text. Thus, although this Note’s reforms would likely help both refugees and asylees successfully reunite with eligible family members, its focus remains on refugees because they have the most difficulty with the system due to their vulnerability. See *infra* notes 78–88 and accompanying text.

²⁴ See Laura P. Lunn, Note, *Displaced and Disillusioned: “Free-Case” Refugees and the Government’s Obligation to Facilitate Effective Resettlement*, 14 J. GENDER RACE & JUST. 833, 842–43 (2011) (explaining the U.S. government’s role in the resettlement process); *U.S. Refugee Admissions Program*, U.S. DEP’T OF STATE, <http://www.state.gov/j/prm/ra/admissions/index.htm>, archived at <http://perma.cc/XA27-SMAY> (last visited Jan. 21, 2015) (noting that the U.S. Refugee Admissions Program is comprised of the U.S. State Department’s Bureau of Population, Refugees, and Migration (“PRM”), U.S. Citizenship and Immigration Services (“USCIS”), and the Department of Health and Human Services’ Office of Refugee Resettlement (“ORR”).

²⁵ See 8 C.F.R. § 207.1–2 (2014).

²⁶ See *id.* § 207.2 (c) (noting that “[e]ach applicant must be sponsored by a responsible person or organization”); *The Reception and Placement Program*, U.S. DEP’T OF STATE, <http://www.state.gov/j/prm/ra/receptionplacement/index.htm>, archived at <http://perma.cc/76QF-HLRW> (last visited Jan. 21, 2015). The nine voluntary agencies, or VOLAGs, are primarily faith-based organizations, and include the Church World Service, Ethiopian Community Development Council, Episcopal Migration Ministries, Hebrew Immigrant Aid Society, International Rescue Committee, US Committee for Refugees and Immigrants, Lutheran Immigration and Refugee Services, United States Conference of Catholic Bishops, and World Relief. *Voluntary Agencies*, OFFICE OF REFUGEE RESETTLEMENT (July 17, 2012), <http://www.acf.hhs.gov/programs/orr/resource/voluntary-agencies>, archived at <http://perma.cc/6SXG-G235>.

²⁷ See U.S. DEP’T OF STATE, *supra* note 26.

²⁸ See *id.*

²⁹ See 8 U.S.C. § 1157(c)(2) (2012). Refugees and asylees may petition to immigrate spouses (to whom they were previously married) and unmarried children under twenty-one. See *id.*

family members are not subject to visa quotas like many other immigrants, meaning they may immigrate without artificially-imposed wait times.³⁰ This policy is good news for refugees, as many are forced to leave family members behind in their home countries in unsafe conditions and petition to immigrate them later.³¹ Yet the process often takes years to complete, and requires both petitioners and their overseas family members to overcome numerous hurdles before reunification is possible.³² Many refugees are not immediately notified of their eligibility for reunification, and those that are notified may not be able to find or afford legal counsel to assist them.³³ This can make the immigration process for family members extremely difficult.³⁴

B. The Regulatory and Procedural Framework for Reunification

A refugee's spouse or unmarried children under twenty-one, known in immigration terminology as "derivatives,"³⁵ may be overseas or living in the United States without permanent legal status.³⁶ To bring these family members here, refugees must undergo a process that begins with the U.S. Citizenship and Im-

³⁰ See Procedures for Filing a Derivative Petition (Form I-730) for a Spouse and Unmarried Children of a Refugee/Asylee, 63 Fed. Reg. 3792-01 (Jan. 27, 1998) (to be codified at 8 C.F.R. pts. 207, 208, 209), available at <http://www.gpo.gov/fdsys/pkg/FR-1998-01-27/pdf/98-1879.pdf>, archived at <http://perma.cc/8QBM-XVXZ> ("Derivative benefits for refugees and asylees are intended to expediently reunite families in order for them to make the difficult transition to a new life with the support of their immediate family members by avoiding lengthy delays due to visa quotas.").

³¹ See Gamm, *supra* note 4, at 1; Rowe, *supra* note 7.

³² See MARTIN, *supra* note 8, at 81–84 (highlighting the "dauntingly labor-intensive" nature of these cases and the numerous delays and obstacles they face); see also Gamm, *supra* note 4, at 1 (describing a case that took nearly four years); Esther's Story, *supra* note 1 (detailing a case that took two years).

³³ See 8 U.S.C. § 1362 (indicating that aliens in proceedings before the DHS have a right to counsel, but not at the expense of the government); see also *Elon University School of Law Establishes Humanitarian Immigration Law Clinic*, ELON UNIV. SCH. OF LAW (Jan. 25, 2011), <http://www.elon.edu/e-net/Article/52926>, archived at <http://perma.cc/R5MH-6UE3> ("The indigent individuals served through the clinic have few, if any, alternatives for legal representation in the region.") (quoting Helen Grant, Professor at Elon University School of Law).

³⁴ See 8 C.F.R. § 207.7 (2014) (outlining the requirements for refugee family reunification); Gamm, *supra* note 4, at 1.

³⁵ See 8 U.S.C. § 1157(c)(2). The petitioner and beneficiary must have been married prior to the petitioner's grant of refugee or asylee status. See *id.* Similarly, children must have been under twenty-one years old either at the time of the petitioner's approval of refugee status or their arrival in the United States. See *id.* Children *in utero* when the refugee arrives in the United States or the asylee receives asylum approval are also eligible for reunification. See 8 C.F.R. § 207.7(c).

³⁶ See 8 C.F.R. § 207.7(f); see also Martin & Yankay, *supra* note 3, at 7 (providing the number of refugees who reunited with overseas relatives in 2013). Although the DHS does not publish statistics on the breakdown between refugee following-to-join derivatives processed domestically vs. abroad, it does maintain these statistics for asylees. See Martin & Yankay, *supra* note 3, at 7. In 2013, 13,026 asylee following-to-join derivatives received authorization for travel from overseas, whereas only 2,240 received following-to-join status while residing domestically. *Id.* These numbers support the conclusion that far more refugee and asylee derivatives undergo the process overseas than domestically. See *id.*

migration Services (“USCIS”), continues with the U.S. State Department, and concludes with a reunification on American soil.³⁷ Subsection 1 discusses the first half of the reunification process, where refugees in the United States file a petition to apply for reunification.³⁸ Subsection 2 describes the second half of reunification, where the petition is forwarded to the relevant US Embassy abroad and additional screenings take place.³⁹

1. The I-730 Approval Process

Refugees in the United States begin the reunification process by filing Form I-730 with USCIS.⁴⁰ Once a petition is filed, adjudicators in a USCIS Service Center in Texas or Nebraska will review the I-730.⁴¹ They look for proof of the refugee petitioner’s relationship to the beneficiary, which is typically done by providing birth or marriage certificates, religious records, photographs, correspondence, or money transfer receipts from remittances sent to the beneficiary overseas.⁴² Officers adjudicate petitions based on the preponderance of the evidence.⁴³ Under this standard, if an officer finds it is more likely than not that the claimed relationship exists, he or she will issue an approval, and forward the petition to the National Visa Center (“NVC”) in Portsmouth, NH.⁴⁴

³⁷ See IGNATIUS & STICKNEY, *supra* note 5, § 14:57; Ken Smith, *Goldsboro Couple Reunited with Six Children*, WRAL.COM (Nov. 3, 2011), <http://www.wral.com/news/local/story/10330148/>, archived at <http://perma.cc/P6NC-XRE5> (telling the story of a joyful airport reunification between a Togolese couple and their six children after a long immigration process).

³⁸ See *infra* notes 40–51 and accompanying text.

³⁹ See *infra* notes 52–88 and accompanying text.

⁴⁰ See U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., OMB NO. 1615-0037, I-730 REFUGEE/ASYLEE RELATIVE PETITION 1 (2015) [hereinafter USCIS, FORM I-730], available at <http://www.uscis.gov/sites/default/files/files/form/i-730.pdf>, archived at <http://perma.cc/T3EL-3MSK>. The term “following-to-join derivative” is employed by the Code of Federal Regulations. See 8 C.F.R. § 207.7. An I-730 must be filed within the first two years after the refugee’s arrival in the United States. *Id.* § 207.7(d). Applicants who miss the deadline may request an extension for “humanitarian reasons.” *Id.* The Code of Federal Regulations, however, does not specify what constitutes a “humanitarian reason.” *Id.* The Director of the Elon Humanitarian Immigration Clinic notes that her clinic has had success in getting extensions granted where a petitioner did not know the location of her spouse or child, or whether they were alive. Telephone Interview with Heather Scavone, Dir., Elon Humanitarian Immigration Clinic (Nov. 15, 2013) (notes on file with author). Humanitarian extensions have also been granted where refugees previously received ineffective assistance of counsel. *Id.*

⁴¹ See STEEL, *supra* note 19, at 349; see also USCIS, FORM I-730, *supra* note 40, at 4 (notifying petitioners to file their forms with either the Nebraska or Texas Service Centers, based on place of residence).

⁴² See U.S. Citizenship & Immigration Servs., Dep’t of Homeland Sec., OMB No. 1615-0037, Form I-730 Refugee/Asylee Relative Petition Instructions 3 (2015) [hereinafter Form I-730 Instructions], available at <http://www.uscis.gov/sites/default/files/files/form/i-730instr.pdf>, archived at <http://perma.cc/P6HK-QK7X>; Steel *supra* note 19, at 349; U.S. Citizenship & Immigration Servs., Adjudicator’s Field Manual § 21.10 (2014) [hereinafter AFM].

⁴³ AFM, *supra* note 42, § 11.1(c).

⁴⁴ *Id.* Concerns about fraud are real: marriage-based family petitions provide a strong incentive for falsifying marriages. See Martin, *supra* note 8, at 12 (noting that “[s]ome programs, particularly

If the adjudicator needs more information or suspects fraud, he or she may issue a Request for Evidence (“RFE”) to petitioners.⁴⁵ These RFEs notify petitioners that their petitions will be denied unless further evidence of the relationship is provided.⁴⁶ RFEs may come with a heightened standard of proof, meaning refugees must now provide clear and convincing evidence of the claimed relationship.⁴⁷ If a petitioner submits sufficient documentation, the adjudicator will issue an approval.⁴⁸ If, however, the adjudicator is not convinced that the petitioner is telling the truth, she will issue either an outright denial or a “Notice of Intent to Deny” (“NOID”).⁴⁹ NOIDs give a petitioner thirty days to rebut the impending denial with any last proof of the claimed relationship.⁵⁰ The entire I-730 approval process typically takes five or six months, and sometimes much longer if USCIS issues RFEs or mandatory security checks take longer than usual to clear.⁵¹

2. The Visa-93 Approval Process

If and when the I-730 Form is approved, the next phase of the refugee reunification process goes overseas in the Visa-93 approval process.⁵² Approved petitions are first forwarded to the NVC in Portsmouth, New Hampshire.⁵³ There, the NVC will either hold the file for further processing, such as request-

family-based resettlement programs in West Africa, have been marred by a high level of fraudulent claims”). Additional documentary requirements help screen out false marriages and give adjudicators more tools for seeing through fraud schemes. *See id.*

⁴⁵ *See AFM, supra* note 42, § 10.5(a) (outlining the requirements for issuing Requests for Evidence).

⁴⁶ *See id.*

⁴⁷ *See id.* § 11.1(c) (informing adjudicators that a higher standard of proof is needed in certain cases, including fraudulent marriage claims and derivative citizenship for children born out of wedlock).

⁴⁸ *See id.* § 21.10(e)(1).

⁴⁹ *See id.* § 10.5(b)(4).

⁵⁰ *Id.*

⁵¹ *See USCIS Processing Time Information*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. <https://egov.uscis.gov/cris/processTimesDisplayInit.do>, archived at <https://perma.cc/C2Y4-EG33> (select “NSC—Nebraska Service Center” or “TSC—Texas Service Center” then follow “Service Center Processing Dates”) (last visited Jan. 21, 2015) (currently listing a five month processing time); *see also* Telephone Interview with Heather Scavone, *supra* note 40 (noting that cases can take months longer if RFEs are issued or security checks take longer than usual).

⁵² *See AFM, supra* note 42, § 21.10(e)(1). Previously, the U.S. State Department would communicate via cable, and cables sent to consulates for derivative asylees and derivative refugees were known as “Visas-92” and “Visas-93,” respectively. *See id.* Although the practice of sending cables has long since been discontinued, I-730 petition approvals are still known as “Visas-92 or 93” cases, or simply “V-92” or “V-93.” *See id.*

⁵³ *See Martin, supra* note 8, at 181; *Follow-to-Join Refugees and Asylees*, BUREAU OF CONSULAR AFFAIRS, <http://travel.state.gov/content/visas/english/immigrate/join-refugees-and-asylees.html>, archived at <http://perma.cc/5R93-29NP> (last visited Jan. 21, 2015). The NVC serves as a processing way-station for most visa petitions filed by immigrants in the United States—this phase is not unique to the refugee family reunification process. *See STEEL, supra* note 19, § 7:36.

ing and reviewing additional documents, or forward it directly to the consular post at the U.S. Embassy in the beneficiary's country.⁵⁴ Once the file arrives at the Embassy, beneficiaries are initially responsible for contacting the consulate and scheduling a mandatory visa interview.⁵⁵

Visa interviews are used to verify the beneficiary's claimed relationship to the petitioner and screen for any possible inadmissibility issues.⁵⁶ Derivatives may be found inadmissible to the United States for a wide variety of reasons, including serious illness, past criminal behavior, or links to terrorist groups, among others.⁵⁷ Visa beneficiaries generally lack counsel during these consular interviews.⁵⁸ Moreover, some refugee minors may not have an adult with them.⁵⁹ Although consular officers presumably keep notes of these interactions, there is typically no record available for petitioners or their counsel to review.⁶⁰

If satisfied that the beneficiaries are telling the truth and no inadmissibility grounds apply, officers will issue a visa approval and instruct the beneficiaries to proceed with the next steps in the visa issuance process.⁶¹ If, however, they suspect fraud or detect an inadmissibility issue, officers will decline to issue the visa

⁵⁴ See AFM, *supra* note 42, § 10.3(g). Whether the NVC holds the file and immediately forwards it depends on the beneficiary's country of residence. See BUREAU OF CONSULAR AFFAIRS, *supra* note 53.

