

U Visas for Victims of Crime in the Workplace: A Practice Manual

May 2014

By Eunice Hyunhye Cho

Author

Eunice Hyunhye Cho, Staff Attorney, National Employment Law Project



The National Employment Law Project (NELP) is a non-profit legal organization with nearly 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights.

Special thanks to Gail Pendleton, Sonia Parras Konrad, and Cecelia Friedman Levin for support in preparation of this manual. Thank you to U visa and immigration experts Susan Bowyer, Susana de Leon, Jessica Farb, Ellen Kemp, Sally Kinoshita, Catherine Ward Seitz, and Debbie Smith. Allison Baker, Ricky Blum, Jan Collatz, Liz Chacko, Julie Dahlstrom, Tom Fritzsche, Giselle Hass, Nadia Hewka, Lori Isley, Stacie Jonas, Jessica Karp, Katie Laskey-Donovan, Cindy Liou, Nadia Marin Molina, Diana Marin, Pat Medige, Spring Miller, Brandt Milstein, Charlotte Noss, Jennie Pasquarella, JJ Rosenbaum, Hollis Pfitsch, Monica Ramirez, Stephanie Richard, Audrey Richardson, Hasan Shafiquallah, Ruth Silver Taube, Leticia Saucedo, Dana Sussman, Amy Tai, Matt Trujillo, Naomi Tsu, Andrew Turner, Marie Vincent, Tim Warden-Hertz, and members of the VAWA Experts Listserv and the NELP Labor Exploitation listserv have all made the road in developing this new area of work.

Susan Butler Plum of the Skadden Foundation and Ron Tabak of Skadden, Arps, Meagher & Flom provided invaluable support and counsel. Thanks to former interns Daniel Rojas and Bryan Lopez for their research assistance. Profound thanks to Rebecca Smith, Catherine Ruckelshaus, and Christine Owens at NELP for providing valuable support and supervision of this project.

Many thanks to the key governmental officials and agencies that make U visas for victims of workplace crime possible, including the U.S. DOL, EEOC, NLRB, CA DLSE, CA DFEH, IDOL, NYSDOL, DHS, and USCIS.

National Employment Law Project
National Office
75 Maiden Lane, Suite 601
New York, NY 10038
Tel: 212-285-3025
www.nelp.org

After June 2014, you may also contact Eunice Cho at: Eunice.Cho@splcenter.org.

Table of Contents

Introduction	1
Chapter 1: The U Visa: An Overview	3
§ 1.1 Benefits of U Visas	3
§ 1.2 Eligibility Requirements for a U Visa	4
§ 1.3 Qualifying Criminal Activities: General	4
§ 1.4 Substantial Mental or Physical Abuse	4
§ 1.5 Helpfulness in the Investigation or Prosecution of the Qualifying Criminal Activity	5
§ 1.6 The U Visa Application Process	6
§ 1.7 Responding to Requests for Evidence or Denials by USCIS	9
§ 1.8 USCIS Contact Information	10
§ 1.9 Deferred Action for Approved U Visa Petitions	10
§ 1.10 After U Visa Approval: Work Authorization, Travel, and Adjustment of Status	11
Chapter 2: Common U Visa Qualifying Criminal Activity in the Workplace	13
§ 2.1 Blackmail and Extortion	13
§ 2.2 False Imprisonment/Unlawful Criminal Restraint	14
§ 2.3 Felonious Assault	15
§ 2.4 Fraud in Foreign Labor Contracting	15
§ 2.5 Involuntary Servitude, Peonage, Trafficking	16
§ 2.6 Obstruction of Justice, Perjury, Witness Tampering	19
§ 2.7 Sexual Misconduct Crimes: Abusive Sexual Contact, Rape, and Sexual Assault	22
§ 2.8 “Substantially Similar” Qualifying Criminal Activities	23
Chapter 3: Obtaining Law Enforcement Certification (Form I-918B) for Victims of Workplace Crime	25
§ 3.1 Equal Employment Opportunity Commission (EEOC)	25
§ 3.2 U.S. Department of Labor (U.S. DOL)	27
§ 3.3 National Labor Relations Board (NLRB)	28
§ 3.4 California Department of Fair Employment and Housing (CA DFEH)	29
§ 3.5 California Division of Labor Standards Enforcement (CA DLSE)	30
§ 3.6 Illinois Department of Labor (IDOL)	31
§ 3.7 New York State Department of Labor (NYS DOL)	32
§ 3.8 Judicial Certifications	33
§ 3.9 Other Law Enforcement Agencies (Local Police, District Attorneys, Attorney General, Department of State)	34
Chapter 4: U Visa Applications for Victims of Workplace Crime: Additional Issues	35
§ 4.1 Coverage of U Visa Clients by LSC Providers	35
§ 4.2 Demonstrating Substantial Physical or Mental Abuse for Victims of Workplace Crime	35
§ 4.3 Confidentiality Provisions and Discovery in Litigation	37

APPENDIX

Section A: Additional Resources

- A1 List of Additional Resources
- A2 U Visas for Workplace Crime—Fact Sheet (Advocates)
- A3 U Visa for Workplace Crime Fact Sheet for Workers (English and Spanish)
- A4 Screening Form for U Visa Applicants—Workplace Crime

Section B: Requests for Certification: Agency Protocols

- B1 US DOL WHD Field Assistance Bulletin—U Visa Certification and Q&A
- B2 US DOL U Visa Coordinator Contact Information
- B3 EEOC Procedures for U Visa Certification
- B4 NLRB – Updated Procedures in Addressing Immigration Status Issues
- B5 CA DFEH U Visa Directive
- B6 CA DLSE U Visa Guidelines
- B7 IL DOL U Visa Protocol
- B8 NYS DOL U Visa Protocol
- B9 Sample Letter: Request for Agency Certification
- B10 *Garcia v. Audobon Communities Mgmt.*, No. 08-1291, 2008 WL 1774585 (E.D. La. Apr. 15, 2008)
- B11 Sample Motion for Judicial U Visa Certification
- B12 Letter to DOL Re: Fraud in Foreign Labor Trafficking

Section C: Sample Application to USCIS

- C1 Cover Letter
- C2 Sample Form G-28
- C3 Sample Form I-912 Fee Waiver Request
- C4 Sample Form I-918
- C5 Addendum to Sample Form I-918
- C6 Sample Declarations (1)
- C7 Sample Declaration (2)
- C8 Sample Form I-918B
- C9 Designation of Authority to Certify (EEOC)
- C10 Designation of Authority to Certify (NYS DOL)
- C11 Sample Form I-192 Waiver of Inadmissibility

Section D: Substantial Abuse Issues

- D1 Letter to USCIS Re: Substantial Abuse in Workplace-Based U Visa Cases to USCIS from NELP, ASISTA, Dr. Giselle Hass (2013)
- D2 Letter to USCIS Re: Denials, RFEs Due to Substantial Abuse Determinations in Workplace Based U Visa Cases from NELP/ASISTA (2014)

Introduction

The U nonimmigrant status (U visa) is an important tool for immigrant victims of workplace crimes. The U visa provides protection from deportation, work authorization, and a pathway to lawful permanent residence and citizenship to victims of certain crimes who are helpful in law enforcement investigations.

Congress created the U visa as part of the Victims of Trafficking and Violence Prevention Act of 2000 for two purposes. First, Congress intended that the U visa would strengthen the ability of law enforcement agencies to investigate and prosecute crimes against immigrants. Second, Congress intended that the U visa would protect victims who feared cooperating with law enforcement because of their immigration status and provide them humanitarian relief.¹

In the past, advocates have most often sought U visas to protect immigrant victims of domestic violence or sexual abuse.² In recent years, however, more immigrant victims of crime in the workplace have begun to apply for and receive U visas. Law enforcement agencies that enforce labor standards and civil rights protections for workers often encounter victims of crime in the workplace—especially in low-wage industries that employ a high percentage of undocumented workers. As a result, these law enforcement agencies have begun to provide U visa certification to immigrant victims of crime in the workplace, the first step of a lengthier process in obtaining a U visa.

A U visa can be a powerful tool to improve the ability of labor and civil rights agencies to enforce the law, and to protect vulnerable workers. U visa certification strengthens the ability of labor and civil rights law enforcement agencies to gain trust and cooperation in detecting and investigating crimes, as intended by Congress. A U visa may also help workers to counter employer retaliation, and the employment authorization that a U visa confers may facilitate workers' access to employment remedies that might otherwise be foreclosed to unauthorized workers, such as reinstatement or back wages.

This manual describes the U visa and its application to workplace crimes. Chapter 1 provides a basic overview of the U visa. Chapter 2 examines common fact patterns of qualifying criminal activity in the workplace. Chapter 3 describes the process for obtaining law enforcement certification from a variety of labor, civil rights, and other law enforcement agencies. Chapter 4 discusses additional issues. The Appendix also provides practical resources, including sample intake forms, application materials, and motions; copies of law enforcement certification protocols; and additional advocacy materials.

This manual is intended to provide attorneys, advocates, and other practitioners that serve low-wage immigrant communities with a general guide the U visa's application to workplace crime. The manual, however, is by no means a comprehensive guide to U visa practice, and does not cover many other complex issues of U visa practice that may arise in your client's case, including inadmissibility waivers and visas for derivative family members. Please refer to the Appendix for a list of several excellent general practice guides and resources on U visas.

¹Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a), 114 Stat. 1464, 1533 (2000) (detailing Congress's findings and purpose for U visa statute); 8 U.S.C. § 1101(a)(15)(U) [hereinafter TVPA] (detailing statutory requirements to qualify for a U visa); New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; 72 Fed. Reg. 53,014-15 (Sept. 17, 2007). The TVPA also created the T visa, which offers similar benefits for victims of trafficking.

²Leslye Orloff & Paige Feldman, Legal Momentum, National Survey on Types of Criminal Activities Experienced by U-Visa Recipients (Nov. 29, 2011) (unpublished survey) (in author's files); 8 U.S.C. § 1101(a)(15)(U) (2012).

A successful U visa for victims of workplace crime requires familiarity with the distinct areas of immigration and labor/employment law. If you are not familiar with both of these areas of law, you may want to partner or consult with another experienced practitioner to support your client's case.

Chapter 1

THE U VISA: AN OVERVIEW

§ 1.1 Benefits of U Visas

Holders of U visas receive:

- Lawful status for up to four years;
- Automatic grant of employment authorization;
- Eligibility to adjust status to that of a lawful permanent resident after three years (and to naturalize);
- Derivative U visas for qualifying family members.³

Eligibility for derivative U visas depends on the relationship of the family member to the principal applicant and the age of the *applicant* at the time of the application's submission to USCIS.

- If the applicant is younger than 21 years old on the date of submission, qualifying family members include: parents, spouse, children, and unmarried siblings under 18;
- If the applicant is 21 or over, qualifying family members include: any spouse and unmarried children under 21. Qualifying family members are not required to be present in the U.S. when the principal applicant applies for a U Visa.⁴

In addition, clients in removal proceedings qualify for a stay of proceedings once a U visa petition is filed. Under DHS's guidance on stay of proceedings for U visa applicants, the Office of Detention and Removal Operations (DRO) should release U visa applicants from detention unless the applicant is subject to mandatory detention or if serious adverse factors exist. The stay of proceedings is typically valid until USCIS has issued a determination of the U visa petition. If the U visa petition is approved, removal or deportation will be canceled. If the U visa petition is denied, ICE may reinstate the removal or deportation order.⁵

DHS has also issued a memorandum instructing Immigration and Customs Enforcement (ICE) to exercise discretion in their law enforcement activities with respect to victims of crime. In some cases, advocates have provided clients with a letter confirming that a U visa application has been filed with USCIS and is pending with a copy of the DHS memorandum.⁶ In some cases, clients have presented ICE officers with this documentation to avoid detention or removal proceedings.

³ 8 U.S.C. § 1184(p) (2012).

⁴ 8 C.F.R. § 214.14(a)(10). Please see Department of Homeland Security, U.S. Citizenship and Immigration Services, Policy Memorandum: Age-Out Protection for Derivative U Nonimmigrant Status Holders: Pending Petitions, Initial Approvals, and Extensions of Status, PM-602-0077 (Oct. 24, 2012), available at http://www.asistahelp.org/documents/resources/Age_Out_Memo_C54AAAODE9911.pdf. Spouses must be legally married *prior* to the filing of the U visa petition with USCIS in order to qualify as a derivative.

⁵ ICE counsel may agree, as a matter of discretion, to file a joint motion to terminate proceedings while a petition is being adjudicated by USCIS. 8 C.F.R. § 214.14(c)(i). Department of Homeland Security, U.S. Immigration and Customs Enforcement, Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-visa) Applicants, Sept. 24, 2009, available at http://www.ice.gov/doclib/foia/dro_policy_memos/11005_1-hd-stay_requests_filed_by_u_visa_applicants.pdf. Applicants who are involved in an ongoing employment or civil rights action against an employer or former employer may also qualify for administrative closure or other favorable exercise of prosecutorial discretion by ICE. See National Employment Law Project, Prosecutorial Discretion by U.S. Immigration and Customs Enforcement (ICE) in Cases Involving Immigrant Workers (2012), available at <http://www.nelp.org/page/-/Justice/2012/ProsecutorialDiscretionImmigrantWorkers.pdf?nocdn=1> for more information.

⁶ Memorandum from John Morton, Director, ICE, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

§ 1.2 Eligibility Requirements for a U Visa

To be eligible for a U visa, an applicant must:

- 1) Have suffered **substantial physical or mental abuse** as a result of having been a **victim** of a **qualifying criminal activity that occurred in the United States** (or in violation of a federal law providing for extraterritorial jurisdiction to prosecute the offense in U.S. federal court);
- 2) **Possess information** concerning the qualifying criminal activity;
- 3) Have been **helpful, be helpful, or be likely to be helpful** in the **detection, investigation, or prosecution** of the qualifying criminal activity;⁷
- 4) Be **admissible** to the United States, or demonstrate eligibility for a waiver of inadmissibility factors.⁸

§ 1.3 Qualifying Criminal Activities: General

The Victims of Trafficking and Violence Prevention Act specified a non-exhaustive list of twenty-six qualifying criminal activities that can trigger U visa eligibility for a victim of crime.⁹ In 2013, Congress added two additional U visa qualifying criminal activities, fraud in foreign labor contracting and stalking, to this list.¹⁰

At the time of this writing, U visa qualifying criminal activities include:

Abduction	Incest	Sexual assault
Abusive sexual contact	Involuntary servitude	Sexual exploitation
Being held hostage	Kidnapping	Slave trade
Blackmail	Manslaughter	Stalking
Domestic violence	Murder	Torture
Extortion	Obstruction of justice	Trafficking
False imprisonment	Peonage	Unlawful criminal restraint
Felonious assault	Perjury	Witness tampering
Female genital mutilation	Prostitution	
Fraud in foreign labor contracting	Rape	

See Chapter 2 for a more detailed discussion of qualifying criminal activities and common fact patterns in the workplace.

§ 1.4 Substantial Physical or Mental Abuse

U visa applicants must also show that they have suffered “substantial physical or mental abuse” as a result of having been a victim of qualifying criminal activity.¹¹ “Physical or mental abuse” is defined as “injury or harm to the victim’s physical person, or harm to or impairment of the emotional soundness of the victim.”¹²

⁷ 8 U.S.C. § 1101(a)(15)(U); 8 C.F.R. § 214.14(b). Importantly, 8 C.F.R. § 214.14(a)(5) defines “investigation or prosecution” to include the “detection or investigation of a qualifying crime or criminal activity.”

⁸ 8 C.F.R. § 214.14(c)(iv). This guide does not discuss inadmissibility issues. Please see additional resources, including SALLY KINOSHITA, SUSAN BOYER & CATHERINE WARD SEITZ, *THE U VISA: OBTAINING STATUS FOR IMMIGRANT VICTIMS OF CRIME*, Chapter 2: U Nonimmigrant Status Eligibility (2d. ed. 2012), and GAIL PENDLETON, *OVERCOMING INADMISSIBILITY FOR U VISA APPLICANTS* (year unknown), available at http://www.asistahelp.org/documents/resources/Overcoming_Inadmissibility_127DDE8158A6A.pdf, for more information.

⁹ 8 U.S.C. § 1101(a)(15)(U)(iii); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(b)(iii), 114 Stat. 1464, 1535 (2000).

¹⁰ The Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1222, 127 Stat. 54 (2013).

USCIS, not the certifying agency, is responsible for determining whether an applicant has suffered substantial physical or mental harm; certifying law enforcement agencies do not make this determination.¹³ When determining whether an applicant has suffered substantial physical or mental harm, USCIS considers several factors, including, but not limited to:

- The nature of the injury inflicted or suffered;
- The severity of the perpetrator's conduct;
- The severity of the harm suffered;
- The duration of the infliction of the harm;
- The extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.

No single factor is a prerequisite to establish substantial abuse; a series of acts may be considered together to constitute substantial abuse, even if no single act rises to that level.¹⁴

See Section 4.1 and Appendix Section D for a more detailed discussion of demonstrating substantial mental or physical abuse in workplace cases.

