

ASSESSING US IMMIGRATION POLICY FOR ALLIED AFGHAN NATIONALS

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ABSTRACT

Throughout US military involvement in Afghanistan, various administrations have promised to offer immigration pathways to Afghans that supported the US military. This Comment assesses whether they have fulfilled these promises. First, this Comment examines the legal immigration pathways available to Afghans within the US or remaining abroad. Then, this Comment discusses legal and practical outcomes for Afghans in the immigration process through both a structural lens and through the lens of active class action litigation. The Comment concludes that both the statutory scheme and the agency implementation of special immigration provisions for Afghans fail to meet US policy goals. Finally, this Comment suggests legal and policy changes that would improve outcomes for Afghans who attempt to access the American immigration system.

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INTRODUCTION

In August 2021, the United States officially withdrew all personnel from Afghanistan after conducting more than twenty years of military operations in the country.¹ During military operations, hundreds of thousands of Afghans worked for the US government.² Afghans who worked for or were affiliated with Western forces are now in acute danger of kidnapping, imprisonment, significant harm, or death under the Taliban regime.³ Though many of these personnel were airlifted out of Afghanistan before Western nations completely withdrew from the country, the vast majority remain in Afghanistan or relocated to Pakistan, Iran, or other nations.⁴

To address the crisis facing Afghans who worked for the US military and affiliated organizations, the US government has enacted numerous special immigration provisions that aim to facilitate their relocation to the United States.⁵ These provisions enjoy longstanding, bipartisan support and reflect US policy goals to relocate allied Afghan personnel.⁶ When announcing that the US would evacuate vulnerable allied Afghans and grant them US immigration statuses, Department of Homeland Security (DHS) Secretary Alejandro N. Mayorkas explained

¹ Lauren Leatherby & Larry Buchanan, *At Least 250,000 Afghans Who Worked with U.S. Haven't Been Evacuated, Estimates Say*, N.Y. TIMES (Aug. 25, 2021), <https://www.nytimes.com/interactive/2021/08/25/world/asia/afghanistan-evacuations-estimates.html> [https://perma.cc/Y6TC-ZYBV].

² *Id.*; Miriam Jordan, *Thousands of Afghans Who Helped the U.S. are Trapped. What Happens Next?*, N.Y. TIMES (Aug. 17, 2021), <https://www.nytimes.com/2021/08/17/us/politics/thousands-of-afghans-who-helped-the-us-are-trapped-what-happens-next.html> [https://perma.cc/8U27-NBEN].

³ Nick Paton Walsh & Masoud Popalzai, *Afghans Awaiting US Resettlement Say They're Being Deported from Pakistan Back to the Taliban*, CNN (July 31, 2023, 10:58 AM), <https://www.cnn.com/2023/07/28/asia/afghanistan-pakistan-taliban-us-visas-intl-cmd/index.html> [https://perma.cc/Z4TP-TB6D].

⁴ Leatherby & Buchanan, *supra* note 1; UNHCR, *Afghanistan situation*, OPERATIONAL DATA PORTAL, <https://data.unhcr.org/en/situations/afghanistan> (Oct. 7, 2023) [https://perma.cc/53UD-326D].

⁵ *Operation Allies Welcome*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/allieswelcome> [https://perma.cc/76QJ-R8EC].

⁶ Amanda Winkler, *Is the US Abandoning Afghan Interpreters to Certain Death?*, REASON (July 22, 2014, 12:34 PM), <https://reason.com/video/2014/07/22/us-abandoning-its-afghan-allies/> [https://perma.cc/DH9Z-ZL3S]; Reps. Crow, Wenstrup, Blumenauer Introduce the Afghan Allies Protection Act, JASON CROW (June 5, 2023), <https://crow.house.gov/media/press-releases/rep-crow-wenstrup-blumenauer-introduce-the-afghan-allies-protection-act#:~:text=The%20Afghan%20Allies%20Protection%20Act%20would%20extend%20the%20Afghan%20SIV,require%20senior%20special%20immigrant%20visa> [https://perma.cc/BL2D-YZRW].

the common rationale: “We have a moral imperative to protect [allied Afghans], to support those who have supported this Nation.”⁷

Despite the special immigration pathways available to allied Afghans, most who try to access the US immigration system remain in legal limbo, whether they have already relocated or remain abroad. Allied Afghans within the US face extreme processing backlogs, and many evacuees remain in the US solely under temporary migration statuses.⁸ Abroad, the US no longer maintains an embassy in Taliban-controlled Afghanistan, making it effectively impossible for Afghans to access the US immigration system within their country.⁹ Furthermore, Afghan refugees in Pakistan await processing indefinitely while experiencing further violence or deportation back to Afghanistan,¹⁰ and refugees in Iran also do not have an accessible embassy.¹¹

This Comment argues that US immigration provisions do not fulfill the nation’s policy goal to successfully and safely welcome allied Afghans. To address the numerous shortcomings in the special immigration processes for allied Afghans, Congress should pass the Afghan Adjustment Act, which would give Afghans in the US a direct pathway to legal permanent residency, expedite processing for Afghan refugees, and provide substantial resources to improve the efficiency of existing special programs.

Part I of this Comment fully examines the legal immigration landscape for allied Afghans within the US and remaining abroad. Part II discusses legal and practical outcomes for allied Afghans in the immigration process and assesses whether the current immigration system meets the nation’s stated policy goals. Part III concludes that both the statutory scheme and agency implementation of special immigration provisions for allied Afghans fail to meet US policy goals and suggests

⁷ *Secretary Mayorkas Delivers Remarks on Operation Allies Welcome*, DEP’T OF HOMELAND SEC. (Sept. 3, 2021), <https://www.dhs.gov/news/2021/09/03/secretary-mayorkas-delivers-remarks-operation-allies-welcome> [<https://perma.cc/A3BS-9HR2>].

⁸ Caroline Covington, *Almost Two Years Since Kabul Fell, a Frayed Refugee System Creates Obstacles for Afghans in Texas*, TEX. TRIB. (June 6, 2023, 05:00 AM), <https://www.texastribune.org/2023/06/06/texas-afghan-refugees-visa-asylum/> [<https://perma.cc/FPT8-WMG9>].

⁹ *U.S. Embassy in Afghanistan Status*, U.S. DEP’T OF STATE, <https://af.usembassy.gov/u-s-embassy-in-afghanistan-status/> [<https://perma.cc/D46M-9N8H>].

¹⁰ Paton Walsh & Popalzai, *supra* note 3.

¹¹ *Contact Us*, U.S. VIRTUAL EMBASSY IRAN, <https://ir.usembassy.gov/contact/#:~:text=The%20United%20States%20does%20not,power%20for%20the%20United%20States> [<https://perma.cc/GEV6-7A9G>].

legal and policy changes that would improve outcomes for Afghans who attempt to access the American immigration system.

I. BACKGROUND

Allied Afghans are specially eligible for both temporary and permanent immigration statuses. Temporary immigration statuses permit their holders to lawfully remain in the US for a certain period of time, but they do not offer a path to permanent residency. In contrast, permanent immigration pathways allow approved individuals to receive Lawful Permanent Resident (LPR) status and eventually apply for citizenship. Part I discusses the temporary and permanent immigration pathways specially available to allied Afghans.

A. TEMPORARY IMMIGRATION PATHWAYS

The Biden Administration allowed Afghans to apply for two distinct temporary statuses upon entering the US: Humanitarian Parole and Temporary Protected Status. This section discusses each status and the benefits they confer on recipients.

1. *Humanitarian Parole under Operation Allies Welcome*

After concluding military operations in Afghanistan, DHS initiated Operation Allies Welcome (OAW).¹² DHS used a “whole-of-government” approach to relocate and resettle Afghans who were evacuated in the final months of military operations, coordinating with several different US agencies.¹³ Under this program, which concluded in September 2022, DHS initially relocated approximately ninety thousand Afghans to the US.¹⁴ Almost all of these persons entered the US with Humanitarian Parole, which is a temporary immigration status that the

¹² *Operation Allies Welcome*, *supra* note 5.

¹³ Priscilla Alvarez, *Biden Administration Pivoting to Long-term Strategy to Assist Afghans*, CNN (Sept. 1, 2022), <https://www.cnn.com/2022/09/01/politics/afghan-resettlement/index.html> [<https://perma.cc/L2CF-PQJP>]; *Operation Allies Welcome Announces Departure of All Afghan Nationals from the National Conference Center Safe Haven in Leesburg, VA*, DEP’T OF HOMELAND SEC. (Sept. 27, 2022), <https://www.dhs.gov/news/2022/09/27/operation-allies-welcome-announces-departure-all-afghan-nationals-national> [<https://perma.cc/QCC3-U7L5>].

¹⁴ Alvarez, *supra* note 13; *Afghan Arrivals Under the U.S. Refugee Admissions Program*, U.S. DEP’T OF STATE, <https://www.state.gov/afghan-arrivals-under-the-u-s-refugee-admissions-program/> [<https://perma.cc/M5ET-T8PX>].

DHS Secretary may grant on a discretionary basis in urgent humanitarian situations.¹⁵

Humanitarian Parole allows parolees to obtain work authorization for a period of two years while applying and waiting for conferral of other immigration statuses.¹⁶ On May 5, 2023, DHS announced that Afghans that were initially paroled into the US under OAW in 2021 were eligible for re-parole, meaning they could maintain legal residency and work eligibility until they received a permanent immigration status.¹⁷ The most common permanent immigration pathways for Afghans include Special Immigrant Visas, asylum, or family-based immigration petitions.¹⁸

From August 2021 to September 2022, Afghans residing outside the US that were not evacuated during OAW could also apply for Humanitarian Parole, which facilitated a faster approval process for physically entering the US, compared to waiting for other permanent pathways.¹⁹ The Biden administration stopped approving humanitarian parole applications for Afghans who remain abroad in October 2022.²⁰ Instead, Afghans abroad must apply for permanent immigration pathways such as ASIVs, refugee status, or other pathways later discussed in Part I.²¹

2. Temporary Protected Status

Separate from Humanitarian Parole, on March 16, 2022, the Secretary of Homeland Security designated Afghanistan as a country whose nationals may receive Temporary Protected Status (TPS) in the

¹⁵ *Operation Allies Welcome*, *supra* note 5; Immigration and Nationality Act, 8 U.S.C. § 1101, § 212(d)(5), 147 (1952) (as amended in 2023).