⁵⁵ See 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL app. O § 1004(c) (2014) [hereinafter 9 FAM]. If the beneficiary does not contact the consulate within sixty days, consular officials are instructed to send a "Notice of Interview" to the address on file. See *id.*

⁵⁶ See 8 U.S.C. § 1182(a) (2012); 9 FAM, *supra* note 55, app. O §§ 706.1–3. Refugee derivatives do not have to prove a history of persecution like their spouses or parents; their ground for admission to the United States rests solely on their relationship to the petitioner. See 9 FAM, *supra* note 55, app. O §§ 706.2–5(A)(d). Thus, consular officers need only ask questions about the beneficiaries' relationship to the petitioner, and not whether or not they fear living in their home countries. See *id.* In processing V-93 cases, consular officers must follow procedures set forth in Chapter 9 of the Foreign Affairs Manual, Appendix O. See generally 9 FAM, *supra* note 55, app. O (providing guidelines for interviewing, credibility determinations, inadmissibility waivers, and visa issuance and denial).

⁵⁷ 8 U.S.C. § 1182(a). Notably, refugees are exempt from the public charge exclusion under the Immigration Nationality Act, which bars immigrants needing government assistance (like food stamps or Medicaid) from entering the country. See Immigration and Nationality Act of 1952, 66 Stat. 163, 185, § 212(a)(4) (codified as amended at 8 U.S.C. § 1182(a)(4)); 9 FAM, *supra* note 55, app. O § 706.2-2.

⁵⁸ See Letter from the Iraqi Refugee Assistance Project to Rachel A. McCarthy, Disciplinary Counsel, Office of Chief Counsel, U.S. Citizenship and Immigration Servs. (Mar. 2, 2011) (available at http://refugeerights.org/wp-content/files/IRAP_DHS_Comment-Proposed_Foreign_Law_Student_Bar.pdf, archived at <http://perma.cc/N887-U9KZ> (commenting on "the dearth of attorneys available to refugee applicants abroad"); Telephone Interview with Heather Scavone, *supra* note 40 (noting that none of her clients benefit from counsel during visa interviews).

⁵⁹ See Corneal, *supra* note 6, at 613–14 (noting the high numbers of unaccompanied refugee minors); Telephone Interview with Heather Scavone, *supra* note 40 (pointing out instances where her clients' minor derivatives had to face the consular process without an adult).

⁶⁰ See 9 FAM, *supra* note 55, app. O § 1004(d). The Foreign Affairs Manual instructs officers to record their "case notes" from interviews, but there is no mention of providing these notes or other formal records to visa applicants or their counsel if requested. See *id.*

⁶¹ See *id.* app. O § 707 (outlining the steps officers must take following V-93 interviews).

and begin the visa denial process.⁶² At this phase, officers may grant waivers for some inadmissibility issues, including public health and certain criminal behavior.⁶³

If a visa is not issued for one of these reasons, consular officers will inform the applicant and return the petition to the USCIS Service Center in the United States.⁶⁴ Officers are not required to inform visa applicants of the reasons for the denial; they are only instructed to “inform the applicant in writing that the petition has been returned to USCIS for reconsideration.”⁶⁵ They are, however, required to provide a detailed memorandum to USCIS with “factual and concrete reasons” supporting the requested denial.⁶⁶

From there, the Service Center in Texas or Nebraska will issue a NOID giving the petitioner a deadline to rebut the findings of the consular officer.⁶⁷ This process—from consular denial to NOID issuance—can take six months or more, pushing the entire reunification process to well over twelve months.⁶⁸ NOIDs generally give a reason for the officer’s denial of the visa and provide space for the petitioner to respond to the consulate’s findings.⁶⁹ Petitioners may respond to the NOID with a written rebuttal, which gets reviewed by the Service Center.⁷⁰ If the rebuttal is successful, USCIS sends the entire file back to the consulate for a re-interview.⁷¹ This process can take many more months.⁷² If denied at the Service Center, the petition fails, and reunification is barred.⁷³

Beneficiaries who receive visa approvals must then undergo more processing, including mandatory medical examinations, security clearance checks,

⁶² See *id.* app. O § 706.2-3.

⁶³ See *id.* app. O § 706.3-2. V-93 applicants may not receive inadmissibility waivers for controlled substance trafficking or issues related to national security, including terrorism, genocide, and espionage. See *id.* app. O § 706.3-1.

⁶⁴ See *id.* app. O § 706.2-3.

⁶⁵ *Id.* app. O § 706.2-5(B)(c). There do not appear to be any official instruction on why officers do not have to state reasons for the denial. See *id.*

⁶⁶ *Id.* app. O § 706.2-5(B)(b). The Foreign Affairs Manual does not give further guidance on the meaning of “factual and concrete reasons.” See *id.*

⁶⁷ See 8 C.F.R. § 205.2 (2013).

⁶⁸ See Telephone Interview with Heather Scavone, *supra* note 40. It is unclear why these consular denials take so long to reach the Service Centers for NOID issuance. *Id.* One practitioner indicates that her clinic almost always has to contact the office of a Congressman or Senator for assistance in getting the NOIDs issued following a visa denial. *Id.*

⁶⁹ See 8 C.F.R. § 205.2(b). These explanations are frequently boilerplate or lack specificity (i.e., “visa applicant was found not credible”). See Telephone Interview with Heather Scavone, *supra* note 40.

⁷⁰ See 8 C.F.R. § 205.2(b).

⁷¹ See AFM, *supra* note 42, § 21.10(e)(3).

⁷² See Telephone Interview with Heather Scavone, *supra* note 40 (noting that her clients have often had to wait six months or more to receive a new interview following a successful rebuttal to a NOID).

⁷³ See AFM, *supra* note 42 § 21.10(e)(3) (noting there is no appeal from the revocation of Form I-730).

and biometrics verification.⁷⁴ After these steps have been completed, derivatives receive assistance with travel from the International Organization for Migration.⁷⁵ The U.S. government fronts the cost of flights and issues a no-interest loan to be repaid by beneficiaries at a later date.⁷⁶ This process, from the visa interview to the beneficiary's arrival in the United States, can also take several months, increasing the total timeline of reunification to eighteen months or more.⁷⁷

The entire process can be daunting for overseas spouses or children, who tend to have little formal education and money.⁷⁸ Indeed, it is not clear how many refugees actually succeed in navigating the system.⁷⁹ DHS maintains statistics for asylee derivative admissions: in 2012, 13,049 visas were issued to asylee spouses or children coming to the United States, up from 9,550 in 2011.⁸⁰ No records of refugee derivative admissions appear to exist, however, even though the United States annually admits more principal refugees than asylees.⁸¹

⁷⁴ 9 FAM, *supra* note 55, app. O § 707. "Biometrics verification" consists of fingerprinting and other identity confirmation procedures. *See id.*

⁷⁵ *Id.* app. O § 710.

⁷⁶ *See id.* app. O §§ 710, 710.4. The refugee travel loan program is controversial. *See* Michael Matza, *Refugees to America Often Owe Huge Travel Bills*, PHILA. INQUIRER, Mar. 19, 2012, http://articles.philly.com/2012-03-19/news/31211104_1_refugees-travel-money-families, *archived at* <http://perma.cc/ZEF8-EN93>; Molly Messick, *Travel Loans Jeopardize Success for Idaho Refugees*, NPR STATEIMPACT (May 10, 2012), <http://stateimpact.npr.org/idaho/2012/05/10/travel-loans-jeopardize-success-for-idaho-refugees/>, *archived at* <http://perma.cc/G8RC-4XXG>. Refugees typically must begin making payments six months after arriving in the United States. *Refugee Travel Loans Collection*, U.S. CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/issues-and-action/human-life-and-dignity/migrants-refugees-and-travelers/refugee-travel-loans-collection/index.cfm>, *archived at* <http://perma.cc/Z9G9-DBBM> (last visited Jan. 21, 2015). For large families, who owe loans for each family member's plane ticket, often for flights from remote locations, the total owed can exceed \$10,000. *See* Matza, *supra*. Supporters of the program argue that loan repayments give refugee families the opportunity to establish credit and learn personal responsibility. *See id.* Critics, however, point out that refugees struggling to find jobs and learn English may not be able to make payments, thereby hurting their credit ratings and making integration more difficult. *See id.* They also claim that many refugees are not fully aware of what responsibilities the loan agreements impose on them when they sign promissory notes as a condition to resettlement. *See* Messick, *supra*.

⁷⁷ *See* Telephone Interview with Heather Scavone, *supra* note 40 (providing an estimate on the time frame based on her program's current work on I-730 cases). The State Department and USCIS do not publish average processing times for overseas V-92 or V-93 cases. *See I-730 Following-to-Join Processing Guide*, UNCHR WASH. 20 http://www.unhcrwashington.org/sites/default/files/rs_i730.pdf, *archived at* <http://perma.cc/EXG3-HSMX> (last visited Jan. 21, 2015) (noting that the length of time for each case "varies according to its circumstances, and cannot be predicted with any accuracy").

⁷⁸ *See* Gamm, *supra* note 4, at 1 (noting that a refugee petitioner had to draw by hand a map of her village to assist the Red Cross in locating her missing family members).

⁷⁹ *See* Martin & Yankay, *supra* note 3, at 3–7 (declining to provide statistics for the number of refugee derivative arrivals in the United States).

⁸⁰ *See id.* at 7.

⁸¹ *See id.* at 4, 6 (indicating that in 2012 the United States admitted 58,179 refugees compared with 29,484 asylees). The DHS statistics do indicate the number of admitted refugee *dependents*, but this figure denotes those refugee spouses and children who arrived *with* the principal applicant, not

Moreover, we should be careful in extrapolating refugee derivative numbers from those of asylee derivatives.⁸² Principal asylees must independently make their way to the United States and then apply for asylum.⁸³ This often requires money, status, and a certain amount of sophistication.⁸⁴ As a result, asylees often tend to be better educated and better resourced than their refugee counterparts, many of whom can languish in refugee camps for years.⁸⁵ Because of this, asylees are in a better position to help their spouses and children navigate the complexities of the I-730 and V-92 systems.⁸⁶ The fact, therefore, that over 13,000 asylee derivatives were admitted to the United States in 2012 is not a predictor of the number of refugee derivatives that were admitted.⁸⁷ Indeed, given the challenges refugees face in negotiating the system, refugee reunification numbers are likely significantly lower.⁸⁸

II. GOOD INTENTIONS, POOR EXECUTION: THE FLAWS IN THE I-730 AND V-93 SYSTEM

Although refugees that make it to the United States have the right to petition to become reunited with their family, the bureaucratic hurdles to reunification can frequently endanger those the system is designed to protect.⁸⁹ Refugee derivatives often live in conflict zones or refugee camps, most lack education

those “following-to-join” beneficiaries who were petitioned for once the principal applicant arrived. *See id.* at 3.

⁸² *See id.* at 4, 6.

⁸³ STEEL, *supra* note 19, at 332–33 (noting that “asylum is a status granted to someone who has been admitted or who is seeking admission into the United States who also meets the definitional standard of refugee”).

⁸⁴ *See Price, supra* note 22, at 446.

⁸⁵ *See id.*; Telephone Interview with Heather Scavone, *supra* note 40 (pointing out that refugee derivatives are more likely to be in positions of long-term confinement, like refugee camps, which can make it more difficult to obtain civil documentation).

⁸⁶ *See Price, supra* note 22, at 446; Telephone Interview with Heather Scavone, *supra* note 40.

⁸⁷ *See Martin & Yankay, supra* note 3, at 7.

⁸⁸ *See id.*

⁸⁹ *See, e.g., Lee Harper, Syrian Women in Jordan at Risk of Sexual Exploitation at Refugee Camps*, GUARDIAN, Jan. 24, 2014, <http://www.theguardian.com/global-development/2014/jan/24/syrian-women-refugees-risk-sexual-exploitation>, archived at <http://perma.cc/9KGR-CKPL> (detailing the dire circumstances faced by Syrian refugees in the Zaatari refugee camp in Jordan); David Veselelak, *After 10 Year Wait, Kenyan Refugee Finally Reunited with Family in Michigan*, GRAND RAPIDS PRESS (June 11, 2010) http://www.mlive.com/news/grand-rapids/index.ssf/2010/06/after_10_year_wait_kenyan_refu.html, archived at <http://perma.cc/NCJ5-V26M> (detailing how a refugee’s family member died in a refugee camp after delays with the reunification process). *Pro Bono Successes and Awards: Happy Family Reunification in the United States for Iraqi Refugee Client After Long Legal Struggle*, ORRICK, HERRINGTON & SUTCLIFFE LLP (Nov. 19, 2013), <http://www.orrick.com/News/Pages/Happy-Family-Reunification-in-the-United-States-for-Iraqi-Refugee-Client-After-Long-Legal-Struggle.aspx>, archived at <http://perma.cc/393S-7SKF> (“Greg confronted every hurdle in this case: the slow-moving bureaucracy that is our immigration system, challenges in communicating with his client, and fears about his client’s physical and mental health.”).

and sophistication with Western legal systems, and few have access to lawyers during the reunification process.⁹⁰ Furthermore, many refugee children do not have a stable parent or guardian with them since their parent or parents are either dead, absent, or in the United States.⁹¹ This means that many minors must learn to advocate for themselves to get their visas approved, or potentially face permanent separation from their parents.⁹²

This Part identifies the ways that the U.S. refugee reunification system not only fails to adequately accommodate these vulnerable beneficiaries, but directly endangers them and hinders reunification.⁹³ First, Section A identifies problems facing refugee petitioners in the United States, stemming from fundamental problems within VOLAGs and the U.S. Citizenship and Immigration Services (“USCIS”).⁹⁴ Next, Section B exposes challenges for visa beneficiaries overseas, arising out of issues with consular processing and the State Department.⁹⁵ Finally, Section C discusses the doctrine of consular non-reviewability, which shields consular decisions from judicial review in the U.S. federal courts.⁹⁶

⁹⁰ See Crystal J. Gates, Immigration Project, *Working Toward a Global Discourse on Children's Rights: The Problem of Unaccompanied Children and the International Response to Their Plight*, 7 IND. J. GLOBAL LEGAL STUD. 299, 318 (1999) (noting that refugee children who “survive the exodus are generally abused and exploited: some are passed from one family to another and others [lack] such basics as food, clothing, shelter, medical care, and education”) (citations omitted) (internal quotation marks omitted); Megan E. Kures, Note, *The Effect of Armed Conflict on Children: The Plight of Unaccompanied Refugee Minors*, 25 SUFFOLK TRANSNAT'L L. REV. 141, 145 (2001) (noting that “[h]umanitarian agencies and receiving nations frequently herd unaccompanied refugee minors into holding camps, which are places where traditional social protection systems are non-existent”); *Access to Legal Counsel*, IRAQI REFUGEE ASSISTANCE PROJECT, <http://refugeerights.org/policy-impact/access-to-legal-counsel/>, archived at <http://perma.cc/M99P-R7VA> (last visited Jan. 23, 2015) (advocating for an increase in legal representation for refugees applying for resettlement to the United States).

