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# **Recommendations on the Reform of the Special Immigrant Visa Program for U.S. Wartime Partners**

June 2020

The International Refugee Assistance Project (IRAP) provides comprehensive legal services to refugees and displaced persons seeking legal pathways from conflict zones to safe countries. IRAP, a “non-governmental organization providing legal aid in the special immigrant visa application process,” is one of the groups that the Office of the Inspector General (OIG) is directed to consult.<sup>1</sup> Indeed, to the best of our knowledge, IRAP is the only such organization. IRAP has provided free, direct legal representation to hundreds of former local employees of the U.S. government in Iraq and Afghanistan applying for the special immigrant visa (SIV). It has provided legal advice to thousands more.

IRAP has also engaged in sustained advocacy on SIV issues, including congressional advocacy, issuing publications on the status of the program,<sup>2</sup> advocating for improvements with the Department of State (DOS) and other partners, submitting comments on relevant Notices and Information Collections, and seeking to improve transparency through Freedom of Information Act (FOIA) requests. IRAP also litigates on behalf of Iraqi and Afghan clients to challenge unreasonable delays in the SIV process, including an ongoing lawsuit, *Afghan and Iraqi Allies v. Pompeo*.<sup>3</sup> This report compiles information from this extensive advocacy in individual cases and for systemic reform. It includes examples based on IRAP’s experience providing pro bono legal representation and legal advice to hundreds of Iraqis and Afghans applying for the SIV program. In the interests of client safety and privacy, client names are not provided unless otherwise publicly available.

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1 National Defense Authorization Act for Fiscal Year 2020 Section 1215(c)(7).

2 See IRAP’s reports, [A Question of Honor: The Ongoing Importance of the Afghan Special Immigrant Visa Program](#) and [Fifteen Years On: Protecting Iraqi Wartime Partners](#).

3 *Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States ex rel. Situated v. Pompeo*, Civil Action No. 18-cv-01388 (TSC) (D.D.C. Jan. 30, 2019); *Nine Iraqi Allies under Serious Threat Because of their Faithful Service to the United States v. Kerry et al*, 1:15-cv-00300 (D.D.C. 2016).

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## I. Executive Summary

For more than a decade the Iraqi and Afghan Special Immigrant Visa (SIV) programs have provided a pathway to safety for Iraqis and Afghans whose service alongside U.S. forces, diplomats, and aid workers has exposed them and their families to threats, harm, and death. Tens of thousands of Iraqis and Afghans have been safely resettled to the United States over the life of the program and it continues to operate today.

The process has not, however, been smooth. Over the years the SIV programs have been beset by technical, practical, and political obstacles and inefficiencies that have hampered their operation and threatened the promise that the U.S. government made to these allies for their service.

This report details the history of the Iraqi and Afghan SIV programs and makes several detailed recommendations that the U.S. government and the Department of State, in particular, can take to improve current and future SIV programs. These include:

- The U.S. government should: take measures to protect allies, streamline certain processes by establishing a central database, and eliminate undue interagency check delays.
- The Chief of Mission (COM) should: improve the process by which it assesses whether an applicant provided “faithful and valuable service” and provide additional assistance to applicants to establish eligibility.
- The U.S. Department of State (DOS) should: implement required statutory changes in the program, timely adjudicate applications, and increase responsiveness and transparency.
- U.S. Embassies should: ensure that their training and policies meet legal requirements, ensure timely review of requests for reconsideration, and give applicants the opportunity to submit supplemental evidence and carefully consider such evidence.
- Any future SIV programs should: be adjudicated by diplomats in a location that supports sufficient resources, set clear expectations for processing times, ensure that adequate numbers of visas are authorized and issued, accept credible statements from applicants as proof of an ongoing serious threat, and ensure that the surviving spouses and children deceased applicants can pursue the visa.

These recommendations are not just vital to improving the current Afghan SIV program, but to ensure that future special immigration programs avoid the same mistakes and pitfalls that have hindered the Iraqi and Afghan programs. As long as the U.S. government relies on local assistance and expertise to implement its foreign policy, there will be a need to protect those locals who risk their lives on behalf of the United States.

## II. Background

### A. Wartime Partners

Since 2001, tens of thousands of Iraqis and Afghans have worked for the U.S. government in their countries. Many have been threatened, abducted, wounded, or even killed because of their work. An internal document from a military contractor obtained by journalists showed 667 casualties—from serious injuries to assassinations—among Iraqi employees for just that contractor through 2008.<sup>1</sup> As just one example, Captain Allen Vaught (Ret.) of the U.S. Army Reserves reported that his unit work relied on Iraqi translators who worked “[f]or as little as \$5 a week, and with no weapons or body armor,” and who “served loyally as though they were U.S. soldiers.”<sup>2</sup> Regrettably, two of Captain Vaught’s five translators were assassinated by militias who opposed the U.S. mission in Iraq.

Threats, assassinations, and attacks also impeded U.S. diplomatic efforts. A memorandum from Embassy Baghdad to Secretary of State Condoleezza Rice reported that:

insurgents’ intimidation campaign has touched our LES [locally engaged staff] personally: two of our LES employees have been gunned down in execution-style murders, and two

others barely escaped a similar fate in August. Our LES employees live in fear of being identified with the Embassy of the U.S. . . .

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“...two of our LES employees have been gunned down in execution-style murders, and two others barely escaped a similar fate.”

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For the first half of 2005 ten of 14 [resignations] were due to security

concerns. Of 58 job offers, thirteen employees did not show up for work or resigned within 30 days. The reality is that the embassy can offer them little protection outside the International Zone (IZ) and is not in a position to grant their repeated requests to house them and their families within the IZ.<sup>3</sup>

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- 1 T. Christian Miller, “Chart: Iraqi Translators, a Casualty List,” ProPublica, Dec. 18, 2009, <https://www.propublica.org/article/chart-iraqi-translators-a-casualty-list>.
  - 2 Allen Vaught, “Refugee Ban Trapped My Iraqi Translator: Veteran,” Jan. 31, 2017, <https://www.usatoday.com/story/opinion/2017/01/31/trump-ban-iraq-muslim-translators-column/97250702/>. See also: Fox4News, “Dallas Army Vet Fights to Bring Iraqi Translator to U.S.,” Dec. 9, 2016, <http://www.fox4news.com/news/dallas-army-vet-fights-to-bring-iraqi-translator-to-us> (“I mean, one was burned alive,” he explained. “Another was hung from a light post — the electrical lines.”).
  - 3 Al Kamen, “LES Means More,” Washington Post, Nov. 9, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/08/AR2005110801504.html>.

U.S. military personnel, diplomats, humanitarian workers, and journalists demanded action. In 2008, Congressman Mike Pence urged his colleagues in Congress: “there is nothing more important than the United States of America saying to people in Iraq or anywhere in the world, if you stand by us, we will stand by you.”<sup>4</sup>

U.S. military personnel continue to demonstrate support for this program. General John Nicholson noted that “[f]ailure to adequately demonstrate a shared understanding of their sacrifices and

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“there is nothing more important than the United States of America saying to people in Iraq or anywhere in the world, if you stand by us, we will stand by you.”

-Mike Pence

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honor our commitment to any Afghan who supports could have grave consequences for these individuals and bolster the propaganda [of] our enemies.”<sup>5</sup> General Joseph Votel, former commander of the U.S. Central Command (Ret.) also voiced his belief that the SIV program sends “a very strong message to our partners and people that put it on the line for us that we are with you and we are going to stay with you.”<sup>6</sup>

Marine Corps Lt. Col. Ty Edwards,

similarly, said: “Anything we can do to show our appreciation for those interpreters that want to come over, we got to do everything we can to help them out.”<sup>7</sup>

The SIV program is the strongest expression of the U.S. government’s commitment to its wartime partners. However, the program’s implementation has been wrought with delays. Individuals seeking protection through the SIV program face extraordinary delays beyond congressionally-mandated timelines and arbitrary implementation of statutory requirements.

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- 4 Hearing, Subcommittee on the Middle East and South Asia, House Committee on Foreign Affairs, “Iraqi Volunteers, Iraqi Refugees: What Is America’s Obligation?” Mar. 26, 2007, p. 21, <https://ia802904.us.archive.org/18/items/gov.gpo.fdsys.CHRG-110hrg34477/CHRG-110hrg34477.pdf>
  - 5 Richard Lardner, “Top General Urges Lawmakers to Preserve Afghan Visa Program,” Military.com, May 25, 2016, <http://www.military.com/daily-news/2016/05/25/top-general-urges-lawmakers-preserve-afghan-visa-program.html>.
  - 6 “Former top U.S. military official in Mideast on the outlook for peace in Syria,” Sept. 12, 2019, <https://www.pbs.org/newshour/show/former-top-u-s-military-official-in-mideast-on-the-outlook-for-peace-in-syria>.
  - 7 Diana Stancy Correll, “4,000 more Afghan interpreters could get special immigrant visas, thanks to defense bill,” Dec. 17, 2019, <https://www.militarytimes.com/news/your-military/2019/12/17/4000-more-afghan-interpreters-could-get-special-immigrant-visas-thanks-to-defense-bill/>.

## B. Legislative Background

Congress did stand by its partners; the National Defense Authorization Act (NDAA) for Fiscal Year 2006 established a permanent SIV program, called the 1059 SIV program, that would provide 50 visas per year to Afghan or Iraqi linguists with at least one year of employment and high-level recommendations.<sup>8</sup> That program continues to operate.

The NDAA for Fiscal Year 2008 established the Iraqi SIV program, which provided significantly greater numbers of visas for Iraqis with proof of at least one year of employment in a variety of capacities.<sup>9</sup> On September 30, 2014, the Iraqi SIV program closed to new applicants; only those who applied prior to that date are able to continue their applications.<sup>10</sup>

Congress also established the Afghan SIV program in the Afghan Allies Protection Act of 2009 (AAPA).<sup>11</sup> The Afghan SIV program continues to operate and represents the significant majority of individuals who have ongoing applications.

As the Congressional Research Service noted, despite “broad agreement that the United States should admit for permanent residence Iraqis and Afghans who assisted the U.S. government overseas, provided that they do not pose security risks . . . implementing the SIV programs intended to accomplish this policy goal has proven difficult.”<sup>12</sup>

## C. Background on the Afghan SIV Program’s Operations

The Afghan SIV program provides lawful permanent residence status in the United States to individuals who can demonstrate that:

- they are a national of Afghanistan;
- they were employed for at least two years by the U.S. government or a closely associated entity, as demonstrated by human resources records;<sup>13</sup>

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8 National Defense Authorization Act for Fiscal Year 2006, Section 1059.

9 National Defense Authorization Act for Fiscal Year 2008, Section 1244.

10 U.S. Department of State, “Special Immigrant Visas for Iraqis - Who Were Employed by/on Behalf of the U.S. government,” <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immig-visas-iraqis-employed-us-gov.html> (“The deadline to apply for COM approval was September 30, 2014. Applications submitted after this date cannot be accepted or processed.”).

11 Afghan Allies Protection Act of 2009, Section 602(b); Richard Lardner, “Top General Urges Lawmakers to Preserve Afghan Visa Program,” Military.com, May 25, 2016, <http://www.military.com/daily-news/2016/05/25/top-general-urges-lawmakers-preserve-afghan-visa-program.html>.

12 Andorra Bruno, “Iraqi and Afghan Special Immigrant Visa Programs,” Congressional Research Service, 19, updated April 2, 202.