§ 1.5 Helpful in the Detection, Investigation, or Prosecution of the Qualifying Criminal Activity

A U visa applicant must show that s/he "has been helpful, is being helpful, or is likely to be helpful" to a certifying agency in the investigation or prosecution of the qualifying criminal activity. Helpfulness means that the applicant has not "refused or failed to provide information and assistance reasonably requested" by the law enforcement agency.¹⁵

This helpfulness standard is purposely broad, and allows law enforcement agencies to certify U visas from the very early stages of an investigation to well after an investigation or case has closed. As USCIS has concluded, "[t]he requirement was written with several verb tenses, recognizing that an alien may apply for U nonimmigrant status at different stages of the investigation or prosecution. . . . Congress intended for individuals to be eligible at the very early stages of an investigation."¹⁶ Likewise, DHS has clarified that "law enforcement can still complete Form I-918B for an investigation or case that is closed. There is no statute of limitations regarding the time frame in which the case must have occurred."¹⁷ A conviction is not required for a law enforcement agency to certify a U visa petition, and certification is valid even if the initial crime detected or investigated is different than the crime that is prosecuted.¹⁸

Notably, U visa regulations have also broadly defined the "investigation and prosecution" of a qualifying criminal activity. U visa regulations explicitly define "investigation or prosecution" to include the "detection or investigation of a qualifying crime or criminal activity."¹⁹ Under this definition, agencies without criminal

¹¹ 8 C.F.R. § 214.14(b)(1).

¹² 8 C.F.R. § 214.14(a)(8).

¹³ See DEPARTMENT OF HOMELAND SECURITY, U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE 10-11 (2012), available at <http://www.dhs.gov/u-visa-law-enforcement-certification-resource-guide> [hereinafter "DHS Resource Guide"].

¹⁴ 8 C.F.R. § 214.14(b)(1).

¹⁵ 8 C.F.R. § 214.14(b)(3).

¹⁶ 72 Fed. Reg. at 53,019.

¹⁷ DHS Resource Guide, at 10.

¹⁸ DHS Resource Guide, at 10, 13.

¹⁹ 8 C.F.R. § 214.14(a)(5).

prosecution authority of a specific crime may certify U visas for qualifying criminal activity detected or investigated in the course of law enforcement activity. This broad certification authority not only protects victims of crime, but may also yield additional evidence useful for future law enforcement investigations or prosecutions.²⁰

§ 1.6 The U Visa Application Process

A successful U visa application includes several steps:

- 1) Conducting an intake with the client and determining whether a client is statutorily eligible for a U visa;
- 2) Obtaining a law enforcement certification form (Form I-918B);
- 3) Completing the U visa application to submit to USCIS, including the client's declaration and supporting evidence;
- 4) Biometrics Appointment
- 5) Responding to any Requests for Evidence (RFE) or appealing denials by USCIS.

Step 1: Determining a Client's Eligibility for a U Visa

When considering whether to apply for a U visa, it is important to first determine whether the client is statutorily eligible for a U visa. In an initial intake, it is helpful to clarify the following:

- Is the client a **victim of a qualifying criminal activity** that occurred in the United States (or in violation of a federal law that provides for extraterritorial jurisdiction to prosecute the offense in U.S. federal court)?
- Has the client **suffered substantial physical or mental abuse** as a result of the crime?
- Does the client have **information about the qualifying criminal activity**?
- Has the client **been helpful, is being helpful, or likely to be helpful to a law enforcement agency or court** in the detection, investigation, or prosecution of the crime?
- Is the client **admissible** to the United States, or can s/he demonstrate eligibility for a waiver of inadmissibility?

See Appendix A4 for a sample intake/screening document for U visa eligibility. Please note that the intake/screening document focuses on crime likely to occur in the workplace; you may also want to explore whether the client is a victim of crime in other contexts (i.e. domestic violence).

When conducting intake with clients, it is important to exercise care and sensitivity, especially when discussing potentially traumatic experiences. Please review the following resources for interview strategies.

Additional Resources:

- SOUTHERN POVERTY LAW CENTER, *SEXUAL VIOLENCE AGAINST FARMWORKERS: A GUIDEBOOK FOR CRIMINAL JUSTICE PROFESSIONALS, WHAT CAN I DO TO ENSURE A SUCCESSFUL INTERVIEW?* (2010), available at <http://www.splcenter.org/sexual-violence-against-farmworkers-a-guidebook-for-criminal-justice-professionals/what-can-i-do-to->.

Step 2: Obtaining Law Enforcement Certification

After determining that the client is eligible for the U visa, the next step will be to obtain certification from a law enforcement agency (Form I-918B), which shows that the client is a victim of a qualifying criminal

²⁰ 72 Fed. Reg. at 53,020 (discussing "certifying agency").

activity and has been helpful (or is likely to be helpful) in detecting, investigating, or prosecuting that crime to file a complete U visa application.²¹ These agencies may include federal, state, and local law enforcement agencies; judges may also issue certification.²² In order to certify a U visa petition, a judge or official who is in a supervisory role at a certifying agency must complete and sign a U Nonimmigrant Status Certification, Form I-918 Supplement B (Form I-918B).²³

Agencies that commonly certify U visa petitions for crime in the workplace include the U.S. Department of Labor (US DOL), Equal Employment Opportunity Commission (EEOC), National Labor Relations Board (NLRB), and equivalent state and local agencies. Local, state, and federal courts have also issued certifications for victims of crime in the workplace.²⁴ Local police departments, state attorneys general, U.S. and district attorneys, the FBI, and the Department of State have also certified U visa petitions in cases involving immigrant victims of workplace-based crime.

The length of time between a request for certification and its receipt may be lengthy. In some cases, clients have waited for over a year to obtain law enforcement certification. In other cases, agencies have quickly issued certification, especially when notified of pending removal proceedings.

See Chapter 3 for a more detailed description of law enforcement certification processes for victims of workplace crime.

Step 3: Completing the U Visa Application

A law enforcement agency's certification does not guarantee that the U visa will be granted. U.S. Citizenship and Immigration Services has jurisdiction to approve or deny the visa and is responsible for determining whether a victim has suffered "substantial mental or physical abuse" as a result of the qualifying crime, based on a number of enumerated factors.²⁵ Advocates should keep in mind that USCIS's U visa adjudicators are not attorneys, but rather, are laypersons specifically trained on adjudicating petitions.

After a certifying official completes Form I-918B, applicants must submit a complete U visa application within six months. Completed applications should be labeled "APPLICATION FOR U STATUS/DO NOT OPEN IN MAILROOM," and sent to:

U.S. Citizenship and Immigration Services
Vermont Service Center
Crime Victim Unit
75 Lower Welden St.
St. Albans, VT 05479-0001

A complete U visa application to USCIS should include the following materials:

- Cover letter to USCIS briefly outlining the facts of the case and materials included in the application.

²¹ 8 C.F.R. § 214.14(b)(2) defines "[i]nvestigation or prosecution" of a qualifying crime or criminal activity as referring to "the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity." See also 72 Fed. Reg. at 53,019.

²² 8 C.F.R. § 214.14(a)(2).

²³ *Id.* § 214.14(a)(3)(i).

²⁴ See, e.g. *Garcia v. Audobon Communities Mgmt.*, No. 08-1291, 2008 WL 1774584 (E.D. La. Apr. 15, 2008).

²⁵ 8 C.F.R. § 214.14(c)(1) & (b)(1).

- Form I-918: “Petition for U Nonimmigrant Status,” including an addendum to explain any potential inadmissibility factors, immigration history, or offenses committed. Be sure to mark “yes” to Part 2, Question 7 in order to receive an Employment Authorization Document upon approval.
- Form I-918B: Law Enforcement Certification. Include any letter issued by the certifying agency that designates a specific official to certify U visa applications.
- Form I-192: Application for Advance Permission to Enter as Non-Immigrant (application for waiver of inadmissibility).
- If filing Form I-192, payment of \$585 or fee waiver application (Form I-912).
- Form I-765: Application for Employment Authorization Document. This form is not necessary if the request for an Employment Authorization Document is marked on Form I-918, but some advocates recommend filing, especially in light of U visa backlogs and the likely grant of deferred action.
- Form G-28: Notice of Entry or Appearance of Attorney or Accredited Representative. The G-28 is traditionally printed on blue paper.
- Applicant’s personal declaration discussing facts of case. The declaration should be in the voice of the applicant, but clearly organized to demonstrate eligibility for all visa requirements, including details of the crime, cooperation in a law enforcement investigation, the substantial abuse suffered, and any remorse or rehabilitation for inadmissibility factors.
- Any supporting evidence, such as letters of support that describe the criminal activity or the impact on the applicant; letters from social workers describing treatment; psychological evaluations; medical records; copies of police reports; legal complaints; etc. Evidence may also include statutory language for qualifying criminal activity.
- Copy of identity page of applicant’s passport (valid for at least 6 months after application).²⁶
- If filing petitions for qualifying family member derivatives, the application for each family member must also include:
 - Separate Form G-28;
 - Form I-918A: Petition for Qualifying Family Members of U-1 Recipient;
 - Form I-192: Application for Advance Permission to Enter as Non-Immigrant (application for waiver of inadmissibility);²⁷
 - If filing Form I-192, payment of \$585 or fee waiver application (Form I-912). Checks or money orders must be made payable to “U.S. Department of Homeland Security;”
 - Identity documents (such as birth certificates, marriage certificates, etc. that show family relationship with primary applicant);
 - Form I-765 application for work authorization, plus two passport-style photos if the applicant is in the U.S.²⁸

²⁶8 C.F.R. § 214.14(c)(2)(i).

²⁷This manual does not address issues of inadmissibility. Be sure to review any grounds of inadmissibility before filing a petition.

²⁸Qualifying family members include the spouse or children of the applicant (for applicants 21 years of age or older); or spouse, children, parents, or unmarried siblings under the age of 18 (for applicants under the age of 21). 8 C.F.R. § 214.14. For further information regarding derivative applications, see Julie Dinnerstein, *The “New” and Exciting U: No Longer Just My Imaginary Friend*, in IMMIGRATION AND NATIONALITY LAW HANDBOOK, 2008-09 EDITION (2008); SALLY KINOSHITA ET AL., *THE U VISA: OBTAINING STATUS FOR IMMIGRANT VICTIMS OF CRIME* (2d ed. 2010); Susana Martinez and Sheila Neville, *Help for Undocumented Victims of Crime*, CLEARINGHOUSE REVIEW 129 (2010).

Note that any documents not in English (including birth certificates, identity documents, personal declarations, etc.) must be accompanied by a translation in English. Translations can be made by anyone who is competent to translate (other than the applicant or a close relative), and must be certified. A certification can consist of a simple statement on the English language translation: "I certify under penalty of perjury that I am competent to translate from [language] to English, and that the above is a complete and accurate translation of all information to the best of my knowledge and belief." The translator should include her name, date, signature, and contact information.

Additional Resources:

- See Appendix Part C for samples of U visa application documents.
- The Immigration Legal Resource Center has published a comprehensive guide to completing U visa applications. Sally Kinoshita, Susan Bowyer, Jessica Farb, and Catherine Ward Seitz, *The U Visa: Obtaining Status for Immigrant Victims of Crime* (2014). Visit www.ilrc.org to order a copy.

Step 4: Biometrics Appointment

Approximately one month after USCIS receives a U visa application, applicants should receive a notice to submit fingerprints, digital photo, and signature at a USCIS "Application Support Center." Applicants should attend the biometrics appointment; those living outside the U.S. will need to submit fingerprint cards at the nearest USCIS office or U.S. consulate.

§ 1.7 Responding to Requests for Evidence or Denials by USCIS

Requests for Evidence (RFEs)

In some cases, USCIS will issue a Request for Evidence (RFE) if it believes that documentation provided in the original petition is insufficient to meet U visa eligibility requirements. The RFE should include a summary of the evidence provided, and specific information as to why the evidence provided in the original petition was insufficient.

In recent months, advocates have noted an increase in the numbers of RFEs issued by Vermont Service Center (VSC). This pattern is particularly true for U visa applications based on workplace-based crime. See Appendix D1 and D2 for advocacy letters to USCIS on RFEs and denials related to workplace-based U visas.

Regardless of the legal or factual accuracy of RFEs issued by USCIS, advocates should timely respond to RFEs. Advocates may include supplemental information, letters of support, or clarification from certifying agencies, or briefing on the legal issue raised by USCIS. See Section 4.2 for examples of responses to RFEs that USCIS has issued on workplace-based U visas in the past.

Advocates should take care to include the blue coversheet provided with the RFE by USCIS when filing any response to ensure proper handling.

Denials by USCIS

USCIS must provide reasons for denial in writing. Applicants may appeal the denial with USCIS's Administrative Appeals Office (AAO); instructions for appeal are included with the denial.²⁹ However, advocates should also consider filing a Motion to Reconsider and Reopen with USCIS Vermont Service Center (VSC) before requesting an appeal with AAO, as USCIS adjudicators may approve a case based on new evidence. A Motion to Reconsider and Reopen should be accompanied by a Form I-290B, new

²⁹ 8 CFR § 214.14(c)(5)(ii); 8 CFR § 214.14(f)(6)(iii).

Form G-28, a memo summarizing new arguments and evidence to consider, and copies of new evidence. In addition, advocates may consider filing a new U visa petition (if another I-918B can be obtained), with an explanation of any inconsistencies between the two petitions.

Additional Resources:

- ASISTA provides its members (and members of the National Lawyers Guild—National Immigration Project) with technical assistance, including requests for supervisorial review of poor RFEs and denials. Visit www.asistahelp.org for more information.

§ 1.8 USCIS Contact Information

After submission of a U visa application, USCIS will assign each case a 13-digit receipt number, preceded by the letters “EAC,” as well as an Alien “A” Number.

- USCIS Vermont Service Center (VSC) maintains an Information Line for advocates who have filed a G-28 for their clients. The Information line is (802) 527-4888; email inquiries can also be made to: Hotlinefollowup19181914.vsc@dhs.gov. Advocates should leave a message, including the advocate’s name, client’s name, receipt number, A number, and phone number. USCIS should respond to advocates within 72 hours, but have requested that advocates use either the phone or email system to avoid duplication of efforts.
- Scott Whelan, Adjudications Officer (Policy), Office of Policy and Strategy at DHS USCIS, is available to troubleshoot particularly problematic U visa cases. He is available at scott.p.whelan@uscis.dhs.gov, or at 202-272-8137. Please notify Scott if you have already contacted the Ombudsman’s office.
- The USCIS Ombudsman office may provide case assistance with pending applications or petitions. To request assistance, visit: <http://www.dhs.gov/case-assistance>. Advocates must also submit Form DHS-7001, available on this website. Please notify the Ombudsman’s office if you have already notified Scott Whelan about your case.
- Law enforcement officials may contact USCIS with U visa-related questions at: LawEnforcement_UTVAWA.VSC@uscis.dhs.gov. Please note that this email address is for law enforcement personnel only. Any email sent by any person or entity that is not law enforcement to this specific e-mail address will not be answered.

§ 1.9 Deferred Action for Approved U Visa Petitions

USCIS may grant up to 10,000 U visas per year, not including qualifying dependents. After the cap is met for each fiscal year, the Department of Homeland Security grants deferred action, a temporary status with employment authorization, to U visa applicants.³⁰ The 10,000 cap for U visas was reached for the first time in 2010.³¹ In December 2013, USCIS announced that it would continue reviewing pending U visa applications in the order in which they were received, and would place those eligible for a U visa on a waiting list. Current U visa trends indicate that an increasing number of approved U visa applicants will likely receive deferred action for a lengthy period of time before receiving a U visa. The current processing

³⁰8 C.F.R. § 214.14(d)(2).

³¹Press Release, U.S. Citizenship and Immigration Services, USCIS Reaches Milestone: 10,000 U Visas Approved in Fiscal Year 2010 (Jul. 15, 2010), available at <http://1.usa.gov/L4QWef>.

time for a U visa is approximately 10-14 months. The 10,000 U visa cap for FY 2014 (start date October 1, 2013) ran out in 2013. In May 2014, all 10,000 U visas for FY 2015 had been claimed, and USCIS was processing conditional approvals for FY 2016.

Waitlisted applicants and derivatives will be found eligible for deferred action, and may apply for work authorization on that basis. The time spent in deferred action status, however, will not count towards the accrual of the 3 years presence necessary to adjust to permanent legal status.³² Applicants who have received deferred action as a result of an approved waitlisted U visa may apply for an employment authorization document by filing a Form I-765. Employment authorization as a result of deferred action expires annually and must be renewed every year, and may be used to apply for a Social Security Card. As of the time of this writing, USCIS has not yet determined whether derivatives of U visa deferred action recipients may be paroled into the United States during the wait for a U visa slot, or whether U visa deferred action recipients may travel outside of the United States.³³

§ 1.10 After U Visa Approval: Work Authorization, Travel, and Adjustment of Status

Work Authorization

If a U visa application is approved, USCIS will send a notice of approval (Form I-797A), with a Form I-94 attached to the advocate for each applicant and derivative. USCIS will also send an Employment Authorization Document (EAD), valid for four years. U visa recipients may use the Employment Authorization Document to apply for a Social Security Card.