⁹¹ See Gates, *supra* note 90, at 317 (highlighting the increasing number of unaccompanied minor refugee children); Kures, *supra* note 90, at 145 (indicating the high number of unaccompanied minors and the perilous conditions that often separate parents from children); see also Smith, *supra* note 37 (describing the events around a Togolese couple who were separated for years from their six children due to civil conflict).

⁹² See Gates, *supra* note 90, at 317; Kures, *supra* note 90, at 145; see also Smith, *supra* note 37 (noting that a couple's six children were separated from their parents and had to undergo visa processing by themselves).

⁹³ See *infra* notes 97–180 and accompanying text.

⁹⁴ See *infra* notes 97–126 and accompanying text.

⁹⁵ See *infra* notes 127–173 and accompanying text.

⁹⁶ See *infra* notes 174–180 and accompanying text.

A. Starting Off on the Wrong Foot: Challenges for Refugee Petitioners in the United States

1. The Lack of Notice to Refugees of Reunification Benefits

Although all refugees are entitled to the benefits of reunification, many times no one informs refugees that they are eligible for reunification.⁹⁷ When they arrive in the United States, refugees are placed with VOLAGs for daily assistance.⁹⁸ Many of these organizations, however, do not have legal assistance programs and focus their energies on refugees' immediate needs like paying rent, finding a job, and learning English.⁹⁹ As a result, refugees may not have anyone tell them about reunification benefits or to provide them with immigration legal assistance.¹⁰⁰

The two-year filing deadline for initiating the reunification process through Form I-730 can also pose problems.¹⁰¹ Refugees might not ever be notified of their eligibility to file for their spouses or children, and consequently miss the deadline.¹⁰² This could mean permanent separation from their spouses or children, or, at minimum, a much longer wait for reunification via the more restricted family-based immigration system.¹⁰³

⁹⁷ See Olivas, *supra* note 6, at 162 (remarking that, at least in the asylum context, “most aliens never know the different options available to them”); Telephone Interview with Heather Scavone, *supra* note 40 (explaining that some refugees arrive without having been informed of their immediate eligibility for family reunification benefits). Affirmative asylees receive notice of reunification benefits after they receive asylum; refugees are not given similar notice. See Telephone Interview with Heather Scavone, *supra* note 40.

⁹⁸ See U.S. DEP'T OF STATE, *supra* note 26.

⁹⁹ See J. James Christian & Kyrsten Sinema, *Lives in Transition: The Global Refugee Community and Arizona's Response*, 43 ARIZ. ATT'Y 38, 40 (2007) (“In addition to monetary support, newly admitted refugees are often in need of all sorts of everyday items, including things as simple as toothbrushes and as practical as beds and other furniture.”); Jason Miller, *SNAP: Praise the Lord Who Lifts Up the Poor*, IGNATIAN SOLIDARITY NETWORK (Sept. 24, 2013), <http://ignatiansolidarity.net/blog/2013/09/24/snap-praise-the-lord-who-lifts-up-the-poor/>, archived at <http://perma.cc/WF4F-HRLM> (noting that the author, a member of the Jesuit Volunteer Corps working for Catholic Charities in Nashville, TN, spent time helping refugees with getting social security cards and finding jobs); see also Alan Robertson, *A Day in the Life of . . . A Refugee Integration Caseworker*, GUARDIAN, June 21, 2013, <http://www.theguardian.com/social-care-network/2013/jun/21/day-in-life-refugee-integration-caseworker>, archived at <http://perma.cc/WT4L-HKCR> (providing a glimpse into the busy life of a Scottish refugee caseworker and noting that one has 170 clients).

¹⁰⁰ See Olivas, *supra* note 6, at 162; Miller, *supra* note 99 (noting that caseworkers are “over-worked” and often need to “be in two places at once”).

¹⁰¹ See 8 C.F.R. § 207.7(d) (2014). It is not clear why a two-year filing deadline is imposed for I-730s. See *id.*

¹⁰² See Telephone Interview with Heather Scavone, *supra* note 40 (stating that many petitioners contact the Elon clinic for assistance after the two-year deadline has already passed).

¹⁰³ See Stephen H. Legomsky, *Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supra-National Associations*, 25 GEO. IMMIGR. L.J. 807, 809 (2011) (noting that many restrictions on family-based immigration are designed to “ration” family immigration, including “quotas” and “express waiting periods”). *But cf.* 8 C.F.R. § 207.7(d) (allowing applicants who miss the deadline to request an extension for “humanitarian reasons”).

2. The Lack of Immigration Legal Services for Refugee Family Reunification Cases

Before tackling the hurdles within the refugee family reunification system, many petitioners face an even more basic problem: they cannot find qualified legal counsel to help with the process.¹⁰⁴ Many VOLAGs lack the funds to have an attorney on staff to handle immigration matters, despite the fact that all refugees arriving in the United States have near-immediate immigration legal needs.¹⁰⁵ Some agencies have non-attorneys serving as accredited representatives certified by the Board of Immigration Appeals (“BIA”) to provide immigration legal services.¹⁰⁶ Yet many of these representatives provide immigration services only part-time due to funding, and many lack the legal training to handle complex legal matters, such as Requests for Evidence (“RFEs”) and Notices

¹⁰⁴ See, e.g., Denny Chin, *Representation of the Immigrant Poor: Upstate New York*, 33 CARDOZO L. REV. 351, 353 (2011) (describing the lack of legal services available to immigrants in upstate New York); Olivas, *supra* note 97, at 162 (describing the need for immigration services for unaccompanied minor refugees); ELON UNIV. SCH. OF LAW, *supra* note 33 (highlighting the overwhelming need for immigration services for refugees in central North Carolina).

¹⁰⁵ See, e.g., 8 U.S.C. § 1159(a) (2012) (requiring refugees to adjust their status after one year). The statute indicates that refugees who have been present in the United States for one year and whose admission has not been terminated by DHS “shall . . . return or be returned to the custody of the Department of Homeland Security for inspection and examination for admission to the United States as an immigrant.” *Id.* Put simply, all refugees are statutorily mandated to apply for an adjustment of the status exactly one year after their arrival in the United States. See *id.* This mandate is challenging, since, practically speaking, not all refugees can apply for a green card after one year in the United States, as they lack the expertise and often have no legal counsel. Cf. Chin, *supra* note 104, at 353 (describing the lack of legal services for immigrants in New York). Like notice of reunification benefits, some refugees are not properly informed about the need to adjust their status. See *id.* And there is no clear punishment or sanction for non-compliance with the Immigration and Nationality Act (§ 209(a)), which creates further confusion. See 8 U.S.C. § 1159(a). Some refugees have been detained for failing to adjust status, despite the fact that they possessed legal status and had not otherwise committed any immigration violations. See HUMAN RIGHTS WATCH, JAILING REFUGEES: ARBITRARY DETENTION OF REFUGEES IN THE U.S. WHO FAIL TO ADJUST TO PERMANENT RESIDENT STATUS 4 (2009) (decrying the detention of unadjusted refugees for numerous reasons, including refugees’ legal immigration status, past history of persecution, frequent lack of knowledge about the need to adjust status, disruption of refugee family life and employment, and the high cost). This should only underscore the need for increased legal representation of refugees with green card applications and other pressing immigration benefits. See *id.*

¹⁰⁶ See 8 C.F.R. § 292.2; *Recognition and Accreditation (R&A) Program*, U.S. DEP’T OF JUSTICE EXEC. OFFICE OF IMMIGRATION REVIEW, <http://www.justice.gov/eoir/ra.htm>, archived at <http://perma.cc/9KXF-DHNV> (last visited Jan. 23, 2015). The BIA Accreditation program represents a great opportunity to expand access to immigration counsel for refugees and immigrants. See 8 C.F.R. § 292.2. One recent initiative, the Immigrant Justice Corps, which expands access to counsel for immigrants in removal proceedings in New York City, plans to employ dozens of BIA-Accredited Representatives to provide skilled support to its team of attorneys. See *Community Fellowship*, IMMIGRANT JUSTICE CORPS, <http://justicecorps.org/fellowship/>, archived at <http://perma.cc/C2SY-6QD8> (last visited Jan. 23, 2015).

of Intent to Deny (“NOIDs”).¹⁰⁷ Moreover, few law firms provide pro bono assistance for refugee family reunification cases.¹⁰⁸ This has created a real challenge in legal representation for refugees, as most cannot afford to hire a private immigration attorney to assist with reunification.¹⁰⁹

3. The Challenge of Stringent Documentation Requirements

Stringent documentation requirements can also impede reunification because primary documents establishing a relationship often do not exist.¹¹⁰ And the procedure for proving relationship is strict: refugees must establish the claimed relationship to a USCIS adjudicator and a consular officer overseas.¹¹¹ These officers look for proof of the relationship through primary documentation such as marriage or birth certificates.¹¹² Presently, refugees lacking primary documentation may submit secondary documentation like religious or school records, along with a statement from the “appropriate civil authority” that the requested primary documentation does not exist.¹¹³ Where secondary evidence is unavailable, refugees may submit affidavits from third parties—often other refugees—with knowledge of the relationship.¹¹⁴

¹⁰⁷ See Telephone Interview with Heather Scavone, *supra* note 40 (explaining that, although filling out I-730s is not that difficult in itself, drafting briefs to rebut the government’s claims of fraud requires a significant amount of legal skill and training).

¹⁰⁸ See *id.* Conversely, many law firms take pro bono asylum cases. See, e.g., *Associate Story—Jennifer Greenberg*, LATHAM & WATKINS LLP, <http://www.lw.com/joinus/associatestory/jennifergreenberg>, archived at <http://perma.cc/VX9E-9JKM> (last visited Jan. 23, 2015) (highlighting the pro bono asylum case handled by an associate); *Political Asylum and Immigrants’ Rights Project*, SIDLEY AUSTIN LLP, <http://www.sidley.com/Political-Asylum-and-Immigrants-Rights-Project/>, archived at <http://perma.cc/RE7J-FAQR> (last visited Jan. 23, 2015) (describing the immigrant victims pro bono work performed by the firm); *Pro Bono*, WILLIAMS & CONNOLLY LLP (last visited Jan. 24, 2015), <http://www.wc.com/probono.html>, archived at <http://perma.cc/RVK7-GNYE> (detailing the firm’s work on asylum cases). Certain non-profit organizations, like the Tahirih Justice Center, focus a large part of their practice on referring asylum cases to firms for pro bono assistance. See *Pro Bono Attorney Network*, TAHIRIH JUSTICE CTR. <http://www.tahirih.org/services/our-attorney-network/>, archived at <http://perma.cc/MX9G-9K4J> (last visited Jan. 23, 2015). It is not clear, however, that any organizations have established similar outreach to firms for assistance with refugee family reunification cases. See *id.*

¹⁰⁹ See ELON UNIV. SCH. OF LAW, *supra* note 33 (highlighting the lack of affordable counsel for refugees in North Carolina).

¹¹⁰ See *Dawoud v. Gonzales*, 424 F.3d 608, 612–13 (7th Cir. 2005) (commenting on the difficulty of asylum-seekers in obtaining documentation); FORM I-730 INSTRUCTIONS, *supra* note 42, at 4 (acknowledging that many documents may not be available).

¹¹¹ See AFM, *supra* note 42, § 21.10; 9 FAM, *supra* note 55, app. O § 700; MARTIN, *supra* note 8, at 81.

¹¹² See FORM I-730 INSTRUCTIONS, *supra* note 42, at 3.

¹¹³ See *id.* at 4. The Form Instructions do not define the term “appropriate civil authority.” See *id.* Presumably it means the national or local government where the refugee is from. See *id.*

¹¹⁴ See *id.* These provisions do offer viable alternatives to providing primary civil documentation, which may be unavailable or dangerous to procure. See *Dawoud*, 424 F.3d at 612–13; *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1285 (9th Cir. 1984) (noting that refugees cannot be expected to

USCIS maintains this documentation requirement to combat immigration fraud.¹¹⁵ Because immigrants may gain legal status in the United States through family ties, they face strong incentives to falsify relationships.¹¹⁶ To counter this, the government has established stringent evidentiary requirements.¹¹⁷ Although the government rightly seeks to deter fraud, it is clear that these evidentiary measures can pose serious obstacles to refugees with bona fide relationships.¹¹⁸

Many refugees fleeing or living in conflict zones do not have access to primary or secondary documents, and many cannot approach their government persecutors to obtain these documents.¹¹⁹ Moreover, many refugee-producing coun-

procure documentation from their former persecutors); Telephone Interview with Heather Scavone, *supra* note 40 (highlighting the difficulties her clients have in obtaining primary documentation).

¹¹⁵ See David A. Martin, *A New Era for U.S. Refugee Resettlement*, 36 COLUM. HUM. RTS. L. REV. 299, 312 (2005); see also AFM, *supra* note 42, §§ 10–11 (detailing numerous anti-fraud and evidentiary measures for USCIS adjudicators).

¹¹⁶ See Martin, *supra* note 115, at 312. Although the author focuses primarily on the refugee resettlement program, his thoughts provide insight on the reunification system as well:

In any selective system, fraud is an inescapable problem. After all, resettlement usually represents major gains in life prospects, often well beyond even what the nondisplaced local population living near the refugees could ever reasonably expect. Hence the temptation to lie is great. Out of desperation or manipulation, or based on the coaching of an entrepreneur collecting a fee for such advice, applicants for resettlement may tailor their stories to fit what they understand to be the requirements of the program (often called the “camp story” problem)—as a great many persons interviewed for this study took pains to emphasize. Importantly, these warnings about the likelihood of fraud in connection with a resettlement program were heard at least as often and as vehemently from humanitarian workers as they were from persons with enforcement roles.

Id. Outside the refugee context, concerns about fraud in obtaining lawful permanent resident cards—often referred to as “green cards”—have existed for years. See Nina Bernstein, *Do You Take This Immigrant?*, N.Y. TIMES, June 13, 2010, at MB1 (providing a fascinating look at the measures couples must go through to receive marriage-based green cards); Laila Hlass, *Congress Cries Wolf on Asylum Fraud*, Op-Ed, BOS. GLOBE, Mar. 8, 2014, <http://www.bostonglobe.com/opinion/2014/03/07/congress-cries-wolf-asylum-fraud/LpwsimgjQU2Ps8mQyIOCeJ/story.html#>, archived at <http://perma.cc/R6VP-2MQK> (acknowledging immigration fraud enforcement as proof that the system works as it should, not that it is fundamentally broken).