¹⁶ *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 2, 2023), https://www.uscis.gov/humanitarian/humanitarian_parole [<https://perma.cc/VA99-F7YR>].

¹⁷ *DHS Announces Upcoming Re-parole Process for Afghan Nationals*, DEP'T HOMELAND SEC. (May 5, 2023) <https://www.dhs.gov/news/2023/05/05/dhs-announces-upcoming-re-parole-process-afghan-nationals> [<https://perma.cc/6KN2-7BVX>].

¹⁸ *Lawful Immigration Pathways for Eligible Afghan Nationals Residing in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 16, 2022), https://www.uscis.gov/sites/default/files/document/guides/Lawful_Immigration_Pathways_for_Eligible_Afghan_Nationals_Residing_in-the-U.S._FINAL.pdf [<https://perma.cc/M7T9-2SMA>].

¹⁹ Alexandra Ciullo, Note, *Humanitarian Parole: A Tale of Two Crises*, 37 GEO. IMMIGR. L.J. 493, 497–500.

²⁰ Jonathan Landay, *U.S. to Revise Afghan Resettlement Policy - U.S. Official*, REUTERS, <https://www.reuters.com/world/us-revise-afghan-resettlement-policy-us-official-2022-09-01/> [<https://perma.cc/U6GT-MXBW>].

²¹ *See id.*

US.²² DHS then renewed this status designation on September 21, 2023, for an additional eighteen months.²³ Afghans that have resided in the US since September 20, 2023, (regardless of how they arrived, in most cases) can apply for this immigration status for the first time, and persons that previously received TPS under the first authorization in 2022 can reapply for TPS.²⁴ Between both categories, over seventeen thousand Afghans are eligible for TPS.²⁵ Persons that receive TPS are not removable from the US and can obtain work authorization.²⁶ TPS is not a path to permanent residency on its own, but TPS does allow the recipient to apply for other immigration benefits, and it “stops the clock” on the one-year deadline to apply for asylum after arriving in the US.²⁷

B. PERMANENT IMMIGRATION PATHWAYS

Unlike parole or TPS, permanent immigration pathways allow recipients to eventually become LPRs and citizens. Section B discusses five permanent pathways for which Afghans may apply, depending on their eligibility: (1) Special Immigrant Visas for Afghan nationals (ASIVs), (2) Special Immigrant Visas (SIVs) for Afghan translators and interpreters, (3) asylum status, (4) family-based visas, and (5) refugee status.

²² *Lawful Immigration Pathways for Eligible Afghan Nationals Residing in the United States*, *supra* note 18.

²³ Notice of Temporary Protected Status (TPS) Extension and Redesignation, 88 Fed. Reg. 65728 (Sept. 25, 2023), <https://www.federalregister.gov/documents/2023/09/25/2023-20791/extension-and-redesignation-of-afghanistan-for-temporary-protected-status> [<https://perma.cc/CP94-6YWR>].

²⁴ *Temporary Protected Status Designated Country: Afghanistan*, U.S. CITIZENSHIP & IMMIGR. SERVS. <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-afghanistan> [<https://perma.cc/5XH9-KBLN>]; Rebecca Santana, *Afghans Who Recently Arrived in U.S. Get Temporary Legal Status from Biden Administration*, PBS NEWS HOUR (Sept. 21, 2023, 6:42 PM), <https://www.pbs.org/newshour/politics/afghans-who-recently-arrived-in-u-s-get-temporary-legal-status-from-biden-administration> [<https://perma.cc/2X4E-8YYL>].

²⁵ Santana, *supra* note 24.

²⁶ *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 10, 2023), <https://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/QYE8-HXGC>].

²⁷ *Id.*

1. *Special Immigrant Visas for Afghan Nationals*

The Afghan Allies Protection Act (AAPA), originally passed in 2009 and extended through 2024, categorizes certain Afghan nationals who were employed by the US government as “special immigrants” under the Immigration and Nationality Act (INA).²⁸ The INA authorizes the United States Citizenship and Immigration Services (USCIS) to issue these individuals Afghan Special Immigrant Visas (ASIVs).²⁹ Once USCIS approves an ASIV application and the holder relocates to the US, if necessary, ASIV holders immediately receive LPR status.³⁰ ASIV holders can then access various forms of public assistance from the Office of Refugee Resettlement (ORR).³¹ In addition, the spouses and unmarried children under twenty-one of ASIV holders (“derivatives”) can receive the same special immigrant status and benefits as the principal visa holder.³² As of 2024, the AAPA allowed USCIS to issue a cumulative total of 38,500 visas from 2014 to 2024.³³ Once DHS meets that threshold, the program lapses unless Congress increases the visa cap.³⁴ However,

²⁸ Afghan Allies Protection Act of 2009 (“AAPA”), Pub. L. No. 111-8, § 602(b)(1), 123 Stat. 524, 807 (as amended); 8 U.S.C. § 1101(a)(27); *Green Card for an Afghan Who Was Employed by or on Behalf of the U.S. Government*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 30, 2023), [https://www.uscis.gov/green-card-for-an-afghan-employed-behalf-us-government#:~:text=Grounds%20of%20Inadmissibility,-The%20Afghan%20Allies%20Protection%20Act%20of%202009%2C%20Section%20602\(b,7%2C%202001%2C%20and%20Dec](https://www.uscis.gov/green-card-for-an-afghan-employed-behalf-us-government#:~:text=Grounds%20of%20Inadmissibility,-The%20Afghan%20Allies%20Protection%20Act%20of%202009%2C%20Section%20602(b,7%2C%202001%2C%20and%20Dec) [https://perma.cc/4EDD-JKPE].

²⁹ Afghan Allies Protection Act § 602(b)(1); 8 U.S.C. § 1101(a)(27); *Green Card for an Afghan Who Was Employed by or on Behalf of the U.S. Government*, *supra* note 28.

³⁰ *Id.*

³¹ *Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the U.S. Government*, U.S. DEP’T STATE – BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immig-visa-afghans-employed-us-gov.html> [https://perma.cc/JK57-LL3X]; *Benefits for Afghan and Iraqi Special Immigrant Visa (SIV) Holders or SQ/SI Parolees*, OFF. REFUGEE RESETTLEMENT, [https://www.acf.hhs.gov/orr/fact-sheet/benefits-afghan-and-iraqi-special-immigrant-visa-siv-holders-or-sq/si-parolees#:~:text=You%20may%20be%20eligible%20for,of%20Refugee%20Resettlement%20\(ORR\)](https://www.acf.hhs.gov/orr/fact-sheet/benefits-afghan-and-iraqi-special-immigrant-visa-siv-holders-or-sq/si-parolees#:~:text=You%20may%20be%20eligible%20for,of%20Refugee%20Resettlement%20(ORR)) (last visited Oct. 22, 2023) [https://perma.cc/5S4B-MWVS].

³² *Chapter 9 - Certain Afghan Nationals*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 20, 2023), <https://www.uscis.gov/policy-manual/volume-6-part-h-chapter-9#footnote-1> [https://perma.cc/H2MK-C2AH].

³³ *Special visa program for US-affiliated Afghans could end later this year*, REUTERS (March 06, 2024), <https://english.alarabiya.net/News/world/2024/03/06/Special-visa-program-for-US-affiliated-Afghans-could-end-later-this-year> [https://perma.cc/33UY-PWQN].

³⁴ Aline Barros, *House-approved Defense Bill Does Not Increase or Extend Special Immigrant Visas for Afghans*, VOA (July 19, 2023), <https://www.voanews.com/a/house-approved-defense-bill-does-not-increase-or-extend-special-immigrant-visas-for-afghans/7186928.html> [https://perma.cc/VM8Q-M7GA].

derivative visas do not count against this cap; only the principal visa holders are capped.³⁵

To receive an ASIV, applicants must meet four requirements.³⁶ First, the US government must have employed the individual in Afghanistan in any capacity for at least one year.³⁷ Alternatively, an applicant may satisfy the employment requirement if the International Security Assistance Force (ISAF) or its successor missions employed the individual for positions that required interpreting or translation services for US military personnel.³⁸ Individuals must have worked directly for the US government or ISAF—“Afghans employed by an organization under a U.S. grant or cooperative agreement are not eligible” for an ASIV, and persons employed as ISAF contractors or subcontractors also do not qualify.³⁹

Second, the applicant must receive a positive recommendation letter from their US citizen supervisor, as well as approval from the Chief of Mission (COM) for Afghanistan or a designee.⁴⁰ Third, the applicant must “have experienced or be experiencing an ongoing serious threat as a consequence of their employment.”⁴¹ Often, individuals who worked with the US government face threats of death, kidnapping, or ransom from groups opposed to US forces, particularly after the resurgence of the Taliban government in 2021, and therefore can meet the ASIV threat requirement.⁴²

Finally, the individual must have applied for an ASIV before the end of 2024, after which point statutory authority lapsed, unless Congress renews the program.⁴³ Under the AAPA, all government-controlled steps

³⁵ *Chapter 9 - Certain Afghan Nationals*, *supra* note 32.

³⁶ *Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the US Government*, *supra* note 31.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*; OFFICE OF INSPECTOR GENERAL, INFORMATION REPORT: AFGHAN SPECIAL IMMIGRANT VISA PROGRAM METRICS 5 (2022), https://www.stateoig.gov/uploads/report/report_pdf_file/aud-mero-22-38.pdf [<https://perma.cc/GZD3-ETE6>]; *Chapter 9 - Certain Afghan Nationals*, *supra* note 32.

⁴¹ *Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the US Government*, *supra* note 31.