Travel

Travel outside the United States with a U visa is possible, but includes important risks. Advocates should carefully counsel U visa recipients on the consequences and risks of travel outside the United States, with specific counsel not to leave the country without first consulting legal counsel. U visa recipients should be warned of these specific considerations:

- U visa recipients must accrue 3 years of continuous physical presence in the United States in order to be eligible to adjust status to a lawful permanent resident. U visa recipients may not be outside the United States for more than 90 days at one time or 180 days total. Some U visa recipients have had difficulty re-entering the United States (particularly if they have several inadmissibility factors or if visiting a country without well-established consular practices around U visas), which have jeopardized timely re-entry.

Additional Resources:

- Immigration Legal Resource Center, *The U Visa: Obtaining Status for Immigrant Victims of Crime*, 3rd Edition, Chapter 9 (2012), available at <http://www.ilrc.org/publications/the-u-visa>.
- Immigration Legal Resource Center, Webinar, *Consular Processing and Travel Abroad with a U Visa* (May 22, 2012), available at <http://www.ilrc.org/trainings-webinars/recorded-webinars/consular-processing-and-travel-with-a-u-visa>.
- Immigration Center for Women and Children, *U Travel and Certifier Database* (ongoing). A shared online database tracks information on consular treatment of U Visa travel documents. For more information on joining, visit: <http://icwclaw.org/services-available/icwc-u-travel-and-certifier-database/>.

³² ASISTA, *U Cap Updates from USCIS & Additional Updates from VSC Stakeholder Teleconference*, Dec. 11, 2013, available at http://www.asistahelp.org/documents/news/U_cap_advisory_and_notes_from_stakh_60F50EB294846.pdf.

³³ Rena Cutlip-Mason, DHS Citizenship and Immigration Services Ombudsman and Scott Whelan, USCIS Adjudications Officer, *U Visa Hot Topics Panel*, Federal Bar Association Immigration Law Seminar (May 17, 2014).

Adjustment of Status

U visa recipients are eligible to obtain lawful permanent resident status.³⁴ In order to receive lawful permanent status (more commonly known as a green card), an applicant must:

- Apply for adjustment of status;
- Prove grant of a U visa and continue to hold U visa status;
- Show continuous presence in the United States for three years with a U visa;
- Not be inadmissible under 8 U.S.C. § 1182(a)(3)(E) (Inadmissible due to having participated in Nazi persecution, genocide, torture, or extrajudicial killing)
- Not have unreasonably refused to provide assistance in the underlying criminal investigation or prosecution;
- Show that presence in the United States is justified on humanitarian grounds, ensures family unity, or is in the public interest.³⁵

Applicants **must** file for adjustment of status **before the four-year expiration date of their U visa.**

Additional Resources:

- Immigration Legal Resource Center, *The U Visa: Obtaining Status for Immigrant Victims of Crime*, 3rd Edition, Chapter 6 (2012), available at <http://www.ilrc.org/publications/the-u-visa>.
- National Network to End Violence Against Immigrant Women, *Summary of U Adjustment Regulations* (2009), available at http://www.asistahelp.org/documents/resources/U_adjustment_regs_summary_C469B70A9DB4Z.pdf.

³⁴ 8 U.S.C. § 1255.

³⁵ 8 C.F.R. § 245.24(b).

Chapter 2

U VISA QUALIFYING CRIMINAL ACTIVITY IN THE WORKPLACE

A U visa applicant must have been a victim of at least one of twenty-eight qualifying activities, or the attempt, conspiracy, or solicitation to commit any of these crimes.³⁶ This chapter discusses qualifying criminal activities that have most commonly occurred in workplace-based U visa applications, and includes examples of fact patterns in successful U visa petitions.

A special note of clarification: Although workers in many cases have suffered from “wage theft,” or non-payment of wages or other violations of labor standards, **wage theft violations are not sufficient to qualify for a U visa alone.** To qualify for a U visa, an applicant must have been the victim of a qualifying criminal activity, or the attempt, conspiracy, or solicitation to commit such a crime.³⁷

The following sections describe the qualifying criminal activities that have most commonly occurred in workplace-based U visa applications, including corresponding federal criminal provisions and fact patterns that have appeared in successful U visa applications. Note that this is not an exhaustive list of criminal provisions that may correspond with U visa qualifying criminal activity, but should serve as a starting point of analysis. In many cases, this discussion covers only federal, not state and local statutes.

Qualifying criminal activities that have most commonly occurred in workplace-based U visa applications include:

- Extortion and Blackmail
- False Imprisonment/Unlawful Criminal Restraint
- Felonious Assault
- Fraud in Foreign Labor Contracting
- Involuntary Servitude, Peonage, Trafficking
- Obstruction of Justice, Perjury, Witness Tampering
- Sexual Misconduct Crimes: Abusive Sexual Contact, Rape, Sexual Assault, Sexual Exploitation

Although many advocates in the past have advised obtaining certification for as many qualifying criminal activities as possible on an I-918B certification, this approach may have some disadvantages in light of recent USCIS adjudication issues. Because workplace-related U visas are often novel to Vermont Service Center (VSC) adjudicators, it appears that having a number of different qualifying criminal activities may confuse adjudicators, leading to a higher likelihood of RFEs.

See Appendix Section F for a sample listing of criminal statutes in federal and select state settings.

§ 2.1 Extortion and Blackmail

In general, extortion is defined as either (1) use of a threat or fear to coerce a person to give up something of value; or (2) knowing receipt of something of value by an individual, usually a public official, under “color of official right.” Under federal law, coercive extortion is defined as the “wrongful use of threatened

³⁶ 8 C.F.R. § 214.14(a)(9).

³⁷ 8 C.F.R. § 214.14(a)(9).

or actual force, violence or fear” to obtain “property [from] another, with his [coerced] consent.”³⁸ Federal law defines extortion as a crime that can be committed by both public and private actors. Employers are thus capable of committing extortion under federal law.

Some states explicitly criminalize as extortion the threat to expose an individual’s immigration status to obtain property or services of value. Colorado state law specifies that an individual commits extortion if he or she “with the intent to induce [a] person [to give] money or another item of value, threatens to report to law enforcement officials the immigration status of the threatened person or another person.”³⁹ Virginia and California extortion laws also include similar provisions.⁴⁰

Blackmail is similar to extortion, although blackmail generally refers to a threat to reveal information (regardless of veracity) unless a demand is met, while extortion generally consists of a threat to take violent action or make use of another’s fear to obtain something of value.⁴¹

Examples of Extortion and Blackmail in the Workplace:

Extortion may occur in the workplace where an employer makes a threat of violence or other action in order to obtain a worker’s property or other thing of value to which the employer is not entitled. Withheld or unpaid wages may constitute the withheld property of value. In one case recently certified for extortion, a worker requested unpaid wages from his employer, only to be threatened with a false report of his immigration status to local law enforcement officials.

In its U visa certification protocol, the NLRB has specified that “blackmail may include interfering with protected activity through illegal threats of retaliation such as threats to call immigration authorities or threats to “blacklist” employees.”⁴²

§ 2.2 False Imprisonment and Unlawful Criminal Restraint

In general, false imprisonment occurs where an individual “restrains another unlawfully so as to interfere substantially with his liberty.”⁴³ The Model Penal Code notes that unlawful restraint (also called felonious restraint, and unlawful imprisonment in some jurisdictions) has no general intent requirement, “and it suffices merely to hold another in condition of involuntary servitude.”⁴⁴

Examples of False Imprisonment or Unlawful Criminal Restraint in the Workplace:

False imprisonment or unlawful criminal restraint can take place in the workplace where an employer knowingly holds an employee against his or her will without any legal basis. For example, an employer may refuse to allow a worker to leave a room or worksite by physically blocking the exit, or by locking

³⁸ 18 U.S.C. § 1951. Federal law also outlaws forms of extortion under 18 U.S.C. § 872 (criminalizing “extortion by officers or employees of the United States”), 18 U.S.C. § 880 (criminalizing knowing receipt of the proceeds of extortion), and 29 U.S.C. § 186 (criminalizing extortion, bribery and exchange of anything of value between unions and employers).

³⁹ COLO. REV. STAT. § 18-3-207.

⁴⁰ Virginia prohibits “threaten[ing] to report [someone] as being illegally present in the United States, or . . . knowingly destroy[ing], conceal[ing], remov[ing], confiscat[ing], withhold[ing] or threaten[ing] to withhold, or possesses any actual or purported passport or other immigration document . . . to extort money, property, or pecuniary benefit.” VA. CODE ANN. § 18.2-59. California Penal Code Section 519 specifies that “[f]ear, such as will constitute extortion, may be induced by a threat . . . to report his, her, or their immigration status or suspected immigration status.” CAL. PENAL CODE § 519.

⁴¹ See, e.g. 18 U.S.C. § 873.

⁴² National Labor Relations Board, Office of the General Counsel, Memorandum OM 11-62, Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings 4 (Jun. 7, 2011).

⁴³ MODEL PENAL CODE § 212.3.

⁴⁴ *Id.*

workers in at a worksite. Situations involving severe sexual harassment may also implicate false imprisonment or unlawful criminal restraint, where a perpetrator may isolate and restrain a victim in a private location against the victim's will. False imprisonment statutes are also often linked to criminal forced labor and human trafficking provisions.⁴⁵

§ 2.3 Felonious Assault

Assault is the intentional attempt by a person, by force or violence, to injure another person; or any threatening gesture with the ability and intent to commit battery.⁴⁶ Generally, felonious assault (in some cases called aggravated assault) involves (1) use of a dangerous or deadly weapon with the intent to cause bodily injury; (2) serious bodily injury; or (3) assault with intent to commit another felony.⁴⁷

Some jurisdictions have specifically classified degrees of assault as felonies; in other jurisdictions, felonious assault can be inferred by the length the sentence designated for the offense.⁴⁸ Advocates should be sure to carefully examine local/state assault statutes; in many cases, qualifying crimes that fall under the category of felonious assault may not be titled "assault."⁴⁹

Examples of Felonious Assault in the Workplace:

Examples of U visa certification for felonious assault include situations where employers, co-workers, or customers have subjected workers to violence or an attempt to commit violence, including beating with or without a weapon, or assault with the intent to commit other felonies.

§ 2.4 Fraud in Foreign Labor Contracting

Congress added the crime of fraud in foreign labor contracting, as defined in 18 U.S.C. § 1351, to the U visa statute in 2013. Fraud in foreign labor contracting is unique because it is the only qualifying criminal activity that corresponds to a specific federal criminal provision in the U visa statute.

Under 18 U.S.C. § 1351, "fraud in foreign labor contracting" requires that a contractor "knowingly" and "with intent to defraud" recruited, solicited, or hired a person outside the United States, or attempted or caused another to do so, "by means of materially false or fraudulent pretenses, representations or promises regarding that employment." This may include hiring for purposes in the United States, employment on a U.S. government contract outside the United States, or on U.S. military installations.

At the time of this writing, to the writer's knowledge, only a few I-918B certifications based on fraud in foreign labor contracting have been issued. The U.S. DOL has issued at least two U visa certifications based on fraud in foreign labor contracting, including one where it was the only ground for certification.

Examples of Fraud in Foreign Labor Contracting:

This qualifying crime is likely to be helpful for cases where employers have provided false representations on issues including the terms and conditions of employment, housing, fees to labor brokers, food and transportation, ability to work at other places of employment, and other material aspects of the work arrangement. It may cover cases where brokers have brought workers to the United States and have

⁴⁵ See, e.g. CAL. PENAL CODE §§ 236, 236.1-12 (discussing false imprisonment, human trafficking, and forced labor).

⁴⁶ 6 AM. JUR. 2D ASSAULT AND BATTERY § 1 (2014).

⁴⁷ U.S. SENTENCING GUIDELINES MANUAL § 2A2.2 (2013); 6 AM. JUR. 2D ASSAULT AND BATTERY §§ 32, 36, 62 (2014).

⁴⁸ See, e.g. Washington state: WASH. REV. CODE §§ 9A.36.011, 9A.36.021, 9A.36.031.

⁴⁹ See, e.g. CAL. PENAL CODE §§ 211 (robbery); 242 (misdemeanor battery); 246 (shooting at inhabited dwelling house). See also U.S. SENTENCING GUIDELINES MANUAL § 2A2.3 (2013) ("minor assault" is defined as a misdemeanor assault, or a felonious assault not covered by §2A2.2 (aggravated assault)).

violated the terms of agreement, even where labor was not obtained under heightened coercive situations necessary for other trafficking offenses.

See Appendix B12 for analysis on jurisdictional requirements for fraud in foreign labor contracting.

§ 2.5 Involuntary Servitude, Peonage, Trafficking

Undocumented immigrants and guest workers are particularly vulnerable to becoming victims of involuntary servitude, peonage, and trafficking. In these cases, employers may compel workers to provide labor through the use of force, fraud, coercion, or indebtedness.

This section describes federal statutory provisions for the U visa qualifying criminal activities of involuntary servitude, peonage, and trafficking, and related criminal provisions under federal law. Advocates should also note that most states have also passed anti-trafficking statutes that in some cases are broader than federal provisions; these state statutes may provide additional grounds for certification. The National Conference of State Legislatures has compiled a helpful list of human trafficking laws in the states, available at <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws-in-the-states-updated-nov.aspx>.

Most importantly, advocates in cases involving involuntary servitude, peonage, or trafficking should seriously investigate whether clients are eligible for T Nonimmigrant Status (“T visa”), as it provides additional benefits not conferred by the U visa. In order to be eligible for a T visa, an applicant must be a victim of a “severe form of trafficking,” be physically present in the United States due to trafficking, have complied with the investigation or prosecution of trafficking, and would suffer extreme hardship if removed from the United States.⁵⁰ Even if a law enforcement agency is not willing to sign a T visa certification, a T visa application can still be approved. Additional resources for obtaining T visas are listed at the end of this section.

Trafficking

In order to combat human trafficking in the United States, Congress passed the Trafficking Victims Protection Act of 2000 (TVPA),⁵¹ and has reauthorized the Act on several occasions. The TVPA prohibits “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.”⁵²

As a result of the TVPA, 18 U.S.C. § 1590 criminalizes trafficking with respect to peonage, slavery, involuntary servitude, or forced labor, and prohibits the knowing recruitment, harboring, transport, provision, or obtaining of any person for labor or services.⁵³

Involuntary Servitude/Forced Labor

The Thirteenth Amendment provides that “neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.” In 1948, Congress passed 18 U.S.C. § 1584, authorizing criminal punishment for involuntary servitude, but did not specifically define the term. The Supreme Court later clarified the definition of “involuntary servitude” in *United States v. Kozminski* as “a

⁵⁰ 8 U.S.C. § 1101(a)(15)(t); 8 C.F.R. § 214.11(b).

⁵¹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

⁵² 22 U.S.C. § 7102(9)(b).

⁵³ 18 U.S.C. § 1590.

condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or legal process.”⁵⁴

In 2000, Congress provided further guidance in the Victims of Trafficking and Violence Prevention Act, defining involuntary servitude as:

(A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (B) the abuse or threatened abuse of the legal process.⁵⁵

Forced labor is a criminal offense substantially similar to involuntary servitude. In *United States v. Bradley*, the First Circuit concluded that Congress, in passing the TVPA, intended to treat forced labor as a form of involuntary servitude.⁵⁶

18 U.S.C. § 1589 defines the crime of forced labor, and prohibits knowingly providing or obtaining labor or services from another person by:

(1) means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another would suffer serious harm or physical restraint.⁵⁷

Notably, “whether a person is paid a salary or a wage is not determinative of the question of whether that person has been held in forced labor. . . . if a person is compelled to labor against his will by any one of the means prohibited by the forced labor statute, such service is forced, even if he is paid or compensated for the work.”⁵⁸

For purposes of showing involuntary servitude and forced labor, “serious harm” is broadly defined as “any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.”⁵⁹ The statute requires consideration of victims’ individual circumstances when determining “whether a particular type or certain degree of harm or coercion is sufficient to maintain or obtain a victim’s labor or services, including the age and background of the victims.”⁶⁰

Likewise, “abuse or threatened abuse of the law or legal process” is the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or

⁵⁴ *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

⁵⁵ 22 U.S.C. § 7102(5).

⁵⁶ *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004). The court also concluded that elements for the crime of forced labor under 18 U.S.C. § 1589 apply to 22 U.S.C. § 7102 (involuntary servitude) and 18 U.S.C. § 1584 (sale into involuntary servitude). The court also concluded that “serious harm” is intended to encompass subtle psychological methods of coercion.

⁵⁷ 18 U.S.C. § 1589(a).

⁵⁸ *United States v. Bradley*, 390 F.3d 145, 154 (1st Cir. 2004).

⁵⁹ 18 U.S.C. § 1589(c)(2).

⁶⁰ H.R. REP. NO. 106-939, at 101 (2000).

refrain from taking some action.⁶¹ In addition, “threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude”⁶²

Note that 18 U.S.C. § 1592 bars the destruction, concealment, removal, confiscation, or possession of passports, immigration documents, or government identification documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.

18 U.S.C. § 1583 prohibits enticement into slavery, or the enticement, persuasion, or inducement of a person “to go on board any vessel or to any other place with the intent that he or she may be made or held as a slave, or sent out of the country to be so made or held.”⁶³

Peonage

Congress abolished peonage, or “the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation” under 42 U.S.C. § 1994. Peonage is also defined as “compulsory service in payment of a debt.”⁶⁴

Peonage occurs where an individual “intentionally held a person against his or her will and coerced that person to work in order to satisfy a debt by (1) physical restraint or force, (2) legal coercion, or (3) threats of legal coercion or physical force.”⁶⁵ 18 U.S.C. § 1581 prohibits the holding or returning of “any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage.”