¹¹⁷ See 9 FAM, *supra* note 55, app. O § 706.2-5 (providing consular officers with instructions on how to identify and respond to fraud).

¹¹⁸ See Janice D. Villiers, *Brave New World: The Use and Potential Misuse of DNA Technology in Immigration Law*, 30 B.C. THIRD WORLD L.J. 239, 249 (2010) (noting the high potential for fraud in immigration law); Telephone Interview with Heather Scavone, *supra* note 40 (highlighting the overwhelming difficulty her clients have in obtaining documents to prove relationships).

¹¹⁹ See *Davoud*, 424 F.3d at 614 (overturning the BIA’s denial of an Egyptian asylum claim). The court uses strong language to describe the challenges of refugees procuring documentation to establish their claims:

Many asylum applicants flee their home countries under circumstances of great urgency. Some are literally running for their lives and have to abandon their families, friends, jobs, and material possessions without a word of explanation. They often have nothing but the shirts on their backs when they arrive in this country. To expect these individuals to stop and collect dossiers of paperwork before fleeing is both unrealistic and strikingly insensitive to the harrowing conditions they face.

tries do not maintain comprehensive systems of record-keeping; even without conflict, civil documents may be unreliable and hard to get.¹²⁰ Under these circumstances, it is even more difficult to expect refugees fleeing violence to be able to procure the appropriate civil documentation.¹²¹

These practical matters confound many refugees seeking reunification with loved ones.¹²² The requirement of rigid documentary proof can often result in endangerment to derivatives, particularly minors.¹²³ Children or other relatives may be forced to approach hostile government agents to obtain documents.¹²⁴ This may alert these governments to the child's desire to immigrate to the United States, resulting in extortion, intimidation, or even violence.¹²⁵ Even if procuring a document itself does not invite direct harm, the process can be formidably expensive and time-consuming, delaying reunification and leaving the child separated from their parent in possibly dangerous conditions.¹²⁶

Id. at 612–13; *cf.* Kures, *supra* note 90, at 145 (noting that some refugee minors can even have their documents confiscated upon arrival in holding camps); Howard W. French, *Liberia's War Refugees Now United in Misery*, N.Y. TIMES, Sept. 17, 1994, <http://www.nytimes.com/1994/09/17/world/liberia-s-war-refugees-now-united-in-misery.html>, archived at <http://perma.cc/X9BE-KPQJ> (describing the miserable conditions many Liberian refugees were forced to endure during Liberia's civil war).

¹²⁰ See U.S. CITIZENSHIP & IMMIGRATION SERVS., OPERATING INSTRUCTIONS § 204.2 (2014), available at <http://www.uscis.gov/iframe/iframe/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-53690.html>, archived at <http://perma.cc/3ADJ-XYZG> (laying out procedures for what to do if civil documents are unavailable in a country).

¹²¹ See *id.*; see also *Dawoud*, 424 F.3d at 612–13 (highlighting the impracticality of immigrants fleeing persecution to stop and collect civil documents).

¹²² See Telephone Interview with Heather Scavone, *supra* note 40 (detailing the struggles of her clients in obtaining documentary evidence from conflict zones or former government persecutors).

¹²³ See *Bolanos-Hernandez*, 767 F.2d at 1285 (granting asylum to an asylum-seeker from El Salvador whose life was threatened by guerrillas and commenting on rigid documentation requirements in immigration proceedings). The court discusses the dangerous conditions faced by asylum-seekers and the impracticality of applicants approaching their former government persecutors for proof of persecution. See *id.*

¹²⁴ See *id.*; see also *Dawoud*, 424 F.3d at 612–13 (discussing the difficulty in acquiring proper documentation).

¹²⁵ See *Balogun v. Ashcroft*, 374 F.3d 492, 502 (7th Cir. 2004) (underscoring that obtaining documentation can be dangerous for refugees and asylum-seekers); *Bolanos-Hernandez*, 767 F.2d at 1285 (highlighting the danger of obtaining documents from oppressive governments). The Seventh Circuit made clear that documentary requirements must be “reasonable”:

No matter what form of corroboration is at issue, the corroboration requirement should be employed reasonably. It is always possible to second-guess the petitioner as to what evidence would be most cogent, and, consequently, there is a distinct danger that, in practice, the corroboration requirement can slip into “could have-should have” speculation about what evidence the applicant could have brought in a text-book environment.

Balogun, 374 F.3d at 502.

¹²⁶ See Kures, *supra* note 90, at 145 (noting that the “interim period” between separation and reunification is “extremely bleak” for many derivatives); UNHCR WASH., *supra* note 77 (declining to provide a timeframe for reunification because the length of time “cannot be predicted with any accuracy”). Refugees can often languish in camps for years and years. See French, *supra* note 119 (providing an example of refugee camps becoming long-term living situations). For example, Nepali refugees

B. The Problems Continue: Challenges for Visa Beneficiaries Overseas

1. Lack of Accommodation for Unaccompanied Minor Derivatives

With so many refugees affected by conflict and hardship, unaccompanied minor derivatives present one of the most pressing difficulties for family reunification.¹²⁷ Children separated from their parents are often the most in need of swift reunification.¹²⁸ Many languish in camps without supervision or structured education; many are at high risk for juvenile delinquency, unwanted pregnancy, or disease; some are even in physical danger from conflict, disasters, or direct persecution.¹²⁹ Yet, ironically, their indisputable neediness directly hurts their chances of getting their visas approved because they are not effective self-advocates.¹³⁰

Esther's story, highlighted in the introduction, illustrates the problem.¹³¹ There, the children needed sustained, direct advocacy with the consulate to even accomplish a simple task like getting an interview scheduled—let alone navigate the rest of the visa process.¹³² Esther's legal counsel spent hours emailing and calling the U.S. Embassy, providing requested documentation, and prodding officers to take action on the case.¹³³ Without this advocacy, it is unlikely the chil-

forced to flee their home country of Bhutan during an ethnic purge in 1990 spent over twenty years in camps because Nepal refused to take them in. See Kyle Knight, *How Do You Get from Kathmandu to L.A.? Wrong! Bhutan Refugees Learn the Ins and Outs of Air Travel*, INT'L BUS. TIMES, Feb. 14, 2014, <http://www.ibtimes.com/how-do-you-get-kathmandu-la-wrong-bhutan-refugees-learn-ins-outs-air-travel-1554497>, archived at <http://perma.cc/Q448-YGVS>.

¹²⁷ See Kures, *supra* note 90, at 155 (calling the lack of protection for unaccompanied refugee minors an "inexcusable tragedy"); Olivas, *supra* note 6, at 162 (noting that without help, unaccompanied refugee children simply do not have the tools to navigate the legal process by themselves); Esther's Story, *supra* note 1.

¹²⁸ See Olivas, *supra* note 6, at 162, 63.

¹²⁹ See Gates, *supra* note 90, at 300. For many unaccompanied refugee children, arriving in the relative safety of a refugee camp does not mean their troubles are over:

Despite the fact that many unaccompanied children confront additional risks of murder, torture, rape . . . imprisonment, abduction, enslavement, robbery, and starvation, the loss of family care and protection is perhaps the greatest loss to these children. Thus, even when they reach the apparent safety of a refugee or displaced person camp, their problems—physical, mental, material, and cultural—may be far from over.

Id. (quotations omitted); cf. Kures, *supra* note 90, at 145 (highlighting stories of "extreme violence" and "mass rape" of unaccompanied refugee minors in refugee camps); Barry Bearak, *Zimbabwe's Children Become Refugees*, N.Y. TIMES, Jan. 24, 2009, <http://www.nytimes.com/2009/01/24/world/africa/24iht-zimbabwe.1.19642607.html?pagewanted=all>, archived at <http://perma.cc/W5R4-AWC4> ("[Zimbabwean refugee children] bear the look of street urchins, their eyes on the prowl for useful scraps of garbage and their bodies covered in clothes no cleaner than a mechanic's rags.").

¹³⁰ See Olivas, *supra* note 6, at 162 (explaining that unaccompanied children are vulnerable due to conflict, stress, predators, and the complexity of immigration law, among other factors).

¹³¹ See *supra* notes 1–2 and accompanying text.

¹³² See Esther's Story, *supra* note 1.

¹³³ See *id.*

dren would have managed to bring their case to the consulate's attention.¹³⁴ Even with this advocacy, one of the children went missing, is presumed dead, and was never reunified with her mother.¹³⁵

From the perspective of the consulate, although this scenario is regrettable, it is defensible.¹³⁶ Faced with large case backlogs and rampant fraud, consular officers simply do not have the time to focus extra energy on one single case.¹³⁷ As a result, those visa beneficiaries with the greatest self-advocacy tools tend to be prioritized over the more vulnerable.¹³⁸ This is not necessarily the fault of consular officers, most of whom are conscientious, highly trained public servants.¹³⁹ Officers' staggering caseloads prevent them from giving individualized attention to the most vulnerable.¹⁴⁰ And unaccompanied refugee minors, far away from their parents, are surely among the most vulnerable and least capable visa beneficiaries that consulates see.¹⁴¹

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See *id.*; see also MARTIN, *supra* note 8, at 82 (highlighting the numerous tasks of consular officers and the fact that many do not manage to find the time to prioritize refugee reunification cases).

¹³⁷ See MARTIN, *supra* note 8, at 82 (remarking that the V-93 process is unfamiliar to some consular officers, and may be "more daunting" and "labor-intensive," leaving some V-93 applications "languishing for many months on a desk in the consulate"); James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 54 (1991) (noting that, because of high caseloads, consular officers often do not have time to devote much attention to individual cases).

¹³⁸ See MARTIN, *supra* note 8, at 82; Corneal, *supra* note 6, at 613–14 ("Child refugees are the most vulnerable population under UNHCR's mandate. Unaccompanied or separated children, because they are alone or in the company of adults focused on exploiting them, are even more vulnerable. These children lack someone to speak for their interests, to negotiate the labyrinth of immigration law, and to ensure that they are well cared for.").

¹³⁹ See Nafziger, *supra* note 137, at 53–54 ("Consular officers are well trained, representing one of the most carefully selected, career-groomed corps of government, the Foreign Service. Consular officers possess high levels of competence and morale. Most officers have had special training in the visa process and are familiar with the characteristics and idiosyncrasies of the local culture. They generally have an experienced eye for fraud and chutzpah by applicants."); *Opportunities*, U.S. DEP'T OF STATE, <http://careers.state.gov/work/opportunities>, archived at <http://perma.cc/5H7W-F2FZ> (last visited Jan. 24, 2015) ("The U.S. Department of State employs adventurous, adaptable, well-rounded strategic problem-solvers, from diverse educational, geographic, and cultural backgrounds and perspectives, with a desire to make a contribution to our global society."). But see MARTIN, *supra* note 8, at 82 (observing that some consular officers are not familiar with the specialized steps needed to complete V-93 processing).

¹⁴⁰ See Nafziger, *supra* note 137, at 54.

¹⁴¹ Dennis McNamara, Dir., Div. of Int'l Prot., UNHCR: A Human Rights Approach to the Protection of Refugee Children, Statement Before London Sch. of Econ. (Nov. 14, 1998) (available at <http://www.unhcr.org/42a00a6c2.html>, archived at <http://perma.cc/4PB2-A74P>). Mr. McNamara's statement provides insight into the vulnerability of refugee minors:

Refugee children suffer a form of double jeopardy. A denial of their human rights made them refugees in the first place; and as child refugees they are also frequently abused, as the most vulnerable category of an already vulnerable population. When they cross a border to flee persecution or conflict, refugee children often lose whatever social or familial protection they enjoyed at home. Established support systems, such as schools, break down and traditional family structures often collapse with flight. Tragically, the

2. Challenges with Visa Denials

The visa denial process also creates significant hurdles for refugees.¹⁴² A number of denial procedures, likely adopted for efficiency or fraud prevention, makes the process opaque and time-consuming.¹⁴³ For example, if consular officers suspect fraud or inadmissibility, they must physically return a case file to the USCIS Service Center back in the United States, a process that can take months.¹⁴⁴ This may be done without any supervisory review or in-country appeals process, or even notification to the applicant of why the visa is getting denied.¹⁴⁵ Thus, applicants leave the visa interview without knowing what happens next, and then wait for months until petitioners in the United States discover that the case is being denied.¹⁴⁶

This approach creates problems because apparent discrepancies in an applicant's testimony may have legitimate explanations that could be easily clarified.¹⁴⁷ For example, foreign cultures often have more expansive concepts of family than in the West, meaning refugee children may refer to various relatives as parents or siblings even when they are not biologically related.¹⁴⁸ Additionally, many refugee minors, separated from their parents, have spent months or years living with various other relatives.¹⁴⁹ Consular officers undoubtedly receive training on these cultural differences, but nonetheless deny visas because

risk of human rights violations against refugee children therefore does not end at the crossing of international borders, even where they may have left behind them a series of traumatic experiences.

Id.

¹⁴² See 9 FAM, *supra* note 55, app. O § 706.2-3 (outlining procedures for visa denial, including sending the file back to the USCIS Service Center without requiring supervisory review); Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113, 113 (2010) (commenting on the opacity of the visa denial processes).

¹⁴³ See 9 FAM, *supra* note 55, app. O § 706.2-3; Dobkin, *supra* note 142, at 113.

¹⁴⁴ See 9 FAM, *supra* note 55, app. O § 706.2-3 to -5(B). It is not entirely clear why the transfer of files back to the United States takes so long. See *id.*

¹⁴⁵ See *id.* The FAM requires that applicants get a notice that their file is being returned to the United States for "reconsideration," but no explanation of the reasons for the reconsideration. See *id.*

¹⁴⁶ See *id.*; Dobkin, *supra* note 142, at 113. Interviews can last as little as 10 minutes and consist of a handful of pre-prepared questions about a beneficiary's relationship to the petitioner. See Telephone Interview with Heather Scavone, *supra* note 40.

¹⁴⁷ See Telephone Interview with Heather Scavone, *supra* note 40 (describing a case where a visa applicant referred to an aunt as a "mother" because he lived with her, despite the fact that his biological mother was the petitioner, who lived in the United States).