13 Prior to Nov. 25, 2015, applicants were required to demonstrate one year of service. See Afghan Allies Protection Act of 2009 as amended through NDAA for FY 2015, Section 1227. This period was raised to two years in the National Defense Authorization Act (NDAA) for Fiscal Year 2016, Section 1216. Eligibility restrictions were further increased in the NDAA for Fiscal Year 2017, Section 1214, limiting eligibility further based on the kind of work performed.



- they provided faithful and valuable service to the United States, as demonstrated by a personal recommendation from a U.S. citizen supervisor; and
- they face a serious, ongoing threat as a result of their employment.<sup>14</sup>

According to public reports from DOS and Homeland Security, the process to obtain an SIV through the 1244 Iraqi or 602 Afghan program consists of 14 steps.<sup>15</sup> It should be noted, though, that depositions of relevant officials during IRAP's litigation revealed that their process deviates from these steps in several ways.

- 1) The applicant submits an application for approval by the Chief of Mission (COM approval) to the National Visa Center (NVC). Applicants must include a "statement of credible threat" detailing the ongoing threat to the applicant as a result of the applicant's service, a letter of recommendation from a U.S. citizen supervisor attesting to the applicant's "faithful and valuable service," and other evidence described at greater length below.
- 2) NVC reviews the applicant's documents for completeness.
- 3) DOS reports indicate that NVC then sends the application materials to COM in Afghanistan.
- 4) COM either approves or denies the applicant's request for COM approval.
- 5) COM then advises NVC of the outcome of the application, which is communicated to the applicant. If denied, the applicant has a statutory right to appeal within 120 days (COM appeal). According to government reports, many COM appeals are successful and result in COM approval. The percentage of successful appeals in 2017 was as high as 66% for Afghan applicants.
- 6) If the applicant receives COM approval, the applicant submits a Special Immigrant Petition, or Form I-360, to the U.S. Citizenship and Immigration Services (USCIS) for categorization as a special immigrant.
- 7) USCIS adjudicates the Special Immigrant Petition and communicates the results to NVC.
- 8) If the applicant is approved, NVC sends a visa application and instructions to the applicant.
- 9) The applicant submits the visa application and required documentation to NVC.
- 10) NVC reviews the applicant's application and supporting documents for completeness.

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<sup>14</sup> Consolidated Appropriations Act of 2009, Section 602(b).

<sup>15</sup> Joint Department of State/Department of Homeland Security Report: Status of the Afghan Special Immigrant Visa Program, <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html>.

- 11) NVC contacts the applicant to schedule an interview at the embassy in Afghanistan.
- 12) The applicant attends an interview conducted by a consular officer.
- 13) If the application is not denied, the applicant's case undergoes "administrative processing," the phrase used by the agencies to refer to final background checks.
- 14) If successful, the applicant is instructed to obtain a medical exam and is issued a visa.

### III. Proactive Protection for Locally Employed Staff

- **The U.S. government should take proactive measures to protect locally employed staff, including providing on-base housing, minimizing risks to individuals traveling to and from work, providing basic protective gear, and protecting the anonymity of employees, including by providing internet security training.**
- **For individuals who do face threats, the U.S. government should provide relocation funding. For those who are injured or killed, the U.S. should provide compensation.**

First, IRAP believes that visas and relocation should not be the first and only response of the U.S. government to its local employees. Rather, the U.S. government should engage proactively throughout hiring, employment, and termination or downsizing of its local employee staff to mitigate risk for employees as much as possible. Immigration protection is "a necessary but insufficient policy option to insulate soft networks."<sup>16</sup> To date, immigration measures protect only Iraqis and Afghans, despite risks for employees of the U.S. military in dozens of countries globally.<sup>17</sup>

The Red T, an association advocating for linguists in high-risk situations, provides the following statement of rights to linguists:

You have a right to protection both during and after the assignment. If necessary, this should include your family as well. You should be provided with protective clothing and equipment, but not arms. As a civilian, you are not required to wear a uniform unless you consent to do so. Medical and psychological assistance must be made available to you. Prior to deployment, you should be given security and emergency training.<sup>18</sup>

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16 Steve Miska, Rebecca Asch, and Samuel Romano, "Soft Networks: Protecting an Achilles Heel of American Influence," 2, <https://protectingsoftnetworks.org/research-and-publications/soft-networks-protecting-an-achilles-heel-of-american-influence/>.

17 Four Green Berets were killed in a raid in Niger—alongside their translator and four Nigerien troops. Thomas Gibbons-Neff and Eric Schmitt, "After Deadly Raid, Pentagon Weighs Withdrawing Almost All Commandos From Niger," N. Y. Times, Sept. 2, 2018, <https://www.nytimes.com/2018/09/02/world/africa/pentagon-commandos-niger.html>.

18 International Association of Conference Interpreters, International Federation of Translators, Red T, Conflict Zone Field Guide for Civilian Translators/Interpreters and Users of Their Services, <https://red-t.org/our-work/safety-guidelines/>.

The U.S. government and its contractors must implement these simple guarantees for its employees. Such measures must not replace an immigration option for those who face serious danger. Proactive protections will mitigate some risk for some employees; immigration protections must still be available when those protections fail.

Many individuals faced significant danger when they were traveling to and from U.S. military bases or work locations. One IRAP client was arrested at a checkpoint run by a militia in Baghdad when he was found to have a U.S. military base badge. He was held in a jail run by the militia for several days. Other U.S. employees were assassinated traveling to and from work, when they were most vulnerable because they were not accompanied by U.S. government personnel.

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**“In Iraq and Afghanistan, most combat translators served on combat missions without any body armor.”**

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In anticipation of those threats, the U.S. government should provide on-base housing wherever possible for its employees. It should take steps to minimize risks to individuals traveling to and from work,

including training and resources to allow individuals to vary their routes. Security procedures to enter U.S. government property should be designed while considering risks imposed to local employees of waiting outside U.S. government properties and carrying U.S. government identification.

The U.S. government should ensure that individuals working outside the wire are given basic protective gear. In Iraq and Afghanistan, most combat translators served on combat missions without any body armor.

The U.S. government should take steps to protect the anonymity of its employees. One Afghan sought IRAP's assistance after, when working as a translator, his name was listed in official publications as the translator for official publications. This meant that he was forever publicly known to have assisted the U.S. government. In Iraq, the U.S. military at one point forbade combat translators from wearing masks while out on patrol, exposing their identities to militias.<sup>19</sup> The U.S. government should provide training on internet security to ensure that local employees are taking basic steps to protect their own identity and information about their location.<sup>20</sup>

The steps above will go some way to mitigating risks. It is inevitable, though, that some individuals employed by a foreign government in a hostile environment will face serious threats. For those who face danger, the

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19 Michael Breen, The debt we owe Iraqi interpreters, Christian Science Monitor, December 9, 2008, <https://www.csmonitor.com/Commentary/Opinion/2008/1209/p09s02-coop.html>.

20 Steve Miska, Rebecca Asch, and Samuel Romano, “Soft Networks: Protecting an Achilles Heel of American Influence,” 6, <https://protectingsoftnetworks.org/research-and-publications/soft-networks-protecting-an-achilles-heel-of-american-influence/>.

U.S. government should provide funding for internal relocation. Many individuals from small villages in Iraq or Afghanistan were known to be employees of the U.S. government because they were gone from their homes for long periods of time or were seen while out on patrol or combat missions. Some of those individuals could still enjoy relative anonymity in major cities. Current U.S. government policy provides no funding for individuals to explore this option.<sup>21</sup>

For individuals who are injured or killed in the line of duty, the U.S. government must take steps to provide compensation. Indeed, the Defense Base Act requires contractors to have insurance for such injuries, but local employees are rarely, if ever, informed of this when they are hired. Employees' contracts often explicitly disclaim liability for any injuries, misleading employees of their legal right for compensation.<sup>22</sup>

If these measures were implemented, they could mean that some employees of the U.S. government are able to avoid significant threats. For those who do face persecution because of their work, the SIV program must be reformed to provide a meaningful pathway to safety.

#### **IV. Building a Predictable and Durable Process**

- **Any future SIV program should, from the outset, provide clear expectations for processing timelines. It should also ensure that adequate visas are regularly authorized, and that authorized visas do not expire until they are issued.**

The SIV programs suffered from two initial design flaws that allowed for political pressure to derail individual applications. First, the program did not have clear timelines for processing and suffered from a lack of accountability. Congress addressed this by legislating a nine-month mandatory processing time.<sup>23</sup> Second, the program did not allocate sufficient visas for the total number of eligible, locally employed staff over an extended period, and the initial allocation of visas largely expired. This left the program vulnerable to a third challenge: in order to gain additional visas, supporters of the program have had to agree to limits on eligibility, leading to frequently shifting eligibility guidelines. If designing a new program to benefit locally employed staff, these concerns must be addressed from the outset.

##### **A. Delays**

Since their inception, the Iraqi and Afghan SIV programs have been plagued by bureaucratic difficulties and extraordinary delays. Early on in the program's operation in Iraq, "Embassy staff mistranslated names out of Arabic or used different transliterations on different forms. Staff

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21 "Soft Networks: Protecting an Achilles Heel of American Influence," 4-5.

22 "Soft Networks: Protecting an Achilles Heel of American Influence," 8.

23 National Defense Authorization Act for Fiscal Year 2014, P.L. 113-66, Section 1218. Note that this nine-month processing timeline applies to the Iraqi 1244 program and the Afghan 602 program, but not to the 1059 Afghan and Iraqi program.

confused applicants with people carrying similar names. Reviewers had even shoved aside pages-long applications because they preferred the blank spaces in the form to be filled with 'None,' 'N/A,' or just left blank. . . . [T]here was no standard request — different reviewers had requested different responses."<sup>24</sup>

In 2014, Secretary of State John Kerry reported that:

Delays in processing applications and lack of transparency in making decisions created problems. Bluntly stated, the process wasn't keeping up with the demand. A full-scale State Department review revealed statistics and anecdotes that highlighted unconscionably long processing times for applicants, including on background checks conducted by other U.S. agencies. Some deserving people were simply falling through the cracks. This was unacceptable to me and to the president.<sup>25</sup>

It appears that at least one reason for delays in the Afghan SIV program was that the then-U.S. Ambassador to Afghanistan actively opposed the program.<sup>26</sup> In 2010, U.S. Ambassador Karl Eikenberry wrote to Secretary of State Hillary Clinton that the SIV program "could drain this country of our very best civilian and military partners — our Afghan employees" and "will have a significant deleterious impact on staffing and morale, as well as undermining our overall mission in Afghanistan."<sup>27</sup> Recall that Embassy Baghdad had noted a very different concern: that its employees faced very serious security threats, that many had been assassinated, and that those threats harmed the U.S. mission.<sup>28</sup> Still, Embassy Kabul reported concern that the SIV program diminished its staff retention efforts.<sup>29</sup>

Those brain drain concerns were misplaced, because Iraqi and Afghan wartime partners apply for visas based on their employment *because their employment puts their lives in danger*.<sup>30</sup> Facing threats

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24 Eline Gordts, "America's Afghan And Iraqi Interpreters Risk Lives But Wait Years In Danger For Visas," Huffington Post, June 23, 2013, [https://www.huffingtonpost.com/2013/06/23/afghan-iraqi-interpreters-siv\\_n\\_3481555.html](https://www.huffingtonpost.com/2013/06/23/afghan-iraqi-interpreters-siv_n_3481555.html).

25 John F. Kerry, "From John Kerry: We Need More Visas, Now, for our Afghan Allies," Jun. 2, 2014, <http://www.latimes.com/opinion/op-ed/la-oe-0602-kerry-afghan-withdrawal-20140603-story.html>.