⁴² NOAH COBURN, THE COSTS OF WORKING WITH THE AMERICANS IN AFGHANISTAN: THE UNITED STATES' BROKEN SPECIAL IMMIGRANT VISA PROCESS 1, 2 (Apr. 5, 2021), <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20Working%20with%20AmericanCoburnCosts%20of%20War.pdf> [<https://perma.cc/AW2F-R7G3>].

⁴³ *Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the US Government*, *supra* note 31; Barros, *supra* note 34.

for processing the ASIVs must be completed within nine months after the submission of a complete application.⁴⁴ However, the AAPA authorizes the State Department (DOS) to take additional time to process any visas that present high-risk national security concerns.⁴⁵

2. *Special Immigrant Visas for Afghan Translators and Interpreters*

Afghans that worked as interpreters or translators can also get SIVs under the National Defense Act of 2006.⁴⁶ Only fifty visas can be issued every year under this program.⁴⁷ Like the ASIV provisions of the AAPA, eligibility is limited—applicants must have worked directly with the US Armed Forces or the COM at the US Embassy as a translator or interpreter for at least twelve months.⁴⁸ They also must get a positive recommendation from the COM or a flag officer in the chain of command of the unit for which the interpreter worked.⁴⁹ Persons that receive these visas are also immediately eligible for LPR status and ORR benefits upon relocating to the US.⁵⁰

3. *Asylum Status with Expedited Processing*

Afghan individuals within the US, whether they were paroled into the US under OAW or arrived irregularly, may apply for asylum within one year of their arrival if they “have been persecuted or fear [they] will be persecuted in Afghanistan on account of [their] nationality, race, religion, membership in a particular social group, or political opinion.”⁵¹

⁴⁴ Afghan Allies Protection Act of 2009 (“AAPA”), Pub. L. No. 111-8, § 602(b)(4)(A), 123 Stat. 524, 807 (as amended), <https://www.govinfo.gov/content/pkg/COMPS-13206/pdf/COMPS-13206.pdf> [<https://perma.cc/3UQU-H636>].

⁴⁵ *Id.*

⁴⁶ National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, § 1059, 119 Stat. 3136, 3443, <https://www.govinfo.gov/content/pkg/PLAW-109publ163/pdf/PLAW-109publ163.pdf> [<https://perma.cc/4D24-Z45C>].

⁴⁷ *Special Immigrant Visas (SIVs) for Iraqi and Afghan Translators/Interpreters*, U.S. DEP’T STATE – BUREAU CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/immigrate/siv-iraqi-afghan-translators-interpreters.html> [<https://perma.cc/XL27-LF8Y>].

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*; *Benefits for Afghan and Iraqi Special Immigrant Visa (SIV) Holders or SQ/SI Parolees*, *supra* note 31.

⁵¹ *Lawful Immigration Pathways for Eligible Afghan Nationals Residing in the United States*, *supra* note 18; *Information for Afghan Nationals*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/information-for-afghan->

If USCIS grants the individual asylum status, they may apply for LPR status after one year of residence in the US as an asylee.⁵² Though anyone of any nationality or immigration status can apply for asylum, Afghan persons paroled under OAW are eligible for expedited processing of their asylum petitions under the Extending Government Funding and Delivering Emergency Assistance Act.⁵³ Under the Act, eligible Afghans will receive an initial asylum interview within forty-five days of applying and a final adjudication of their case within 150 days of filing, barring any exceptional circumstances.⁵⁴ This processing is thirty days faster than a standard asylum claim from an applicant of another nationality.⁵⁵

4. *Family-Based Visas under Operation Enduring Welcome*

Operation Enduring Welcome (OEW) began after OAW ended in September 2022 and remains ongoing as of November 2024.⁵⁶ OEW focuses on resettling Afghans that remain abroad, and OEW does not have a prescribed end date.⁵⁷ Distinct from OAW, which primarily focused on specially processing Afghan evacuees within the United States, OEW particularly aims to reunify individuals in the US with their family overseas by providing family-based visas, ASIVs, and refugee status through existing pathways.⁵⁸ Afghans abroad are eligible for family-based visas if their parents, spouses, or siblings are US LPRs or US citizens.⁵⁹

nationals#:~:text=To%20obtain%20a%20Permanent%20Resident,%2C%20or%20Special%20immigrant%2C%20with [https://perma.cc/M7K6-SK2].

⁵² *Lawful Immigration Pathways for Eligible Afghan Nationals Residing in the United States*, *supra* note 18.

⁵³ *Information for Afghan Nationals*, *supra* note 51; Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. 117-43, § 2502(c), 135 Stat. 344, 377 (2021), <https://www.congress.gov/117/plaws/publ43/PLAW-117publ43.pdf> [https://perma.cc/4T9F-EA32].

⁵⁴ *Information for Afghan Nationals*, *supra* note 51.

⁵⁵ *See Questions and Answers: Affirmative Asylum Eligibility and Applications*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-frequently-asked-questions/questions-and-answers-affirmative-asylum-eligibility-and-applications> (last updated Oct. 11, 2024) [https://perma.cc/5YCL-PAPN].

⁵⁶ Alvarez, *supra* note 13.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Family Immigration*, U.S. DEP'T OF STATE – BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration.html> [https://perma.cc/U3AW-9HEQ]. Though Afghans' applications receive special designation under OEW, these eligibility categories apply to any foreign national applying for family-based visas in the U.S. *Id.*

5. Refugee Status

If Afghans who remain abroad do not qualify for family-based visas or ASIVs, they may apply for refugee status.⁶⁰ Like asylees, refugees must demonstrate that they “have been persecuted or fear [they] will be persecuted in Afghanistan on account of [their] nationality, race, religion, membership in a particular social group, or political opinion.”⁶¹ Applicants for refugee status must remain outside the US (in a country other than their country of origin) until their application is approved, at which point they may relocate to the US—once resettled in the US, refugees are eligible for work authorization and can apply for LPR status after one year of residency.⁶²

Under the US Refugee Admissions Program (USRAP), there are four pathways for refugee resettlement in the US.⁶³ First, the Priority-1 (P-1) process accepts individual case referrals for people of any nationality from designated entities, including the UN High Commissioner for Refugees (UNHCR), certain certified NGOs, or US embassies.⁶⁴ Second, on August 2, 2021, DOS announced the USRAP Priority-2 (P-2) Designation for Afghan Nationals.⁶⁵ This program aims to provide an additional pathway for relocation to Afghans that worked with the US or its affiliates but do not qualify for SIVs.⁶⁶ Afghans eligible for the P-2 program include:

- (1) Afghans who do not meet the minimum time-in-service for a SIV but who work or worked as employees of contractors, locally-employed staff, interpreters, or translators for the US Government, United States Forces

⁶⁰ *See id.*

⁶¹ *Lawful Immigration Pathways for Eligible Afghan Nationals Residing in the United States*, *supra* note 18; *Information for Afghan Nationals*, *supra* note 51.

⁶² *Legal Information: Federal*, WOMENLAW.ORG (Aug. 15, 2022), <https://www.womenslaw.org/laws/federal/immigration/refugee-status/benefits-getting-refugee-status/what-are-benefits-having>. [<https://perma.cc/294H-UXM2>].

⁶³ *See generally About Refugee Admissions*, U.S. DEP’T STATE, <https://www.state.gov/refugee-admissions/about/> [<https://perma.cc/64DH-B9E4>].

⁶⁴ *Id.*

⁶⁵ *Afghan Arrivals under the U.S. Refugee Admissions Program*, *supra* note 14.

⁶⁶ *U.S. Refugee Admissions Program Priority 2 Designation for Afghan Nationals*, U.S. DEP’T STATE (Aug. 2, 2021), <https://www.state.gov/u-s-refugee-admissions-program-priority-2-designation-for-afghan-nationals/> [<https://perma.cc/CEQ9-JV99>].

Afghanistan, International Security Assistance Force, or Resolute Support;

(2) Afghans who work or worked for a US government-funded program or project in Afghanistan supported through a US government grant or cooperative agreement; and

(3) Afghans who are or were employed in Afghanistan by a US-based media organization or non-governmental organization.⁶⁷

The P-2 designation expands access to legal immigration pathways for Afghans who worked alongside the US during military operations through executive action, given the limitations placed on ASIVs by Congress.⁶⁸

Third, Afghans with immediate family members that receive refugee or asylum status are eligible for USRAP under the Priority-3 (P-3) pathway.⁶⁹ Finally, the Priority-4 (P-4) pathway establishes a public-private partnership with the Community Sponsorship Hub, which facilitates refugee settlements in communities across the US that agree to privately sponsor Afghan refugees.⁷⁰ In the initial phases of the program, which started in 2023, approved sponsors “will be matched with refugees who already have access to the USRAP through another priority category and whose cases are already being processed.”⁷¹

II. ANALYSIS

Both Congress and the executive branch intended that the special immigration pathways discussed in Part I would fulfill the US policy goal of protecting individuals who worked with US forces in Afghanistan. Since Congress enacted the Afghan Allies Protection Act (AAPA) in 2009, bipartisan coalitions have supported facilitating the expedient migration of

⁶⁷ *Id.*

⁶⁸ *See id.*

⁶⁹ *Report to Congress on Proposed Refugee Admissions for Fiscal Year 2023*, U.S. DEP’T OF STATE (Sept. 8, 2023), <https://www.state.gov/report-to-congress-on-proposed-refugee-admissions-for-fiscal-year-2023/#eap> [<https://perma.cc/JJ3L-2Y5X>].