¹⁴⁸ See Mwizenge S. Tembo, *The Traditional African Family 3* (1988) (unpublished manuscript), available at <http://people.bridgewater.edu/~mtembo/menu/articles/TraditionalAfricanFamily.shtml>, archived at <http://perma.cc/96KU-8J8E> ("In [the Baganda kinship] system, all brothers of the father are called 'father,' all sisters of the mother are called 'mother,' all their children 'brother' and 'sister.'").

¹⁴⁹ See Gamm, *supra* note 4 (profiling the Ningatoloum children, who spent nearly four years apart from their mother after being separated during conflict in the Central African Republic).

of fraud concerns.¹⁵⁰ For example, in an interview, an officer could hear a beneficiary mention a “mother” or “father” that is not the petitioner and conclude that the child is lying rather than referring to a member of her extended family.¹⁵¹ These discrepancies might be easily explained, but the denial system prevents refugees from challenging or appealing an officer’s findings until months later, when the petitioner receives the NOID from the USCIS Service Center.¹⁵²

This lack of notice or in-country review can penalize refugees with bona fide relationship claims.¹⁵³ Moreover, the policy of returning files to the United States for denial creates headaches for all parties.¹⁵⁴ Refugees are not notified of the reasons for the proposed denial and must scramble to gain even basic information about their applications.¹⁵⁵ They must also make difficult life choices about what to do next: where to live, what plans to make, and what they have to do to see their relatives again.¹⁵⁶

The file-return policy is also more cumbersome for immigration officials, who are burdened with more paperwork.¹⁵⁷ Consular officers must package and return files to vast USCIS Service Centers, where files may sit for months without adjudication or notice to petitioners.¹⁵⁸ Once a file does arrive at an adjudicator’s desk, officers must determine what happened in the interview and prepare a NOID.¹⁵⁹ These NOIDs at last allow the petitioner to rebut the adverse findings, but many months may have passed by the time the petitioner receives the notice.¹⁶⁰ If a petitioner succeeds at rebutting a claim of fraud or inadmissibility, the entire process begins again: USCIS reviews and approves the petition, then

¹⁵⁰ See Nafziger, *supra* note 137, at 54 (pointing out that despite officers’ expertise, budget and time constraints give them little leeway to carefully investigate close cases involving potential fraud).

¹⁵¹ See *id.*

¹⁵² See 9 FAM, *supra* note 55, app. O §§ 706.2–3 (mandating the physical transfer of files back to the United States for Service Center review).

¹⁵³ See Dobkin, *supra* note 142, at 113–14 (highlighting the frustration that many of the author’s clients face when confronted with visa denials despite their bona fide relationships); Telephone Interview with Heather Scavone, *supra* note 40 (echoing this same frustration with her clients).

¹⁵⁴ See Telephone Interview with Heather Scavone, *supra* note 40 (describing the despair her clients face in knowing that the process may be delayed another six to twelve months following an unsuccessful visa interview).

¹⁵⁵ See 9 FAM, *supra* note 55, app. O § 706.2-5(B)(c) (requiring written notice of denial to an applicant but not requiring a disclosure of reasons for denial).

¹⁵⁶ See Telephone Interview with Heather Scavone, *supra* note 40 (citing examples of clients facing these kinds of difficult life decisions).

¹⁵⁷ See AFM, *supra* note 42, § 21.10(e)(3); 9 FAM, *supra* note 55, app. O § 706.2-5(B)(c).

¹⁵⁸ See Telephone Interview with Heather Scavone, *supra* note 40. In the majority of visa revocation cases handled by the Elon Humanitarian Immigration Clinic, staff have had to contact congressional constituent services staff to prompt the Service Center to find and review the file. *Id.*

¹⁵⁹ See AFM, *supra* note 42, § 21.10(e)(3) (providing instructions to USCIS officers for the handling of the development of adverse information following the petition’s original approval).

¹⁶⁰ See *id.* (giving petitioners the choice of withdrawing the petition or having an eligibility determination made based on the facts at hand); Telephone Interview with Heather Scavone, *supra* note 40 (indicating that months might have passed before a NOID is received).

forwards it to the National Visa Center (“NVC”), which forwards it to the consulate to contact the visa beneficiary, which can add many more months to the process.¹⁶¹

In the meantime, beneficiaries will have been forced to remain in-country, oftentimes in the capital city where the consulate is located, waiting for word on next steps.¹⁶² This can be disorienting and dangerous, and may prevent reunification from happening altogether.¹⁶³ By the time the consulate receives the file with the written rebuttal from the petitioner, there may be new consular personnel unfamiliar with the details of the case.¹⁶⁴ Scheduling a new interview can take many more months, further delaying reunification.¹⁶⁵ All of these delays add up, and make the process very difficult process to manage with limited information in unstable circumstances.¹⁶⁶

3. Lack of Counsel for Refugee Derivatives

In addition to there being a lack of legal assistance domestically, refugee derivatives overwhelmingly lack in-country counsel during the Visa-93 (“V-93”) process.¹⁶⁷ This compounds the difficulties of visa applicants for many reasons: the complexity of the legal process, refugees’ low educational levels, and the intimidating and high-stakes nature of visa interviews.¹⁶⁸ The opportunity to

¹⁶¹ See AFM, *supra* note 42, § 21.10(e)(3); Telephone Interview with Heather Scavone, *supra* note 40.

¹⁶² See 9 FAM, *supra* note 55, app. O § 705.1 (indicating that beneficiaries must undergo an in-person interview before visas are issued); Esther’s Story, *supra* note 1.

¹⁶³ See Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213, 213, 287 (2003) (describing involuntary separation of families as a “widespread problem” and noting that “some of the most frequent, yet most difficult to resolve, instances of family separation occur in the context of immigration and anti-immigration policies . . . [while] [o]thers result from wars and refugee crises”); Esther’s Story, *supra* note 1 (detailing how Esther, a refugee, lost contact with her child while pursuing her visa).

¹⁶⁴ See Michael Gene Edwards, *I Am No Longer a Foreign Service Officer*, WORLD ADVENTURERS (Jan. 4, 2012), <http://worldadventurers.wordpress.com/2012/01/04/i-am-no-longer-a-foreign-service-officer/>, archived at <http://perma.cc/K4A5-4G4H> (explaining that consular officers should “[b]e prepared to move frequently. In some cases, this may mean a short tour of one year or less in a conflict zone, a short-term assignment, an evacuation, or a reassignment to another post. You will move from place to place every two-to-three years, or sooner, unless you can find a different assignment at the same post”).

¹⁶⁵ See Telephone Interview with Heather Scavone, *supra* note 40.

¹⁶⁶ See *id.*

¹⁶⁷ See Letter from the Iraqi Refugee Assistance Project to Rachel A. McCarthy, *supra* note 58 (addressing “the dearth of attorneys available to refugee applicants abroad”); Telephone Interview with Heather Scavone, *supra* note 40 (explaining that not one of her client’s derivatives have ever retained a lawyer abroad for help with interviewing). Recall that “V-93” denotes the visa approval process that takes place at U.S. consulates overseas. See *supra* notes 52–88 and accompanying text.

¹⁶⁸ See Corneal, *supra* note 6, at 614 (noting the difficulties of navigating the “labyrinth of immigration law”).

have an attorney present during a visa interview is subject to the discretion of the consulate, and some refuse to allow attorneys to participate.¹⁶⁹

Furthermore, even when there is counsel to help navigate the V-93 process, many times attorneys are not given the information they need to be successful advocates.¹⁷⁰ The Iraqi Refugee Assistance Project has highlighted the lack of counsel afforded to many principal applicant refugees applying for resettlement to the United States.¹⁷¹ It notes that the State Department often declines to communicate information about a case to the applicant's legal counsel.¹⁷² Although visa applications do not have a constitutional right to counsel, allowing refugees to have and fully utilize attorneys could help streamline the process.¹⁷³

C. No Judicial Review: The Doctrine of "Consular Non-Reviewability"

One final hindrance to reunification is the lack of judicial review available to refugee derivatives whose visas are denied.¹⁷⁴ Under the judicial doctrine of "consular non-reviewability," federal courts will not review visa decisions rendered by consular officers to would-be entrants to the United States.¹⁷⁵ This doc-

¹⁶⁹ See 1 NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYER'S GUILD, IMMIGRATION LAW AND DEFENSE § 4:145 (2013); see also *Refugee/Asylee Family Reunification*, EMBASSY OF THE U.S. KINSHASA, CONGO, <http://kinshasa.usembassy.gov/refugee-family-reunification.html>, archived at <http://perma.cc/H8KX-FPXC> (last visited Jan. 23, 2015) ("You may bring an attorney or family member to your interview, but the consular officer may request that the individual not participate in the interview."). Some may question the purpose of hiring an attorney if he or she cannot participate in the most crucial phase of the visa process. See Andrew T. Chan & Robert A. Free, *The Lawyer's Role in Visa Refusals*, IMMIGR. BRIEFINGS, Apr. 2008, at 1. Consuls have near-absolute authority in visa determinations. See *id.* This leaves visa applicants with no right to counsel and no real opportunity for meaningful visa review. See *id.* As a result, "a consular visa practice can be a humiliating experience—with doors to consulates barring entrance to lawyers, visa windows slammed shut, and telephone calls and letters left unanswered." *Id.*

¹⁷⁰ See Letter from Rebecca Heller, Exec. Dir., Iraqi Refugee Assistance Project, Ahilan T. Arulanantham, Dir. of Immigrants Rights & Nat'l Sec., ACLU of S. Cal., & William J. Genego, Supervising Attorney, Nasatir, Hirsch, Podberesky, Khero, & Genego, to Harold Koh, Legal Advisor, U.S. Dep't of State (Sept. 1, 2010) (available at http://refugeerights.org/wp-content/files/Refugee_legal_counsel_letter.pdf, archived at <http://perma.cc/7XKW-C8DL>. [hereinafter IRAP Letter].

¹⁷¹ See IRAQI REFUGEE ASSISTANCE PROJECT, *supra* note 90.

¹⁷² See IRAP Letter, *supra* note 170.

¹⁷³ See Chan & Free, *supra* note 169, at 3. Even in immigration courts in the United States, immigrants have no guaranteed or court-appointed right to counsel. See *id.* Courts, however, must recognize attorneys if immigrants have the means to retain one. See 8 U.S.C. § 1362 (2012); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 114 (2008).

¹⁷⁴ See Dobkin, *supra* note 142, at 114 (noting that when a consular officer denies a visa, the applicant is generally without any judicial recourse).

¹⁷⁵ See *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972) (establishing the doctrine of "consular non-reviewability" and declining to review a visa denial of Ernest Mandel, a Belgian academic who espoused communist ideologies, a ground for exclusion under the immigration laws of the time). The *Mandel* case did carve out an exception to the doctrine of consular non-reviewability: where the constitutional rights of a U.S. Citizen are threatened, courts will conduct a "highly-constrained" re-

trine, rooted in Congress's plenary power to unilaterally establish its own rules for admission and exclusion of aliens, leaves visa applicants with virtually no options for challenging or appealing adverse visa decisions.¹⁷⁶ Lawsuits challenging ostensibly unfair visa denials in federal court will generally be dismissed, leaving the Executive branch without any reliable check on its power.¹⁷⁷ As a result, consular officers wield enormous, nearly unchallengeable authority over an applicant's prospects for entry to the United States.¹⁷⁸ This can lead to inconsistent results and is deeply frustrating for applicants and their families.¹⁷⁹ Yet the doctrine of consular non-reviewability ensures that these types of officers will continue to receive no meaningful judicial scrutiny or oversight.¹⁸⁰

III. MAKING REFUGEE FAMILY REUNIFICATION WORK: SOLUTIONS FOR A MORE EQUITABLE SYSTEM

For many refugees, the life-changing benefit of resettlement is clouded by the arduous and often ineffective family reunification process.¹⁸¹ A number of commonsense reforms could bring greater transparency and protection to refugee spouses and children seeking reunification with loved ones.¹⁸² Some are small and easily implemented, like revisions to the Foreign Affairs Manual.¹⁸³ Others, like consular circuit rides to remote areas, would require a greater allocation of government resources.¹⁸⁴ Challenging the doctrine of consular non-reviewability would require a major victory in the federal courts.¹⁸⁵ In this Part, Section A advances proposals to help immigration practitioners and advocates

view to ensure that the consular officer acted on the basis of a "facially legitimate" and "bona fide" reason. See Andrew Haile, Comment, *Din v. Kerry: A Missed Opportunity to Challenge the Doctrine of Consular Non-Reviewability*, 19 BENDER'S IMMIGR. BULL. 306, 307, 312 (Mar. 15, 2014) (arguing that this precedent fails to provide meaningful judicial oversight to counter the unilateral actions of consular officers).

¹⁷⁶ See *Mandel*, 408 U.S. at 766; Dobkin, *supra* note 142, at 114 (noting that because of the doctrine of consular non-reviewability, when a consular officer denies a visa, the visa applicant is "generally without any recourse").

¹⁷⁷ See Dobkin, *supra* note 142, at 114.

¹⁷⁸ See Chan & Free, *supra* note 169, at 1–2 (characterizing this system as "consular absolutism," and noting that consuls have "virtually absolute authority" to make decisions over a visa applicant's case).

¹⁷⁹ See *id.*; Dobkin, *supra* note 142, at 113 (highlighting the frustrations practitioners face in having little outlet to challenge denied visa applications).

¹⁸⁰ See Chan & Free, *supra* note 169, at 1–2; Dobkin, *supra* note 142, at 114.

¹⁸¹ See MARTIN, *supra* note 8, at 81–84.

¹⁸² See *id.* (advocating for increased training of consular officers, changes to Form I-730, and processing by an independent "Overseas Processing Entity").

¹⁸³ See *id.* at 82–83 (calling for an update of the Foreign Affairs Manual).

¹⁸⁴ See *id.* at 106–09 (discussing the challenge of balancing circuit rides for Refugee Corps officers with the need to maintain security).