26 Military Times, "Left behind: Without security, without citizenship, interpreters are exposed to death squads," April 22, 2014, <https://www.militarytimes.com/2014/04/22/left-behind-without-security-without-citizenship-interpreters-are-exposed-to-death-squads/>.

27 Associated Press, "Visas stall for at-risk Afghans who work for the U.S.," August 9, 2011, <https://www.denverpost.com/2011/08/09/visas-stall-for-at-risk-afghans-who-work-for-the-u-s/>.

28 Al Kamen, "LES Means More," Washington Post, Nov. 9, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/08/AR2005110801504.html>.

29 GAO, "State and USAID Should Evaluate Actions Taken to Mitigate Effects of Attrition among Local Staff," December 2015.

30 As part of the SIV application, applicants must demonstrate that they have experienced an ongoing, serious threat as a result of their work. Afghan Allies Protection Act of 2009 Section 602.

of death or abduction, former employees of the United States are often forced to go into hiding or flee from their country—meaning they are also unable to contribute to the Embassy’s mission.

Embassy Kabul’s complaints that the SIV program decreased average Embassy staff tenure ignored, first, that the vast majority of SIV recipients were DOD linguists rather than Embassy staff; second, that the time for an SIV applicant to work long enough to become eligible and then to complete application processing would be far longer than needed to gain high-level experience;<sup>31</sup> third, that SIV eligibility was a significant incentive for recruiting local staff;<sup>32</sup> fourth, that average tenure was largely attributable to significant staff expansion;<sup>33</sup> and finally, that, in fact, it was security concerns that caused significant damage to retention rates.<sup>34</sup> Despite the flaws in the brain drain argument, it appears that Ambassador Eikenberry’s position may have been at least one contributing factor to long delays and the expiration of thousands of authorized visas.

The Refugee Crisis in Iraq Act authorized the Iraqi 1244 SIV program to issue 5,000 visas to primary applicants in each of its first five years;<sup>35</sup> in fiscal years 2009 to 2012, it issued 4,336 visas *total*.<sup>36</sup> In the years immediately following the Afghan SIV program’s creation, DOS failed almost completely to process and issue visas. The Afghan Allies Protection Act of 2009 (AAPA) provided 1,500 visas per year for each of five fiscal years.<sup>37</sup> In fiscal year 2010, DOS issued seven visas, and in 2011, it issued three.<sup>38</sup> It was not until 2014 that DOS began processing SIV applications at the scale that Congress had intended. By that time, thousands of authorized visas had expired, wasted by bureaucratic inaction. IRAP estimates that because of these delays, at least 6,500 visas for Afghans expired between fiscal years 2009 and 2013.<sup>39</sup>

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31 Applicants must now provide at least two years of faithful and valuable, qualifying service to the U.S. government before applying to the SIV program, which in turn takes an average of more than two years to complete processing. See Department of State, Quarterly Afghan SIV Report, Oct. 2019, <https://travel.state.gov/content/dam/visas/SIVs/Q4-Afghan-SIV-Report-October-2019.pdf> (showing an average processing time of 503 days to issue Afghan SIVs); GAO Report, 14.

32 GAO Report at 14.

33 With regard to decreasing years of tenure, at Embassy Kabul, from 2010 to 2015 there was a 5% decrease in average years of tenure for local staff but a 10.8% increase in total staff. For USAID, there was a 13% decrease in average years of tenure but a 23.4% increase in staff. In both cases, SIV-related resignations are noted as a reason for decreasing tenure, but greater staff numbers is also a factor that has led to decreased average years of tenure. GAO Report at 13.

34 See GAO Report at 12, 15 (noting attrition of locally employed staff caused by “SIV-related resignations and for other reasons”).

35 NDAA FY 08 1244(c)(1).

36 U.S. Department of State, SQ Number Use (Iraqis and Afghans Employed by or on Behalf of the U.S. government and Iraqi and Afghan SI Cases Converted under Section 1244), last updated Dec. 31, 2019.

37 Afghan Allies Protection Act of 2009, Section 602(b)(3).

38 U.S. Department of State, SQ Number Use, accessed Dec. 13, 2016, [https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/SIV/SQNumbers\\_0916.pdf](https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/SIV/SQNumbers_0916.pdf).

39 Compare Afghan Allies Protection Act of 2009, Section 602(b)(3) (authorizing 1,500 visas per year) with U.S. Department of State, SQ Number Use, accessed Dec. 13, 2016, [https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/SIV/SQNumbers\\_0916.pdf](https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/SIV/SQNumbers_0916.pdf) (showing actual visa authorization).

Noting the long delays in SIV processing and low numbers of visas issued, Congress intervened again. In 2013, Congress passed legislation mandating that Iraqi and Afghan SIV applications shall be

processed so that all steps under the control of the respective departments incidental to the issuance of [SIVs], including required screenings and background checks, should be completed not later than 9 months after the date on which an eligible alien submits all required materials to complete an application for such visa.<sup>40</sup>

Since then, average processing has far exceeded Congress's ceiling of nine months of processing time at every point. As of April 2014, average case processing time was 287 business days, or roughly 401 calendar days, for government-controlled steps.<sup>41</sup> The most recent data, from September 2019, showed average government processing times of 503 days. The overall timelines, including steps controlled by applicants, are longer.<sup>42</sup> And worse still, as discussed below in section VIII, there is significant reason to question the validity of this DOS-reported data.

## B. Visa Availability

Most U.S. visa programs provide an annual allotment of visas, or make visas available for anyone who qualifies.<sup>43</sup> But the statutes establishing the Iraqi and Afghan SIV programs allocated visas for a limited number of years. This reflected the hope that the United States would not require a significant, long-term presence in those countries. However, when DOS issued only a tiny percentage of authorized visas and U.S. presence continued, the Afghan SIV program was left with thousands of backlogged applicants without any supply of visas.<sup>44</sup> Since then, the Afghan SIV program has relied on Congress to allocate visas on an *ad hoc* basis. This makes access to the program subject to political pressure on an annual basis to obtain more visas.

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40 National Defense Authorization Act for Fiscal Year 2014, P.L. 113-66, Section 1218. Note that this nine-month processing timeline applies to the Iraqi 1244 program and the Afghan 602 program, but not to the 1059 Afghan and Iraqi program.

41 Joint Department of State/Department of Homeland Security Report: The Implementation of Processing Improvements for Afghan Special Immigrant Visa (SIV) Program, Apr. 2014, [https://travel.state.gov/content/dam/visas/Afghan\\_SIVs\\_public%20report\\_\(05%2001%2014\).pdf](https://travel.state.gov/content/dam/visas/Afghan_SIVs_public%20report_(05%2001%2014).pdf).

42 Ibid.

43 U.S. Department of State, "Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the U.S. government," <https://travel.state.gov/content/visas/en/immigrate/afghans-work-for-us.html>.

44 On Sept. 30, 2014, the Iraqi SIV program closed to new applications, and the Department of State indicates that sufficient visas are authorized to issue to qualified applicants. The Iraqi SIV program closed in part because a parallel refugee program operated. That program has almost entirely ceased to function. See Dan De Luce, "Only 2 Iraqi translators who worked with U.S. troops got U.S. visas last year," NBC News, August 23, 2019, <https://www.nbcnews.com/news/world/only-2-iraqi-translators-who-worked-u-s-troops-got-n1035661>.

The Afghan SIV program ran out of visas entirely in 2014. Congress took the rare step of passing a standalone bill—during a government shutdown—to authorize additional visas.<sup>45</sup> However, this visa shortage was largely due to DOS' own inaction. Despite being authorized to issue 1,500 visas per fiscal year,<sup>46</sup> it issued seven visas in fiscal year 2010 and three in fiscal year 2011.<sup>47</sup> Thousands of visas expired,<sup>48</sup> and then-Secretary of State John Kerry published an op-ed admitting that the visa shortage stemmed from DOS delays and begged Congress to allocate additional visas to allow continued visa processing.<sup>49</sup> He warned that exhausting visas, even short-term, “leaves us in danger of stranding hundreds of deserving Afghans until a new batch of visas is approved . . . [i]t will be dangerous for applicants — and damaging to our national credibility the next time we have to rely on local knowledge.”<sup>50</sup>

Congress continued to allocate visas on an *ad hoc* basis, generally through the National Defense Authorization Act. The President's Budget (issued by President Obama) had requested authorization for 4,000 visas for FY 2017. In the NDAA for FY 2017, however, Congress authorized only 1,500 visas. IRAP warned immediately that this allocation was inadequate. In March 2017, IRAP learned that Embassy Kabul had ceased scheduling new visa interviews because the Embassy had scheduled as many interviews for applicants as visas were available.<sup>51</sup> Congress rectified the shortage and authorized another 2,500 visas in May 2017.<sup>52</sup>

Throughout more than eleven years of the Afghan SIV program, the program has faced visa shortages twice. One shortage was attributable primarily to DOS' failure to issue the visas that were authorized despite thousands of individuals in danger who were waiting for visas. The other shortage was relatively short-lived. Given that the longest delays in the SIV process stem from the

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45 Emergency Afghan Allies Extension Act of 2014, H.R. 5195; Pub.L. 113–160; Blumenauer, Kinzinger Hail Passage of the Emergency Afghan Allies Extension Act, July 30, 2014, <https://blumenauer.house.gov/media-center/press-releases/blumenauer-kinzinger-hail-passage-emergency-afghan-allies-extension-act> (“Today, the House passed our bill, H.R. 5195, the Emergency Afghan Allies Extension Act of 2014. This bill secures 1,000 additional, emergency Special Immigrant Visas (SIVs) to bring Afghan translators, who served shoulder-to-shoulder with our troops, to safety in the United States. There was need for immediate action because the State Department has confirmed they have completely exhausted all visas Congress authorized in December.”).

46 Afghan Allies Protection Act of 2009, Section 602(b)(3).

47 U.S. Department of State, SQ Number Use, accessed Dec. 13, 2016, [https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/SIV/SQNumbers\\_0916.pdf](https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/SIV/SQNumbers_0916.pdf).

48 Compare Afghan Allies Protection Act of 2009, Section 602(b)(3) (authorizing 1,500 visas per year) with U.S. Department of State, SQ Number Use, accessed Dec. 13, 2016, [https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/SIV/SQNumbers\\_0916.pdf](https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/SIV/SQNumbers_0916.pdf) (showing actual visa authorization).

49 John F. Kerry, “From John Kerry: We Need More Visas, Now, for our Afghan Allies,” Jun. 2, 2014, <http://www.latimes.com/opinion/op-ed/la-oe-0602-kerry-afghan-withdrawal-20140603-story.html>.

50 Ibid.

51 Fahim Abed & Rod Nordland, “Afghans Who Worked for U.S. Are Told Not to Apply for Visas, Advocates Say,” New York Times, Mar. 10, 2017, <https://www.nytimes.com/2017/03/10/world/asia/afghanistan-visa-program-united-states.html>.

52 Consolidated Appropriations Act for FY 2017 Section 7083.



Chief of Mission stage and the post-interview security check processes, it is unclear to what extent the shortage delayed any applicants' visa issuance. Still, it is clear that any future program must provide sufficient visas to protect local staff for the duration of the U.S. government's presence.