Relatedly, debt bondage is defined as “the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.”⁶⁶

Examples of Involuntary Servitude/Forced Labor/Peonage:

Several court decisions have discussed fact patterns that indicate force, threats, physical restraint, serious harm, and abuse of legal process sufficient for a finding of involuntary servitude and/or forced labor. These include:

- Threats of deportation;⁶⁷
- Eviction of workers from employer-provided housing without process;⁶⁸
- Threats, curses, yelling, intimidation, including threats to call police or law enforcement agencies or physical force;⁶⁹

⁶¹ 18 U.S.C. § 1589(c)(1).

⁶² *Kozminski*, 487 U.S. at 948.

⁶³ 18 U.S.C. § 1583.

⁶⁴ *Bailey v. Alabama*, 219 U.S. 219, 242 (1911).

⁶⁵ *United States v. Farrell*, 563 F.3d 364, 372 (8th Cir. 2009).

⁶⁶ 22 U.S.C. § 7102(4).

⁶⁷ *United States v. Dann*, 652 F.3d 1160, 1165 (9th Cir. 2011); *United States v. Farrell*, 563 F.3d 364, 371 (8th Cir. 2009); *United States v. Calimlim*, 538 F.3d 706, 709 (7th Cir. 2008); *Garcia v. Audobon Communities Mgmt.*, No. 08-1291, 2008 WL 1774584, at *3 (E.D. La. Apr. 15, 2008); *United States v. Alzanki*, 54 F.3d 994, 999 (1st Cir. 1995).

⁶⁸ *Garcia* at *3.

⁶⁹ *Dann*, 652 F.3d at 1165; *United States v. Bradley*, 390 F.3d 145, 148 (1st Cir. 2004); *United States v. Veerapol*, 312 F.3d 1128, 1131 (9th Cir. 2002); *Alzanki*, 54 F.3d at 999; *United States v. Warren*, 772 F.2d 827, 830 (11th Cir. 1985); *United States v. Booker*, 655 F.2d 562, 563 (4th Cir. 1981).

- Seizure of identity documents, travel documents, passports, and/or plane tickets;⁷⁰
- Underpayment of wages, with requirements to pay off debts;⁷¹
- Physical assault, including hitting, punching, shaking, beating, and choking;⁷²
- Deprivation of medical care;⁷³
- Restrictions on movement and isolation from family and friends;⁷⁴
- Restriction on basic necessities, including food intake, clothing, sleep, and decent living conditions;⁷⁵
- Threats of harm to family members;⁷⁶
- Control of financial accounts and wage payments.⁷⁷

Additional Resources:

- Coalition to Abolish Slavery and Trafficking, *A Practical Guide for Attorneys Assisting Survivors of Human Trafficking* (2014). Contact Stephanie Richard at Stephanie@castla.org to obtain a copy.
- Kathleen Kim, *The Coercion of Trafficked Workers*, 96 Iowa L. Rev. 409 (2011) (describing elements of coercion in cases involving involuntary servitude, trafficking, and forced labor).
- Ivy Lee, Lynette Parker, and Cindy Liou, *Representing Survivors of Human Trafficking* (2014), available at <http://www.ilrc.org/publications/representing-survivors-of-human-trafficking>.
- National Conference of State Legislators, *Human Trafficking Laws in the States* (2011), available at <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws-in-the-states-updated-nov.aspx>.
- NY Anti-Trafficking Network Legal Subcommittee, *Identification and Legal Advocacy for Trafficking Survivors* (2009), available at [http://aaldef.org/docs/T-visa-manual-3rd-ed\(1208\).pdf](http://aaldef.org/docs/T-visa-manual-3rd-ed(1208).pdf).
- Appendix B10: *Garcia v. Audobon Communities Mgmt.*, 2008 WL 1774584 (E.D. La. Apr. 15, 2008).

§ 2.6 Obstruction of Justice, Perjury, Witness Tampering

Unlike other qualifying criminal activities, the U visa statute views obstruction of justice, perjury, and witness tampering as “criminal activities . . . not targeted against a person.”⁷⁸ Because U visa applicants must have suffered direct and proximate harm as a result of the criminal activity, USCIS requires victims of obstruction of justice, perjury, and witness tampering to demonstrate that:

- (A) The petitioner has been directly and proximately harmed by the perpetrator of witness tampering, obstruction of justice, or perjury; and
- (B) There are reasonable grounds to conclude that the perpetrator committed the witness tampering, obstruction of justice, or perjury offense, at least in principal part, as a means: (1) To avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring justice the perpetrator for other

⁷⁰United States v. Sabhani, 599 F.3d 215, 225 (2d. Cir. 2010); *Farrell*, 563 F.3d at 368; *Calimlim*, 538 F.3d at 708; *Bradley*, 390 F.3d at 148; *Alzanki*, 54 F.3d at 999; *Veerapol*, 312 F.3d at 1130.

⁷¹*Dann*, 652 F.3d at 1165; *Farrell*, 563 F.3d at 367; *Bradley*, 390 F.3d at 148; *Warren*, 772 F.2d at 830; *Booker*, 655 F.2d at 563.

⁷²*Sabhani*, 599 F.3d at 225; *Bradley*, 390 F.3d at 148; *Veerapol*, 312 F.3d at 1131; *Alzanki*, 54 F.3d at 999; *Kimes v. United States*, 939 F.2d 776, 778 (9th Cir. 1991); *Warren*, 772 F.2d at 830; *Booker*, 655 F.2d at 563.

⁷³*Bradley*, 390 F.3d at 155; *Alzanki*, 54 F.3d at 999.

⁷⁴*Sabhani*, 599 F.3d at 226; *Farrell*, 563 F.3d at 368; *Calimlim*, 538 F.3d at 708; *Veerapol*, 312 F.3d at 1131; *Kimes*, 939 F.2d at 778.

⁷⁵*Dann*, 652 F.3d at 1165; *Sabhani*, 599 F.3d at 225, 228; *Alzanki*, 54 F.3d at 999; *Warren*, 772 F.2d at 830.

⁷⁶*Sabhani*, 599 F.3d at 227.

⁷⁷*Dann*, 652 F.3d at 1165.

⁷⁸72 Fed. Reg. at 53,017.

criminal activity; or (2) To further the perpetrator's abuse or exploitation of or undue control over the petitioner through manipulation of the legal system.⁷⁹

USCIS does not require that these criminal activities be committed in relation to other qualifying criminal activities in the U visa statute.⁸⁰

When submitting U visa applications based on these crimes, advocates should exercise special care in documenting injury to the worker to demonstrate the required substantial physical or mental harm caused by the qualifying crime. See Section 4.1, Demonstrating Substantial Physical or Mental Abuse for Victims of Workplace Crime, and Appendix D2, Letter to USCIS Re: Denials, RFEs Due to Substantial Abuse Determinations in Workplace Based U Visa Cases from NELP/ASISTA.

Obstruction of Justice

Obstruction of justice generally refers to "an offense to do any act that prevents, obstructs, impedes, or hinders the administration of justice."⁸¹

Federal obstruction of justice provisions most likely to apply to workplace investigations include 18 U.S.C. § 1505 (obstruction of proceedings before departments, agencies, and committees), and 18 U.S.C. § 1519 (destruction, alteration, or falsification of records in federal investigations and bankruptcy).

18 U.S.C. § 1505 prohibits any individual from "corruptly, or by threats or force, or by any threatening letter or communication" influencing, obstructing, or impeding "the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States."⁸²

To prove a violation of 18 U.S.C. § 1505, the government is required to prove three elements: (i) that there was an agency proceeding; (ii) that the defendant was aware of that proceeding; and (iii) that the defendant "intentionally endeavored corruptly to influence, obstruct or impede the pending proceeding."⁸³

A proceeding is "defined broadly," and includes preliminary inquiries by a law enforcement agency.⁸⁴ As one court noted in the context of the NLRB, "[p]roceedings . . . simply mean proceeding in the manner and form prescribed for conducting business before the department or agency, including all steps and stages in such an action from its inception to its conclusion."⁸⁵

18 U.S.C. § 1519 prohibits the falsification or destruction of records during the course of a federal investigation. Specifically, the statute bars the alteration, destruction, mutilation, concealment, cover up, falsification, or false entry in any record book "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter" within the jurisdiction of any U.S. department or agency, "or in relation to or contemplation of any matter or case."⁸⁶ 18 U.S.C. § 1519 "does not require

⁷⁹ 8 C.F.R. § 214.14(a)(14)(ii).

⁸⁰ 72 Fed. Reg. at 53,017.

⁸¹ 58 AM. JUR. 2D OBSTRUCTING JUSTICE § 2 (2014).

⁸² 18 U.S.C. § 1505.

⁸³ U.S. v. Price, 951 F.2d 1028, 1031 (9th Cir.1991) (citation omitted).

⁸⁴ United States v. Dessange, No. 00-1486, 2001 WL 138290 (2d. Cir. Feb. 16, 2001) (citing U.S. v. Kelley, 36 F.3d 1118, 1127 (D.C. Cir. 1994)). The term "official proceeding" includes proceedings before federal judges or courts, proceedings before Congress, and a proceeding before a federal government agency authorized by law. 18 U.S.C. § 1515(a)(1)(AC).

⁸⁵ Rice v. United States, 356 F.2d 709, 712 (8th Cir. 1966).

⁸⁶ 18 U.S.C. § 1519.

the existence or likelihood of a federal investigation;” legislative history indicates that Congress rejected any requirement that the government prove a link between a defendant’s conduct and an imminent or pending official proceeding.⁸⁷

Witness Tampering

Federal witness tampering provisions most likely to apply to workplace investigations include 18 U.S.C. § 1512 (tampering with a witness, victim, or an informant), and 18 U.S.C. § 1513 (retaliating against a witness, victim, or an informant).

18 U.S.C. § 1512 (tampering with a witness, victim, or an informant) makes it a crime to knowingly us[e] intimidation, threaten[], or corruptly persuade[] another person, or engage[] in misleading conduct with the intent to cause the person to

- (1) withhold testimony or records;
- (2) alter or destroy an object to make it unavailable for use in an official proceeding;
- (3) evade legal process;
- (4) be absent from an official proceeding;
- (5) hinder, delay, prevent, or dissuade a person from attending or testifying at an official proceeding, reporting to a law enforcement or a judge, seeking the arrest of another person, or causing a criminal prosecution.⁸⁸

The statute also bars the corrupt alteration or destruction of a record in order to impair its integrity or availability for use in an official proceeding.⁸⁹ It further prohibits harassment to hinder a person from “attending or testifying in an official proceeding; reporting to a law enforcement official; seeking the arrest of another person in violation of a federal offense; or causing a criminal prosecution.”⁹⁰

An “official proceeding” includes proceedings before a U.S. judge or court, Congress, or a federal government agency authorized by law.⁹¹ The official proceeding “need not be pending or about to be instituted at the time of the offense.”⁹² Indeed, 18 U.S.C. § 1512(b) “does not require that the witness’s communication with the federal officers be . . . imminent.”⁹³ In addition, it is sufficient to show the perpetrator’s intent to “hinder, delay, or prevent communication” with law enforcement, not that the threat succeeded.⁹⁴

The testimony, record, or document “need not be admissible in evidence or free of a claim of privilege.”⁹⁵

18 U.S.C. § 1513 (retaliating against a witness, victim, or an informant) prohibits:

- Retaliatory killing or attempt to kill a person for serving as a witness or a party at an official proceeding, providing witness testimony, or providing information to a law enforcement officer;

⁸⁷ *United States v. Gray*, 642 F.3d 371, 377 (2d Cir. 2011) (citing S. Rep. No. 107-146 at 14-15 (2002)).

⁸⁸ 18 U.S.C. § 1512(b).

⁸⁹ 18 U.S.C. § 1512(c).

⁹⁰ 18 U.S.C. § 1512(d).

⁹¹ 18 U.S.C. § 1515(a)(1).

⁹² 18 U.S.C. § 1512(f).

⁹³ *United States v. Perry*, 335 F.3d 316, 332 n.9 (4th Cir. 2003).

⁹⁴ *Id.*

⁹⁵ 18 U.S.C. § 1512(f). See *United States v. Baldyga*, 233 F.3d 674, 680 (1st Cir. 2000) (noting that defendant’s conduct violated § 1512(b)(3) where he hindered government cooperator’s communication with authorities and where “the possibility existed that such communication would eventually occur with federal officials”).

- Bodily force, destruction of property, or threat to retaliate for serving as a witness or a party at an official proceeding, or for providing information related to a federal offense;
- Any harmful retaliatory action, including interference with lawful employment or livelihood, for providing truthful information to law enforcement about the commission or possible commission of a federal offense;
- Or any conspiracy to do so.⁹⁶

Perjury

The Model Penal Code defines perjury as making a “false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.” Model Penal Code § 241.1.

Under 18 U.S.C. § 1621, perjury occurs where an individual “willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true” after having taken testified or sworn that it is true, or where an individual “willfully subscribes as true any material matter which he does not believe to be true” under penalty of perjury.⁹⁷

Examples of Obstruction of Justice, Perjury, and Witness Tampering in the Workplace:

Labor law agencies have issued certifications for obstruction of justice and witness tampering where a worker who filed wage and hour claims was threatened, harassed, or intimidated by the employer to withdraw affirmative labor or employment claims, or to lie to law enforcement investigators. In some cases, employers have threatened to contact law enforcement officials or immigration enforcement officials or harm family members; in other cases, employers have threatened to fire workers and evict them from company housing. Certifications for perjury may also include employers who commit visa fraud, make false statements in seeking certification for labor, or issue fraudulent wage and hour records.

Additional Resources:

- CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, OBSTRUCTION OF JUSTICE: AN OVERVIEW OF SOME OF THE FEDERAL STATUTES THAT PROHIBIT INTERFERENCE WITH JUDICIAL, EXECUTIVE, OR LEGISLATIVE ACTIVITIES (2007), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl34303.pdf>.

§ 2.7 Sexual Misconduct Crimes: Abusive Sexual Contact, Rape, and Sexual Assault

Undocumented immigrants and guestworkers may be particularly vulnerable as victims of sexual misconduct in the workplace by employers, supervisors, co-workers, and clients.

This section describes federal statutory provisions for the U visa qualifying criminal activities of abusive sexual contact, rape, and sexual assault under federal law. Advocates should also note that state statutes will apply in most cases.

Substantially similar crimes may also be captioned “gross sexual imposition,” “wrongful sexual contact,” “lewd act,” “sexual abuse,” “sexual misconduct,” and “sexual battery,” among others.

Abusive Sexual Contact

18 U.S.C. § 2244(b) defines “abusive sexual contact” as “knowingly engag[ing] in sexual contact with another person without that other person's permission.”⁹⁸ “Sexual contact” is defined as “the intentional

⁹⁶ 18 U.S.C. § 1513.

⁹⁷ 18 U.S.C. § 1621.

⁹⁸ 18 U.S.C. § 2244(b).

touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."⁹⁹ Courts often use the terms "abusive sexual contact" and "abusive sexual conduct" interchangeably.¹⁰⁰ Advocates should also refer to relevant state statutes for further reference.

Rape

In the federal context, the Uniform Code of Military Justice defines rape as the commission of a sexual act upon another person by:

- (1) Use of unlawful force against the other person;
- (2) Use of force causing or likely to cause death;
- (3) Threatening or placing the other person in fear that s/he will be subject to death, grievous bodily harm, or kidnapping;
- (4) First rendering the other person unconscious; or
- (5) Administering by force or threat of force or without knowledge or consent of the other person a drug, intoxicant, or other substance that would substantially impair the other person.¹⁰¹

Advocates should also refer to relevant state statutes for further reference; statutory rape statutes may also be applicable.

Sexual Assault

In the federal context, the Uniform Code of Military Justice defines sexual assault as the commission of a sexual act upon another person by:

- (1) Threatening or placing the other person in fear;
- (2) Causing bodily harm to that other person;
- (3) Making a fraudulent representation that the sexual act serves a professional purpose;
- (4) Inducing a belief by artifice, pretense, or concealment that the person is another person;
- (5) Commission of a sexual act with the knowledge or reasonable knowledge that the other person is asleep, unconscious, or unaware that the sexual act is occurring;
- (6) Commission of a sexual act upon another person incapable of consent due to intoxication, mental disease, defect, or physical disability.¹⁰²

Advocates should also refer to relevant state statutes for further reference.

Additional Resources:

- The National Women's Law Center and National Crime Victim Law Institute have prepared a helpful chart of state sexual assault statutes, which is available at <http://www.lclark.edu/org/ncvli/clpps.html>.

§ 2.8 "Substantially Similar" Qualifying Criminal Activities¹⁰³

Qualifying criminal activity identified in the U visa statute may not necessarily correspond to any single federal or state criminal provision. However, U visa eligibility is not precluded even if the title of a state or federal criminal statute is not identical to the qualifying criminal activity identified in the U visa statute.¹⁰⁴

⁹⁹ 18 U.S.C. § 2246(3).