⁷⁰ *Id.*

⁷¹ *Id.*

allied Afghans to the US.⁷² In 2007, when considering the AAPA, then-Congressman Mike Pence remarked that “there is nothing more important than the United States of America saying to people. . . anywhere in the world, if you stand by us, we will stand by you.”⁷³ On the two-year anniversary of OAW, Secretary Mayorkas echoed, “Our allies deserve certainty and stability. . . America keeps its promises, and no promise is more sacrosanct than the one we make to support and protect those who serve alongside our troops.”⁷⁴

In June of 2023, bipartisan coalitions introduced bills in the House and the Senate that would provide additional immigration support to Afghans.⁷⁵ As Republican Representative Brad Wenstrup stated in 2023, special immigration provisions for allied Afghans demonstrate that “America made a commitment to our Afghan allies and interpreters . . . We have an obligation to keep our word to these partners who stood together with us through 20 years of battle in Afghanistan.”⁷⁶ In the Senate, Republican Lindsey Graham agreed: “It is imperative that America assist those Afghans who supported our country and that fled the oppressive regime of the Taliban. We must let the world know that we do not abandon those who aid America.”⁷⁷

Overall, these statements made over decades, across party lines, and in both the executive and legislative branches demonstrate broad political support for providing efficient immigration pathways for allied Afghans. Despite this declared support, overall, both the statutory scheme

⁷² Winkler, *supra* note 6; *Reps. Crow, Wenstrup, Blumenauer Introduce the Afghan Allies Protection Act*, *supra* note 6.

⁷³ Editorial Board, *America Must Not Turn Its Back on Battlefield Allies from Iraq and Afghanistan*, WASH. POST (Jan. 30, 2019, 5:47 PM), https://www.washingtonpost.com/opinions/global-opinions/america-must-not-turn-its-back-on-battlefield-allies-from-iraq-and-afghanistan/2019/01/30/a3c969f4-2317-11e9-81fd-b7b05d5bed90_story.html [<https://perma.cc/58YK-29AX>].

⁷⁴ *Statement from Secretary Mayorkas on the Two-Year Anniversary of Operation Allies Welcome*, DEP’T OF HOMELAND SEC. (Aug. 29, 2023), <https://www.dhs.gov/news/2023/08/29/statement-secretary-mayorkas-two-year-anniversary-operation-allies-welcome> [<https://perma.cc/2GUG-EG8U>].

⁷⁵ *Reps. Crow, Wenstrup, Blumenauer Introduce the Afghan Allies Protection Act*, *supra* note 6.

⁷⁶ *Id.*

⁷⁷ Klobuchar, Graham, Coons, Moran, Blumenthal, Murkowski, Shaheen, Wicker, Durbin, Tillis, Miller-Meeks, Blumenauer Reintroduce Bipartisan Legislation to Allow Afghans Allies in the United States to Apply for Permanent Legal Status (July 14, 2023), <https://www.klobuchar.senate.gov/public/index.cfm/2023/7/klobuchar-graham-coons-moran-blumenthal-murkowski-shaheen-wicker-durbin-tillis-miller-meeks-blumenauer-reintroduce-bipartisan-legislation-to-allow-afghans-allies-in-the-united-states-to-apply-for-permanent-legal-status#:~:text=The%20Afghan%20Adjustment%20Act%20would,Female%20Tactical%20Team%20of%20Afghanistan> [<https://perma.cc/6QN4-22QW>].

and its implementing agencies fail to support the Afghans who worked alongside US troops. Because of agency inefficacy, agency lack of capacity, and structural statutory issues, many special immigration programs for Afghans are practically inaccessible for those abroad, and they only offer an elusive, unsure future for those within the United States. Part II identifies issues with agency action and the statutory scheme and then makes recommendations for both executive and legislative action.

A. AGENCY ACTION: ISSUES AND SOLUTIONS

Within the US constitutional framework, executive agencies possess substantial power and discretion over immigration decision-making. Part II(A) examines issues with agency action in the context of special immigration provisions for Afghans and proposes potential solutions. First, Part II(A) assesses agency processing of ASIVs through the lens of ongoing class-action litigation, and then it discusses Afghan asylum application processing. This Part concludes by describing opportunities for agency action in the face of the Kabul Embassy closure.

1. *Afghan Special Immigrant Visas*

Despite broad political consensus supporting the provision of ASIVs, the current ASIV program is mired in controversy and inefficiencies. A major class-action lawsuit brought by ASIV applicants in 2018, *Afghan & Iraqi Allies v. Pompeo* (now *Afghan & Iraqi Allies v. Blinken*), addresses ways in which executive agencies fail to effectively process ASIVs.⁷⁸ This section discusses (a) the court's first evaluation of agency action in 2018, (b) the court's later evaluation of agency action in 2022, and (c) more recent ASIV processing data in the context of the *Afghan Allies* litigation.

a. Early Litigation in the *Afghan Allies* Class-Action Lawsuit

In *Afghan Allies*, the named plaintiffs each worked with the US government in Afghanistan, applied for ASIVs, and were *prima facie*

⁷⁸ See generally *Afghan & Iraqi Allies v. Pompeo*, No. 18-cv-01388 (TSC), 2019 U.S. Dist. LEXIS 14465 (D.D.C. Jan. 30, 2019); *Afghan & Iraqi Allies v. Blinken*, 643 F. Supp. 3d 148 (D.D.C. 2022).

qualified to receive the visas.⁷⁹ Each applicant had been waiting between two and five years for DOS, DHS, or USCIS to complete the next step of their visa processing at the time they filed the lawsuit.⁸⁰

Plaintiffs sought injunctive relief for faster adjudication under the Administrative Procedure Act (APA) and the Mandamus Act, alleging that the government exercised undue delay in processing the ASIVs.⁸¹ Under the APA and Mandamus Act, a court may compel agency action if it finds that the agency owes a duty to the plaintiff to perform a nondiscretionary action, and that the agency action was unreasonably delayed.⁸² Because USCIS *must* make a decision about an ASIV application, regardless of whether they approve or deny the applicant's visa request, the court held that the agency owed the plaintiffs a duty to perform a nondiscretionary action.⁸³ As such, the plaintiffs alleged an issue-in-fact to pursue a claim under the APA and Mandamus Act.⁸⁴

After initial discovery, the court determined that class members had waited an average of two and a half years during the COM approval phase and an additional three years for final adjudication of their visa applications, despite a nine-month statutory processing limit.⁸⁵ The court then used the factor test established in *Telecommunications Research &*

⁷⁹ *Afghan & Iraqi Allies*, 2019 U.S. Dist. LEXIS 14465 at *9–13. One Iraqi SIV applicant was also a named plaintiff and brought suit pursuant to the Refugee Crisis in Iraq Act (“RCIA”), which also provides that the government must adjudicate Iraqi SIV (ISIV) applications within 9 months of completing a submitted application. Refugee Crisis in Iraq Act of 2007, Pub. L. 110–181, 122 Stat. 395. The RCIA and AAPA have substantially similar SIV provisions, and thus the claims were brought together. *Afghan Allies Protection Act of 2009* (“AAPA”), Pub. L. 111–8, 123 Stat. 807; Refugee Crisis in Iraq Act of 2007, Pub. L. 110–181, 122 Stat. 395. This Comment will focus on the ASIV applicant plaintiffs; however, the injunctive relief sought and granted in the case is equally applicable to ISIV applicants.

⁸⁰ *Afghan & Iraqi Allies*, 2019 U.S. Dist. LEXIS 14465 at *9–13.

⁸¹ *Id.* at *2–3, *21–22.

⁸² 5 U.S.C. § 706; 28 U.S.C. § 1361; *Afghan & Iraqi Allies*, 2019 U.S. Dist. LEXIS 14465 at *21–22.

⁸³ *Afghan & Iraqi Allies*, 2019 U.S. Dist. LEXIS 14465 at *28.

⁸⁴ *Id.*

⁸⁵ *Afghan & Iraqi Allies v. Pompeo*, No. 18-cv-01388 (TSC), 2019 U.S. Dist. LEXIS 160619 at *5–6 (D.D.C. Sep. 20, 2019). At the time this claim was adjudicated, the court had only provisionally certified the class, though the court later permanently certified the class. *Id.* at *5. Current class members include any individual that submitted their ASIV or ISIV application before Feb. 5, 2020, and whose applications have been awaiting government action for more than 9 months. *Afghan & Iraqi Allies v. Pompeo*, 334 F.R.D. 449, 452–53 (D.D.C. 2020).

Action Center v. FCC (“*TRAC*”) to determine whether these delays were “unreasonable” under the APA.⁸⁶ There are six *TRAC* factors:

- (1) Whether a “rule of reason” governs the time an agency takes to make a decision;
- (2) Whether Congress has provided in the enabling statute a timetable or other indication of the speed with which it expects the agency to proceed, thus supplying content for the rule of reason;
- (3) The affected sphere of regulation, because delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
- (4) The effect of expediting delayed action on agency activities of a higher or competing priority;
- (5) The nature and extent of the interests prejudiced by delay; and
- (6) Any impropriety of the agency, although the court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’”⁸⁷

First, the court held that the first and second *TRAC* factors—whether a “rule of reason” governed processing time—weighed towards plaintiffs, given congressional standards for ASIV processing and the importance of the visa adjudication for each applicant.⁸⁸ To determine whether a “rule of reason” governed ASIV processing time, the court analyzed the complexity of the agency task under review, the significance and permanence of the outcome, and the resources available to the agency,

⁸⁶ See *Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 80 (1984) (establishing six-factor test to determine unreasonable agency delay); *Afghan & Iraqi Allies*, 2019 U.S. Dist. LEXIS 160619 at *12–13.

⁸⁷ *Afghan & Iraqi Allies*, 2019 U.S. Dist. LEXIS 160619 at *12–13 (quoting *Telecomms. Rsch. & Action Ctr.*, 750 F.2d at 80 (internal citations omitted)).