### C. Changing Eligibility Guidelines

Congress has adjusted eligibility for the Afghan SIV program. These changes reflected, on one hand, congressional desire to expand eligibility, and on the other, political pressure to decrease eligibility to continue to authorize additional visas. The Afghan SIV program at first required employment "by or on behalf of the U.S. government." This meant that individuals who had worked with U.S. forces but were employed by the International Security Assistance Force (ISAF) were not eligible. Congress expanded eligibility to include some kinds of employment by ISAF.<sup>53</sup> The following year, it clarified that individuals employed by an ISAF successor mission would also be eligible.<sup>54</sup>

Two years in a row, Congress tightened eligibility requirements in agreements to extend timelines and authorize visas. First, eligibility increased from one year of qualifying employment to two years.<sup>55</sup> The following year, Congress required individuals to demonstrate not just employment with U.S. government funding, but also that they worked either as a linguist with DOS, USAID, or U.S. military personnel, or that they worked in a sensitive and trusted capacity.<sup>56</sup> The requirement to demonstrate work in a qualifying position, though, was removed three years later.<sup>57</sup>

These changing requirements required DOS to adjust its protocols. When eligibility requirements increased, DOS had different requirements for Afghan SIV applications depending on the date on which the application was submitted.

If a new program were to be established, it should authorize adequate visas for the duration of the U.S. government's presence in a location where local staff face threats. In particular, it should ensure that no authorized visa expires until issued, that visas can be issued to as many individuals as establish eligibility, and to authorize visas for a period of time tied to the U.S. government presence in the location. It should also include mandatory processing timelines to ensure that the agencies process visa applications.

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53 NDAA for FY 2015 Section 1218.

54 NDAA for FY 2016 Section 1216.

55 NDAA for FY 2016 Section 1216.

56 NDAA for FY 2017 Section 1214.

57 NDAA for FY 2020 Section 1219.

## V. Documentation

The SIV statutes require applicants to provide numerous pieces of documentation, including some information and evidence that the U.S. government is much better positioned to provide. In other cases, the government's delay in verifying evidence means that applicants must continue to compile new evidence. If they cannot, their applications fail.

The statutes establishing the Iraqi and Afghan SIV programs both required proof that the applicant provided faithful and valuable service while employed by or on behalf of the U.S. government. As of December 20, 2019, an Afghan SIV applicant must demonstrate that he or she:

- (i) is a citizen or national of Afghanistan;
- (ii) was or is employed in Afghanistan on or after October 7, 2001, for not less than 1 year, or, if submitting a petition after September 30, 2015, for a period of not less than 2 years—
  - (I) by, or on behalf of, the United States Government;
  - (II) [or by the International Security Assistance Force or a successor mission]
- (iii) provided faithful and valuable service to an entity or organization described in clause (ii), which is documented in a positive recommendation or evaluation . . . from the employee's senior supervisor . . . ; and
- (iv) has experienced or is experiencing an ongoing serious threat as a consequence of the alien's employment described in clause (ii).<sup>58</sup>

The statute only requires one specific document: a recommendation letter from a supervisor. DOS interprets the statute to require three elements to establish eligible employment:

- a human resources letter from the applicant's employer (called an employment verification or HR letter);
- a personal recommendation letter from a U.S. citizen supervisor; and
- documentation of contracts between the individual's employer and the U.S. government, establishing that the individual's employment was funded by the U.S. government.<sup>59</sup>

The HR letter and personal recommendation letter must include numerous specific elements. In addition, the applicant must submit a statement describing the threats that they face as a result of their work.

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58 AAPA Section 602(b)(2).

59 Embassy of the United States of America - Kabul, Afghanistan, "How to Apply for Chief of Mission Approval," [https://travel.state.gov/content/dam/visas/SIVs/Afghan\\_SIV\\_Guidelines\\_and\\_DS157\\_Instructions\\_Dec%202018.pdf](https://travel.state.gov/content/dam/visas/SIVs/Afghan_SIV_Guidelines_and_DS157_Instructions_Dec%202018.pdf).

It is appropriate to verify that an applicant satisfies application criteria. However, a new program should consider different requirements. It is inconsistent for the United States to say that it is protecting individuals who face danger because of their work and then to deny applicants who cannot provide information that the U.S. government possesses. To ensure that the SIV program provides a meaningful pathway to safety, DOS should carefully parse which documents the applicant should provide and which should be required from the employer or established from U.S. government records.

### **A. Central Database**

- **A future SIV program should allow applicants to submit and update information in a central database. It should also provide a process to submit updates and correct errors. Applicants should also be able to establish their eligibility through documentary evidence if their information is not located in a central database. Efforts should also be made to protect the security of this database.**

The NDAA for FY2020 suggests that the Office of Inspector General consider whether future efforts to protect local employees should include a central database of local employees of the U.S. government. With several important safeguards, a central database of local employees could be a significant improvement over the current system, which leaves each individual to prove their employment years later.

The U.S. government will need to take several steps to ensure that there is a central source of complete and accurate data. To establish a central database, the U.S. government would need to require each agency operating in designated areas to keep complete and accurate records. It would also need to require, as a material term of its contracts, that all contractors provide complete and accurate records.

Government agencies, contractors, and individuals, could submit HR information, including references to U.S. government contracts and recommendation letters during or immediately following local staff's employment. Those documents could be verified immediately. Then, even years later, if an individual were applying for an SIV, the applicant would establish their identity. If the records in the central database demonstrated eligible employment, the individual could then proceed with the application.

Many contractors did not keep HR records; others no longer exist. These are often absolute bars to applicants proceeding with their applications; COM requires an HR letter and a letter from a supervisor, and also contacts the signers of those letters to verify them. When a supervisor's contact has changed, or the employer is no longer in operation, an applicant is often denied. This is true

even if an applicant submitted current information years prior and COM's own delays in verifying the supervisor or employer mean that the supervisor's contact information is no longer valid.

Some applicants are also barred because their employers did not maintain accurate records. An individual whose HR letter shows a termination for cause cannot establish SIV eligibility based on that employment because COM deems such a termination to negate faithful and valuable service. As one safeguard against inaccurate documentation, the central database could require input from U.S. government supervisors who work directly with local employees before documenting a contractor's for-cause termination.

A central database must allow applicants to submit and update information in the database and provide a process to correct errors. This should include a way to request updated security checks if they "failed" a test administered through questionable methods such as polygraph tests.<sup>60</sup>

Even with appropriate safeguards, a database would not comprehensively identify every individual. Thus, applicants should also be able to establish their eligibility through documentary evidence if their information is not located in a central database.

Of course, any such database would be an enormously valuable asset to forces hostile to the United States. Security experts must play a central role, ensuring that the central database is flexible enough to allow applicants, employers, and U.S. government supervisors to submit information, but ensuring that access is limited to protect the identities of local employees.

The next sections evaluate the specific challenges related to individual pieces of required documentation in current SIV processing.

## **B. HR Documentation**

SIV applicants are required to provide documentation of employment. But the U.S. government did not require that contractors maintain records or provide the evidence required for SIV applications to employees. IRAP has witnessed hundreds of instances of Iraqis and Afghans who are unable to move forward with their applications because their former employers refuse to provide documentation of service to its current or former employees, keep incomplete or inaccurate records, or are now defunct.

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60 National Research Council, Committee to Review the Scientific Evidence on the Polygraph, *The Polygraph and Lie Detection*, 4, 2003 (specific-incident polygraph tests can discriminate lying from truth telling at rates well above chance, though well below perfection. Because the studies of acceptable quality all focus on specific incidents, generalization from them to uses for screening is not justified. Because actual screening applications involve considerably more ambiguity for the examinee and in determining truth than arises in specific-incident studies, polygraph accuracy for screening purposes is almost certainly lower than what can be achieved by specific-incident polygraph tests in the field.”).

## 1. Holistic Consideration of Faithful and Valuable Service

- **COM should assess whether an applicant provided “faithful and valuable service” by assessing the totality of the circumstances, including individual recommendations where evidence shows that an individual was terminated.**
- **COM should reopen applications when it becomes aware of mistakes or missing evidence outside of the applicant’s control. This would include a mistaken assessment by COM, an improper termination, inaccurate evidence of a for-cause termination, or an unresponsive supervisor. If eligibility requirements have increased, COM should apply the lower, previous standard.**

Thousands of Afghan allies faithfully served alongside U.S. personnel for years, only to be denied an SIV based on their employer’s human resources (HR) documentation. These documents can be erroneous or reflect simple misunderstandings. For example, HR records may incorrectly list a person as being terminated for job abandonment or mission refusal even if the interpreter properly followed resignation procedures.

DOS’ internal guidance, the Foreign Affairs Manual (FAM) states that “[a] record of disciplinary actions that have been taken against the employee does not automatically disqualify the employee” from SIV eligibility under the INA.<sup>61</sup> Rather, “[t]he principal officer should assess the importance of any such disciplinary actions in light of: (1) The gravity of the reasons for the disciplinary action; and (2) Whether the record as a whole, notwithstanding existing disciplinary actions, is one of faithful service.”<sup>62</sup> Despite that guidance, COM has, with rare exception, denied SIV applicants who were terminated for cause.

As examples, some SIV applicants have credibly reported that they were terminated so that other employees could hire relatives.<sup>63</sup> One IRAP client served for over a year as a combat interpreter employed through MEP.<sup>64</sup> While on a combat mission, he was seriously injured in a grenade attack. While at home recovering, he resigned from his work. MEP erroneously noted that his tenure ended in termination, not medical leave or resignation. Even with documented faithful and valuable service from U.S. military supervisors, COM denied his application because the record erroneously included a termination.

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61 9 FAM 42.32(d)(2) N6.2.

62 9 FAM 42.32(d)(2) N6.2.

63 Christopher Harland-Dunaway, The Verge, “Outside the wire,” Nov. 19, 2019, <https://www.theverge.com/2019/11/19/20961811/taliban-afghanistan-radio-in-a-box-djs-news-war-us-army>.

64 Mission Essential Personnel (MEP), including its corporate predecessors, is a private contractor that provides the U.S. military with linguists in Afghanistan. It is a common employer of many Afghan SIV applicants by its role supplying U.S. forces in Afghanistan with translators.

Another former IRAP client, also employed by MEP, translated for the U.S. military. He informed his U.S. military supervisor that he had received a scholarship to study overseas. His supervisor granted his request to resign and filed paperwork with MEP, citing resignation as the basis for ending employment. MEP had, however, mistakenly noted in its records that he had been terminated for job abandonment, and COM denied two applications. After months of work to locate his former supervisor, the supervisor sent an affidavit confirming to MEP that the applicant resigned. MEP then updated his employment verification letter, but by this time the eligibility requirements had changed from one year of qualifying employment to two. Years after applying, he has no remaining avenue to pursue an Afghan SIV.

COM cannot simply rely on HR records from private companies that are often inaccurate or incomplete. If COM abides by Congress's intentions and FAM guidance and takes a totality-of-the-circumstances approach to faithful and valuable service, many Afghan allies, who are in danger because of their service to the United States, will be able to find safety through the SIV program.

## **2. Uncooperative Employers**

- **COM should accept supervisor letters in lieu of HR employment verification letters from employers that are unwilling to provide HR documentation to applicants for reasons beyond the applicant's control.**
- **COM should disregard employer clauses in employment verification letters that purport to invalidate their use for SIV purposes. COM should instead focus on whether the elements of the letter suffice to verify employment.**

Some SIV applicants cannot provide employment verification letters because their former employers are unable or unwilling to provide letters. Some employers that formerly had a human resources department no longer do. Other companies have destroyed their employment records or retained documents only for a limited period of time. Still other companies simply refuse to provide employment verification letters or issue letters that explicitly state that the letters are not to be used for SIV verification. Examples of contractors with such issues include major contractors in Afghanistan including PAE, Supreme Group, PGS, and USTC/Blackwater/Academi. In Iraq, major U.S. military contractors like Global Linguist Solutions have refused to provide former employees with such documentation.<sup>65</sup> The U.S. Embassy in Kabul and Other Government Agencies (OGA) are also among those who refuse to provide documents or verify employment.