¹⁰⁰ See, e.g., *United States v. Urrabazo*, 234 F.3d 904, 905 (5th Cir. 2000); *United States v. Bahe*, 201 F.3d 1124, 1126 (9th Cir. 2000); *United States v. Downer*, 143 F.3d 819, 820 (4th Cir. 1998); *United States v. Foster*, 30 F.3d 65, 66 (7th Cir. 1994); *United States v. Lauck*, 905 F.2d 15, 16 (2nd Cir. 1990).

¹⁰¹ 10 U.S.C. § 920(a).

¹⁰² 10 U.S.C. § 920(b).

¹⁰³ This section is based on a presentation prepared by Susana de Leon, with great thanks.

The statute construes “qualifying criminal activity” broadly, explaining that “the criminal activity referred to in this clause is that involving one or more of the following *or any similar activity* in violation of Federal, State or local criminal law.”¹⁰⁵ The term “any similar activity” “refers to criminal offenses in which the *nature and elements* of the offenses are *substantially similar* to the statutorily enumerated list of criminal activities.”¹⁰⁶ As the Department of Homeland Security’s regulatory commentary concludes, the “definition of any ‘similar activity’ takes into account the wide variety of state criminal statutes in which criminal activity may be named differently than criminal activity found on the statutory list,” while the elements of both criminal activities are comparable.¹⁰⁷

When explaining to USCIS whether a statute is “substantially similar” to a qualifying criminal activity, advocates should outline the elements of a statute that clearly falls within the category of the qualifying criminal activity. Advocates should then highlight similarities between the elements of both crimes, and explain why any differences are insignificant. Some practitioners have found it helpful to use a table to compare the elements side by side, and to use case law in support of the argument.

Additional Resources:

- University of North Carolina Law School, Immigration and Human Rights Policy Clinic, Wage Theft and U Visa: Analyzing Federal and State Crimes Relevant for Undocumented Workers Seeking U Visa Remedies (2011), available at <http://www.law.unc.edu/documents/clinicalprograms/wagetheftanduvisasguide.pdf>. Specific to North Carolina.

¹⁰⁴ The only exception to this is the qualifying criminal activity of fraud in foreign labor contracting; federal U visa statute specifies violation of 18 U.S.C. § 1351.

¹⁰⁵ *Id.* (emphasis supplied).

¹⁰⁶ 8 C.F.R. § 214.14(a)(9).

¹⁰⁷ 72 Fed. Reg. at 53,018.

Chapter 3

OBTAINING LAW ENFORCEMENT CERTIFICATION (FORM I-918B) FOR VICTIMS OF WORKPLACE CRIME

Federal U visa regulations specifically contemplate that federal, state, and local agencies responsible for enforcement of civil rights protections and labor standards in the workplace may certify U visa petitions. 8 C.F.R. § 214.14(a)(2) specifies that a certifying agency may be a “federal, state or law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal authority. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to . . . the Equal Employment Opportunity Commission, and the Department of Labor.”¹⁰⁸

Several federal and state labor and civil rights law enforcement agencies have issued protocols describing the process to request U visa certification. This chapter describes agencies’ requirements for certifications, qualifying criminal activities certified by each agency, the process to request certification, and relevant deadlines and information for filing an underlying complaint with each agency. This chapter also reviews requests for certification from other law enforcement agencies, including local police departments, prosecutors, and judges.

§ 3.1 Equal Employment Opportunity Commission (EEOC)

The EEOC frequently detects and investigates U visa qualifying criminal activity in the course of enforcing federal workplace discrimination and harassment law. Since Congress passed the Trafficking and Violence Prevention Act in 2000, the EEOC has worked with a variety of law enforcement agencies to secure immigration protection, including the T visa, for undocumented immigrant workers involved in its investigations.¹⁰⁹ The EEOC released its first memorandum detailing internal procedures governing U visa certification for immigrant victims of crimes in 2008.¹¹⁰ In 2013, the EEOC issued a revised memorandum updating internal procedures for U visa certification.¹¹¹

Requirements for EEOC Certification

In order for the EEOC to certify a U visa petition, the qualifying criminal activity must be related to unlawful employment discrimination alleged in an EEOC complaint or otherwise covered by a statute enforced by EEOC.

Qualifying Criminal Activities Certified by EEOC

EEOC will certify U visa applications for all qualifying criminal activities specified in statute.

EEOC investigations of hostile work environment, sexual harassment, and discrimination charges may uncover facts that support U visa certification for the qualifying crimes of abusive sexual contact, rape,

¹⁰⁸ 8 C.F.R. § 214.14(a)(2).

¹⁰⁹ Leticia M. Saucedo, *A New “U”*: Organizing Victims and Protecting Immigrant Workers, 42 UNIVERSITY OF RICHMOND LAW REVIEW 891, 921-37 (2008). *But see* Letter from Advocates to EEOC, T Visa Certification and Continued Presence Applications by Equal Employment Opportunity Commission (Apr. 4, 2013).

¹¹⁰ Memorandum from Naomi C. Earp, Chair, EEOC, to District Directors and Regional Attorneys, EEOC, EEOC Procedures for U Nonimmigrant Classification Certification (Jul. 3, 2008).

¹¹¹ EEOC, EEOC Procedures: Requesting EEOC Certification for U Nonimmigrant Classification (U Visa) in EEOC Cases (Feb. 5, 2013).

sexual assault, and sexual exploitation. EEOC cases have also involved facts that establish trafficking, peonage, and involuntary servitude.¹¹²

Advocates have also asked the EEOC for issuance of a T visa certification protocol, and are currently awaiting response.

Process to Request Certification from EEOC

The EEOC protocol requires requests for U visa certification to be submitted to an EEOC Regional Attorney, who investigates whether the petitioner is a victim of a qualifying criminal activity, and whether the petitioner has been helpful, is being helpful, or will be helpful to investigation of the criminal activity. EEOC must conduct an interview of the applicant as part of its factual inquiry for U visa certification and to determine credibility.

After the EEOC Regional Attorney has determined that the applicant qualifies for U visa certification as a factual and legal matter, the Regional Attorney will submit its findings to the EEOC's Office of General Counsel for review. If the Office of General Counsel approves certification, the Regional Attorney will be provided a letter delegating authorization to issue a Form I-918B, and be authorized to issue certification.¹¹³

In cases involving more than one individual (but who are affected by the same discriminatory employment practices), requests for certification can be submitted in one cover memorandum. However, such group requests must include sufficient information for each individual applicant to make an individualized determination of eligibility for U visa certification.

When requesting U visa certification from the EEOC, advocates should consider submitting a cover letter that provides basic facts about the basis for the U visa, reference number of an underlying EEOC charge or investigation. Advocates should also provide information and analysis of state and federal criminal statutes triggered by the crime, and relevant information for the Form I-918B.

When submitting information in a request for certification, advocates should consider that any materials submitted to EEOC may be subject to discovery in litigation. See Section 4.3.

Relevant Deadlines and Information on Filing Complaints with EEOC

In general, a complaint with the EEOC should be filed within 180 days from the date that the discriminatory activity took place, but this deadline is 300 days if a state or local agency enforces a law prohibiting employment discrimination on the same basis. In cases of ongoing harassment, the filing deadline begins after the *last incident* of harassment.¹¹⁴

For more information on filing a U visa charge, visit: <http://www.eeoc.gov/employees/howtofile.cfm>.

Additional Resources:

- See Appendix B3 and B4 for the EEOC's U visa protocol.
- See Appendix C9 for a sample letter from EEOC's Office of General Counsel designating authority to Regional Attorney to certify a U visa.

¹¹²In such cases, advocates should consider whether a T visa would be more appropriate. 8 U.S.C. § 1101(a)(15)(t).

¹¹³The EEOC has appointed Lucila Rosas, Administrative Law Judge, to coordinate immigrant worker issues for the agency, including concerns with U visas. Please contact Ms. Rosas at lucila.rosas@eeoc.gov.

¹¹⁴42 U.S.C. § 2000e-5(e).

§ 3.2 U.S. Department of Labor (U.S. DOL)

In 2010, the Department of Labor announced that it would exercise its authority to certify U visas.¹¹⁵

Requirements for U.S. DOL Certification

The DOL has limited certification authority to the department's Wage and Hour Division (WHD), which enforces federal labor laws related to minimum wage, overtime pay, child labor, employment of people with disabilities, family and medical leave, and employment of temporary and seasonal labor.¹¹⁶

At this time, DOL will only certify cases that fall under the jurisdiction of WHD. U visa petitions based solely on health and safety violations investigated by the Occupational Safety and Health Administration (OSHA) or other sub-agencies are not, at the time of this writing, eligible for certification by U.S. DOL.

Qualifying Criminal Activities Certified by U.S. DOL

Under the protocol, the Wage and Hour Division will certify U visa petitions in cases that involve any of five qualifying criminal activities: **involuntary servitude, peonage, trafficking, obstruction of justice, and witness tampering**. The qualifying criminal activity must arise "in the context of a work environment or an employment relationship," and the petitioner must show a "related, credible allegation of a violation of a law that WHD enforces."

DOL has also provided certification for other qualifying criminal activities, as long as one of these five has also taken place. In 2013, Congress added fraud in foreign labor contracting and stalking as new qualifying criminal activities to the U visa statute. To our knowledge, DOL has certified a few cases involving fraud in foreign labor contracting, including one case where it was the only qualifying criminal activity specified.

Advocates have also asked the U.S. DOL to expand its U visa certification protocol to cover all qualifying criminal activities, and for issuance of a T visa certification protocol, and are currently awaiting response.

Process to Request Certification from U.S. DOL

Immigrant workers may request U visa certification upon filing an allegation of a labor violation with the Wage and Hour Division, during, or after the division completes an investigation.

The U.S. Department of Labor has designated a coordinator in each of the WHD's five regional offices to manage requests for U visa certification, coordinate efforts with department investigators and other law enforcement agencies, and work with the department's solicitor's office in reviewing requests. Applicants for certification or their advocates should direct their requests to the relevant regional U visa coordinator. Please see Appendix Section B2 for DOL Regional U visa coordinator contact information.

Advocates requesting U visa certification should provide the regional coordinator with basic facts about the qualifying criminal activity, injury, and violations of law enforced by the Wage and Hour Division, and statutory analysis of the qualifying criminal activity and labor violations. When submitting information in a request for certification, advocates should consider that any materials submitted to DOL may be subject to discovery in litigation. See Section 4.3.

After receiving a request for U visa certification, the DOL U visa regional coordinator will investigate the merits of the request. The coordinator will also ensure that the petitioner is interviewed. Interviews are typically conducted in-person or over the phone, and are conducted to allow DOL to determine an applicant's credibility, obtain more detailed information about the case, and to ensure that all statutory

¹¹⁵Press Release, U.S. Department of Labor, Secretary Solis Announces the Department to Exercise Its Authority to Certify U Visas (Mar. 15, 2010), available at <http://1.usa.gov/JdxUbn>.

¹¹⁶Memorandum from Nancy J. Leppink, Acting Administrator, U.S. Department of Labor Wage and Hour Division, to Regional Administrators, Certification of Supplement B Forms of U Nonimmigrant Visa Applications (Apr. 28, 2011).

requirements are met. DOL has typically allowed advocates to accompany their clients in interviews. Advocates should communicate any interpretation needs in advance.

After the regional coordinator has made a preliminary determination of eligibility for certification, and prepared a narrative statement of the case, a Regional Solicitor will then review the U visa coordinator's narrative statement and complete the Form I-918B, which the Wage and Hour Division Regional Administrator must then review.

Relevant Deadlines and Information on Filing Complaints with U.S. DOL

Complaints for violations of the Fair Labor Standards Act (FLSA) must be filed within two years of a violation, or within three years for a willful violation of the statute.¹¹⁷ There is no statute of limitations for the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), although the statute of limitations for a claim of retaliation under the MSPA is 180 days.¹¹⁸

For more information on filing a complaint with U.S. DOL's WHD, visit:
<http://www.dol.gov/wecanhelp/howtofilecomplaint.htm>.

Additional Resources:

- See Appendix B1 for the DOL WHD's U visa certification protocol.
- See Appendix B2 for a list of contact information for DOL's Regional U Visa Coordinators.

§ 3.3 National Labor Relations Board (NLRB)

In 2011, the National Labor Relations Board (NLRB) released guidelines for U visa certification in a departmental memorandum on immigration status issues.¹¹⁹ The NLRB enforces the National Labor Relations Act (NLRA), which protects workers' rights to engage in concerted activities for mutual aid and protection. Among other provisions, the NLRA bars employers from engaging in unfair labor practices against workers engaged in organizing and collective bargaining. The NLRA applies to all workers, regardless of immigration status.¹²⁰ Although investigators are instructed not to investigate a worker's immigration status on their own initiative, immigration issues may emerge if Immigration and Customs Enforcement takes workers into custody, employers issue immigration-related threats, or workers volunteer information about their immigration status in the process of a proceeding under the Act.

Requirements for NLRB Certification

In order for the NLRB to certify a U visa petition, the qualifying criminal activity must be related to an unfair labor practice alleged in an NLRB complaint.

Qualifying Criminal Activities Certified by NLRB

NLRB's protocol includes all qualifying criminal activities specified in statute at the time the protocol was issued. At the time of writing, it is unclear whether the agency will certify for the qualifying criminal activities of stalking and fraud in foreign labor contracting, which were added to the federal U visa statute

¹¹⁷ 29 U.S.C. § 255(a).

¹¹⁸ 29 U.S.C. § 1801 *et seq.*; 29 C.F.R. § 500.9(b).

¹¹⁹ Memorandum from Richard A. Siegel, Associate General Counsel, National Labor Relations Board, to All Regional Directors, Updated Procedures in Addressing Immigration Status Issues That Arise During NLRB Proceedings (June 7, 2011) [hereinafter "NLRB Immigration Status Memorandum"].

¹²⁰ 29 U.S.C. §§ 151-169; *Sure-Tan, Incorporated v. National Labor Relations Board*, 467 U.S. 883, 892 (1984). Some remedies may be limited due to *Hoffman Plastics*.

after the issuance of agency protocol. Certification for these additional crimes, however, would be consistent with the intent of the original protocol.

NLRB's memorandum outlines potential scenarios for unfair labor practices that may constitute qualifying criminal activity for U visa purposes—for example, an employer's confiscation of an employee's passport or imposition of illegal working conditions could constitute involuntary servitude, while interference with protected activity through illegal threats of retaliation, including threats to call immigration authorities or blacklist employees, could constitute blackmail.¹²¹

Process to Request Certification from NLRB

To petition for a U visa, advocates should send a request to the National Labor Relations Board Regional Office, which must first determine whether the petitioner is a victim of a qualifying criminal activity related to a meritorious unfair labor practice that the board is investigating. The Regional Office must then submit a written recommendation for U visa certification to the Division of Operations-Management.¹²²

Advocates who approach the Board for certification should consider including a completed draft Form I-918B, basic facts about unfair labor practices that constitute qualifying criminal activity for U visa purposes, analysis of applicable state and federal criminal statutes triggered by the crime, and relevant supporting information. The Deputy Associate General Counsel's Office in the Division of Operations Management should receive copies of requests for certification.¹²³

Relevant Deadlines and Information on Filing Complaints with NLRB

In general, an NLRB complaint must be filed within six months of the alleged unfair labor practice.¹²⁴

For more information on filing a complaint with the NLRB, visit: <http://www.nlr.gov/what-we-do/investigate-charges>.

Additional Resources:

- See Appendix B4 for NLRB, Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings.

§ 3.4 California Department of Fair Employment and Housing (CA DFEH)

In 2010 California's Department of Fair Employment and Housing, the state equivalent of the EEOC, issued a directive regarding its certification of U visas.¹²⁵ The department investigates and prosecutes claims under the California Fair Employment and Housing Act and the Ralph Civil Rights Act, which prohibit discrimination in employment.¹²⁶

Requirements for CA DFEH Certification

Under its protocol, the DFEH will certify U visa petitions where it is actively investigating a California Fair Employment and Housing Act or Ralph Act claim of an individual who has requested certification. Cases in

¹²¹ NLRB Immigration Status Memorandum, at 4.

¹²² NLRB Immigration Status Memorandum, at 5-6.

¹²³ The NLRB directive specifies that NLRB Regional Office should contact Peter Sung Ohr in the Division of Operations Management with U visa questions; Offices should now contact Aaron Karsh.

¹²⁴ 29 U.S.C. § 160(b).

¹²⁵ Memorandum from Phyllis W. Cheng, Director, California Department of Fair Employment and Housing, Employment Division Directive: Obtaining U Visas in Investigated Cases (May 6, 2010) [hereinafter "DFEH U Visa Directive"].

¹²⁶ CAL. GOV'T CODE §§ 12900-12996; CAL. CIV. CODE § 51.7.

private litigation for which the department has issued a right-to-sue letter without an ongoing investigation are, as of the date of this writing, ineligible for U visa certification.¹²⁷

Qualifying Criminal Activities Certified by CA DFEH

The Department of Fair Employment and Housing currently certifies U visas for thirteen qualifying crimes: sexual assault, sexual exploitation, abusive sexual contact, rape, trafficking, domestic violence, murder, manslaughter, abduction, extortion, torture, incest, and prostitution.

In 2012, advocates requested that CA DFEH consider expanding its U visa certification policy, and are currently awaiting response.