⁸⁸ *Id.* at *15.

in combination with Congress's expectations for the agency's performance under the second factor.⁸⁹ Though the court recognized the complexity of the ASIV approval process, which required fourteen separate steps at the time, the court determined that this complexity alone does not justify the government's significant delay beyond the statutory limit of nine months.⁹⁰ Moreover, the court reasoned that Congress fully understood the complexities of visa issuance and nonetheless set a nine-month deadline for the government-controlled steps of ASIV processing.⁹¹ This demonstrated that Congress did not intend to give USCIS and other coordinating agencies an indefinite time period to process these visas, compared to other types of immigrant visas.⁹² Relying on these facts, the court held that the first two *TRAC* factors showed that the defendant agencies exercised an unreasonable delay under the APA.⁹³

Next, the court held that the third factor—the sphere of regulation—and the fifth factor—the nature and extent of the plaintiffs' interest in the outcome of agency action—weighed towards plaintiffs.⁹⁴ The court considered these two *TRAC* factors in tandem. First, the court noted that the sphere of regulation—immigration benefits for international allies at high risk of persecution—clearly has high stakes, both for the applicants and for overall US foreign interests.⁹⁵ In order to even qualify for the visa, applicants must have demonstrated an ongoing, serious threat to their life because of their employment by the US government.⁹⁶ Specifically, the named plaintiffs described that because of their work for the US, the Taliban harassed them, placed them under house arrest, sent them death threats by mail and by phone, and forced them to move several times to escape threats.⁹⁷ One plaintiff's brother was stabbed repeatedly by a Taliban member who had mistaken his brother for the plaintiff.⁹⁸ In addition, when considering the sphere of regulation at issue, the court noted that the agencies' delay undermined US credibility in the region.⁹⁹ And, in discovery, the defendant agencies failed to demonstrate that ASIV

⁸⁹ *Id.* at *18–19.

⁹⁰ *Id.* at *15.

⁹¹ *Id.* at *17.

⁹² *Id.* at *20.

⁹³ *Id.*

⁹⁴ *Id.* at *22–24.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Afghan & Iraqi Allies*, 2019 U.S. Dist. LEXIS 14465 at *9–13.

⁹⁸ *Id.* at *11–12.

⁹⁹ *Afghan & Iraqi Allies*, 2019 U.S. Dist. LEXIS 160619 at *21–22.

processing entailed high enough national security risks that would justify a delay.¹⁰⁰ As such, both the third and fifth *TRAC* factors, the sphere of regulation and nature of plaintiffs' interests, showed that the defendant agencies unduly delayed ASIV processing.¹⁰¹

Finally, the court determined that the fourth *TRAC* factor—the effect of expediting ASIV processing on higher priority agency activities—was neutral, as the defendant agencies failed to demonstrate in discovery that the demands of ASIV processing would affect the agencies' other priorities.¹⁰² The court did not consider the sixth factor, as no impropriety was alleged.¹⁰³ Taken together, the *TRAC* analysis demonstrated that the several agencies that work to process ASIVs exercised undue delay for which the court could compel agency action.¹⁰⁴ At this stage, the court issued an injunction that mandated that the defendant agencies submit a plan for promptly processing and adjudicating the ASIV applications of class members.¹⁰⁵ The injunction also compelled the defendant agencies to submit progress reports every sixty days thereafter that included data on pending application and processing times, whether processing times meet benchmarks, and how to address any processing issues.¹⁰⁶

Though the stakes and statistics have changed since 2019 and will be explored later in this section, the first resolution of summary judgments in *Afghan Allies v. Pompeo* clearly demonstrates that DOS, DHS, and USCIS processed ASIVs with undue delay throughout the 2010s, well before the US withdrew from Afghanistan. US immigration agencies were fully unprepared for the massive influx of applications in 2021—two years before withdrawal, the agencies were operating at a pace that trailed their statutory mandate by more than two years, on average.¹⁰⁷

Then, the US evacuated tens of thousands of Afghans, many of whom were likely eligible for this immigration status since they were approved to be evacuated.¹⁰⁸ And, US forces left hundreds of thousands of

¹⁰⁰ *Id.* at *22–24.

¹⁰¹ *Id.*

¹⁰² *Id.* at *26–27.

¹⁰³ *Id.* at *13.

¹⁰⁴ *Id.* at *28.

¹⁰⁵ *Id.* at *29.

¹⁰⁶ *Id.* at *29–30.

¹⁰⁷ *Id.* at *5–6.

¹⁰⁸ *Operation Allies Welcome*, *supra* note 5.

applicants behind.¹⁰⁹ In this way, early phases of the *Allied Afghans* litigation provide important context for the state of ASIV processing that the Biden administration inherited in early 2021. Moreover, the court's analysis offers an important lens for assessing whether Biden administration effectively protected the Afghans who supported the US mission in Afghanistan, both by the administration's own standards and by the court's standards.

b. Recent Litigation in the *Afghan Allies* Class-Action Lawsuit

Litigation in *Afghan Allies* is ongoing, though much has changed both domestically and abroad since the case was filed in 2018. Reflecting these changes, in May of 2022, the defendant agencies filed a Motion for Relief from Judgment, asking the court to conclude that there is no longer unreasonable delay in processing ASIVs and to vacate its injunction mandating that the agencies submit a processing plan and progress reports.¹¹⁰ The defendant agencies argued that exponential increases in applications since 2021, the closure of the Kabul embassy, COVID-19, increased adjudication capacity, and a streamlined application process combined to demonstrate that any processing delay is no longer unreasonable under the *TRAC* factors.¹¹¹ Thus, they argued, the court can no longer compel agency action and must lift the plan implemented in 2020.¹¹²

The court acknowledged the shifts in several *TRAC* factors, yet nonetheless held that the agencies exercised unreasonable delay in processing ASIVs.¹¹³ The primary shift occurred in the analysis of the first factor, whether a "rule of reason" governed the time that the agencies took to make a decision on a visa application.¹¹⁴ The court acknowledged that the defendant agencies had a 413 percent increase in the number of active ASIV applications, while losing the ability to conduct in-person interviews at the embassy in Kabul and experiencing COVID-related complications.¹¹⁵ Though the agencies' workload increased while their

¹⁰⁹ *Id.*; Leatherby & Buchanan, *supra* note 1.

¹¹⁰ *Afghan & Iraqi Allies*, 643 F. Supp. 3d at 152.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 154.

¹¹⁴ *Id.* at 154–55.

¹¹⁵ *Id.*

capacity to process ASIVs ostensibly decreased, the court held that the average processing delay remained unreasonable.¹¹⁶

Specifically, the court noted that the agencies remain under a statutory mandate to process the ASIVs within nine months.¹¹⁷ Furthermore, in the intervening two years since the court issued the 2020 injunction, the government failed to produce a concrete timeline for processing and adjudicating ASIVs, indicating a continuing need for court involvement.¹¹⁸ Therefore, the *TRAC* factors continued to demonstrate that the agencies processed the visas with undue delay, and the court left the majority of its 2020 injunction in place.¹¹⁹ However, the court allowed the government to propose targets for processing and adjudication in light of its heightened caseload, inability to schedule in-person interviews abroad, and internal processing updates.¹²⁰

These developments in litigation demonstrate that despite the increased strain on agencies from 2020 to 2022, and arguably still today, the defendant agencies' failure to process ASIVs within the congressional mandate of nine months constitutes an unreasonable delay.¹²¹ With Afghanistan under Taliban control, the stakes for visa applicants who remain abroad are higher than ever.¹²² Among evacuees in the US, a failure to timely process ASIVs leaves individuals without a confirmed pathway to obtain long-term legal status for themselves or for their families.¹²³ Prolonged wait times and obscure, indefinite processes for obtaining a permanent status heighten anxiety among resettled Afghans and negatively impact their personal outcomes as they build a new life in the US.¹²⁴ Despite this reality, executive agencies continued to trail their statutory mandate and unreasonably delay ASIV processing.

¹¹⁶ *Id.* at 156.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 155.

¹¹⁹ *Id.* at 157.

¹²⁰ *Id.* at 156.

¹²¹ *See generally id.*

¹²² *See* Paton Walsh & Popalzai, *supra* note 3.

¹²³ Covington, *supra* note 8.

¹²⁴ *Id.*

c. Recent Processing Data and Issues in the Context of *Afghan Allies*

Data published by DOS in July of 2023 indicated that government-controlled processing steps for ASIVs averaged 366 days.¹²⁵ This processing time is a remarkable improvement from the initial phases of litigation and from the fall of 2021 and early 2022, when processing times averaged over two years.¹²⁶ DOS's internal Office of the Inspector General (OIG) found that several measures influenced this improvement.¹²⁷ Specifically, DOS (1) increased staff that specifically processed ASIVs; (2) improved coordination with DOD to verify applicants' prior employment with the US military or relevant affiliates; (3) adopted new email processing software that significantly improved screening time in the first phases of the application process; (4) eliminated extraneous steps in the overall application process; and (5) established remote consular operations in Doha, Qatar to conduct ASIV interviews for applicants abroad.¹²⁸ Furthermore, as of August 25, 2021, DOS no longer requires applicants to submit statements and evidence that demonstrate that they experienced an ongoing, serious threat to their life—after Taliban rule resumed, such a threat is implied for eligible employees.¹²⁹

Nonetheless, DOS faces a vastly increased and growing backlog of applications after the start of Taliban rule in 2021, since 805,475 Afghans await determination on their ASIV applications as of late 2023.¹³⁰ OIG states that this backlog will pose a significant obstacle to timely processing unless DOS takes several preventative measures.¹³¹ First, OIG recommends that DOS adopts specific program-wide goals that state how all relevant DOS agencies plan to address the backlog, which aligns with the injunctive relief sought by the plaintiffs in *Afghan Allies*.¹³² Next, OIG found that hiring additional staff to the ASIV processing unit is essential—

¹²⁵ U.S. DEP'T STATE, REPORT TO CONGRESS ON POSTING OF THE AFGHAN SPECIAL IMMIGRANT VISA QUARTERLY REPORT ON THE DEPARTMENT OF STATE'S WEBSITE 6 (Jul. 2023).

¹²⁶ U.S. DEP'T STATE, REPORT TO CONGRESS ON POSTING OF THE AFGHAN SPECIAL IMMIGRANT VISA QUARTERLY REPORT ON THE DEPARTMENT OF STATE'S WEBSITE 5 (Jan. 2022).