The Iraqi and Afghan SIV statutes require an applicant to demonstrate eligible employment, but do not require government agencies or contractors to provide documentation. COM has generally

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65 Jacob Resneck, "Iraqi Translator for US Military Now Stuck in Greece," PRI, March 24, 2016, <https://www.pri.org/stories/2016-03-24/iraqi-translator-us-military-now-stuck-greece>.

denied applications where an applicant is unable to provide an employment verification letter or COM is unable to verify the letter. Such situations will only increase as the U.S. government decreases its footprint in Afghanistan. COM must accept supervisor letters confirming employment for dates to the best of their knowledge. If an applicant has an employment verification letter but it cannot be verified, the supervisor's verification of the letter should be deemed sufficient.

One contractor, PGS, issues employment verification letters that state that they are not to be used for SIV purposes. Many applicants have been denied COM approval on the basis that their employment verification letter stated that it was not to be used for SIV purposes. If an applicant is able to demonstrate qualifying employment, this must be deemed sufficient. The employer's role is to confirm whether an individual was employed or not; the Iraqi and Afghan SIV statutes allocate responsibility for determining eligibility with COM and not with employers.

### **3. Employment with Embassy Kabul and Other Government Agencies**

- **DOS, as with all government agencies and contractors, should provide information on how to obtain employment verification and respond to attempts to verify employment.**

Distressingly, among the uncooperative employers of SIV applicants is the Embassy Kabul and U.S. intelligence agencies. Many SIV applicants worked for OGA, which likely indicates they were working with the CIA or another sensitive U.S. government entity. Others worked directly for Embassy Kabul or the Embassy Kabul Annex. The U.S. government has not facilitated employment verification letters, letters of recommendation from supervisors, or even contact information for U.S. supervisors. Some individuals were able to obtain employment verification letters, but even they generally cannot proceed with the application because no one is available to verify those documents.

The Embassy Kabul employee who signed employment verification letters and letters of recommendation, Tiwana Armwood, is no longer at Embassy Kabul. Applicants who had submitted letters from Ms. Armwood receive COM rejections on the basis of COM's inability to verify the letters. While another employee at the Embassy should be able to verify employment, applicants are unable to make such a request without a known email address to contact to do so. Many applicants have attempted to contact Embassy Kabul at [kabuliv@state.gov](mailto:kabuliv@state.gov) and [kabuljobs@state.gov](mailto:kabuljobs@state.gov) to ask whom to contact to obtain letters, but the Embassy only replies that they are unable to assist and do not provide any other guidance.

Incredibly, the Chief of Mission of the U.S. Embassy in Kabul rejects applicants from the SIV process on the grounds that no one has verified employment letters issued by the U.S. Embassy in Kabul. It is unconscionable that the entity responsible for issuing SIVs is unable or unwilling to issue documents to its own employees. DOS, as with other government agencies and all U.S. government

contractors, must provide information on how to obtain employment documentation, and must respond to requests—from DOS—to verify employment when requested.

### C. Proof of U.S. government Funding

- **Require U.S. government contractors to confirm employment under U.S. government funding.**
- **COM should improve its staff training and guidance so that applicants are not wrongly denied due to COM's failure to adequately search for and locate readily available contracts.**

SIV applicants are required to provide proof that they were employed “by or on behalf of” the U.S. government. In practice, COM interprets this to require proof that applicants were employed under U.S. government contracts. Individual applicants can demonstrate this by providing contracts or contract numbers between their employer and the U.S. government at the time of their employment. Some employers are willing to provide contract numbers on HR letters; other applicants have to identify the contracts that their employer had on their own.

Between the U.S. government, employers, supervisors, and SIV applicants, the applicants are worst positioned to provide this information. The question of whether an employer had U.S. government funding is something that, obviously, the U.S. government is better positioned to establish than an individual working under a contract. Requiring this information from an applicant is akin to requiring a former McDonald’s employee to submit a copy of the franchise agreement between their restaurant and the McDonald’s corporation before filing their tax return—five years after the restaurant closed.

Although the Afghan Allies Protection Act required the U.S. government to assemble a database of information about contractors, it did not require contractors to maintain records or to provide needed information to employees. With some exceptions, employers did not generally provide their employees with information about contracts between the company and the U.S. government. Major U.S. military contractors like Global Linguist Solutions have refused to provide former employees with such documentation,<sup>66</sup> and many former contractors are now defunct. Some, but not all contracts, are searchable on portals such as FPDS. However, most applicants are unaware of those resources, and navigating them requires some understanding of U.S. government contracts.

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66 Jacob Resneck, “Iraqi Translator for US Military Now Stuck in Greece,” PRI, March 24, 2016, <https://www.pri.org/stories/2016-03-24/iraqi-translator-us-military-now-stuck-greece>.



Many applicants are unable to provide evidence of their employer's contracts and are denied COM approval because COM was unable to locate a contract between the applicant's employer and the U.S. government. However, contracts are often available on public databases of DOD contracts such as FPDS, SPOT, or Govtribe.com. COM has often failed to adequately search all readily available resources and thus wrongly denied applicants.

The FAM, DOS' own internal handbook, states that "the COM, or his or her designee, must conduct an independent review of records maintained by the U.S. government or hiring organization or entity."<sup>67</sup> Given the ease with which IRAP has been able to locate contracts on publicly available government contract databases, it is evident that COM is not consistently conducting a sufficient "independent review of records maintained by the U.S. government."

One applicant was denied COM approval on the basis that COM could not verify that he was employed under U.S. government funding. However, his employer's company was listed as the prime contractor on a contract provided on the FPDS website. In numerous instances, IRAP assisted individuals who received COM denials that said that their employers were not listed on the contract number that they provided. In fact, those contracts—each of which were publicly searchable—listed the applicants' employers as the subcontractors. Others have been denied on the grounds that their employment was under a grant or cooperative funding, which does not constitute employment "by or on behalf of" the U.S. government. However, in several instances, the publicly searchable agreements clearly demonstrated that they were, in fact, contracts.

Many Afghan interpreters who worked alongside U.S. forces in Afghanistan were employed by International Management Services, Inc. (IMS). These former IMS employees were denied COM approval because DOS maintained that IMS had only one contract with the U.S. government for a seven-month period in 2012. COM maintained that any other IMS contracts were with ISAF, the NATO-led security mission in Afghanistan. Therefore, COM had denied all SIV applications based on IMS employment, on the basis that IMS employees could not have been employed "by or on behalf of" the United States government for the required minimum period of employment.

These rejections were the result of a failure to search Department of Defense (DOD) records adequately. IRAP submitted a FOIA request to the U.S. Army Sustainment Command and received a response within one week providing 17 contracts between IMS and the U.S. government between 2009 and 2012.<sup>68</sup> Subsequently, some individuals with IMS employment were approved, but many individuals had to reapply and were not able to establish the newly-increased requirement to demonstrate two years of qualifying employment. IRAP was grateful to see DOS work to approve individuals identified in that situation; even so, this failure must have led to wrongful denials of

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67 FAM § 502.5-12(b)(2)(a) (emphasis added).

68 These contracts were located in the Department of Defense Electronic Document Access using IMS' cage code.

individuals who were not identified. Even those who eventually received COM approval faced several years of delays due to these wrongful denials.

One IRAP client applied twice for COM approval and was denied twice on the basis that his work through IMS did not qualify. He reapplied and provided IMS contracts as well as documentation of additional qualifying employment establishing the two-year threshold. He was denied for a third time—again saying that IMS employment did not qualify and also that COM could not verify his additional employment through a different contractor. These denials caused years of delay in his application during which he was in danger.

Staff must be given adequate training and resources to search available sources of U.S. government contracts, including, but not limited to, the FPDS website, the Department of Defense's SPOT database, and Govtribe.com. They should be instructed to search those resources before issuing COM denials on the basis of inability to locate a contract.

#### **D. Letter of Recommendation**

- **A central database should accept letters of recommendation from supervisors contemporaneously with employment, and should not require re-verification of the information contained in the recommendation letters.**
- **If the SIV program needs to verify evidence, it should do so immediately after applicants, supervisors, or employers submit evidence.**

Applicants are required to provide a personal recommendation letter from a U.S. citizen supervisor.<sup>69</sup> Military supervisors' email addresses change frequently, making it difficult for Iraqi and Afghan employees to maintain contact with their supervisors.<sup>70</sup> COM then requires that supervisors and employers verify those letters, but often reaches out to contact individuals years later, sometimes several times over the course of several years. This means that applicants may be asked repeatedly over long periods of time to obtain revised contact information for U.S. government employees or former contractors. Active duty military personnel, in particular, provide email addresses that are valid only for the period of their deployment. If an applicant cannot provide revised contact information, their application will likely be denied.

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69 Afghan Allies Protection Act, Section 602(b)(2)(iii).

70 Christopher Harland-Dunaway, The Verge, "Outside the Wire," Nov. 19, 2019, <https://www.theverge.com/2019/11/19/20961811/taliban-afghanistan-radio-in-a-box-djs-news-war-us-army> ("Time passed, and when Afghans who worked for the US went looking for their old bosses, they discovered email addresses no longer worked, phone numbers had changed, or contact information had been lost.").

In many cases, the Iraqi and Afghan applicants are burdened with telling the U.S. government the whereabouts of U.S. government employees—information that should be much easier for U.S. government officials to locate.

In other situations, it is long delays from the COM itself that necessitate new information. COM should establish a system that allows an employer or supervisor to verify employment contemporaneously. This should be deemed sufficient to verify the employment attested to without additional contact. At that stage, the employer or supervisor should provide at least one permanent form of contact information to COM. Should SIV eligibility requirements change, then, those individuals and employers could be more easily contacted.

### **1. Contacting Supervisors**

- **DOS and DOD should provide an effective process to assist applicants to identify their former supervisors.**

Many individuals are unable to contact their supervisors. SIV applicants are required to provide a letter of recommendation from a U.S. citizen supervisor. However, most U.S. citizens in Afghanistan or Iraq were there only for several months or up to one year on rotations or deployments. It is then difficult for SIV applicants to maintain contact with their supervisors, especially for military personnel whose email addresses change regularly.

IRAP advises applicants to try to contact their supervisors on LinkedIn or through Google searches, and occasionally individuals are able to contact supervisors through such means. In many situations, though, the U.S. government is best positioned to identify those individuals' locations because it is their employer. As noted above, any future SIV program should request permanent contact information for supervisors, and should verify recommendations and employment information contemporaneously with the employment. A central database should preempt repeated and long-delayed verifications.

Supervisors also have total discretion whether or not they will provide a recommendation letter or to include all of the information required by COM. COM requires that U.S. supervisors provide passport numbers on recommendation letters. This may be so COM can easily verify that the recommender is a U.S. citizen. Many recommenders have, understandably, balked at providing personal information. In other instances, supervisors are now deceased—sometimes killed in the line of duty or, given the duration of the conflicts in Iraq and Afghanistan, deceased from natural causes.

Current efforts to facilitate identification of supervisors have been, at best, poor. The form DS-158, the DOD Supervisor Locator Form, purports to allow SIV applicants to submit information to the DOD to identify information about the supervisor. IRAP has seen this form work only once in years

of assisting applicants. IRAP believes the form to be so useless that it no longer advises applicants to complete the form, even though the form is free.