Process to Request Certification from CA DFEH

Advocates requesting U visa certification should submit to the CA DFEH consultant a draft Form I-918B, a cover letter with facts and statutory analysis about the qualifying criminal activity, and an explanation of the relationship between the crime and the discriminatory activity under investigation. Department consultants are authorized to complete and sign Form I-918B, although certification requests must be reviewed by the Chief of Enforcement.¹²⁸ When submitting information in a request for certification, advocates should consider that any materials submitted to CA DFEH may be subject to discovery in litigation. See Section 4.3.

Relevant Deadlines and Information on Filing Complaints with CA DFEH

A complaint with the CA DFEH should be filed within one year from the date that the discriminatory activity took place. The one-year FEHA limitation can be extended by a maximum of 90 days if the claimant did not learn of the facts of the alleged unlawful act until more than one year after its occurrence.¹²⁹

For more information on filing a complaint with CA DFEH, visit:

http://www.dfeh.ca.gov/Complaints_eCompProc.htm.

Additional Resources:

- See Appendix Section B5 for the CA DFEH's Directive on Obtaining U Visas in Investigated Cases.
- See Appendix Section E2 for an advocacy letter requesting that CA DFEH expand its U visa certification policy.

§ 3.5 California Division of Labor Standards Enforcement (CA DLSE)

The DLSE, or California's Labor Commissioner, investigates and enforces violations of the California Labor Code.

Requirements for CA DLSE Certification

DLSE's will certify U visa petitions for qualifying criminal activities that it detects or investigates in the course of its enforcement efforts of the California Labor Code.

Qualifying Criminal Activities Certified by CA DLSE

¹²⁷ The CA DFEH is currently reviewing this policy. See Appendix E2, Letter from Advocates to CA DFEH, CA DFEH U Visa Protocol, Sept. 25, 2012.

¹²⁸ DFEH U Visa Directive, *supra* note 44.

¹²⁹ CAL. GOV'T CODE § 12960.

CA DLSE will certify U visa applications for all qualifying criminal activities specified in statute.

Process to Request Certification from CA DLSE

In order to request certification, advocates should include written authorization that the DLSE may discuss the petitioner's case with the advocate, a completed draft Form I-918B, and a cover letter with any other relevant information that would assist the DLSE in evaluating the request. The draft I-918B should include the case status and DLSE Case Number. Applicants should include a complete description of the criminal activity, dates of occurrence, chronology of relevant events, and parties involved. A cover letter should include a statutory citation of the crime committed, and how the specific facts of the situation satisfy the elements of the crime. Applicants should also include how the qualifying criminal activity took place in the context of an alleged labor law violation investigated by the DLSE. When submitting information in a request for certification, advocates should consider that any materials submitted to CA DLSE may be subject to discovery in litigation. See Section 4.3.

Requests for certification should be mailed or emailed to:

Mary Ramirez, DLSE Headquarters, 455 Golden Gate Ave., 9th Floor, San Francisco, CA 94102, or mramirez@dir.ca.gov. Envelopes or emails should be marked "Confidential: U Visa Certification Request."

The CA DLSE will interview applicants for U visa certification to ascertain credibility and obtain additional details for purposes of certification. Some advocates have noted that CA DLSE has limited language interpretation capacity; be sure to inform the agency of any interpretation needs (and advocate's capacity to provide interpretation services, if available).

Relevant Deadlines and Information on Filing Complaints with CA DLSE

Wage and hour claims in California are subject to different statutes of limitation, depending on the type of claim.¹³⁰ Claims for meal and rest period violations under Cal. Labor Code § 226.7 are subject to a 3-year statute of limitations.¹³¹ Wage claims based on breach of contract must be filed within 2 or 4 years, depending on whether the contract is oral or written.¹³² Claims for waiting time penalties under Cal. Labor Code § 203 must be filed within one year of termination.¹³³ Claims for wage statement violations must be filed within one year.¹³⁴

For more information on filing a complaint with CA DLSE, visit:

<https://www.dir.ca.gov/dlse/HowToFileWageClaim.htm>.

Additional Resources:

- See Appendix B6, U Visa Certification by the Division of Labor Standards Enforcement: Information for Immigrant Crime Victims.

§ 3.6 Illinois Department of Labor (IDOL)

The IDOL enforces violations of Illinois State labor and employment law, including the Illinois Wage Payment Act and the Minimum Wage Law.

¹³⁰ CAL. CODE CIV. PROC. § 338.

¹³¹ *Murphy v. Kenneth Cole*, 40 Cal. 4th 1094 (2007).

¹³² CAL. CODE CIV. PROC. §§ 337, 339.

¹³³ CAL. LAB. CODE § 203.

¹³⁴ CAL. CODE CIV. PROC. § 340(a).

Requirements for IDOL Certification

In order to certify a U visa petition, the IDOL must have jurisdiction to investigate the case and must be conducting an ongoing investigation. There is no requirement that the qualifying criminal activity be charged or prosecuted.

Qualifying Criminal Activities Certified by IDOL

IDOL's protocol includes all qualifying criminal activities specified in statute at the time the protocol was issued. At the time of writing, it is unclear whether the agency will certify for the qualifying criminal activities of stalking and fraud in foreign labor contracting, which were added to the federal U visa statute after the issuance of agency protocol. Certification for these additional crimes, however, would be consistent with the intent of the original protocol.

Process to Request Certification from IDOL

Petitioners may make an oral or written request to IDOL for U visa certification to an IDOL employee. In order to obtain certification, petitioners should submit a draft Form I-918B and a brief cover letter with the petitioner's name, charge number, and overview of the case.

After receiving a request for U visa certification, the IDOL employee must inform his or her immediate supervisor, who will then forward the request to the IDOL Director or the Director's U visa designee. The Director or U visa designee will determine whether certification is appropriate, including an inquiry to the IDOL staff member as to the petitioner's cooperation in the investigation. When submitting information in a request for certification, advocates should consider that any materials submitted to IDOL may be subject to discovery in litigation. See Section 4.3.

Relevant Deadlines and Information on Filing Complaints with IDOL

Claims for unpaid wages must be filed within one year after compensation was due.¹³⁵

For more information on filing a complaint with IDOL, visit:

<https://www.illinois.gov/idol/pages/complaints.aspx>.

Additional Resources:

- See Appendix Section B7 for the Illinois Department of Labor Policy Memorandum: Obtaining U Visas in Investigated Cases.

§ 3.7 New York State Department of Labor (NYS DOL)

Requirements for NYS DOL Certification

To certify a U visa petition, the NYSDOL must have jurisdiction to investigate the case and the allegations must establish that the petitioner is a victim of one of the qualifying criminal activities identified in the federal U visa statute. The request for certification must be submitted during, or within a reasonable time after, the conclusion of the state agency's investigation or detection of the qualifying crime, and the individual must be, have been, or be likely to be helpful in the investigation.¹³⁶ There is no requirement that the crime be charged or prosecuted, or that the victim testify or the perpetrator be convicted.

Qualifying Criminal Activities Certified by NYSDOL

¹³⁵ 820 ILL. COMP. STAT. § 115/11.

¹³⁶ Memorandum from N.Y. State Department of Labor, Memorandum & Order Regarding Certification of U Visa Petitions (2011) (unpublished protocol for U Visa certification requests, in my files).

NYSDOL's protocol includes all qualifying criminal activities specified in statute at the time the protocol was issued. At the time of writing, it is unclear whether the agency will certify for the qualifying criminal activities of stalking and fraud in foreign labor contracting, which were added to the federal U visa statute after the issuance of agency protocol. Certification for these additional crimes, however, would be consistent with the intent of the original protocol.

Process to Request Certification from NYSDOL

When requesting U visa certification from the New York State Department of Labor, advocates should include the claim number and name of any agency staff involved in the underlying claim and submit a completed draft I-918B form. Advocates should include a cover letter with information about the details of the crime, injury to the victim, victim's statement of helpfulness in the investigation, and victim's written authorization for the agency to communicate directly with the advocate. When submitting information in a request for certification, advocates should consider that any materials submitted to NYSDOL may be subject to discovery in litigation. See Section 4.3.

Relevant Deadlines and Information on Filing Complaints with NYSDOL

For more information on filing a complaint with NYSDOL, visit: http://labor.state.ny.us/workerprotection/wp_index.shtml. See <http://www.labor.state.ny.us/formsdocs/wp/P715.pdf> for a fact sheet on the New York State Wage Theft Prevention Act.

Additional Resources:

- See Appendix B8 for the New York State Department of Labor's Memorandum and Order Regarding Certification of U Visa Petitions.

§ 3.8 Judicial Certifications

Federal regulations specify that a "Federal, State, or local judge" constitutes a proper certifying official.¹³⁷ Judges regularly certify U visa petitions in criminal proceedings, and have certified U visa petitions in civil proceedings, including cases involving claims under the Fair Labor Standards Act, Victims of Trafficking Protection Act, and state labor and employment law claims.

In *Garcia v. Audobon Communities Mgmt.*, the Eastern District of Louisiana was the first case in which a judge presiding over civil litigation certified U visa petitions for immigrant worker victims of qualifying criminal activity.¹³⁸ The decision clarified that a judge may certify a U visa petition upon a prima facie showing that an individual is a victim of the qualifying criminal activity.¹³⁹ Since that decision, advocates have reported successful requests for judicial certification of U visa petitions for victims of crime in the workplace. See Appendix B11 for a sample motion for judicial certification of a U visa application, based on a successful effort in New Mexico state court.

¹³⁷ 8 C.F.R. § 214.14(a)(3)(ii).

¹³⁸ *Garcia v. Audubon Communities Management*, No. 08-1291, 2008 WL 1774584, at *2-3 (E.D. La. Apr. 15, 2008); see also Andrew Turner et al., *Federal Judge in Civil Case May Certify U Visa Applications of Undocumented Immigrant Human Trafficking Victims*, 43 CLEARINGHOUSE REV. 510 (2009).

¹³⁹ *Audubon* at *3.

Additional Resources:

- See Appendix B10: *Garcia v. Audobon Communities Mgmt.*, 2008 WL 1774584 (E.D. La. Apr. 15, 2008).
- See Appendix B11: Sample Motion for Judicial Certification in a civil state labor and employment lawsuit.
- Andrew Turner et al., *Federal Judge in Civil Case May Certify U Visa Applications of Undocumented Immigrant Human Trafficking Victims*, 43 Clearinghouse Rev. 510 (2009).
- Leslye E. Orloff, et al., U Visa Certification Toolkit for Federal, State, Local Judges and Magistrates (2014), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/tools-for-courts/Judges-Toolkit.pdf>.

§ 3.9 Other Law Enforcement Agencies (Local Police, District Attorneys, Attorney General, Department of State)

Local police departments, state attorneys general, U.S. and district attorneys, the FBI, and the Department of State have certified U visa petitions in cases involving immigrant victims of workplace-based crime.

In some instances, the most efficient way to obtain certification related to workplace crimes may be from a local police department that is already familiar with U visas and immigrants' vulnerability to sexual assault and other violent crimes, such as felonious assault, by employers.

Additional Resources:

- Immigration Center for Women and Children, U Travel and Certifier Database (ongoing). A shared online database tracks information on U visa law enforcement certifying agencies. For more information on joining, visit: <http://icwclaw.org/services-available/icwc-u-travel-and-certifier-database/>.
- Gail Pendleton, *Winning U Visas: Getting the Law Enforcement Certification* (2008), available at http://www.asistahelp.org/documents/resources/ExpCommPendleton0208_4D9DF9844BDF9_965B4AD489B27.pdf.
- The Department of Homeland Security has published a resource guide for law enforcement agencies on U visa certification. Department of Homeland Security, *U Visa Law Enforcement Certification Resource Guide 10-11* (2012), available at <http://www.dhs.gov/u-visa-law-enforcement-certification-resource-guide>.
- Gail Pendleton and Sonia Parras, *Webinar: Training Law Enforcement Agencies on U Visa Certification*, Immigration Advocates Network, available at <http://www.screencast.com/t/Qsy7NbsoCAdN>.
- Law enforcement officials may contact USCIS with U visa-related questions at: LawEnforcement_UTVAWA.VSC@uscis.dhs.gov. Please note that this email address is for law enforcement personnel only. Any email sent by any person or entity that is not law enforcement to this specific e-mail address will not be answered.

Chapter 4

U VISA APPLICATIONS FOR VICTIMS OF WORKPLACE CRIME: ADDITIONAL ISSUES

§ 4.1 Coverage of U Visa Clients by LSC Providers

Advocates who work for programs funded by the Legal Services Corporation (LSC) are permitted to file U visa petitions and provide legal services “directly related to the prevention of or obtaining relief from” U visa crimes. In a 2006 program letter LSC clarified that grantees may provide legal assistance that is “directly related to the prevention of, or obtaining relief from” the criminal activity; determination of whether a particular service is “directly related to preventing or obtaining relief” must be made on a “case-by-case basis.”¹⁴⁰

§ 4.2 Demonstrating Substantial Physical or Mental Abuse for Victims of Workplace Crime

U visa applicants must show that they have suffered “substantial physical or mental abuse” as a result of having been a victim of qualifying criminal activity.¹⁴¹ “Physical or mental abuse” is defined as “injury or harm to the victim’s physical person, or harm to or impairment of the emotional soundness of the victim.”¹⁴²

USCIS determines whether an applicant has suffered substantial physical or mental harm; certifying law enforcement agencies do not make this determination.¹⁴³ When determining whether an applicant has suffered substantial physical or mental harm, USCIS considers several factors, including, but not limited to:

- The nature of the injury inflicted or suffered;
- The severity of the perpetrator’s conduct;
- The severity of the harm suffered;
- The duration of the infliction of the harm;
- The extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.

No single factor is a prerequisite to establish substantial abuse; a series of acts may be considered together to constitute substantial abuse, even if no single act rises to that level.¹⁴⁴

At the time of this writing, many advocates have noted that USCIS adjudicators have had some difficulty understanding substantial abuse in workplace U visa applications, and have issued boilerplate RFEs and even denials on that basis. In general, USCIS adjudicators seem to have applied a higher standard for a showing of substantial abuse for victims of workplace crime than for victims of more common U visa crimes such as domestic violence. In addition, RFEs issued by adjudicators indicate some confusion about the ways that broader labor violations contribute to qualifying abuse suffered by victims of workplace crime. USCIS

¹⁴⁰Letter from Helaine R. Barnett, President, Legal Services Corporation, to All LSC Program Directors, Violence Against Women 2006 Amendments, Program Letter 06-2, at 4 (Feb. 21, 2006), <http://l.usa.gov/KTHGjw>.

¹⁴¹ 8 C.F.R. § 214.14(b)(1).

¹⁴² 8 C.F.R. § 214.14(a)(8).

¹⁴³ See Department of Homeland Security, U Visa Law Enforcement Certification Resource Guide 10-11 (2012), available at <http://www.dhs.gov/u-visa-law-enforcement-certification-resource-guide>.

¹⁴⁴ 8 C.F.R. § 214.14(b)(1).

adjudicators have also disregarded aggravation of prior injury to applicants. Finally, USCIS adjudicators have often found issue with whether a victim has sufficiently shown the nexus between the qualifying criminal activity and the harm suffered. See Appendix D2, Letter to USCIS Re: Denials, RFEs Due to Substantial Abuse Determinations in Workplace Based U Visa Cases from NELP/ASISTA, for more information.

We are optimistic that further advocacy and training with USCIS will address this problem. In the meantime, advocates may consider the following strategies to clearly demonstrate substantial abuse and minimize RFEs in workplace-related U visa petitions:

- **Familiarize yourself with the issue of workplace abuse and the mental and physical effects of such abuse.** Review Appendix D1: Letter Re: Substantial Abuse in Workplace-Based U Visa Cases to USCIS from NELP, ASISTA, Dr. Giselle Hass, which discusses forms of abuse in the workplace, and effects of abuse on victims of crime in the workplace.
- **Gather evidence of substantial mental or physical harm suffered by the client from the start of the application process.** Remember to spend time during the intake process asking questions about the physical and emotional impact of the criminal activity in the workplace. Ask clients if they may know of any friends or community members who witnessed the aftermath of the criminal activity and can write letters of support to include in the application detailing the impact. If the underlying case has been publicized, gather media clippings that detail mistreatment and abuse in the workplace.
- **Gather any copies of medical records, photos, or other documentary evidence of physical injury.** Document any pre-existing physical or mental health issues that may have been aggravated by the workplace abuse. See Appendix A4: Screening Form for U Visa Applicants—Workplace Crime, which includes questions about a client’s mental state.
- **Consider asking the client to receive counseling/therapy or receive a psychological evaluation.** If services are available, clients may benefit greatly from receiving treatment from a mental health professional, who may also be able to help document the mental harm resulting from the qualifying criminal activity. Although costly, advocates in some cases have found it helpful to obtain a forensic psychological evaluation for purposes of the application. In these cases, it may be helpful to provide the psychologist with background information about the impact of workplace abuse on immigrant workers, especially if the psychologist has limited experience in this area.
- **Ensure that the client’s declaration is well-organized and covers all of the elements of the qualifying criminal activity.** Be sure to identify and include facts that are directly related to the qualifying crime.
- **Clearly document substantial mental or physical harm in the client’s declaration.** Ask clients to describe, in detail, the *direct impact* that the qualifying criminal activity had on their physical and mental health.
- **Ensure that declarations, psychological evaluations, and supporting documentation clearly draw a nexus between the harm suffered by the client and the qualifying criminal activity.** For example, victims of witness tampering and obstruction of justice in the workplace should clearly discuss how an employer’s threats or intimidation not to

participate in a labor investigation directly caused mental or physical harm. The declaration should then also discuss how the witness tampering or obstruction was meant to perpetuate the employer's underlying abuse of the worker, and any relevant pre-existing conditions.