¹⁸⁵ See Dobkin, *supra* note 142, at 114 (noting that the doctrine of consular non-reviewability has been reaffirmed by a number of federal circuit courts).

assist refugees to be reunited with their families.¹⁸⁶ Section B offers reforms that U.S. Citizenship and Immigration Services (“USCIS”) should implement to streamline the process for the vulnerable.¹⁸⁷ Finally, Section C outlines policies the State Department should introduce to ensure greater efficacy and accountability in the V-93 process.¹⁸⁸

A. Advocating for the Vulnerable: Recommendations to Immigration Practitioners and Advocates

Immigration practitioners and advocates play a crucial role in supporting refugee reunification.¹⁸⁹ Subsection 1 argues that refugees should be given clear notice of their right to reunification after arriving in the United States.¹⁹⁰ Subsection 2 calls on the greater legal community to help support this vulnerable population through an increase in pro bono representation and the Board of Immigration Appeals (“BIA”) Accreditation and Recognition Program.¹⁹¹ Finally, Subsection 3 outlines how the doctrine of consular non-reviewability could be challenged and eventually overturned.¹⁹²

1. Provide Refugees with Clear Notice of Reunification Benefits

First and foremost, refugees must be provided with better information about their eligibility for reunification when they are resettled to the United States.¹⁹³ This begins with cultural orientation overseas, where refugees selected for resettlement undergo classes and training.¹⁹⁴ The caseworkers leading orientation should be trained to provide basic information on reunification benefits, including what family members are eligible for immediate reunification, how long the process might take, and the fact that petitions must be filed within two years of arrival.¹⁹⁵ Similarly, VOLAGs receiving new refugees should do a better job of informing them of reunification benefits.¹⁹⁶ Although refugees face many immediate needs, these immediate needs should not overshadow the importance of

¹⁸⁶ See *infra* notes 189–226 and accompanying text.

¹⁸⁷ See *infra* notes 227–232 and accompanying text.

¹⁸⁸ See *infra* notes 233–309 and accompanying text.

¹⁸⁹ See Olivas, *supra* note 6, at 162.

¹⁹⁰ See *infra* notes 193–198 and accompanying text.

¹⁹¹ See *infra* notes 199–216 and accompanying text.

¹⁹² See *infra* notes 217–226 and accompanying text.

¹⁹³ See Lunn, *supra* note 24, at 845–46 (detailing the current process of refugee resettlement and describing the role of the different actors, including State Department and nongovernmental organization employees who could inform refugees of their eligibility for reunification).

¹⁹⁴ See *id.*; U.S. DEP’T OF STATE, *supra* note 26 (indicating that most refugees go through a “brief cultural orientation” prior to departure for the United States).

¹⁹⁵ See Lunn, *supra* note 24, at 845–46.

¹⁹⁶ See *id.* at 833–34, 846 (describing the services VOLAGs provide and highlighting one egregious example of negligent casework).

being reunited with a spouse or child who remains in a foreign country.¹⁹⁷ At a minimum, caseworkers should make a point to identify clients with reunification needs in their first three months in the United States and make arrangements for referrals to legal service providers.¹⁹⁸

2. Address the Lack of Immigration Legal Services for Refugee Family Reunification Cases

The legal community must rise to the challenge of providing adequate legal assistance to refugees who need help with family reunification.¹⁹⁹ First, law firms should contribute more pro bono services to the cause of reunification.²⁰⁰ Presently, law firms do not provide significant pro bono assistance to refugee family reunifications, likely because they are not aware of the need.²⁰¹ Yet most major law firms are firmly committed to pro bono work and allow their attorneys to bill pro bono cases like those of paying clients.²⁰²

Refugee family reunification cases could be very attractive cases for law firms to take.²⁰³ First, attorneys could represent petitioners largely at a distance, since the I-730 and V-93 process does not generally require regular contact or

¹⁹⁷ See *id.* at 846 (describing some of the needs of refugees upon arrival).

¹⁹⁸ See *id.* (noting that caseworkers are funded to assist arriving refugees for ninety to one-hundred-eighty days).

¹⁹⁹ See Caren Shannon, *To License or Not to License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33 CARDOZO L. REV. 437, 446 (2011) (highlighting the “severe lack of willing pro bono attorneys” in immigration law in general); Kaufman, *supra* note 173, at 114 (noting that immigration law is “notoriously complex” and that many non-citizens lack legal representation).

²⁰⁰ See Shannon, *supra* note 199, at 446.

²⁰¹ See, e.g., *2012 Annual Pro Bono Report*, ROPES & GRAY, <http://www.ropesgray.com/~media/Files/Pro%20Bono/2012%20ProBono.ashx>, archived at <http://perma.cc/FQJ5-QPEE> (heralding the firm’s pro bono efforts in areas such as veteran’s disability benefits, voter registration, and asylum, but lacking any refugee family reunification cases); *Pro Bono Efforts*, WILMERHALE, <http://www.wilmerhale.com/probono/#!1>, archived at <http://perma.cc/FC3H-AVU2> (last visited Jan. 23, 2015) (claiming to be a “national leader in our pro bono services and charitable activities” but lacking any refugee family reunification cases); *Pro Bono Report*, SKADDEN, ARPS, SLATE, MEAGHER, & FLOM LLP, Summer 2014, http://www.skadden.com/newsletters/Skadden_Pro_Bono_Report.pdf, archived at <http://perma.cc/3VWJ-2GYV> (noting that Skadden “strongly believes” in pro bono work and performs laudable work in asylum cases, but lacking any refugee family reunification cases).

²⁰² See, e.g., *Pro Bono*, GOODWIN PROCTOR LLP, <http://www.goodwinprocter.com/Our-Firm/Pro-Bono.aspx>, archived at <http://perma.cc/KL62-RYXD> (last visited Jan. 23, 2015) (noting that pro bono assistance is “one of the cornerstones of our firm” and highlighting that the firm dedicated more than 65,000 hours to 610 matters in the last fiscal year); *About Pro Bono at Jones Day: Pro Bono Mission and Policy*, JONES DAY, <http://www.jonesdayprobono.com/mission/>, archived at <http://perma.cc/BN3X-2PXW> (last visited Jan. 23, 2015) (noting that “work performed on approved pro bono matters is given the same weight and consideration as client billable work”).

²⁰³ See JONES DAY, *supra* note 202 (indicating that the firm already provides pro bono services in the protection of children and in combatting human trafficking in Liberia).

long interviews with petitioners.²⁰⁴ This would allow attorneys flexibility in the time they devoted to cases.²⁰⁵ Second, reunification cases are morally compelling, and provide great satisfaction to advocates and heartwarming narratives to highlight in annual reports.²⁰⁶ Refugee service providers should do a better job of reaching out to firms with these types of cases.²⁰⁷

Second, the BIA Accreditation and Recognition program should be expanded and improved.²⁰⁸ This program, which allows non-attorneys to provide legal services to immigrants, lends critical support to low-income refugees and immigrants who cannot afford to pay private attorneys for immigration assistance.²⁰⁹ Yet at present, the Executive Office of Immigration Review (“EOIR”) provides virtually no oversight or training to recognized agencies or their accredited representatives.²¹⁰ As a result, the quality of the services provided varies dramatically from agency to agency.²¹¹ EOIR should increase oversight of BIA-recognized agencies and offer more training to Accredited Representatives.²¹² It

²⁰⁴ See 8 C.F.R. § 207.7 (d)–(f) (2014) (laying out procedures for filing and approval of petitions). Attorneys would need to meet with petitioners to fill out I-730 Forms and collect supporting documentation, but once the petition is filed the bulk of the work is done through communication with employees at USCIS and the State Department. See USCIS, FORM I-730, *supra* note 40, at 1.

²⁰⁵ See 8 C.F.R. § 207.7 (d)–(f); USCIS, FORM I-730, *supra* note 40, at 1–4.

²⁰⁶ See, e.g., Gamm *supra* note 4 (celebrating the reunification of a family from the Central African Republic); Veselenak, *supra* note 89 (discussing the reunion between members of a Kenyan family after a ten year wait); Smith, *supra* note 37 (telling the story of a Togolese couple who were separated for years from their six children due to civil conflict).

²⁰⁷ See Lunn, *supra* note 24, at 846 (describing the work of refugee caseworkers).

²⁰⁸ See 8 C.F.R. § 292.2 (detailing the rules for BIA accreditation and recognition); U.S. DEP’T OF JUSTICE EXEC. OFFICE OF IMMIGRATION REVIEW, *supra* note 106. Agencies seeking BIA recognition must meet a number of requirements: they must be non-profits, have a “religious, charitable, or social services mission,” and either provide free services or charge “nominal” fees. 8 C.F.R. § 292.2. As of January 19, 2015, there were 884 recognized agencies, including faith-based resettlement agencies, ethnic mutual assistance agencies, and immigration law clinics. *Recognized Organizations and Accredited Representatives Roster*, U.S. DEP’T OF JUSTICE EXEC. OFFICE OF IMMIGRATION REVIEW http://www.justice.gov/eoir/ra/raroster_orgs_reps.htm, archived at <http://perma.cc/H44J-6HVM> (last updated Jan. 19, 2015) (explaining the BIA accreditation and recognition process).

²⁰⁹ Ann Naffier, Note, *Attorney-Client Privilege for Nonlawyers? A Study of Board of Immigration Appeals-Accredited Representatives, Privilege, and Confidentiality*, 59 DRAKE L. REV. 583, 589 (2011) (noting that the accreditation of non-lawyers as BIA representatives has a “specific humanitarian purpose—to ensure immigrants of low financial means have access to legal counsel in their legal immigration proceedings”).

²¹⁰ See Shannon, *supra* note 199, at 450 (noting that regulations of BIA-accredited representatives have not substantially changed since 1974 and that DOJ has declined requests for greater oversight).

²¹¹ See *id.* at 454 (contrasting the “fine work” of some BIA-recognized agencies with the sad case of “Father Bob,” a BIA-accredited representative who was reprimanded by immigration courts for failing to provide adequate immigration services to his 761 clients, more than the New York Legal Aid Society’s entire immigration unit); see also Sam Dolnick, *Removal of Priest’s Cases Exposes Deep Holes in Immigration Courts*, N.Y. TIMES, July 8, 2011, at A17 (profiling “Father Bob,” the Catholic priest and former BIA-Accredited Representative).

²¹² See Shannon, *supra* note 199, at 483–84 (calling for an increase in training of BIA-accredited representatives and their organizations).

could do so by mandating an annual or biannual training on immigration law basics, and make attendance a requirement of continued agency recognition.²¹³

At the same time, BIA recognition should be promoted as a way for non-profits to help meet the significant immigration needs of the refugee community.²¹⁴ This would expand the availability of affordable immigration services and enhance accountability for agencies providing them.²¹⁵ Combined with an increase in pro bono representation from law firms, this strategy could greatly expand the chances that more refugee families will be reunited through the immigration system.²¹⁶

3. Fight for Judicial Review of Visa Denials

Abolishing or reshaping the judicial doctrine of consular non-reviewability could also significantly assist refugees seeking reunification with loved ones.²¹⁷ Although convincing federal judges to overturn or modify the doctrine would be difficult, immigration practitioners should embrace the challenge.²¹⁸ Indeed, courts have shown a willingness to revisit the doctrine in recent years, increasing transparency for visa applicants.²¹⁹

Furthermore, the doctrine of consular non-reviewability may be vulnerable to challenge.²²⁰ As courts frequently point out, consular non-reviewability is

²¹³ *See id.*

²¹⁴ *See id.* at 482 (advocating for laws that “contain provisions to encourage . . . reputable agencies to seek and obtain BIA recognition and accreditation”). The Immigrant Justice Corps (“IJC”), a new initiative seeking to provide free immigration legal services to indigent immigrants facing deportation in New York City, provides a promising model of increased use of BIA-Accredited Representatives. *See* IMMIGRANT JUSTICE CORPS, *supra* note 106. The IJC will provide “Community Fellowships” to high-achieving recent college graduates and train them to become BIA-Accredited Representatives. *See id.* Once they receive accreditation, they will provide crucial immigration support to the IJC’s staff of immigration attorneys. *See id.* This is a creative and compelling way to utilize BIA Recognition and Accreditation in tandem with full-time immigration attorneys. *See id.*

²¹⁵ *See* Shannon, *supra* note 199, at 481–84.

²¹⁶ *See id.*

²¹⁷ *See* Dobkin, *supra* note 142, at 113–16 (calling for challenges to the doctrine of consular non-reviewability to provide greater transparency and oversight to consular visa adjudications); Haile, *supra* note 175, at 312 (advocating for courts to review visa denial cases where certain constitutional rights of U.S. citizens are at stake); *see also* Din v. Kerry, 718 F.3d 856 (9th Cir. 2013), *cert. granted* 135 S. Ct. 44 (2014) (chipping away at the doctrine of consular non-reviewability). It remains to be seen whether the Supreme Court will increase judicial oversight of consulates or continue with the status quo. *See id.*

²¹⁸ *See* Dobkin, *supra* note 142, at 113–16.

²¹⁹ *See* Din, 718 F.3d at 858 (applying the exception articulated in *Kleindienst v. Mandel*, 408 U.S. 753 (1972) to the doctrine of consular non-reviewability and finding that a consulate’s withholding of information about a visa denial of the Afghan husband of a U.S. citizen did not constitute a “facially legitimate” or “bona fide” reason for the denial).

²²⁰ *See id.* A more detailed analysis of the strategies for challenging the doctrine are beyond the scope of this Note. *See id.* For a more in-depth discussion of consular non-reviewability, see generally Dobkin, *supra* note 142 (providing an overview of the doctrine).

rooted in the doctrine of plenary power, wherein Congress holds exclusive and unchallengeable authority to set rules for the inclusion and exclusion of aliens immigrating to the United States.²²¹ Some scholars have maligned this doctrine for its xenophobic underpinnings.²²² It originated in *Chae Chan Ping v. United States*, an 1889 U.S. Supreme Court ruling that upheld a law excluding Chinese laborers based solely on their national origin.²²³ Advocates should challenge the doctrine by highlighting these racist policy underpinnings.²²⁴ Overturning or even modifying this doctrine would allow courts to provide limited review of visa denials.²²⁵ This would create better accountability for consular officers and increase refugees' chances of having their reunification cases fairly adjudicated.²²⁶

²²¹ See *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009); *Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008); see also Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 925–26 (1995) (providing an overview of the plenary power doctrine).

²²² See, e.g., Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6–8 (1998) (noting that “immigration scholars love to hate the plenary power doctrine”); Natsu Taylor Saito, *Asserting Plenary Power over the “Other”*: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law, 20 YALE L. & POL’Y REV. 427, 433–447 (2002) (describing various uses of the plenary power doctrine over various nationalities); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for on-Going Abuses of Human Rights*, 10 ASIAN L. J. 13, 13 (2003) (describing the Chinese Exclusion Cases as “a remnant of the racist past of Asian exclusion and segregation in America”); see also Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1981–98 (2013) (discussing the plenary power doctrine and its severe limitation of judicial scrutiny of immigration cases).