The form is most notable, and most obviously concerning, in what it does not ask for: the name of the supervisor and other identifying information such as their military unit. It is no surprise that the DS-158 is not successful in locating supervisors when it does not give applicants the opportunity to provide information about the supervisor they are trying to locate. The form also requests unnecessary information that does not assist DOD in finding the supervisor, but that discourages applicants from using the form. The DS-158 requires information about the applicant's spouse, parents, and siblings—information that is obviously irrelevant to finding the applicant's supervisor. Even more concerning, the form requires the applicant to provide information for two contacts in the applicant's country. Most SIV applicants go to great lengths to conceal their work, location, and identity. They may not have two contacts who they are willing to list.

IRAP submitted these concerns, with specific recommendations for reform, to DOS when the form was last subject to regulatory review. DOS acknowledged IRAP's comments and renamed the form. It did not change any of the substantive fields on the form.<sup>71</sup> DOS and DOD should overhaul its efforts to assist former employees in identifying supervisors, including redesigning the form that is used and whatever process is used to identify supervisors so that it is a benefit to applicants rather than a waste of resources.

## **2. COM Verification of Letters of Recommendation**

- **To the extent that verification of documents is needed, COM should verify documents as quickly as possible after the letters are submitted.**
- **No applicant should be denied for COM's inability to verify a document where COM has not made good-faith efforts to contact a recommender or employer.**

SIV applicants are required to provide a letter of recommendation from their U.S. citizen supervisors with their COM applications.<sup>72</sup> IRAP has observed worrying trends of COM rejections and COM appeal rejections on the grounds that a letter of recommendation "could not be verified." In numerous instances, the letter writer, after thoroughly checking their inbox and spam folder, has confirmed to IRAP that they were never contacted. Both because of COM's statutory duty to conduct an "independent review"<sup>73</sup> of documents and the danger that these applicants face, no SIV applicant

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71 Department of State, Supporting Statement for Paperwork Reduction Act Submission, DS-158, Special Immigrant Visa Supervisor Locator, OMB Number 1405-0144, 2018 ("The Department is always seeking to improve its information collections, and has taken IRAP's suggestions into consideration and implemented some of them within the DS-158.").

72 Afghan Allies Protection Act, Section 602(b)(2)(iii).

73 Afghan Allies Protection Act, Section 602(b)(2)(D)(i).

should be rejected because a letter “cannot be confirmed” until COM has made a good-faith effort to contact that letter writer.

An applicant who receives a rejection “shall receive a written decision that provides, to the maximum extent feasible, information describing the basis for the denial, including the facts and inferences underlying the individual determination”. If COM rejects an application based on lack of ability to verify its contents, without having made serious and repeated efforts to verify those contents, it has clearly misstated the “basis for the denial, including the facts and inferences underlying the individual determination”<sup>74</sup> and is in violation of its statutory duty.

One applicant was rejected on the basis that his recommendation letter could not be verified. IRAP assisted him to obtain a new letter and submitted it with an appeal. He received a second denial of his appeal on the basis that his recommendation letter could not be verified. The recommendation letter writer confirms he was never contacted to confirm the authenticity of the letter. After the recommender called NVC to ask about this, NVC admitted to the recommender on the phone that they had not noticed that new LOR and that it had not been reviewed. NVC maintained that, because applicants are only permitted one appeal, the appeal could not be re-submitted for review by COM. After repeated inquiries, NVC refused to re-submit the appeal to COM. The appeal was never reviewed on its merits. A review of an appeal that failed to notice a document overcoming the reason for rejection is no appeal at all. This brings COM in violation of its duty to review applications in good faith.

Another applicant submitted several letters of recommendation, an HR letter from his employer, and the contract between his employer and the U.S. government. He was denied on the grounds that the contract listed a slightly different name of his employer. Several U.S. Army personnel volunteered to clarify and vouch for the authenticity of the relationship, but COM refused to follow up with those supervisors. Because of their insufficient review of the documentation and the applicant’s record of service, he was unfairly denied COM approval.

Again, a central database to which an applicant can submit a letter of recommendation should preempt the need for verification. To the extent that a letter must be re-verified, it should be done as quickly as possible after the letter is submitted, as a supervisor’s contact information might change. No applicant should be denied without a good-faith effort to contact the supervisor or employer.

### **3. COM Application Re-Openings**

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74 Afghan Allies Protection Act, Section 602(b)(2)(D)(i)(aa).

- **COM should reopen applications when it becomes aware of mistakes or missing evidence outside of the applicant’s control, including where a supervisor does not respond in a timely manner to verify a letter. If eligibility requirements have increased, COM should apply the lower, previous standard.**

In certain instances, SIV applicants are denied because a supervisor failed to respond to COM’s email confirming the validity of his letter of recommendation. This is outside of the applicant’s control but leads to the severe consequence of a COM denial. In one instance, an applicant submitted a letter of recommendation but received a denial of COM appeal because the supervisor did not respond to COM’s requests to confirm the letter of recommendation. Subsequently, the supervisor responded to the applicant and COM, explaining that at the time COM contacted him he had been deployed and did not have access to his email. The supervisor sent his verification directly to COM. The NVC refused to consider this additional information.

In instances like this, when the only issue was a supervisor not replying to an email within a certain period of time, when the supervisor remedies the situation, as is the case here, COM should reopen the case. This is especially true given that military supervisors frequently must deploy to locations with limited email access.

## **E. Statement of Threats**

- **Statements of threat from the applicant, credibly describing the danger that they face, should sufficiently establish that the applicant faces an ongoing serious threat.**

Both the Iraqi and Afghan SIV programs, from their inception, required an applicant to demonstrate that he or she “has experienced or is experiencing an ongoing serious threat as a consequence of the alien’s employment.”<sup>75</sup> However, in the early years of the program, there were large numbers of denials on this ground—but only in the Afghan program.

One applicant, Mohammad, noted in his COM application “that the Taliban had spotted him on the job and had spread word in his village that he was a wanted man.”<sup>76</sup> Another interpreter had worked at a U.S. military prison and had daily interaction screening family members of detained militants visiting their relatives. U.S. military supervisors attested that he was at particular risk. Yet another, Naseri, survived three IED attacks and members of his family had received death threats.

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75 Afghan Allies Protection Act Section 602(b)(2)(A)(iv).

76 Kevin Sieff, “In Afghanistan, interpreters who helped U.S. in war denied visas; U.S. says they face no threat,” Washington Post, Nov. 10, 2013, [https://www.washingtonpost.com/world/in-afghanistan-interpreters-who-helped-us-in-war-denied-visas-us-says-they-face-no-threat/2013/11/10/af7acfc8-4180-11e3-b028-de922d7a3f47\\_story.html](https://www.washingtonpost.com/world/in-afghanistan-interpreters-who-helped-us-in-war-denied-visas-us-says-they-face-no-threat/2013/11/10/af7acfc8-4180-11e3-b028-de922d7a3f47_story.html).

All three were rejected on the grounds that they had not experienced an “ongoing serious threat as a consequence” of their work.

Alarmed by these denials, Congress clarified the “serious threat” requirement, stating that:

A credible sworn statement depicting dangerous country conditions, together with official evidence of such country conditions from the United States Government, should be considered as a factor in determination of whether the alien has experienced or is experiencing an ongoing serious threat as a consequence of the alien’s employment by the United States Government . . .<sup>77</sup>

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“...the Taliban had spotted him on the job and had spread word in his village that he was a wanted man.”

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Should Congress authorize future SIV programs, it should ensure that such safeguards are included from the beginning to prevent arbitrary denials.

## VI. Other Procedural Concerns

### A. Chief of Mission

- **Reassign the responsibility to adjudicate the initial application step from COM in the country where the applicant served to a senior diplomat who can be located in a place that supports greater staffing and longer staff tenure.**

The COM process has been a primary source of delay in the Iraqi and Afghan SIV programs. Applicants to both the Iraqi and Afghan programs must obtain approval from the COM in Embassy Baghdad and Kabul, respectively, by demonstrating that they have qualifying employment. Security concerns in both Iraq and Afghanistan mean that only a small number of staff are based in those embassies at any given time, and that any U.S. consular or COM officer serves in Embassy Kabul and Baghdad for very brief periods.

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77 NDAAs for FY 2014, Section 1219.

Rather than requiring approval from the COM in the country where the applicant was employed, a future SIV program should establish an initial step demonstrating eligibility to a senior diplomat. This would preserve the same standards but allow for greater staffing flexibility and longer staff tenure.

## **B. Surviving Spouses and Children**

- **If an applicant is killed in the line of duty or while applying, the surviving spouse and child should be allowed to pursue the primary applicant's SIV.**

As currently drafted, if an individual who is eligible for an SIV dies in the line of duty or at any point in the process prior to receiving I-360 approval, that individual's spouse and children cannot pursue a visa. Any future program should ensure that spouses and minor children can continue or initiate an application if they can demonstrate that their deceased spouse or parent was eligible for an SIV.

## **C. COM Appeals**

- **Applicants who are not provided with a copy of their denial notice should be afforded the opportunity to appeal within 120 days of receiving the denial, per statutory requirements.**

Several SIV applicants have been denied COM approval but did not receive notice of the denial for many months or even years later. The Afghan SIV statute explicitly states that the deadline is "120 days after the date that the applicant *receives such decision in writing*."<sup>78</sup>

IRAP has assisted several such applicants. In each case, upon receiving notice of the denial from NVC, they then submitted a timely appeal within 120 days of the date of notice. NVC, however, has refused to forward these appeals to COM Kabul for review. One applicant's request for COM approval was denied in 2014 but he did not receive notice until two years later, after intervention from a U.S. Senator's office. He filed a timely appeal within 120 days of receiving notice, but NVC refused to forward the appeal to COM. Another applicant was denied in July 2015 but did not receive the denial until a year later, filed a timely appeal within 120 days of receiving the denial, but NVC again refused to submit the appeal.

## **D. NVC Communication and Efficiency**

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78 Afghan Allies Protection Act Section 602(b)(2)(D)(ii)(bb)(AA) (emphasis added).



- **DOS should ensure that NVC is responsive to individual applicant and attorney inquiries rather than issuing pattern responses that take up valuable time and fail to respond to questions and requests.**

IRAP has experienced pervasive communication issues in which NVC sends form responses that ignore questions or requests posed in applicants' or attorneys' emails. Sometimes this imposes significant delays. In one instance, an applicant spent more than four years attempting to get an answer to basic questions about his case, including whether the letter of appeal submitted on his behalf by a supportive supervisor was ever received, and whether a decision had been rendered in his case. Several of NVC's replies to him were inconsistent with previous communications. By the time he did receive an answer, he was ineligible to re-apply because eligibility requirements had increased.

Another individual was delayed for eight months as NVC insisted that it needed to obtain birth certificates before an applicant could proceed to an interview. However, the applicant provided an alternate document that satisfied visa application requirements according to DOS guidelines.

NVC has caused particular challenges for Afghan SIV applicants who have been forced to flee from Afghanistan for their safety and who no longer have valid passports or who cannot obtain original civil documents such as *tazkiras*. Afghan SIV applicants in Denmark, India, Malaysia, United Kingdom, Germany, and Sweden have been asked to provide passports or *tazkiras*, but their country of asylum currently possesses the passport or the passport is expired and the Afghan Embassy is unwilling to provide new documents. These applicants have no guidance on how to proceed.

DOS must ensure that NVC employees understand the need to send individualized responses instead of copying and pasting form replies that do not address the underlying request. Improved training would prevent unnecessary back and forth between the applicant or attorney and NVC. Ultimately, providing high-quality customer service would save NVC time and resources. DOS should also publish clear guidelines for when an applicant cannot provide a passport or *tazkira*.