¹²⁷ OFF. INSPECTOR GEN., U.S. DEP'T STATE, AUD-MERO-23-23, EVALUATION OF ADJUSTMENTS TO THE AFGHAN SPECIAL IMMIGRANT VISA PROGRAM FROM 2018 THROUGH 2022 (Aug. 2023) at 7.

¹²⁸ *Id.* at 7.

¹²⁹ *Id.* at 4.

¹³⁰ *Id.* at 23. This figure includes both principal and derivative visa applicants. *Id.*

¹³¹ *Id.* at 7.

¹³² *Id.* at 23; Plaintiffs' Notice of Supplemental Authority Supporting Entry of New Adjudication Plan at 1–2, *Afghan & Iraqi Allies v. Blinken*, Doc. 227, No. 18-cv-01388-TSC-MAU (D.D.C. 2023).

without more personnel, DOS can expect to lose any gains made during the Biden administration.¹³³ One DOS official stated that “without . . . additional staff, processing all current applicants at the COM approval phase would take 3 to 5 years.”¹³⁴

Other aspects of the COM approval phase outside DOS control continue to pose significant challenges to ASIV processing. Most importantly, DOD did not maintain a central database of the Afghan employees of the various US military entities that operated within Afghanistan.¹³⁵ DOD’s failure to systematically track both contractors and its own employees significantly extends ASIV processing times, and also “makes it difficult to assess the current effects of the SIV program, since there is no simple or precise count of the number of Afghans who have worked for the US government or the number of these Afghans who have been killed during or after their service.”¹³⁶

Though DOS and DOD have improved channels of communication since the start of the *Afghan Allies* litigation in 2018, the COM approval phase remains a central issue contributing to the ASIV backlog.¹³⁷ As such, OIG recommends that DOS and DOD explicitly define their roles and responsibilities for processing ASIVs and meet regularly to assess their progress.¹³⁸ Overall, as noted recently by the *Afghan Allies* plaintiffs, echoing OIG and immigration advocates, “unless the Court orders Defendants to implement an adjudication plan with enforceable timing benchmarks, class members’ SIV applications will continue to languish in the [government]’s control.”¹³⁹ The defendant agencies still exceed the nine-month statutory limit, and delays will likely increase without substantial adjustments—as such, the court will likely hold that the defendant agencies continue to exercise unreasonable delay in processing ASIVs under the *TRAC* factors whenever it revisits the question.

Whether the court will mandate more stringent injunctive relief remains to be seen. A possible approach could be for the court to impose all of OIG’s recommendations to implement a strategic performance

¹³³ OFF. INSPECTOR GEN., *supra* note 127, at 12.

¹³⁴ *Id.*

¹³⁵ COBURN, *supra* note 42, at 5.

¹³⁶ *Id.*

¹³⁷ OFF. INSPECTOR GEN., *supra* note 127, at 13.

¹³⁸ *Id.*

¹³⁹ Plaintiffs’ Notice of Supplemental Authority Supporting Entry of New Adjudication Plan at 1–2, *Afghan & Iraqi Allies v. Blinken*, Doc. 227, No. 18-cv-01388-TSC-MAU (D.D.C. 2023).

management approach with measurable goals. This option for relief may strike a seemingly appropriate balance between ensuring the defendant agencies' compliance with statutory mandates and allowing the agency itself to conduct a thorough investigation and recommend its own reasonable solutions, since OIG is housed within DOS. Overall, despite notable improvements in ASIV administration by DOS, because the central factors in the *TRAC* balancing test have not largely shifted since the court last considered the question in 2022, the court could likely impose harsher injunctive relief on the defendant agencies for an unreasonable delay in processing ASIVs, if and when it revisits the question.

2. Expedited Asylum Processing: Recent Class-Action Litigation

Distinct from *Afghan Allies*, which addresses several years of ASIV processing issues, more recent class action litigation specifically challenged Afghan asylum application processing issues post-withdrawal. In April of 2023, a group of Afghan asylum applicants filed a class-action suit against DHS and USCIS in the Northern District of California in *Ahmed v. DHS*.¹⁴⁰ The named plaintiffs represent a group of Afghans evacuated from Afghanistan under OAW who were granted Humanitarian Parole and subsequently applied for asylum while in the US.¹⁴¹ Most of the named plaintiffs worked for US-affiliated groups, within the elected Afghan government, or in other human rights advancement positions that threaten their safety under the Taliban, but would not otherwise qualify them for ASIVs.¹⁴²

Like the *Afghan Allies* plaintiffs, the *Ahmed* plaintiffs alleged that the agencies' delay in adjudicating their asylum applications was unreasonable under the APA, and they sought to compel timely adjudication under the Mandamus Act.¹⁴³ The plaintiffs waited between 229 and 393 days for adjudication at the time of filing, significantly higher

¹⁴⁰ *Ahmed et al. v. DHS et al.: Challenging Adjudication Delays for Afghan Asylum Seekers*, NAT'L IMMIGRANT JUSTICE CTR., https://immigrantjustice.org/court_cases/ahmed-et-al-v-dhs-et-al [<https://perma.cc/3YBT-W2J3>].

¹⁴¹ *Id.*

¹⁴² Complaint at 3–5, *Ahmed v. U.S. Dep't Homeland Sec.*, No. 4:23-cv-01892-JST (N.D. Cal. Apr. 19, 2023) (hereinafter "*Ahmed* Complaint").

¹⁴³ *Id.* at 3; 5 U.S.C. § 701 *et seq.*; 28 U.S.C. § 1361.

than the expedited statutory limit of 150 days for Afghan nationals.¹⁴⁴ They were particularly anxious to receive asylee status because such status would enable them to obtain derivative visas for their family members remaining abroad—the plaintiffs’ families, like many others, were separated during OAW.¹⁴⁵ Moreover, those evacuated during OAW had strong asylum claims—the agencies granted asylum to over ninety nine percent of plaintiffs in the class (Afghans granted humanitarian parole under OAW), bolstering the plaintiffs’ argument of unreasonable processing delays.¹⁴⁶

The parties quickly reached a settlement, and in September 2023, the government defendants agreed to a court-enforced schedule to adjudicate all pending asylum claims.¹⁴⁷ The settlement ensures that the longest-pending applications will be adjudicated first, and at least 90% of outstanding applications with delays over 150 days must be adjudicated by June 2024.¹⁴⁸ The settlement culminates in a trajectory that ensures all applications are adjudicated within 150 days of filing.¹⁴⁹ This expedited schedule will apply to over twenty thousand Afghan principal asylum applicants, as well as their immediate family members who can obtain derivative asylee status.¹⁵⁰ The government defendants must also publish detailed progress reports showing adherence to the settlement.¹⁵¹ As of the

¹⁴⁴ *Ahmed* Complaint at 3–5; Extending Government Funding and Delivering Emergency Assistance Act § 2502(c), Pub. L. No. 117–43, 135 Stat. 377 (2021).

¹⁴⁵ *Ahmed* Complaint at 3–5; Whitney Shefte, *Two years after U.S. withdrawal, Afghan refugees wait for asylum*, WASH. POST (Aug. 30, 2023), <https://www.washingtonpost.com/dc-md-wa/2023/08/30/two-years-after-us-withdrawal-afghan-refugees-wait-asylum/> [<https://perma.cc/VY7C-DX68>].

¹⁴⁶ *Ahmed* Complaint at 2; U.S. CITIZENSHIP & IMMIGR. SERVS., *AHMED V. DHS PUBLIC STATUS REPORT 1* (Oct. 11, 2023); U.S. CITIZENSHIP & IMMIGR. SERVS., *ASYLUM QUARTERLY ENGAGEMENT 1*, 5 (June 13, 2023).

¹⁴⁷ *See Afghan People Seeking Asylum Reach Landmark Settlement with U.S. Government In Class Action*, NAT’L IMMIGRANT JUSTICE CTR. (Sept. 11, 2023), <https://immigrantjustice.org/press-releases/afghan-people-seeking-asylum-reach-landmark-settlement-us-government-class-action> [<https://perma.cc/32PF-3VD8>].

¹⁴⁸ Settlement Agreement at 4, *Ahmed v. U.S. Dep’t of Homeland Sec.*, No. 4:23-cv-01892-JST (N.D. Cal. Apr. 19, 2023) (hereinafter “*Ahmed* Settlement Agreement”).

¹⁴⁹ *Id.*

¹⁵⁰ *Afghan People Seeking Asylum Reach Landmark Settlement with U.S. Government in Class Action*, *supra* note 147.

¹⁵¹ *Ahmed* Settlement Agreement at 4–5; *see generally USCIS Class Action, Settlement Notices and Agreements*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws-and-policy/other-resources/uscis-class-action-settlement-notices-and-agreements> [<https://perma.cc/UQ8A-SKT8>] (repository for all mandated reports published under the settlement agreement).

time of writing, they have timely published such reports and adhered to the settlement terms.¹⁵²

The settlement in the *Ahmed* case represents an affirmative step towards fulfilling both congressional and executive policy goals to efficiently ensure a permanent immigration pathway for Afghans evacuated during OAW. Presumably, as a result of this litigation, all applicants should have their asylum claims fully adjudicated within five months, and then asylees can finally begin the work of family reunification for any family members that remain in Afghanistan or other countries. While this settlement pertains to only a limited class of applicants, it nonetheless represents a positive step towards fulfilling the promises of Congress, OAW, and OEW under the Biden administration.

The *Ahmed* settlement could provide an example of a settlement for the *Afghan Allies* plaintiffs and ASIV applicants writ large—though the immigration statuses at issue are distinct, the legal claims and relief sought substantially overlap. However, asylum claims for OAW evacuees are much simpler to adjudicate and do not require cooperation from DOD. Therefore, any similar settlement plan would have to account for the additional complexities of adjudicating an ASIV application compared to an asylum application. Nonetheless, both *Afghan Allies* and *Ahmed* demonstrate that courts and litigators who force defendant agencies to address substantial processing issues have been the most effective tools for enforcing congressional intent and holding the executive branch accountable so far.