Additional Resources:

- Gail Pendleton and Eunice Cho, Effectively Framing a U Visa Labor-Based Application (Webinar Recording) (Jun. 17, 2013), available at <http://www.nelp.org/page/-/Justice/2013/NELP-ASISTA-WorkplaceUvisas.pdf?nocdn=1>.
- Appendix D1: Letter Re: Substantial Abuse in Workplace-Based U Visa Cases to USCIS from NELP, ASISTA, Dr. Giselle Hass.
- Appendix D2: Letter to USCIS Re: Denials, RFEs Due to Substantial Abuse Determinations in Workplace Based U Visa Cases from NELP/ASISTA.

§ 4.3 Confidentiality Provisions and Discovery in Litigation

U visa applications may benefit from statutory confidentiality protections specifically intended to protect victims of crime eligible for the U visa. 8 U.S.C. § 1367(a)(2) prohibits the Attorney General, any official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any employees or officials of those departments from “use or disclosure of information relating to an alien who is the beneficiary of a U visa.” Victims of domestic violence have successfully blocked abusers’ attempts to compel production of U visa or VAWA applications under the statute. Although claims of abuse made in U visa applications may be relevant to “credibility as a witness and may be used to impeach . . . testimony at trial, disclosure of these documents for this purpose runs contrary to the intent of the protections afforded by 8 U.S.C. § 1367.”¹⁴⁵ However, 8 U.S.C. § 1367(b)(3) provides that subsection (a)(2) shall not be construed as preventing disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of the information.

For additional memoranda about recent developments in discovery of U visas in employment litigation, please email the author. Please note that information will be shared only with low-wage immigrant worker advocates or plaintiff-side advocates.

¹⁴⁵ Demaj v. Sakaj, No. 09-255, 2012 WL 476168 (D. Conn. Feb. 14, 2012); see also Hawke v. Department of Homeland Security, No. 07-3456, 2008 WL 4460241 (N.D. Cal. Sept. 29, 2008) (denying request that DHS produce battered wife’s VAWA petition for purposes of witness impeachment).

ADDITIONAL RESOURCES

U Visa Statutory and Regulatory Provisions:

- Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (detailing Congress's findings and purpose for U visa statute);
- New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant status; Interim Rule, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, and 299).
- Alien Victims of Certain Qualifying Criminal Activity, 8 C.F.R. § 214.14.
- U.S. Citizenship and Immigration Services website: www.uscis.gov.

General U Visa Resources and Practice Guides:

- DEPARTMENT OF HOMELAND SECURITY, U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE (2012), available at <http://www.dhs.gov/u-visa-law-enforcement-certification-resource-guide>.
- Immigration Center for Women and Children, U Travel and Certifier Database (ongoing). A shared online database tracks information on U visa law enforcement certifying agencies. For more information on joining, visit: <http://icwclaw.org/services-available/icwc-u-travel-and-certifier-database/>.
- Immigration Legal Resource Center, Webinar, Consular Processing and Travel Abroad with a U Visa (May 22, 2012), available at <http://www.ilrc.org/trainings-webinars/recorded-webinars/consular-processing-and-travel-with-a-u-visa>.
- Sally Kinoshita, Susan Bowyer, Jessica Farb, and Catherine Ward-Seitz, THE U VISA: OBTAINING STATUS FOR IMMIGRANT VICTIMS OF CRIME (4th ed. 2014). This resource provides an accurate and comprehensive guide to U visa petitions. To order, visit: www.ilrc.org.
- Susana Martinez, et al., *Help for Undocumented Victims of Crime*, 44 CLEARINGHOUSE REV. 129 (2010).
- National Network to End Violence Against Immigrant Women, Summary of U Adjustment Regulations (2009), available at http://www.asistahelp.org/documents/resources/U_adjustment_regs_summary_C469B70A9DB47.pdf.
- Leslye E. Orloff, et al., U Visa Certification Toolkit for Federal, State, Local Judges and Magistrates (2014), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/tools-for-courts/JudgesToolkit.pdf>.
- Gail Pendleton, *Winning U Visas: Getting the Law Enforcement Certification* (2008), available at http://www.asistahelp.org/documents/resources/ExpCommPendleton0208_4D9DF9844BDF9_965B4AD489B27.pdf.
- Gail Pendleton and Sonia Parras, Webinar: Training Law Enforcement Agencies on U Visa Certification, Immigration Advocates Network, available at <http://www.screencast.com/t/Qsy7Nbs0CAdN>.

- Suzanne B. Seltzer, et al., *Immigration Relief for Crime Victims: The U Visa Manual* (2010), available at <http://www.nsvrc.org>.
- SOUTHERN POVERTY LAW CENTER, *SEXUAL VIOLENCE AGAINST FARMWORKERS: A GUIDEBOOK FOR CRIMINAL JUSTICE PROFESSIONALS, WHAT CAN I DO TO ENSURE A SUCCESSFUL INTERVIEW?* (2010), available at <http://www.splcenter.org/sexual-violence-against-farmworkers-a-guidebook-for-criminal-justice-professionals/what-can-i-do-to>.

Resources on Workplace-Based U Visas:

- Eunice Cho, *U Visa Protections for Victims of Workplace Crime*, 46 Clearinghouse Review 122 (2012).
- Gail Pendleton and Eunice Cho, *Effectively Framing a U Visa Labor-Based Application* (Webinar Recording) (Jun. 17, 2013), available at <http://www.nelp.org/page/-/Justice/2013/NELP-ASISTA-WorkplaceUvisas.pdf?nocdn=1>.
- Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008).
- Andrew Turner, et al., *Case of First Impression: Federal Judge in Civil Case May Certify U Visa Applications of Undocumented Immigrant Human Trafficking Victims*, 43 CLEARINGHOUSE REV. 510 (2009).
- University of North Carolina Law School, *Immigration and Human Rights Policy Clinic, Wage Theft and U Visa: Analyzing Federal and State Crimes Relevant for Undocumented Workers Seeking U Visa Remedies* (2011), available at <http://www.law.unc.edu/documents/clinicalprograms/wagetheftanduvisasguide.pdf>. Specific to North Carolina.

T Visa Resource Guides:

- COALITION TO ABOLISH SLAVERY AND TRAFFICKING, *A PRACTICAL GUIDE FOR ATTORNEYS ASSISTING SURVIVORS OF HUMAN TRAFFICKING* (2014). Contact Stephanie Richard at Stephanie@castla.org to obtain a copy.
- Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011) (describing elements of coercion in cases involving involuntary servitude, trafficking, and forced labor).
- IVY LEE, LYNETTE PARKER, AND CINDY LIU, *REPRESENTING SURVIVORS OF HUMAN TRAFFICKING* (2014), available at <http://www.ilrc.org/publications/representing-survivors-of-human-trafficking>.
- NATIONAL CONFERENCE OF STATE LEGISLATORS, *HUMAN TRAFFICKING LAWS IN THE STATES* (2011), available at <http://www.ncsl.org/research/civiland-criminal-justice/human-trafficking-laws-in-the-states-updated-nov.aspx>.
- NY ANTI-TRAFFICKING NETWORK LEGAL SUBCOMMITTEE, *IDENTIFICATION AND LEGAL ADVOCACY FOR TRAFFICKING SURVIVORS* (2009), available at [http://aaldef.org/docs/T-visa-manual-3rd-ed\(1208\).pdf](http://aaldef.org/docs/T-visa-manual-3rd-ed(1208).pdf).

The U Visa: A Potential Immigration Remedy for Immigrant Workers Facing Labor Abuse

What is a U visa?

A “U visa” is a temporary non-immigrant status available to non-citizen victims of certain crimes. Congress created the U visa as part of the Victims of Trafficking and Violence Prevention Act of 2000, in order to strengthen the ability of law enforcement agencies to investigate and prosecute certain crimes against immigrants and to offer protection to victims who fear cooperating with law enforcement due to their immigration status.

What Are the Benefits of a U visa?

U visa holders are eligible for the following benefits:

- Lawful status for up to 4 years;
- Eligibility to adjust status to lawful permanent resident after 3 years;
- Automatic grant of work authorization;
- Derivative visas for qualifying family members.

What are the eligibility requirements for a U visa?

In order to be eligible for a U visa, an immigrant worker must:

- 1) Have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity;
- 2) Possess information concerning the qualifying criminal activity;
- 3) Have been helpful, be helpful, or be likely to be helpful in the detection, investigation, or prosecution of the qualifying criminal activity;¹
- 4) Show that the qualifying criminal activity violated a local, state, or federal law, or have occurred in the United States.²

What constitutes a qualifying criminal activity?

U visa regulations identify 28 categories of qualifying criminal activity (QCAs) and any other substantially similar criminal activity as eligible for certification.³ Advocates should identify violations of local, state, or federal statutes that may correspond to the qualifying criminal activity when seeking certification. Law enforcement agencies may also certify U visa petitions for attempt, conspiracy, or solicitation of the qualifying criminal activity.

¹ 8 C.F.R. § 214.14(a)(5) defines “investigation or prosecution” of a qualifying crime or criminal activity as referring to “the *detection* or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.” *Id.* (emphasis added); see also 8 C.F.R. § 214.14(c)(2)(i).

² 8 C.F.R. § 214.14(b)(4).

³ 8 C.F.R. § 214.14(a)(9).

Qualifying crimes that constitute criminal activity include:

Abduction	Incest	Rape
Abusive sexual contact	Involuntary servitude	Sexual assault
Being held hostage	Kidnapping	Sexual exploitation
Blackmail	Manslaughter	Slave trade
Domestic violence	Murder	Stalking
Extortion	Obstruction of justice	Torture
False imprisonment	Peonage	Trafficking
Felonious assault	Perjury	Unlawful criminal restraint
Female genital mutilation	Prostitution	Witness tampering
Fraud in foreign labor contracting		

What are some examples of worker abuse that may constitute qualifying criminal activity?

Below is a list of qualifying criminal activity and corresponding fact patterns that have received certification. Please note that statutory requirements and elements of offenses may vary by jurisdiction.

Felonious Assault

- Abusive touching, battery, beating, or use of a weapon by employer resulting in substantial mental or physical harm.

Fraud in Foreign Labor Contracting

- False representations by employers to contracted workers on conditions of employment, housing, fees to labor brokers, food and transportation, ability to work at other places of employment, and other material aspects of the work arrangement.

Involuntary Servitude/Peonage/Labor Trafficking

- Threats of physical, psychological, financial or reputational restraint or harm by employer that compels an individual to continue work;
- Threats to contact local law enforcement or immigration authorities by employer in order to compel continued work;
- Confiscation or withholding of identity documents, passports, or other travel documents by employer;
- Supporting facts could include: wage theft; inadequate food, housing, medical care or clothing; lengthy hours; verbal or physical abuse; restricted contact with others; use of locks and fences to restrict workers' mobility (see also false imprisonment/unlawful criminal restraint).⁴

Obstruction of Justice/Perjury/Witness Tampering

- Evidence of visa fraud, false statements in seeking certification for labor, misuse of visas by employer; fraudulent wage and hour records;
- Instructions to lie to law enforcement investigations by employer;
- Intimidation of workers who seek to comply with law enforcement investigations or affirmative complaints against an employer, including threats to contact local law enforcement or immigration authorities.⁵

⁴ Involuntary servitude includes a condition of servitude induced by any scheme "intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; . . . or the abuse or threatened abuse of the legal process." 22 U.S.C. § 7102(5). See also 18 U.S.C. §§ 1589(c)(1)-(2) (definition of serious harm and abuse of the law or legal process).

Abusive Sexual Contact/Rape/Sexual Assault/Sexual exploitation

- Unwelcome sexual contact, rape, assault, or exploitation by co-workers, employers, or clients.

What government agencies have the authority to certify a U Visa petition?

Federal, state, or local law enforcement agencies, prosecutors, and judges may certify a U visa petition. U visa regulations specify that agencies such as the Equal Employment Opportunity Commission and the Department of Labor, which have criminal investigative jurisdiction in their respective areas of expertise, are valid certifying agencies.⁶ Federal judges have also certified U visa petitions in the context of labor abuse.⁷

Several labor enforcement agencies have released certification protocol for U visas. These agencies include the U.S. Department of Labor (US DOL), the Equal Employment Opportunity Commission (EEOC), the National Labor Relations Board (NLRB), as well as the New York Department of Labor (NY DOL), and the California Department of Fair Housing and Employment (CA DFEH). Other agencies, such as the California Division of Labor Standards Enforcement (CA DLSE), have indicated plans to issue certification protocol. In addition, local, state, and federal law enforcement agencies, prosecutors, and judges have certified U visa petitions for workplace-related crimes. Copies of agency protocols are available at <http://www.just-pay.org>.

Certifying Labor Agency	QCAs Certified	Other Requirements	Requests for Certification
U.S. Department of Labor	Involuntary servitude, peonage, trafficking, obstruction of justice, witness tampering	-Authority to certify is limited to Wage and Hour Division (WHD) -Considers whether QCA arises in context of employment and related allegation of violation of law enforced by DOL WHD -In-person interview of applicant required	-Request for certification, detailed description of facts and relevant case law/statutes should be submitted to one of five Regional U Visa Coordinators
U.S. Equal Employment Opportunity Commission	All QCAs specified by statute	-QCA must be related to unlawful employment discrimination investigated by EEOC; -Interview of applicant required	-Request for certification, including I-918B, detailed description of facts and relevant case law/statutes should be submitted to EEOC Regional Attorney

⁵ 8 C.F.R. § 214.14(a)(14)(ii) specifies that a petitioner may be considered a victim of the crimes of witness tampering, obstruction of justice, or perjury if s/he has been directly and proximately harmed by the perpetrator, and if there are reasonable grounds to conclude that the perpetrator committed the crime as a means to avoid or frustrate investigation or prosecution for other criminal activity, or to further abuse, undue control, or exploitation through manipulation of the legal system.

⁶ 8 C.F.R. § 214.14(a)(2).

⁷ See, e.g. *Garcia v. Audubon Cmty. Mgmt.*, No. 08-1291, 2008 WL 1774584 (E.D. La. Apr. 15, 2008).

National Labor Relations Board	All QCAs specified by statute	-QCA must be related to an unfair labor practice under investigation by NLRB	-NLRB regional offices should contact Deputy Assistant General Counsel Aaron Karsh, aaron.karsh@nlrb.org, if approached with request for certification.
California Department of Fair Employment and Housing	Sexual assault, sexual exploitation, abusive sexual contact, rape, trafficking, domestic violence, murder, manslaughter, abduction, extortion, torture, incest, prostitution	-DFEH must conduct an ongoing investigation into a FEHA or Ralph Act claim	-Not specified in protocol.
California Division of Labor Standards Enforcement	All QCAs specified by statute	-QCA must be detected or investigated in the course of DLSE's enforcement efforts	-Request for certification, including draft I-918B, DLSE case status and case number, and description of QCA and helpfulness of victim.
Illinois Department of Labor	All QCAs specified by statute	-IDOL must have jurisdiction to investigate charge or is conducting an ongoing investigation	-Oral or written request to IDOL employee; draft I-918B, and cover letter describing request.
New York Department of Labor	All QCAs specified by statute	-NY DOL must have jurisdiction to investigate case (allegation of NY state labor law violation); -Petitioner must be a victim of a QCA	-Request for certification, including I-918B, NY DOL claim number and names of staff involved in claim, and other relevant information should be submitted to NY Labor Commissioner.

How do you petition for a U visa?

In order to successfully petition for a U visa, the applicant must first obtain certification from a law enforcement agency stating that he or she is a victim and has been, is currently, or likely to be helpful in the detection, investigation, or prosecution of a qualifying criminal activity. The certification form, Form I-918 Supplement B, must be signed by a supervisory agent from the certifying agency.

After obtaining certification, the applicant must then submit a complete U visa petition to U.S. Customs and Immigration Services (USCIS), which has authority to grant the U visa. The petition should include:

- Form I-918 “Petition for U Nonimmigrant Status”
- Form I-918B “U Nonimmigrant Status Certification”
- Filing Fee (\$585) and biometrics fee (\$80) or fee waiver
- Supplemental evidence: personal statement, other evidence of abuse/injury
- Copy of identity page of applicant’s passport (or request for waiver)
- Form I-192 “Application for Advance Permission to Enter as Non-Immigrant”
- Form G-28 “Notice of Entry as Appearance of Attorney or Accredited Representative”
- Form I-918A “Petition for Qualifying Family Members of U-I Recipient”

How can U visas affect immigrant worker organizing?

The successful grant of a U visa may support organizing by providing relief to immigrant leaders willing to call attention to workplace abuse, and by strengthening investigation and enforcement of labor laws. Employment authorization gained through a U visa may also provide plaintiffs with eligibility for damages in private lawsuits. However, the highly individualized nature of U visa relief may pose challenges in broader organizing contexts where all workers may not have encountered similar treatment by an abusive employer.