## **E. Interview - Right to Counsel**

- **U.S. Embassies – particularly the Baghdad and Kabul Embassies – must ensure compliance with procedural rights afforded by law, such as the right to counsel.**

Iraqi and Afghan SIV applicants are entitled to an attorney.<sup>79</sup> However, both the Baghdad and Kabul Embassies have refused to allow SIV applicants to bring attorneys with them to their interviews,

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79 National Defense Authorization Act for Fiscal Year 2014, Section 1218-1219.

even with advance notice. Given that this is contrary to the law and detrimental to SIV applicants, DOS must educate all U.S. Embassies and ensure compliance with the law allowing SIV applicants to be accompanied by attorneys and accredited representatives to their visa interviews.

## F. Post-Interview Visa Refusal

### 1. Concerns about Embassy Kabul's Procedures for Determining Marriage Dates, Divorce Dates, and Dates of Birth

- **DOS should publish on its website guidance on best practices with respect to documentation of major life events, including what evidence an applicant may bring to the interview to prove dependents' eligibility.**
- **When there is uncertainty about the accuracy of certain relevant dates based on marriage certificates, divorce certificates, and tazkiras, applicants should be issued a refusal under 221(g) and requested to provide additional evidence clarifying the uncertainty.**

IRAP has seen a notable rise in Afghan SIV applicants who have been refused visas on inadmissibility grounds after their visa interviews, with denials citing issues with an applicant's marriage date, parentage, or children's ages. If a child is listed as being born prior to a date of marriage, or a child's date of birth is recorded as two different dates on two different documents, for example, the family may be rejected for misrepresentation or alien smuggling. The Embassy may be concerned that the children are not related to the parents or that the children are older than the age-out period (meaning that they should not be included as derivatives on their parent's application).

Embassy Kabul appears to rely on marriage and divorce certificates and *tazkiras* to verify children's ages. There are notable issues with the reliability of these types of documents. Marriage and divorce certificates in Afghanistan can be issued at any time after the marriage or divorce, even years later. The Civil Code of the Republic of Afghanistan does not require immediate registration with a government agency or court.<sup>80</sup> Afghan agencies often issue divorce certificates that conflate the date of divorce and the date of issuance of the divorce certificate, which may not have been obtained until years later. *Tazkiras* are issued by Afghan ministries where an official often makes a subjective determination of the child's age based on the child's appearance or other factors.<sup>81</sup>

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80 See Civil Code of the Republic of Afghanistan, Articles 77, 135, 139, and 156.

81 See Department of State Reciprocity Schedule for Afghanistan under "Identity Card" section: "The document also lists the holder's age as of the year the document was issued, but this is usually just an estimate as birth records are seldom available."

There is no public information to determine how Embassy Kabul makes these determinations. Elsewhere, the U.S. government admits that Afghan civil documents are not reliable.<sup>82</sup> To the best of our understanding, visa applicants are not confronted in their visa interviews with the specific evidence that Embassy Kabul finds problematic. They are not given a chance to rebut the concern or gather and provide additional evidence supporting the claimed marriage date, parentage, or child's age. Despite the unreliability of civil documents, the Embassy has adopted a harsh policy of issuing an inadmissibility determination of "misrepresentation" or "alien smuggling." This is a lifetime bar to admission to the United States—for individuals who have already proven that they faced ongoing and serious threats because of their employment for the United States.

An SIV applicant was told by an Afghan representative at Embassy Kabul that the Embassy did not believe her marriage date and the only way she was ever going to see her husband, who was in the United States, was to sign a statement admitting that she had lied about the marriage date, and to pursue joining her husband under an I-130. This information was erroneous: if an applicant is deemed inadmissible due to a misrepresentation, it would prevent family reunification through an I-130 absent an exceptional waiver. This raises serious concerns about the potentially coercive nature under which such interviews are being conducted.

In places of conflict where the U.S. government employs local nationals to support its wartime engagement, civil registrations and civil documentation systems will often not be reliable. DOS should publish guidance on best practices with respect to documentation of major life events, including what evidence an applicant may bring to the interview to prove dependents' eligibility. When there is uncertainty about the accuracy of certain relevant dates based on documentation such as marriage certificates, divorce certificates, and *tazkiras*, applicants should be issued a visa refusal under INA Section 221(g) with instructions on the specific evidence that the applicant needs to provide to overcome the visa refusal. This would ensure applicants are given a full and fair opportunity to clarify the record about claimed dates, provide the Embassy with additional information to make a fully-informed decision about eligibility, and avoid deserving applicants receiving a lifetime bar of admissibility to the United States in instances when there was simply a misunderstanding based on documents DOS itself has acknowledged are unreliable.

## **2. Concerns about Embassy Kabul's Handling of Requests for Reconsideration of Visa Refusals**

- **Embassies should comply with immigration law by reviewing requests for reconsideration made by applicants and considering submitted evidence.**

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<sup>82</sup> "Alert: Protracted wartime conditions and the intermittent absence of an established central authority have made document availability and reliability uncertain in Afghanistan. Procedures for obtaining government documents change with great frequency." Department of State, "Afghanistan - Reciprocity Schedule," <https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country/Afghanistan.html>.

- **DOS should affirmatively review inadmissibility findings for misrepresentation and smuggling. Where applicants were not given opportunities to provide additional evidence, DOS should remove the finding, notify applicants, and consider another application, or should change the status to a 221(g) refusal to allow applicants to submit additional evidence.**

If an applicant receives a visa refusal, federal regulation requires they have one year to request reconsideration by the relevant embassy and provide additional evidence that establishes their eligibility.<sup>83</sup> However, when applicants contact Embassy Kabul and provide new evidence to overcome the basis for visa refusal, Embassy Kabul responds without acknowledging receipt or review of such additional evidence. Instead, the Embassy reiterates that the applicant was previously refused and states that the decision is final. This is legally incorrect; individuals refused a visa have a right to request reconsideration and provide new evidence.<sup>84</sup> Moreover, such refused applicants are not informed of the right to contact LegalNet to allege errors as a matter of law and request further review.

In each of those cases, when an applicant's attorney submits the request for reconsideration, Embassy Kabul has at least acknowledged receipt and review of such additional evidence but within just a few days of receipt of the request has confirmed that the original decision stands. In contrast to Embassy Kabul's response to applicants' *pro se* requests for reconsideration, attorneys submitting requests for reconsideration are informed of the right to contact LegalNet to request further review based on an allegation of errors as a matter of law. In each instance, though, whether *pro se* or with the assistance of counsel, visa refusals have been summarily affirmed.

The Department of State should ensure that requests for review are reviewed and new evidence is considered, as immigration law requires. Embassies must also provide the same review of requests for reconsideration and response to applicants contacting the Embassy on their own as it does to attorneys contacting the Embassy on their clients' behalf.

## VII. Security Checks and Delays

- **Executive agencies should take steps to increase the efficiency of the interagency check process and ensure that all checks are completed within the required 9-month adjudication period.**

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83 See INA section 212(b) (requiring an applicant to be informed of the reason for denial); 22 CFR 42.81(e), require that "[i]f a visa is refused, and the applicant within one year from the date of refusal adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be reconsidered").

84 22 CFR 42.81(e).

**The agencies should also ensure that Congressional overseers have necessary and accurate information about delays.**

Since its inception, the Afghan SIV program has been plagued by needless delays at multiple steps of processing, particularly during post-interview interagency checks. In 2019, IRAP's ongoing litigation over unreasonable delays in SIV processing revealed that virtually every applicant (98%) in the final stage of SIV processing has waited longer than the statutorily-mandated 9 months to have their case adjudicated.<sup>85</sup> Applicants waiting for COM approval have been waiting an average of two years for a decision on their COM approval; "All applicants waiting in [subsequent] stages have waited an average of nearly three years for final adjudication."<sup>86</sup>

While publicly-available information about the nature of the delays remains elusive, Congress has identified interagency security checks as a primary source of delays. The Senate Armed Services Committee explicitly raised alarm about delays in intra-agency checks in 2018, endorsing additional reporting requirements as a result of "reports that the SIV application process may be hampered by a breakdown in interagency coordination resulting in undue delay, needless stress on applicants, and a sizable drop in SIV admissions during the first and second quarters of fiscal year 2018."<sup>87</sup>

## **VIII. Arbitrary Orders Denying Boarding and Detaining Applicants on Arrival**

- **Executive agencies should ensure that, once an individual is cleared for travel, they are admitted to the United States rather than being arbitrarily detained.**

Despite having undergone extensive vetting and demonstrated the existence of serious threats to their safety prior to having their applications approved for travel, many SIV holders have faced lengthy secondary inspection, days-long detention, family separation, and even deportation back to danger in their countries of origin. When President Trump signed the first Muslim ban, Executive Order, 13,769 on January 27, 2017, Iraqis who had been through years of processing, after years of loyal service to the U.S. mission, saw themselves banned from entry to the United States in an instant.<sup>88</sup>

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85 Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States ex rel. Situated v. Pompeo, Civil Action No. 18-cv-01388 (TSC) (D.D.C. Jan. 30, 2019), Plaintiffs' Supplement In Further Support of Their Motion For Preliminary Injunction, p. 8, ECF No. 68, June 11, 2019. <https://refugeerights.org/wp-content/uploads/2019/06/ECF-068-Plaintiffs-Supplement-ISO-Motion-for-Preliminary-Injunction-00014274xEBEF1.pdf> (last visited April 9, 2020).

86 Id. at 9.

87 Committee on Armed Services, United States Senate, Report Accompanying S.2987, The John S. McCain National Defense Authorization Act for Fiscal Year 2019, June 5, 2018. p. 289. <https://www.armed-services.senate.gov/imo/media/doc/THE%20JOHN%20S.%20McCAIN%20NATIONAL%20DEFENSE%20AUTHORIZATION%20ACT%20FOR%20FISCAL%20YEAR%202019%20BILL%20REPORT.pdf> (last visited April 9, 2020).

88 Allen Vaught, "Refugee Ban Trapped My Iraqi Translator: Veteran," Jan. 31, 2017, <https://www.usatoday.com/story/opinion/2017/01/31/trump-ban-iraq-muslim-translators-column/97250702/> (noting that Sam, an Iraqi translator, was banned from entry after completing years of processing).

Hameed Darweesh, who worked as a translator with U.S. forces for ten years, was already in flight when the Executive Order was signed, which immediately impacted his legal status while he was flying to New York's JFK Airport. Upon arrival, he was handcuffed, detained overnight, and scheduled for deportation to Iraq. Only after IRAP and legal partners filed a petition for emergency judicial review was he released and admitted to the United States.<sup>89</sup> Reports suggested that the White House quickly requested a "list" of Iraqi partners who should be exempt from the Executive Order.<sup>90</sup> Within a few days, the White House issued an exemption for all Iraqi SIV recipients, allowing SIV recipients to travel – however, maintaining the ban on thousands of Iraqis with U.S. government affiliations pursuing relocation through the U.S. Refugee Admissions Program.<sup>91</sup> SIV recipients, like all travelers from the United States, should not see a years-long process to obtain an immigration benefit upended due to discriminatory executive action.