3. *Kabul Embassy Closure*

Apart from the largely domestic processing issues litigated in *Afghan Allies* and *Ahmed*, logistical challenges remain on the ground in Afghanistan. Specifically, as discussed in Part I, the US no longer operates an embassy within Afghanistan, making the visa application process extremely difficult to complete if the applicant still resides within the country.¹⁵³ However, DOS set up an Afghan Affairs Unit that remotely

¹⁵² See *Ahmed* Settlement Agreement at 4–5; see generally *USCIS Class Action, Settlement Notices and Agreements*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws-and-policy/other-resources/uscis-class-action-settlement-notices-and-agreements> [<https://perma.cc/UQ8A-SKT8>] (reflecting timely publication of reports showing settlement compliance).

¹⁵³ *U.S. Embassy in Afghanistan Status*, *supra* note 9.

processes ASIV applications from the US Embassy in Doha, Qatar.¹⁵⁴ OIG heralded this innovative method for visa processing—the Afghan Affairs Unit is the only consular section worldwide that physically operates outside an in-country diplomatic post.¹⁵⁵ Nonetheless, such an approach relies on internet connectivity for the applicant, yet only about 25 percent of Afghan men and 6 percent of women have reliable internet access.¹⁵⁶ Furthermore, if applicants schedule a visa interview in another country, their movements depend on Taliban cooperation to leave the country, and they risk severe retaliation if the Taliban ascertains their reason for travel.¹⁵⁷

DOS could address these issues by promulgating clear guidance for ASIV applicants remaining abroad, including its preferred method for applicants to set up their visa interviews. DOS agencies could also direct applicants towards resources to assist them with setting up virtual interviews, exiting Afghanistan, or traveling to neighboring countries in order to facilitate their visa processing. This guidance would be especially important for family reunification—as Afghans already in the United States get their ASIV and asylum applications approved, they can begin to petition for visas for their immediate family members remaining in Afghanistan. To fully accomplish the goals of OEW, such guidance is imperative.

B. CONGRESSIONAL ACTION: ISSUES AND SOLUTIONS

While agencies possess immense discretion in the immigration context, they are fundamentally limited by the statutes enabling them to confer immigration benefits. To achieve more lasting change, Congress must act in alignment with its stated policy goals to protect allied Afghans by ensuring they can migrate to the US. Part II(B) first discusses the Afghan Adjustment Act (AAA), which is the most sweeping possibility for change. Then, Part II(B) discusses other statutory shortcomings related to ASIVs, TPS, and USRAP, and identifies opportunities for smaller-scale change that may have an outsize impact on allied Afghans.

¹⁵⁴ OFF. INSPECTOR GEN., *supra* note 127, at 15.

¹⁵⁵ *Id.*

¹⁵⁶ Khorshied Nusratty & Steve Crabtree, *Digital Freedom Out of Reach for Most Afghan Women*, GALLUP (Mar. 8, 2023), <https://news.gallup.com/opinion/gallup/471209/digital-freedom-reach-afghan-women.aspx> [<https://perma.cc/69G6-DW8Z>].

¹⁵⁷ OFF. INSPECTOR GEN., U.S. DEP'T STATE, AUD-MERO-23-21, RELOCATION AND RESETTLEMENT OUTCOMES OF AFGHAN SPECIAL IMMIGRANT VISA HOLDERS 1, 4 (June 2023).

1. *The Afghan Adjustment Act*

Outside of ASIVs, asylum status, and family-based petitions, persons evacuated during OAW generally have few other options to obtain permanent legal status.¹⁵⁸ Though many were paroled into the US upon arrival, this status is temporary and does not confer any permanent status upon recipients.¹⁵⁹ Given the backlogs in asylum and ASIV processing, both the House and Senate introduced the AAA, which would provide an independent legal pathway to permanent residence for Afghans paroled under OAW.¹⁶⁰ The AAA is modeled after similar legislation passed during other urgent humanitarian crises related to US military action, including the Vietnam War, the Gulf Wars, the Iraq War, and the rise of Fidel Castro.¹⁶¹ In these eras, Congress passed legislation that granted Cubans, Southeast Asians, and Iraqis paroled into the US the ability to eventually adjust to a permanent status, by virtue of their initial parolee status only.¹⁶²

Likewise, under the AAA, Afghans paroled into the United States on or after July 30, 2021, or otherwise lawfully admitted to the US, would be eligible to receive LPR status after remaining in the US for one year.¹⁶³ These individuals would still have to complete rigorous security screenings, as they would through the asylum or ASIV process.¹⁶⁴ The

¹⁵⁸ *Lofgren, Blumenauer, Meijer, Nadler, Kinzinger, Miller-Meeks, Crow, Upton, Peters Introduce the Afghan Adjustment Act in the House*, U.S. CONGRESSWOMAN ZOE LOFGREN (Aug. 9, 2022), <https://lofgren.house.gov/media/press-releases/lofgren-blumenauer-meijer-nadler-kinzinger-miller-meeks-crow-upton-peters> [https://perma.cc/P2SC-SC69].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Factsheet: Afghan Adjustment Act*, HIAS (December 2021), https://hias.org/wp-content/uploads/factsheet_afghan_adjustment_act_november_2021.pdf [https://perma.cc/R8XV-FX4F].

¹⁶² *Id.*

¹⁶³ *S.2327 - Afghan Adjustment Act*, CONG. (July 13, 2023), [https://www.congress.gov/bill/118th-congress/senate-bill/2327#:~:text=Introduced%20in%20Senate%20\(07%2F13%2F2023\)&text=This%20bill%20provides%20lawful%20permanent,Afghanistan%20and%20addresses%20related%20issues](https://www.congress.gov/bill/118th-congress/senate-bill/2327#:~:text=Introduced%20in%20Senate%20(07%2F13%2F2023)&text=This%20bill%20provides%20lawful%20permanent,Afghanistan%20and%20addresses%20related%20issues) [https://perma.cc/UPY6-ARYT].

¹⁶⁴ *The Afghan Adjustment Act*, U.S. CONGRESSMAN EARL BLUMENAUER, <https://blumenauer.house.gov/sites/evo-subsites/blumenauer.house.gov/files/evo-media-document/one-pager-theafghanadjustmentact.pdf> (last visited Nov. 8, 2024). Additionally, persons paroled into the U.S. during OAW and OEW completed screening before their departure and immediately upon their arrival in the U.S., so screening during the adjustment process would be the third time individuals must pass security screening. *Id.*

AAA would appropriate \$20 million to DHS each year for four years after its enactment to carry out adjustments of status for eligible Afghans.¹⁶⁵

The AAA's adjustment process would significantly expedite paroled Afghans' pathways to permanent residency. Individuals would not have to wait for the approval of their asylum or ASIV status, and *then* wait another year for their green card—they would simply need to be paroled into the US and then receive another round of screening before becoming LPRs.¹⁶⁶ This process would remove Afghans' dependence on a future administration to reauthorize their parole status while they wait for asylum, ASIV, or family-based visa approval, which can take several years. Moreover, granting paroled Afghans LPR status through the AAA would remove individuals from the existing pool of ASIV applicants, freeing up space and resources for DHS to approve the ASIV applications of persons that remain abroad and urgently need to relocate.

The AAA would improve several other aspects of special immigration provisions for Afghans. First, the bill would allocate more resources to the ASIV program and expand ASIV eligibility to include members of several former Afghan government organizations that worked alongside the US during its presence in the country.¹⁶⁷ This provision would help fulfill the US's overall commitment to offer protection to Afghans who worked with the US, as Afghan government and military officials were crucial for mission success.¹⁶⁸ Furthermore, the AAA would create an interagency task force with the resources and capacity to relocate and resettle Afghans eligible for ASIVs and refugee status from Afghanistan over the next ten years.¹⁶⁹ Given the substantial structural barriers facing allied Afghans who remain abroad, such a task force could vastly improve the likelihood that they can access the promise made to them by the US government.

The AAA was introduced in 2019 and 2021, and most of its provisions were included in the early 2024 bipartisan immigration reform

¹⁶⁵ Dan Kosten, *Bill Summary: The Afghan Adjustment Act of 2023*, NAT'L IMMIGR. FORUM (July 28, 2023), <https://immigrationforum.org/article/bill-summary-the-afghan-adjustment-act-of-2023/> [<https://perma.cc/B8XF-FR2Y>].

¹⁶⁶ *The Afghan Adjustment Act*, *supra* note 163; see Lofgren, Blumenauer, Meijer, Nadler, Kinzinger, Miller-Meeks, Crow, Upton, Peters *Introduce the Afghan Adjustment Act in the House*, *supra* note 158.

¹⁶⁷ Kosten, *supra* note 165.

¹⁶⁸ See *S.2327 – Afghan Adjustment Act*, *supra* note 163; Lofgren, Blumenauer, Meijer, Nadler, Kinzinger, Miller-Meeks, Crow, Upton, Peters *Introduce the Afghan Adjustment Act in the House*, *supra* note 158.

¹⁶⁹ *The Afghan Adjustment Act*, *supra* note 164.

bill.¹⁷⁰ In each instance, conservative lawmakers prevented the bill from progressing in either chamber due to concerns about the vetting process for evacuees—despite the fact that under the AAA, all persons adjusting status would have to undergo an additional rigorous security screening.¹⁷¹ Nonetheless, as written, the bill would be an excellent step towards expediting immigration pathways for Afghans both at home and abroad. With this bill, lawmakers and voters have the opportunity to fulfill promises made to Afghans that worked alongside the US, their families, and other persons imperiled by the Taliban regime.