²²³ See 130 U.S. 581, 581 (1889) (asserting that if Congress “considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary”). For a critique of the plenary power doctrine, see Chin, *supra* note 222, at 3–50; Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 SAN DIEGO L. REV. 887, 888 (1989) (“The lack of any meaningful administrative or judicial review of the denial of United States entry visas is one of the major outrages of the American immigration system.”).

²²⁴ See Chin, *supra* note 222, at 6–8 (noting that Congress “has not hesitated to use the plenary power recognized by the Supreme Court to discriminate”).

²²⁵ See Won Kidane, *The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom, and the United States: Transporting Best Practices*, 33 FORDHAM INT’L L.J. 300, 322–23 (2010) (showing that visa decisions are not subject to review under the doctrine of consular non-reviewability); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 610 (1990) (noting that the major Supreme Court precedents upholding the plenary power doctrine severely limit judicial review); Haile, *supra* note 175, at 312 (advocating for courts to modify the doctrine by allowing judicial review where the “liberty interests” of U.S. citizens are threatened).

²²⁶ See Dobkin, *supra* note 142, at 121 (noting that judicial review makes consular officers more accountable).

B. Recommendations to USCIS: Allowing Greater Flexibility in Documentation Requirements

USCIS should allow more flexibility in evidentiary requirements for refugee petitioners.²²⁷ It could accomplish this by placing greater weight on affidavits prepared by competent legal counsel.²²⁸ Particularly when non-profit attorneys or BIA-accredited representatives represent petitioners, officers may take comfort that the petitions have received an extra layer of screening, as counsel will likely decline to waste precious organizational resources representing petitioners with fraudulent claims.²²⁹ Affidavits from community members or friends who know the petitioner well can also provide convincing, detailed knowledge of the claimed relationship.²³⁰ These affidavits should be given more weight, particularly where the beneficiaries are living in remote areas or are unaccompanied minors, since these groups are least likely to have access to formal documentation.²³¹ Allowing these affidavits to play a greater role in verifying family roles would ease the heavy burden on derivatives to produce frequently unattainable primary documentation.²³²

C. Recommendations to the U.S. State Department

The State Department has an outside role to play in ensuring refugee beneficiaries are not penalized for their vulnerability and lack of resources.²³³ Sub-

²²⁷ See FORM I-730 INSTRUCTIONS, *supra* note 42, at 3–4 (outlining documentation requirements).

²²⁸ See *id.* at 4 (describing the criteria for submitting affidavits).

²²⁹ See *id.* This may appear to some immigration officials as an overly rosy view of the integrity of legal counsel, yet it has merit, particularly where petitioners are represented by non-profits. See Shannon, *supra* note 199, at 454 (noting that there are many “religious and charitable organizations doing fine work”). These cash-strapped agencies simply do not have the resources to spend extra time on petitions that are clearly fraudulent, and will decline to represent refugees advancing bogus claims. See *id.* at 455–56 (describing the overwhelming need for immigration services compared with the small number of accredited providers). Furthermore, refugee resettlement agencies that simultaneously provide immigration services have the benefit of knowing their clients very well, through the reception and placement process. See *Reception and Placement*, U.S. COMM. FOR REFUGEES & IMMIGRANTS, <http://www.refugees.org/our-work/refugee-resettlement/reception-and-placement-rp/reception-placement.html>, archived at <http://perma.cc/XY4Z-PW7U> (last visited Jan. 23, 2015) (outlining the organization’s many activities with recently-arrived refugee families). As a result, they will have better personal knowledge of whether a petitioner really has a spouse or child overseas; they will likely have heard the petitioner and other refugees from the community speak about it on occasion before. See *id.*

²³⁰ See FORM I-730 INSTRUCTIONS, *supra* note 42, at 4; AFM, *supra* note 42, § 11.1(g) (providing consular officers with guidelines for determining the credibility of witnesses in immigration proceedings).

²³¹ See Corneal, *supra* note 6, at 613–14 (noting the vulnerability of unaccompanied minor refugees).

²³² See *id.*

²³³ See generally MARTIN, *supra* note 8 (addressing a wide range of refugee resettlement reforms for the U.S. State Department).

section 1 recommends the creation of special fast-track procedures and “consular advocate” positions to assist unaccompanied minors.²³⁴ Subsection 2 advocates the increased use of “circuit rides” to remote locations to interview beneficiaries who cannot travel to population centers.²³⁵ Subsection 3 calls for more controls on the visa denial power of a single officer.²³⁶ Subsection 4 advocates enhanced training for consular officers who interview refugees.²³⁷ Finally, Subsection 5 champions increased access to counsel for derivatives undergoing consular processing.²³⁸

1. Create Special Protections for Unaccompanied Minors

As some of the most vulnerable would-be immigrants in the world, unaccompanied refugee minors deserve higher attention and special protection from USCIS and the State Department.²³⁹ These applicants must be identified early in the immigration process and provided with special accommodations to ensure their safety and swift reunification with their parents.²⁴⁰ First, this Subsection proposes fast-track procedures for the application and interview processing of unaccompanied minors.²⁴¹ Second, it argues that U.S. consulates should create new staff positions tasked with advocating for unaccompanied minors.²⁴²

a. Implement Fast-Track Processing Procedures

Unaccompanied minors must be identified and prioritized early in the reunification process.²⁴³ To accomplish this, USCIS should first amend Form I-730, the petition that initiates reunification, to include a box to check—under penalty of perjury—indicating that the beneficiary is an unaccompanied minor.²⁴⁴ This would be a simple fix as the form is only four pages long and USCIS revises many of its forms from time to time in a relatively uncomplicated process.²⁴⁵ Checking this box would alert the adjudicator to the presence of an unaccompa-

²³⁴ See *infra* notes 239–265 and accompanying text.

²³⁵ See *infra* notes 266–276 and accompanying text.

²³⁶ See *infra* notes 277–293 and accompanying text.

²³⁷ See *infra* notes 294–300 and accompanying text.

²³⁸ See *infra* notes 301–309 and accompanying text.

²³⁹ See *infra* notes 301–309 and accompanying text.

²⁴⁰ See *infra* notes 301–309 and accompanying text.

²⁴¹ See *infra* notes 243–250 and accompanying text.

²⁴² See *infra* notes 251–265 and accompanying text.

²⁴³ See Corneal, *supra* note 6, at 613–14.

²⁴⁴ See MARTIN, *supra* note 8, at 83 (calling for USCIS to change Form I-730 to alert consulates that the case is a V-93 application); USCIS, FORM I-730, *supra* note 40, at 1.

²⁴⁵ See *Forms Updates*, U.S. CITIZENSHIP & IMMIGRATION SERVS. <http://www.uscis.gov/forms-updates>, archived at <http://perma.cc/7NQS-VS68> (last updated Aug. 6, 2014) (providing a month-by-month update of revised USCIS forms).

nied minor and, provided that the petitioner establishes the relationship, would place the file on a fast-track.²⁴⁶

Once the adjudicator approves the petition and places it on the fast-track, the file would get priority in the V-93 process.²⁴⁷ This means that clerks at the Service Centers, the National Visa Center (“NVC”), and overseas consulates would expedite shipment of the case file.²⁴⁸ Again, this would not be an insurmountable task since immigration officials routinely expedite case files for a variety of reasons, including humanitarian disasters, certain administrative inaccuracies, and at the request of members of Congress.²⁴⁹ When the file arrives at the consular post, officers would immediately prioritize getting in touch with the children, schedule interviews as soon as possible, and refer the file to a “consular advocate.”²⁵⁰

b. Provide “Consular Advocates” for Unaccompanied Minors

U.S. Consulates should employ “consular advocates” to ensure that refugee minors are not penalized due to their vulnerability.²⁵¹ From the moment the consulate receives a V-93 case, these advocates would investigate beneficiaries’ liv-

²⁴⁶ See *id.* To provide clarity to petitioners, the Form instructions could also define the term “unaccompanied minor” as children under 21 (or 18) who are presently living in a different country from their parent(s). See FORM I-730 INSTRUCTIONS, *supra* note 42, at 1–3.

²⁴⁷ See USCIS, FORM I-730, *supra* note 40, at 1 (providing a space at the top for USCIS adjudicators to make “remarks” that could include a note about the beneficiary’s status as an unaccompanied minor). USCIS Service Centers, the National Visa Center, and U.S. Consulates would have to coordinate amongst themselves to determine what the best mechanism is for alerting clerks to the heightened priority. See *id.* The system already accommodates expedite requests. *Expedite Criteria*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/forms/expedite-criteria>, archived at <http://perma.cc/H7E4-49WE> (last updated June 17, 2011). For example, for cases involving a “humanitarian situation” or “USCIS error,” petitioners may call the USCIS hotline to make an expedite request. *Id.*

²⁴⁸ See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 248.

²⁴⁹ See *id.* Indeed, each Service Center maintains staff whose sole duty is to respond to congressional inquiries. See USCIS, *Office of Legislative Affairs*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/about-us/directorates-and-program-offices/office-legislative-affairs>, archived at <http://perma.cc/PDX7-GAS9> (last updated Jan. 27, 2012) (noting that the “Operations Branch” of the USCIS Office of Legislative Affairs “[r]esponds to all Congressional casework inquiries”). One of these positions could be tasked with ensuring that unaccompanied refugee minor cases are properly flagged and expedited. See *id.*; see also *USCIS to Expedite Review of Certain Cases Affected by Specific Inaccuracies*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Apr. 4, 2012), <http://www.uscis.gov/news/uscis-expedite-review-certain-cases-affected-specific-administrative-inaccuracies>, archived at <http://perma.cc/57N8-A3X8> (providing an example of where USCIS expedites certain cases affected by administrative errors).

²⁵⁰ See MARTIN, *supra* note 8, at 84 (calling on the State Department and DHS to enact reforms to ensure that V-93 cases do not “languish”); see also 9 FAM, *supra* note 55, app. O § 705 (giving consulates instructions for the preliminary processing of V-93 cases). This section could be revised to provide new accommodations for unaccompanied minors. See 9 FAM, *supra* note 55, app. O § 705.

²⁵¹ See Corneal, *supra* note 6, at 613–14.

ing situation, language abilities, and general welfare.²⁵² Where appropriate, they could inform the consular officer of the need for accommodation.²⁵³ This could include, for example, an interpreter in cases where a child lacks fluency in a Western language.²⁵⁴ They could also assist with simple tasks like meeting visa beneficiaries at the embassy gate and ensuring they do not get hassled by over-vigilant security guards.²⁵⁵ In especially dangerous situations, they could coordinate safer housing or affordable medical care for minors while they await completion of case processing.²⁵⁶

Creating these positions would not have to be difficult.²⁵⁷ Many District Attorney's offices around the country now employ victim witness advocates.²⁵⁸ Their job is to liaise directly with crime victims and ensure that the victim's wishes are adequately expressed in the busy lifecycle of a criminal case.²⁵⁹ A "consular advocate" would follow a similar model by meeting with unaccompanied minors and helping ensure that their needs are properly expressed to the consulate.²⁶⁰

Moreover, these positions would not have to be unreasonably expensive: on the contrary, the posts would be best staffed by host-country nationals, most of whom are paid local wages rather than U.S. diplomat salaries.²⁶¹ By employing foreign nationals who speak local languages and understand local customs, consulates would ensure that refugee minors have someone with whom they can communicate and contact for questions.²⁶² Depending on the consular post, advocates might also be allowed to accompany refugees to interviews and clear up

²⁵² See Esther's Story, *supra* note 1 (detailing the tenuous living situation of Esther's children).

²⁵³ See *id.*

²⁵⁴ See *id.*

²⁵⁵ See *id.* (detailing how Esther's children were turned away by guards when they arrived at the embassy for their scheduled interview).

²⁵⁶ See *id.*

²⁵⁷ See Nafziger, *supra* note 137, at 67 (noting that consular officers already make use of local staff to accomplish certain investigative duties, like following up with visa applicants).

²⁵⁸ See, e.g., *Victim Witness Assistance Unit*, COOK CNTY. STATE'S ATTORNEY'S OFFICE, <http://www.statesattorney.org/victimservices.html#overview>, archived at <http://perma.cc/4738-HE2V> (last visited Jan. 23, 2015) (explaining the victim witness assistance unit in Cook County, Illinois); *Victim-Witness Assistance Program*, L.A. CNTY. DIST. ATTORNEY'S OFFICE, <http://da.co.la.ca.us/vwap/>, archived at <http://perma.cc/BCV3-ZTVL> (last visited Jan. 23, 2015) (describing the victim witness assistance program in Los Angeles county); *Victim Assistance*, SUFFOLK CNTY. DIST. ATTORNEY <http://www.suffolkdistrictattorney.com/victim-assistance>, archived at <http://perma.cc/H7C5-KH87> (last visited Jan. 23, 2015) (explaining the victim witness assistance program in Suffolk County, Massachusetts).

²⁵⁹ See *supra* note 258 and accompanying text.

²⁶⁰ See *supra* note 258 and accompanying text.

²⁶¹ See OFFICE OF INSPECTOR GEN., ISP-I-09-44, REPORT OF INSPECTION, REVIEW OF LOCALLY EMPLOYED STAFF COMPENSATION ISSUES 1 (2009), available at <http://oig.state.gov/system/files/123525.pdf>, archived at <http://perma.cc/DVL3-XY73> (noting that U.S. embassies and consulates employ over 51,000 locally employed staff under "local compensation plans").

²⁶² See *id.* at 3 (remarking that locally-employed staff are "invaluable" and have "historic reference . . . contacts and know-how to operate within their country").

simple cultural or linguistic misunderstandings.²⁶³ This sort of assistance would be invaluable, saving both visa beneficiaries and consular officers time and hassle.²⁶⁴ It would also safeguard against tragedies like Esther's by ensuring unaccompanied minors do not get inadvertently deprioritized.²⁶⁵

2. Increase Circuit Rides to Remote Locations for Visa Interviews

To increase accessibility, consular officers should make periodic circuit rides to remote locations for visa interviews.²⁶⁶ This is not a new idea, as U.S. Refugee Corps officers and United Nations officials already utilize this procedure to interview principal applicants for resettlement.²⁶⁷ When refugees in rural locations cannot travel to population centers, these officers will travel to them, either via car or small plane.²⁶⁸ This process is crucial for ensuring that all displaced people have an opportunity to be screened for resettlement, and keeps refugees from making dangerous journeys in the hopes of getting an interview.²⁶⁹

Consulates should consider using these measures for certain visa interviews.²⁷⁰ To be sure, flying a consular officer hundreds of miles to interview a single family for reunification benefits would not be feasible.²⁷¹ But consulates could coordinate with U.S. Refugee Corps officers, brief them on given cases, and transfer files to their custody for circuit rides to remote locations.²⁷² Although this type of coordination might be time-consuming, it is preferable to

²⁶³ See *id.*

²⁶⁴ See *id.*; MARTIN, *supra* note 8, at 82–83 (noting that V-93 cases can often impose extra administrative burdens on consular staff, making them more prone to deprioritize them).