Afghans were not mentioned in E.O. 13769 or its successor E.O. 13780, but nonetheless many applicants were arrested on arrival or denied boarding. An Afghan SIV recipient named Abdul was arrested on his arrival in Newark airport. His visa was revoked, and he was incarcerated in immigration detention for more than a year. Abdul held a valid visa for entry to the United States, after the U.S. intelligence community cleared his entry, and DOS found that he faced serious threats because of faithful and valuable service to the U.S. mission in Afghanistan. He was incarcerated for over a year at public expense and was forced to claim asylum rather than receive the green card to which he was entitled.<sup>92</sup>

Many SIV holders were denied boarding, or deplaned from, flights to the United States when they attempted to travel to the United States after receiving their visas.<sup>93</sup> Another Iraqi SIV recipient, Munther, and his family were removed from a flight to the United States after they had boarded their plane.<sup>94</sup> Asif Khan Ahmadzai departed Afghanistan after lengthy processing but, at his layover, was not allowed to board his flight—one of several interpreters denied boarding after receiving a visa.<sup>95</sup>

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89 Nicholas Kulish, "Iraqi Immigrant, Caught in a Trump Policy Tangle, Is Allowed to Stay," N.Y. Times, Jan. 28, 2017, <https://www.nytimes.com/2017/01/28/us/iraqi-immigrant-donald-trump-airport-detention.html>.

90 Jeremy Herb, "Pentagon Recommending Exemptions to Immigration Ban for Iraqis Working with U.S. Forces," Politico, Jan. 30, 2017, <https://www.politico.com/story/2017/01/trump-immigration-ban-pentagon-iraqis-234373>.

91 David Zucchino, "Visa Ban Amended to Allow Iraqi Interpreters into U.S.," N.Y. Times, Feb. 2, 2017, <https://www.nytimes.com/2017/02/02/world/middleeast/trump-visa-ban-iraq-interpreters.html>.

92 Monsy Alvarado, "Afghan man who helped U.S. troops is granted asylum, released from immigration detention," North Jersey, May 9, 2018, <https://www.northjersey.com/story/news/nation/2018/05/09/afghan-man-who-helped-u-s-troops-released-granted-asylum-njaclu-announced/595961002/>.

93 Lachlan Murray, "'Enhanced Vetting' Leaves Our Afghan Allies Behind," Daily Beast, Dec. 2, 2017, <https://www.thedailybeast.com/they-helped-our-troops-sold-their-homes-uprooted-their-families-enhanced-vetting-has-left-them-in-limbo>.

94 David Zucchino, "Visa Ban Amended to Allow Iraqi Interpreters into U.S.," N.Y. Times, Feb. 2, 2017, <https://www.nytimes.com/2017/02/02/world/middleeast/trump-visa-ban-iraq-interpreters.html>.

95 Lachlan Murray, "'Enhanced Vetting' Leaves Our Afghan Allies Behind," Daily Beast, Dec. 2, 2017, <https://www.thedailybeast.com/they-helped-our-troops-sold-their-homes-uprooted-their-families-enhanced-vetting-has-left-them-in-limbo>.

Others were detained after arriving in the United States. One family—a father, who worked as an interpreter for the U.S. in Afghanistan, his wife, and their three children—were detained in LAX airport. The family was only admitted to the United States after prompt legal action.<sup>96</sup> IRAP is aware of at least one Afghan SIV recipient who was deported to Afghanistan despite possessing a valid visa for admission to the United States because he faced danger after providing faithful and valuable service to the U.S. mission in Afghanistan.

Likewise, IRAP believes that this disturbing pattern is due to overzealous Customs and Border Protection (CBP) officials revoking permission for an individual to board their plane to the United States or to be admitted. This is despite the prior review and approval of numerous U.S. intelligence agencies. CBP officials ought not be given a veto over the considered approval of vetting partners.

## IX. Transparency

- **DOS should ensure that published processing data reflect actual processing times.**
- **DOS should improve response times to Freedom of Information Act requests.**

### A. Quarterly Reports

Congress has taken several steps to promote greater accountability in the SIV programs. In its 2014 reforms of the SIV program, DOS required public reporting on, among other things, wait times and backlogs experienced by SIV applicants. Several elements of these reports must be published on DOS' public website. Those reports have consistently been delayed or missed entirely, often publishing data that is a year or more old. The data that is provided to the public and to Congress is misleading and inaccurate. IRAP's litigation revealed that DOS "systematically undercount[s] the processing times" that are published.<sup>97</sup>

For example, the October 2019 Joint Report reported an average processing time in government-controlled steps of 587 days. However, "all currently pending [applications for COM approval] have already awaited an average of two years for a decision from State . . . All applicants waiting in [subsequent] stages have waited an average of nearly three years for final adjudication."<sup>98</sup>

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96 Associated Press, "Afghan Family of 5 Detained at LAX to Be Released, Attorney Says," March 5, 2017, <https://www.nbcboston.com/news/national-international/afghan-family-detained-lax-airport-children/32210/>.

97 Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States ex rel. Situated v. Pompeo, Civil Action No. 18-cv-01388 (TSC) (D.D.C. Jan. 30, 2019), Plaintiffs' Supplement In Further Support of Their Motion For Preliminary Injunction, p. 2, ECF No. 68, June 11, 2019. <https://refugeerights.org/wp-content/uploads/2019/06/ECF-068-Plaintiffs-Supplement-ISO-Motion-for-Preliminary-Injunction-00014274xEBEF1.pdf> (last visited April 3, 2020).

98 Id. at 9.

The Joint Reports indicate that an application is pending government action only after an initial application is deemed complete after agency review, not the date on which a complete application is submitted. As noted above, this means that months-long delays from NVC are attributed to the applicant when NVC proves unable to receive and process requested documents.

Rather than reporting the average time that it takes NVC employees to review initial applications, the Joint Reports instead provide the average length of time to respond to any inquiry, regardless of topic. Rather than reporting the average length of time to adjudicate initial applications, DOS calculates an average of a sample of 40-50 applications, has no methodology for determining sample size, and excludes cases from the sample that require verification from third parties, even though that verification is part of a government-controlled step. Even after it was notified of these deficiencies in litigation, DOS continues to provide outdated data and misleading reporting to Congress. DOS should ensure that all publicly reported data on visa processing reflects actual processing times and accepted methods of statistical reporting.

## **B. FOIA Delays and Denials**

IRAP has also submitted several FOIA requests to obtain greater information about the SIV process. Noting that these concerns are not limited to FOIA requests related to the SIV program, IRAP has generally waited for several years before obtaining responses to requests—when it obtains them at all. Among many SIV-related FOIA requests, IRAP is waiting for records for requests filed in 2017 requesting standard operating procedures for reviewing Chief of Mission applications, copies of reports that DOS is required to submit to Congress, and an accounting of the number of SIV applicants that DOS knows to have died while awaiting visa processing.

## **X. Delayed Implementation of Changes in Law**

### **A. Prioritization**

- **DOS cannot avoid its obligations to adjudicate applications within nine months, including by relying on an expired appropriation.**

DOS cannot avoid its obligations to adjudicate applications within nine months, including by relying on a prioritization requirement in an appropriations bill. The Consolidated Appropriations Act for Fiscal Year 2019 specified that “None of the funds appropriated by this Act may be made available for the additional special immigrant visas made available under subsection (a) until the Secretary of State . . . develops and implements a system to prioritize the processing of Afghan applicants



for special immigrant visas . . . ”<sup>99</sup> Yet, on November 12, 2019—after the completion of Fiscal Year 2019—DOS published a prioritization scheme in its FAM indicating that this prioritization scheme will be applied on a permanent basis.<sup>100</sup>

The prioritization requirement is an appropriation. An appropriation is any Act in which “Congress specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation and expenditure. . . .”<sup>101</sup> This includes allocations of funding, but also includes limitations on spending.

Section 7076(b) did not authorize government action; it created conditions on funding. Section 7076(a), the subsection immediately preceding, demonstrates that Congress can create an unambiguous amendment to authorizing language when it so chooses. In Section 7076(a), Congress amended AAPA, the authorizing legislation for the SIV program, to authorize additional visas. Not only does the 7076(a) explicitly modify the SIV program’s authorizing language, the authorizing language has an explicit carry forward clause that authorizes action in future fiscal years. The prioritization scheme in 7076(b), by contrast, does not reference authorizing language. As a restriction on funding rather than an amendment to authorizing language, Section 7076(b) is an appropriation.

Appropriations, including limitations on funding, expire at the end of the fiscal year. Section 501 of CAA FY19’s Title V notes that “[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein.” Neither the text of the appropriation nor the accompanying report indicate that this is a permanent legislative change. As a result, the prioritization requirement, an appropriation, expired at the end of FY 2019.

Nothing about the prioritization requirement modified DOS’ statutory obligation to complete all steps of government-controlled processing within nine months continues to apply. The AAPA requires that all government-controlled steps of SIV processing shall be completed within nine months; a failure to do so is unreasonable as a matter of law, and the prioritization requirement did nothing to alter this obligation.

Congress has repeatedly expressed concern and affirmed its commitment to providing safety in reasonable time frames for Iraqi and Afghan partners. On March 8, 2019, less than one month after the CAA for FY19 was enacted, a bipartisan group of more than 30 Representatives wrote to DOS,

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99 Consolidated Appropriations Act for Fiscal Year 2019, Section 7076(b).

100 9 FAM 502.5-12(B)(b)(9).

101 Matter of Saint Lawrence Seaway Development Corporation - Status of Funds as “Appropriated,” decision of the Comptroller General of the United States, B-193573, Dec. 19, 1979.

DOD, and Homeland Security, and the Federal Bureau of Investigation to express that the Members were “disturbed by reports of slow processing in the two primary programs that remain available to our Iraqi and Afghan partners.” Whether or not it prioritizes certain applications, the State Department is still obligated to adjudicate SIV applications within nine months.

## **B. The “Sensitive and Trusted” Requirement**

- **DOS should approve applicants who meet all statutory requirements. When a requirement is repealed by statute, DOS should not continue to issue denials based on no-longer-existing requirements.**

DOS also continues to implement a “sensitive and trusted” requirement that was explicitly removed from Afghan SIV eligibility in December 2019. Beginning with the NDAA for FY17, applicants to the SIV program were required to prove that they worked either as a linguist for certain U.S. government agencies or in a “sensitive and trusted” capacity” in order to be eligible for a visa.<sup>102</sup> The NDAA for FY20, however, unequivocally repealed that requirement.<sup>103</sup>

However, IRAP continues to see Afghan SIV applicants denied solely on the basis that they did not work in a sensitive and trusted requirement, where the denial was issued after that requirement was repealed. Further, both DOS’s online instructions and the FAM continue to incorrectly inform current and prospective applicants that they must have served as an interpreter or in a “sensitive and trusted” capacity.<sup>104</sup> Given these changes to the law, DOS’s continued application of a non-existent “sensitive and trusted” requirement to SIV applicants defies Congressional intent and the plain legal obligations of DOS.

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102 National Defense Authorization Act for Fiscal Year 2017, Sec. 1214(a).

103 National Defense Authorization Act for Fiscal Year 2020, Sec. 1219(a).

104 U.S. Department of State, Bureau of Consular Affairs, Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the U.S. government, “Who can apply for this program?” <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html> (last visited March 26, 2020); 9 FAM 502.5-12(B)(a)(1).

## **Abbreviations**

Afghan Allies Protection Act of 2009 (AAPA)

Chief of Mission - COM

Department of Defense - DOD

Department of State - DOS

Freedom of Information Act - FOIA

Foreign Affairs Manual - FAM

International Management Services, Inc. - IMS

International Refugee Assistance Project - IRAP

International Security Assistance Force - ISAF

National Defense Authorization Act - NDAA

National Visa Center - NVC

Office of the Inspector General of the Department of State - OIG

Other Government Agencies - OGA

Special Immigrant Visa - SIV

United States Citizenship and Immigration Services - USCIS