2. Structural Issues with the ASIV Program

Whether or not they pass the AAA, Congress could address the several structural issues in the ASIV program in smaller legislative measures when re-approving the program. The foremost issue is that Congress currently has only authorized the approval of 38,500 principal ASIVs by the end of 2024.¹⁷² As of the time of writing, only thirteen thousand principal visas remain available,¹⁷³ while about one hundred and fifty thousand applications for principal visas are still in processing.¹⁷⁴ Historically, Congress has increased the statutory visa cap after USCIS reaches it, as happened in 2014 and 2017.¹⁷⁵ However, when USCIS reaches the statutory cap, all coordinating agencies must cease visa processing until Congress increases the visa cap, which takes, at best, several months and further contributes to backlogs and delays.¹⁷⁶

¹⁷⁰ Leo Shane III, *Help for Afghan Allies Included in Senate's Security Supplemental Plan*, MIL. TIMES (Feb. 5, 2024), <https://www.militarytimes.com/news/pentagon-congress/2024/02/05/help-for-afghan-allies-included-in-senates-security-supplemental-plan/> [https://perma.cc/8CBD-TN8V].

¹⁷¹ Camilo Montoya-Galvez, *Tens of Thousands of Afghans in U.S. Could Lose Deportation Protections Unless Congress Acts*, CBS NEWS (Feb. 16, 2023), <https://www.cbsnews.com/news/afghan-adjustment-act-evacuees-parole-legal-status-deportation-protections/> [https://perma.cc/6HNW-D86H].

¹⁷² *Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the U.S. Government*, *supra* note 31.

¹⁷³ U.S. DEP'T STATE, *supra* note 125, at 1.

¹⁷⁴ *Id.* at 7.

¹⁷⁵ INT'L REFUGEE ASSISTANCE PROJECT, RECOMMENDATIONS ON THE REFORM OF THE SPECIAL IMMIGRANT VISA PROGRAM FOR U.S. WARTIME PARTNERS 1, 16 (June 2020), https://refugeerights.org/wp-content/uploads/2020/06/IRAP_SIV_Report_2020.pdf [https://perma.cc/JZ2W-TJC].

¹⁷⁶ *See id.* at 15, 17; INT'L REFUGEE ASSISTANCE PROJECT, A QUESTION OF HONOR: THE ONGOING IMPORTANCE OF THE AFGHAN SPECIAL IMMIGRANT VISA PROGRAM 1, 8 (Mar. 2017),

Moreover, a capped ASIV program that relies on Congress to allocate visas on an ad hoc basis makes applicants' ability to obtain an ASIV subject to changing and variable political pressure.¹⁷⁷ Though the program has historically received broad support, such support for reauthorization of ASIVs is by no means guaranteed in the future. To solve this issue, just as Congress can increase the statutory visa cap in the AAPA, Congress could instead make the ASIV program uncapped, allowing every person who meets its qualifications to receive a visa. Such a solution would better adhere to the policy goal to offer refuge to every Afghan person who is under threat as a result of working for US forces in Afghanistan.

Additionally, as discussed, a core qualification for the ASIV program is that the applicant is under serious, ongoing threat as a result of their service to the US.¹⁷⁸ However, the ASIV organic statute does not allow derivative applicants to continue with their ASIV applications if the principal applicant is killed by the Taliban or otherwise dies.¹⁷⁹ The Taliban has killed at least 335 ASIV applicants while they awaited visa processing as of 2022.¹⁸⁰ Other organizations estimate that the Taliban had killed over one thousand interpreters by 2015 and maintain that such figures were an undercount at the time of publication almost ten years ago.¹⁸¹ Again, when reapproving the ASIV program, Congress could amend the AAPA language to allow derivative applicants to receive ASIVs if the principal applicant is killed or dies. Such language would much better adhere to Congress's overall policy goal to provide immigration pathways for Afghans who worked alongside the US in Afghanistan and their families.

3. *Temporary Protected Status*

Congress could also address a major issue for Afghans through a smaller change to the enabling statute for TPS designations. TPS offers documentation and work permits to Afghans who arrived in the US

<https://refugeerights.org/wp-content/uploads/2016/03/A-Question-of-Honor-The-Ongoing-Importance-of-the-Afghan-SIV-Program.pdf> [<https://perma.cc/6FY7-VPRF>].

¹⁷⁷ INT'L REFUGEE ASSISTANCE PROJECT, *supra* note 175 at 15.

¹⁷⁸ *Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the US Government*, *supra* note 31.

¹⁷⁹ INT'L REFUGEE ASSISTANCE PROJECT, *supra* note 175, at 32.

¹⁸⁰ Andrea Castillo, 'Blacklisted' Afghan Interpreters Were Disqualified from US Visas. Now They're in Hiding, L.A. TIMES (Oct. 2, 2022), <https://www.latimes.com/world-nation/story/2022-10-02/afghan-interpreters-blacklisted-special-immigrant-visas> [<https://perma.cc/U3F4-KJ4Z>].

¹⁸¹ COBURN, *supra* note 42, at 8.

irregularly, though it does not confer a path to legal, permanent residence.¹⁸² Nonetheless, as the leader of the US Committee for Refugees and Immigrants stated, TPS authorization for Afghans “is a clear recognition of the ongoing country conditions in Afghanistan, which have continued to deteriorate under Taliban rule.”¹⁸³ TPS’s primary pitfall is that, by statute, the Attorney General must review and renew country designations every eighteen months.¹⁸⁴ As such, the Afghans who rely on TPS to lawfully remain in the US while pursuing a pathway to permanent residence may lose their status if a new Attorney General fails to renew the TPS designation.¹⁸⁵ To combat this issue, Congress can update the INA to allow lengthier TPS designations, either specifically for Afghanistan, or for all countries designated under the statute. Or, before passing the AAA, Congress could amend the language to make all Afghans residing in the US with TPS additionally eligible for adjustment of status.

4. *USRAP in the Context of OEW*

Finally, Congress could assist allied Afghans through additional allocations to the Afghan-specific refugee program (USRAP P-2). Because of the limitations on ASIV eligibility, the USRAP P-2 designation creates an expedited pathway for persons who worked for US government contractors or affiliates in Afghanistan to apply for refugee status.¹⁸⁶ This expedited pathway toward refugee status represents an excellent option for those who can apply for it, and the pathway clearly furthers the US policy goal to allow *all* of its allies to relocate to the US. However, the process typically takes twelve to eighteen months, in a best-case scenario.¹⁸⁷ Therefore, Afghans residing in precarious situations in third countries may be unable to access the process at all, or they may be unable complete the process once they have started.¹⁸⁸ As such, any possible mechanism to expedite refugee application processing would be

¹⁸² Santana, *supra* note 24.

¹⁸³ *Id.*

¹⁸⁴ *Id.*; 8 U.S.C. §1254a(b)(2).

¹⁸⁵ Diana Roy & Claire Klobucista, *What Is Temporary Protected Status?*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/background/what-temporary-protected-status> [https://perma.cc/9VFQ-WP9G].

¹⁸⁶ *Priority 2 (P-2) for Refugees*, HUM. RTS. FIRST, <https://resources.humanrightsfirst.org/wp-content/uploads/2022/07/P1-P2-Info.pdf> (last visited Jan. 16, 2024) [https://perma.cc/S6XJ-MX9Y].

¹⁸⁷ *Id.*

¹⁸⁸ Paton Walsh & Popalzai, *supra* note 3.

crucial to meeting the promises made to persons that endangered themselves to further the US mission in Afghanistan. One potential avenue to expedite refugee application processing is by allocating greater resources to USRAP, specifically to process Afghans, either through the passage of the AAA or a specific standalone allocation.

III. CONCLUSION

Though the US government has approved several special immigration pathways for Afghans that supported the US military, in many ways these pathways fall short of achieving the executive and legislative branches' goal to efficiently facilitate allied Afghans' permanent resettlement in the US. However, Afghan immigration advocates operating both within and outside the government may adopt various strategies to improve outcomes for this population.

First, through litigation such as *Afghan Allies* and *Ahmed*, affected persons and their advocates can directly hold agencies accountable for processing delays and inefficiencies. The *Afghan Allies* plaintiffs in particular can continue to advocate for stronger injunctive measures in court, especially if circumstances at the defendant agencies deteriorate in the future. Moreover, the settlement plan for asylum applicants in *Ahmed* offers a potential path forward for ASIV applicants in *Afghan Allies*. The *Afghan Allies* court could adopt a firmer approach by requiring the defendant agencies to set specific processing benchmarks and continuously report on their progress until they comply with the statutory processing mandate of nine months, like the *Ahmed* court.

On its own initiative, DOS can address issues in ASIV processing by complying with all of the OIG's recommendations, which are clear, specific, and attainable solutions designed to solve processing issues. In addition to OIG's suggestions, DOS can issue clear guidance for ASIV applicants remaining abroad, by, for example, detailing its preferred method for applicants to set up their visa interviews. Such guidance could also include resources to assist applicants with setting up virtual interviews within Afghanistan or exiting Afghanistan and traveling to a neighboring country for a visa interview.

Outside of the agencies themselves, Congress can take several measures to address shortcomings in facilitating allied Afghans' resettlement in the US. Most importantly, Congress can reintroduce the AAA, which would create an independent legal pathway to permanent residence for Afghans paroled under OAW, provide greater funding for

the ASIV program, expand ASIV eligibility, and allocate resources for family reunification.

If such sweeping measures are out of reach, Congress can nonetheless adjust the ASIV program in smaller ways whenever they reauthorize it. First, Congress can uncap the ASIV program, thereby eliminating the statutory constraint on the number of visas that USCIS can issue to qualified applicants and eliminating the need to continually expand the program. In the same vein, Congress can eliminate the sunset provision that requires the program to be continually reauthorized on its expiration date. Finally, Congress can allow family members of applicants to continue the application process if the principal applicant dies.

In conclusion, many facets of government and civil society must work together to ensure that allied Afghans obtain permanent immigration status. As Representative Peter Meijer stated, “our credibility with our allies and our moral standing in the world depend on the completion of this mission.”¹⁸⁹

¹⁸⁹ Lofgren, Blumenauer, Meijer, Nadler, Kinzinger, Miller-Meeks, Crow, Upton, Peters Introduce the Afghan Adjustment Act in the House, *supra* note 158.