²⁶⁵ See Esther's Story, *supra* note 1.

²⁶⁶ See *Refugee Admissions Program for Africa: Fact Sheet*, U.S. DEP'T OF STATE (Jan. 9, 2013), <http://www.state.gov/j/prm/releases/onepagars/202626.htm>, archived at <http://perma.cc/KQF2-JR9F> (noting that the DHS and USCIS conducts periodic circuit rides to interview principal refugee applicants).

²⁶⁷ See *id.* Created in 2005, the U.S. Refugee Corps is a “cadre of specially-trained USCIS officers” dedicated to interviewing applicants and adjudicating applications for refugee status overseas. See *Terrorist Exploitation of Refugee Programs: Hearing Before the H. Comm. on Homeland Sec.*, 112th Cong. 2 (2012) (Written Testimony of Barbara Strack, Refugee, Asylum & International Operations Directorate Refugee Affairs Division Chief, U.S. Citizenship and Immigration Services), available at <http://www.dhs.gov/news/2012/12/04/written-testimony-uscis-house-homeland-security-subcommittee-counter-terrorism-and>, archived at <http://perma.cc/A2T8-WC8G>. These officers frequently travel to remote locations, including refugee camps and conflict zones, to conduct refugee status determinations. See *id.*

²⁶⁸ See *id.* at 2 (remarking that Refugee Corps officers “travel around the world to the locations where refugees reside”).

²⁶⁹ See MARTIN, *supra* note 8, at 108–09.

²⁷⁰ See *id.*

²⁷¹ See *id.* at 91 (“DHS circuit rides, with the necessary preparation by an Overseas Processing Entity, are costly to schedule and perhaps not worthwhile if only a handful of cases await processing in a particular location.”).

²⁷² See *id.* (describing the U.S. Refugee Corps).

forcing vulnerable visa beneficiaries to travel hundreds of miles to unfamiliar cities to wait for an interview date.²⁷³

Some advocates have championed videoconferencing as another solution to the problem of distant refugee interviews.²⁷⁴ Although this option might be distasteful for consular officers trained to detect fraud by observing applicants' mannerisms and demeanor, improvements in modern video technology could make this a worthwhile—and highly-cost effective—choice.²⁷⁵ Again, given the potential travel risks to vulnerable refugees, it remains a commonsense reform worth implementing.²⁷⁶

3. Establish Checks on the Visa Denial Process

A number of simple reforms to the visa denial process could help refugee derivatives avoid the visa denial nightmare.²⁷⁷ First, visa applicants should receive full notification of the alleged deficiencies in their applications.²⁷⁸ Where an officer suspects fraud or detects an inadmissibility issue, refugees should receive notice of the issue in writing.²⁷⁹ This would require little extra effort on the part of the officer, who must already draft a memorandum for USCIS explaining the proposed denial.²⁸⁰ The State Department could do this by revising Appendix O of Chapter 9 of the Foreign Affairs Manual to require that such written notice be sent to the applicant.²⁸¹ This would help ensure greater transparency for applicants.²⁸²

²⁷³ See *Esther's Story*, *supra* note 1 (describing the long and dangerous journey made by Esther's children).

²⁷⁴ See David A. Martin, *Foreword* to MARTIN, *supra* note 8, at x (“DHS should also continue exploring technological innovations, such as video hookups, that might permit interviewing from a remote location when security risks are high in a refugee settlement.”); Tim Arango, *Unrest and American Safety Concerns Strand Iraqis in Syria Awaiting Visas for U.S.*, N.Y. TIMES, Jan. 23, 2012, at A9 (“[Iraqi refugees] are caught between a rock and no place,” said Becca Heller of the Iraqi Refugee Assistance Project in New York, who added, ‘A simple solution to that would be to agree to conduct interviews by videoconference.’”).

²⁷⁵ See MARTIN, *supra* note 8, at 108–09.

²⁷⁶ See *id.*

²⁷⁷ See 9 FAM, *supra* note 55, app. O § 706.2-3 (outlining procedures for visa denial, including sending the file back to the USCIS Service Center without requiring supervisory review).

²⁷⁸ See *id.* app. O § 706.2-5(B)(b)–(c) (allowing consular officers to return visa files to the United States without giving applicants a reason for the “reconsideration”).

²⁷⁹ See *id.*

²⁸⁰ See *id.* (noting that officers must prepare a “comprehensive” memorandum showing the “concrete and factual reasons” for the request for reconsideration).

²⁸¹ See *id.* For example, in 9 FAM Appendix O, Section 706.2-3(b), “What To Do if Applicant May Be Inadmissible,” after the line “Inform the applicant in writing that the case is being submitted to the USCIS” the State Department could add “and provide the applicant with a written notice detailing the concrete, factual reasons for the submission of the application to USCIS.” See *id.* app. O § 706.2-3(b).

²⁸² See *id.*

Second, the State Department should reconsider its policy of immediately returning files to the United States for reconsideration by USCIS.²⁸³ This process is time-consuming and can leave applicants in limbo for months without knowing what was wrong with their application.²⁸⁴ In lieu of this, consulates should establish a system of in-country supervisory review.²⁸⁵ When consular officers detect fraud or inadmissibility in a refugee derivative case, they should be required to submit the file to a supervisor for a second look.²⁸⁶ Where a finding appeared to be erroneous, the applicants could be called back in to be re-interviewed to provide further clarification.²⁸⁷ This would ensure that cases are thoroughly examined before sending files back to the Notice of Intent to Deny (“NOID”) process.²⁸⁸ Because supervisors would only review a small handful of refugee reunification cases, this requirement would be unlikely to place an unduly heavy burden on their caseload.²⁸⁹

In the event that cases do get returned to USCIS for revocation, Service Centers must develop a more effective way to identify them and provide notice to petitioners.²⁹⁰ First, consulates should inform beneficiaries directly of the alleged deficiencies.²⁹¹ Second, USCIS Service Centers should ensure that petitioners receive NOIDs in a timely manner, so that petitioners can submit written rebuttals to the consulate’s allegations.²⁹² Whatever procedure the Service Centers devise, it must guarantee that files are received and NOIDs issued in a more efficient and timely manner than is done currently.²⁹³

²⁸³ See *id.* app. O §§ 706.2-3 to -5.

²⁸⁴ See *id.*

²⁸⁵ See Chan & Free, *supra* note 169, at 16.

²⁸⁶ See *id.* (calling for specially trained administrative law judges to perform certain reviews of visa denials).

²⁸⁷ See *id.*

²⁸⁸ See *id.*

²⁸⁹ See *Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts: Fiscal Years 2009–2013*, U.S. DEP’T OF STATE, <http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableL.pdf>, archived at <http://perma.cc/MCJ7-ZFJE> (last visited Jan. 23, 2015) (noting the much smaller number of “immediate relative” immigrant visas granted as compared with nonimmigrant visas); see also *Visa Denials*, U.S. DEP’T OF STATE, <http://travel.state.gov/content/visas/english/general/denials.html>, archived at <http://perma.cc/4PKY-USKG> (last visited Jan. 23, 2015) (indicating that applicants who are denied visas may reapply).

²⁹⁰ See Chan & Free, *supra* note 169, at 13 (discussing the practice of consulates returning applications to USCIS).

²⁹¹ See 9 FAM, *supra* note 55, app. O § 706.2-5(B)(c) (outlining the current procedures for notifying visa applicants of deficiencies in their applications); Chan & Free, *supra* note 169, at 13 (noting that in Immigrant Visa denials, consulates must normally inform the applicant of the basis of the denial).

²⁹² See Chan & Free, *supra* note 169, at 13 (noting that USCIS may “reaffirm” the visa petition).

²⁹³ See *id.* at 16 (calling on Congress to enact a number of reforms to improve the transparency of the visa denial process).

4. Increase Country-Conditions Training for Consular Officers

Some of the problems associated with the refugee reunification process can be attributed to cultural misunderstandings.²⁹⁴ Consequently, some of these issues could be avoided with better cultural training for consular staff.²⁹⁵ Although officers do undergo significant operational training, a number of factors hinder their abilities to bridge the vast cultural differences between them and visa applicants.²⁹⁶ Too few possess critical linguistic skills, most live in relative Western comfort in capital cities, and relatively few are afforded opportunities to visit more remote parts of the country where refugees often live.²⁹⁷ Specialized training for dealing with victims of persecution could reduce misunderstandings in visa interviews by giving officers more insight into refugee cultural practices and family dynamics.²⁹⁸ This would not mean that officers would stop screening for fraud or rubberstamp every application that appears on their desks.²⁹⁹ But it could reduce misunderstanding and ensure that deserving visa applicants get a full and fair hearing from a wise and conscientious officer.³⁰⁰

5. Expand Access to Counsel for V-93 Beneficiaries

V-93 beneficiaries must also be given greater access to legal counsel for visa processing and interviews.³⁰¹ Although this presents challenges for all the reasons described above—poverty, distance, logistics—there are several concrete steps that consulates should take to ensure that families wishing to be rep-

²⁹⁴ See Telephone Interview with Heather Scavone, *supra* note 40 (providing examples from her practice of cultural misunderstandings between visa applicants and consulates).

²⁹⁵ See MARTIN, *supra* note 8, at 150 (calling for “cultural orientation” for certain DHS staff).

²⁹⁶ See Phil Primack, *Is Diplomacy Broken?* TUFTSNOW (Aug. 8, 2011), <http://now.tufts.edu/articles/diplomacy-broken>, archived at <http://perma.cc/QSE7-MHPC> (detailing the lack of Foreign Service officers trained in certain languages and cultural competencies).

²⁹⁷ See *id.* (“[I]nstitutional problems within the [Foreign] [S]ervice itself, such as not enough officers with critical linguistic skills, jeopardize its ability to advance the goals of smart power.”); see also MARTIN, *supra* note 8, at 150 (discussing the role of the consular officer abroad).

²⁹⁸ See MARTIN, *supra* note 8, at 150. One possible solution would be for officers to be trained to interview refugee derivatives during circuit rides. See *id.* (“Finally, interviewing techniques and procedures should be addressed in the training. This should include the challenges of conducting interviews through an interpreter, as well as other specific difficulties the officers may face in the cultural and physical setting of the particular circuit ride. A kind of cultural orientation for DHS officers could be provided regarding the conditions of their existence during the circuit ride (particularly useful for any temporary duty officers who have limited experience of living in developing countries).”)

²⁹⁹ See *id.* at 146 (noting that increased officer training would give them a better eye to exposing falsehoods as well as spotting bona fide claims).

³⁰⁰ See *id.* at 150.

³⁰¹ See Chan & Free, *supra* note 169, at 3–4 (underscoring the positive role attorneys can play in visa processing).

resented by counsel have that opportunity.³⁰² First, consulates that have policies of barring counsel from visa interviews should reconsider these positions.³⁰³ The State Department should issue a policy memorandum addressed to all consulates instructing them to allow attorney participation in interviews.³⁰⁴ Attorneys could help refugees explain their case to officers and better understand the outcome of the interview.³⁰⁵

Second, consulates should identify capable local attorneys and provide visa interviewees with a list if they wish to retain legal counsel.³⁰⁶ Although it might sound counterintuitive that refugees could afford to retain an attorney, lawyers in most developing countries cost a fraction of what they would in the United States.³⁰⁷ Even a small sum sent to beneficiaries by the U.S. petitioner could help pay for an attorney, and the impact could be dramatic.³⁰⁸ Although most refugees traveling to a capital city would probably not know where to find a trustworthy attorney, the State Department could help by instructing beneficiaries to visit the consulate once they arrive to obtain a pre-screened listing of immigration lawyers.³⁰⁹

CONCLUSION

The refugee family reunification system too often fails to provide adequate protection to refugee families. Rather than prioritizing the most vulnerable refugee derivatives, the government penalizes them for their inability to self-advocate. To remedy this problem, this Note advocates for significant reforms to the system, starting before petitioners arrive in the United States and continuing to the reunification of families at the airport. These reforms target the processes used by USCIS, the Department of State, federal courts, and even private non-profit organizations.

³⁰² See *id.* (noting some steps consulates could take to allow greater attorney participation in visa processes).

³⁰³ See EMBASSY OF THE U.S. KINSHASA, CONGO, *supra* note 169 (noting that the consulate reserves the right to refuse to allow attorneys to participate in visa interviews).

³⁰⁴ Cf. Memorandum from Patrick F. Kennedy, Undersecretary, U.S. State Department, on “Guidance on Operations during a Lapse in Appropriations” to Assistant Secretaries and Directors, U.S. State Department, (Sept. 27, 2013), available at <http://www.state.gov/documents/organization/215074.pdf>, archived at <http://perma.cc/95ND-LKMR> (providing an example of a policy memorandum).

³⁰⁵ See Chan & Free, *supra* note 169, at 3.

³⁰⁶ See *id.*

³⁰⁷ Cf. *Asia, More Expensive, Is Still Cheaper for Expats*, N.Y. TIMES, Jan. 10, 2006, <http://www.nytimes.com/2005/08/02/world/asia/02iht-expats.html>, archived at <http://perma.cc/LR43-3E6C> (showing many Asian countries, including Bangladesh, the Philippines, and Laos, to be dramatically cheaper than the United States).

³⁰⁸ See *id.*

³⁰⁹ See, e.g., *List of Local Legal Providers*, EMBASSY OF THE U.S., CONAKRY, REPUBLIC OF GUINEA, <http://photos.state.gov/libraries/guinea/231771/PDFs/legalproviders.pdf>, archived at <http://perma.cc/5NUW-HDJC> (last visited Jan. 23, 2015) (providing a list of qualified attorneys to U.S. citizens who need them).

Such reforms represent commonsense solutions to a broken system. Too often we fail to protect the most vulnerable in their attempts to be reunited with long-lost loved ones. Finding solutions to these problems would ensure that “the least of these” among us are welcomed and cared for: surely a worthy goal for a great nation of immigrants desiring to welcome new peoples to their shores.

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