Legislative proposals, including the Protect Our Workers from Exploitation and Retaliation Act (POWER Act) (S 3207), introduced by Senator Robert Menendez in 2010, could provide key labor protections for immigrants who face retaliation by employers. Specifically, the POWER Act expands U visa protections to workers involved in civil workplace claims and who fear or have received threats of force, physical restraint, or harm in retaliation by employers.

Additional resources on U visas:

- To join a national **listserv dedicated to labor-related U visa advocacy**, nelp-laborexploitation@yahoogroups.com, please contact Eunice Cho at echo@nelp.org.
- **Relevant statutory and regulatory provisions:**
 - Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A § 1513(a), 114 Stat. 1464, 1533 (2000) (detailing Congress’s findings and purpose for U visa statute);
 - New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant status; Interim Rule, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, and 299).
 - Alien Victims of Certain Qualifying Criminal Activity, 8 C.F.R. § 214.14.
 - Agency certification protocol, including the U.S. DOL, EEOC, NLRB, CA DFEH, and NY DOL are located at the National Wage and Hour Clearinghouse, located at: <http://www.just-pay.org>.
- **U visa practice guides:**
 - Sameera Hafitz, et al., U Visa Certification Tool Kit for Judges and Magistrates (2010), available at: <http://iwp.legalmomentum.org/immigration/u-visa/tools>.
 - Sally Kinoshita, Susan Bowyer, and Catherine Ward-Seitz, THE U VISA: OBTAINING STATUS FOR IMMIGRANT VICTIMS OF CRIME (2010). To order, visit: www.ilrc.org.
 - Susana Martinez, et al., *Help for Undocumented Victims of Crime*, 44 CLEARINGHOUSE REV. 129 (2010).
 - Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008).
 - Suzanne B. Seltzer, et al., IMMIGRATION RELIEF FOR CRIME VICTIMS: THE U VISA MANUAL (2010), available at: <http://www.nsvrc.org>.
 - Andrew Turner, et al., *Case of First Impression: Federal Judge in Civil Case May Certify U Visa Applications of Undocumented Immigrant Human Trafficking Victims*, 43 CLEARINGHOUSE REV. 510 (2009).

For more information on U visas for victims of labor abuse, please contact:

Eunice Cho, *Staff Attorney* | echo@nelp.org | 510-663-5707

Rebecca Smith, *Deputy Director* | rsmith@nelp.org | 206-324-4000

The U Visa: How Can It Protect Immigrant Workers?

All immigrant workers—including documented and undocumented workers—are protected by employment laws in the United States. Under these laws, all workers should be able to work in safe working conditions, receive minimum wage and overtime pay, and be free from harassment and abuse by employers. Many workers are afraid to report crimes to authorities because they fear detention or deportation due to their status. However, Congress has created the U visa to help undocumented victims of crime to come forward.

To qualify for a U visa, you must:

- 1) Have suffered substantial physical or mental abuse as a result of having been a victim of a crime;
- 2) Have credible and reliable information about the crime;
- 3) Have been helpful, be helpful, or be likely to be helpful in the detection, investigation, or prosecution of the crime;
- 4) Show that the crime occurred in the United States.

What are the benefits of a U visa?

- Temporary legal status and work permit for up to 4 years;
- Eligibility to adjust status to lawful permanent resident after 3 years;
- Temporary residency and work permit for some family members:
 - Spouse, children, unmarried siblings under 18, and parents if you are younger than 21;
 - Spouse and unmarried children under 21 if you are older than 21;
 - Family members do not have to be in the U.S. when you apply for a U visa.

What kinds of crimes qualify?

Several crimes, including those that take place in the workplace, qualify for a U visa. These include:

- Abusive sexual contact, rape, sexual assault, or sexual exploitation
- Felonious assault: abusive touching, beating, or use of a weapon that causes serious harm. This may include touching of a sexual nature.
- Extortion: an employer may obtain something of value—including money, by using threats or force
- Involuntary servitude or peonage: An employer makes threats, including threats to contact immigration authorities, to force you to continue to work.
- Obstruction of justice, perjury, or witness tampering: An employer may instruct you to lie to law enforcement investigations, intimidate workers from filing complaints, or force you to destroy or hide evidence of a crime.

The U visa application process:

To apply for a U visa,

- 1) You should meet with an attorney for an initial screening
- 2) Your attorney will contact a certifying agency (for example, the Equal Employment Opportunity Commission (EEOC), Department of Labor (DOL)) or a judge to provide a document that proves a crime took place and that you are helping or are likely to help in the investigation or prosecution of a crime.
- 3) Your attorney will submit your petition for a U visa based on the information filed. There is no fee for this.
- 4) If you or a family member is not admissible (for example, if you entered the country without authorization or have a criminal record), you will have to file a waiver. You will have to pay a fee of \$585, but it can be waived if you earn very little.

La Visa U: ¿Cómo protege a los trabajadores inmigrantes?

Todos los trabajadores inmigrantes, inclusive los trabajadores documentados e indocumentados — están protegidos por las leyes de empleo en los Estados Unidos. Bajo estas leyes, todos los trabajadores deben poder trabajar en condiciones seguras de trabajo, recibir el salario mínimo y pago de tiempo extra y estar libre de acoso y abuso por parte de los empleadores. Muchos trabajadores tienen miedo a denunciar los delitos, incluyendo el abuso y el acoso, que pueden pasar en el trabajo a las autoridades, porque temen detención o deportación debido a su condición. Sin embargo, el Congreso creó la visa U para ayudar a los indocumentados y las indocumentadas víctimas de delitos.

Para calificar para una visa U, usted debe:

- 1) Haber sufrido abuso físico y mental como consecuencia de haber sido víctima de un delito;
- 2) Tener información creíble y confiable acerca del delito;
- 3) Haber sido útil, ser útil o pudiera ser útil en la detección, la investigación o el enjuiciamiento del delito;
- 4) Mostrar que el crimen paso en los Estados Unidos.

¿Cuáles son los beneficios de la visa U?

- Estatus legal temporal y permiso de trabajo de hasta 4 años;
- Elegibilidad para ajustar estatus a residente permanente legal después de 3 años;
- Autorización de trabajo y residencia temporal de algunos miembros de la familia:
 - Cónyuge, hijos, hermanos solteros menores de 18 años y los padres si es menor de 21;
 - Cónyuge e hijos solteros menores de 21 si es mayor de 21;
 - Miembros de la familia no tienen que estar en los Estados Unidos al aplicar para una visa U.

¿Qué tipos de crímenes califican?

Varios crímenes, incluyendo aquellas que se realizan en el lugar de trabajo, califican para una visa U. Estos incluyen:

- Servidumbre involuntaria o peonaje: un empleador hace amenazas, incluida la amenaza de ponerse en contacto con las autoridades de inmigración, para forzarlo a seguir trabajando.
- Asalto criminal: tocar abusivo, paliza o uso de un arma que provoca graves daños. Esto puede incluir contacto de naturaleza sexual.
- Contacto sexual abusivo, violación, agresión sexual o explotación sexual.
- Extorción: un empleador puede obtener algo de valor — incluyendo dinero, mediante el uso de amenazas o la fuerza
- Obstrucción de la justicia, perjurio o testigos: un empleador lo dirige a mentir en investigaciones policiales, intimida a los trabajadores de presentar quejas o lo forza a destruir u ocultar la evidencia de un crimen.

El proceso de solicitud de la visa U:

Para solicitar una visa U,

- 1) Usted debe reunirse con un abogado para una evaluación inicial;
- 2) Su abogado se pone en contacto con una agencia de certificación (por ejemplo, la Comisión de Oportunidad Igual de Empleo (EEOC), el Departamento de Labor (DOL)) o un juez, para que estos proporcionen un documento que demuestra que un delito tuvo lugar y que usted está ayudando o es probable que ayude en la investigación o el enjuiciamiento de un delito;
- 3) Su abogado presenta su petición para la visa U basándose en la información presentada. No hay ninguna cuota para ello;
- 4) Si usted o un miembro de la familia no es admisible (por ejemplo, si entraron al país sin autorización o si tiene antecedentes penales), tendrá que presentar una renuncia. Usted tendrá que pagar una cuota de \$585, pero si usted gana muy poco, lo pueden dejar hacer sin costo.

**U VISA INTAKE FORM (SCREENING FOR WORKPLACE CRIMES)
BASIC INFORMATION/*Información Básica***

Last Name/Apellidos completos: _____

First Name/Nombre: _____

Other names used (including maiden name)/Otro nombres que Usted ha usado (incluso nombre de soltero/a): _____

Address/Domicilio: _____

City/Ciudad: _____ State/Estado: _____ Zip/Código postal: _____

Telephone/Telefono:
(home/casa) _____ (cell) _____

Email: _____

Emergency contact/contacto de emergencia: (name/nombre) _____

Tel: _____

Date of Birth/Fecha de nacimiento: _____

City and country of birth/ciudad y país de nacimiento: _____

Country of citizenship/país de ciudadanía: _____

Social Security number (if you have)/ número de seguro social (si tiene): _____

Alien registration number (if you have)/ número de inmigración (si tiene): _____

Primary language/Primer idioma: _____

English Proficiency/Habilidad con Inglés:

Spanish only/Solamente español English/Spanish English only/Solamente Inglés

Current employer/empleador presente: _____

Monthly income/ingresos mensual: \$ _____

Number of adults in the household/ número de adultos en el hogar: _____

Number of children in household/ número de niños en el hogar: _____

Are you receiving any public benefits? ¿Está recibiendo beneficios públicos?

CLIENT'S NAME: _____

INTERVIEWER'S NAME: _____ DATE: _____

FAMILY INFORMATION

How old are you? _____ Do you have any children? Yes No

Are you married? Single / Married / Separated / Divorced / Widowed

CHILDREN

If you have children, please provide us with the following information:

Child's name	Child's date of birth	Child's country of birth	Child's current location	Child's marital status	Child's Immigration status
					undocumented conditional resident permanent resident U.S. Citizen
					undocumented conditional resident permanent resident U.S. Citizen
					undocumented conditional resident permanent resident U.S. Citizen
					undocumented conditional resident permanent resident U.S. Citizen

Would you like to obtain immigration status for any children under the age of 21 who are not already U.S. citizens? Yes No

PARENTS

If you are under the age of 21, would you like to obtain immigration status for your parents? Yes No

If yes, please provide the following information:

Parent's name	Parent's date of birth	Parent's country of birth	Parent's current location	Parent's marital status	Parent's Immigration status
					undocumented conditional resident permanent resident U.S. Citizen
					undocumented conditional resident permanent resident U.S. Citizen

SIBLINGS

If you are under the age of 21, would you like to obtain immigration status for your siblings who are under 18? Yes No

If yes, please provide us with the following information:

Sibling's name	Sibling's date of birth	Sibling's country of birth	Sibling's current location	Sibling's marital status	Sibling's Immigration status
					undocumented conditional resident permanent resident U.S. Citizen
					undocumented conditional resident permanent resident U.S. Citizen
					undocumented conditional resident permanent resident U.S. Citizen

SPOUSE

Are you married? Yes No If yes, what was the date of your marriage? _____

Is the person who committed a crime against you your spouse? Yes No

If no, do you want to obtain immigration status for your spouse? Yes No

Is your spouse also applying for a U visa? Yes No

If no, what is your spouse's name? _____

Spouse's date of birth? _____ Spouse's country of birth? _____

Spouse's current location? _____

Spouse's current immigration status: _____

A U visa application also allows you to file a petition and obtain immigration status for the person who is your spouse at the time of the filing of the petition. Would you plan to get married and obtain status on behalf of your spouse? Yes No

IMMIGRATION HISTORY

When did you first enter the United States? _____

How did you enter the United States? _____

Where did you first enter the United States? _____

If you entered with a visa, where was it issued? _____ Expiration date? _____

(please make copy of visa and I-94 if available and add to file)

Do you have a passport? Yes No (If yes, please copy and add to file)

Name on passport: _____

If yes, what is the issuing country? _____ Passport No. _____

Expiration date: _____

Have you ever had any immigration petitions filed on your behalf? Yes No

If so, which ones? When?

What immigration documents do you have? (Please list, copy, and include in file):

Have you ever had a work authorization document (permiso de trabajo)? Yes No

Have you ever worked in the U.S. without permission? Yes No

Have you ever used false documents in order to work in the U.S.? Yes No

Have you ever pretended to be a U.S. citizen? Yes No

Did you use false documents to enter the U.S.? Yes No

If so, what kind of false documents did you use?

- False social security card
- False birth certificate
- False residency card
- Other: _____

Have you left the U.S. since your first entry? Yes No

If yes, please list the following information:

Departure date/country	Arrival to U.S./date	Purpose for trip

Have you ever had any encounters with immigration authorities? Yes No

If yes, please explain:

Have you ever been (circle):

- Fingerprinted
- Picture taken by immigration
- Asked to sign papers by immigration
- Seen an immigration judge or criminal judge
- Been arrested or detained at the border or airport

If yes, please explain:

Have you ever appeared before an immigration judge? Yes No

If yes, when? _____ Where? _____

What happened at the end of proceedings?

Have you ever left the U.S. following a deportation order? Yes No

If yes, when? _____

Do you have any U.S. citizen or legal permanent resident relatives? Yes No
If so, what is your relationship to them? What is their status?

Have you ever overstayed a visa/I-94? Yes No

Have you ever been denied a visa or denied entry into the U.S.? Yes No

Have you ever lied or stated in writing that you are a U.S. citizen? Yes No

Have you ever knowingly helped anyone to enter the U.S. illegally? Yes No

Have you ever voted in a U.S. election? Yes No

Have you or ever received any public benefits? Yes No

If so, what kind?

- General assistance/asistencia general
- Food stamps/estampillas de comida
- Social security/seguro social
- SSDI
- Disability/Incapacidad

CRIMINAL HISTORY

Have you ever been arrested? Yes No

If yes, what were you charged with? _____

Where? _____

When? _____

Were you convicted? Yes No

If so, what was the punishment? _____

(Please copy any relevant documents)

FEE WAIVER INFORMATION

Are you currently working? Yes No

If yes, how much do you earn per month? \$ _____

If not, how do you support yourself? _____

Are you or your children receiving any public assistance? Yes No

If so, in what amount? _____

Are you receiving any child support, unemployment, social security, or other income? Yes No

If so, please describe: _____

INFORMATION ABOUT CRIMINAL ACTIVITY IN WORKPLACE

When did you start working at your job? _____

Are you still working there? Yes No If no, what was your last day? _____

What kind of work did you do? _____

What was your job title? _____

Who were your supervisors? _____

Where did you work/address/unit? _____

How many days did you normally work per week? _____

How many hours did you work per day? _____

Were you free to decide to work overtime? Did you get paid overtime?

How much were you paid? _____

Were you paid in cash, check, or other? _____

Were you paid for all of your work? If not, what did you do? What happened? _____

Did you get pay stubs? Were they correct? _____

If they were not correct, did you ever ask about it? If so, what happened? _____

Were you ever forced to buy papers or change papers to work? _____

Were you able to take vacation time? _____

Do you have copies of your pay stubs, or records of your hours worked? _____

LAW ENFORCEMENT COOPERATION/OBSTRUCTION OF JUSTICE, WITNESS TAMPERING, PERJURY

Have you ever filed a complaint with the Department of Labor, Equal Employment Opportunity Commission, National Labor Relations Board, or state department of labor? Have you ever sued your employer?

If so, why and when? If not, would you be willing to do so?

Has your employer ever told you to lie about conditions at work to government officials?

Has your employer filed false documents with the government (i.e. false records, H2A applications, etc.)?

Has your employer ever threatened you in response to complaints about work conditions?

QUALIFYING CRIMINAL ACTIVITY: SCREENING FOR EXTORTION, ASSAULT, INVOLUNTARY SERVITUDE, TRAFFICKING, PEONAGE, UNLAWFUL CRIMINAL RESTRAINT

When you worked at your job, were you ever treated badly by a supervisor or manager? Yes No
If so, what was his/her name? How did your employer treat you badly?

Did any of your managers/employers ever make degrading or discriminatory comments to you? Did he or she ever say anything cruel, humiliating, or embarrassing? If so, what kind of comments were made?

Did a manager or employer ever threaten you in any way?

Did he or she ever threaten violence?

Did he or she ever threaten to report you to immigration, get you arrested, fire you, hurt you economically, or cause you legal problems?

Did he or she ever threaten to destroy your reputation?

Did a manager or employer ever destroy or threaten to destroy your documents, or anything of yours?

Did a manager or employer ever make any threats to harm a family member or anyone else you know?

Did you ever see a manager or employer ever make degrading comments, threaten, hit, punch, injure, or mistreat a co-worker in any way? If so, did it make you scared?

Did a manager or employer ever hit, punch, or injure you in any way? If so, when and where? What happened?

If so, why did he or she hit you? Is one of the things s/he wanted to do is to have him pay you money?

Were you ever asked to make payments to your manager/employer? Why? When? For how much?

Have you ever owed money to your employer? If so, why? How much? Did you pay this off? What happened if you did not pay your employer?

Did your employer ever bar you from taking a break?

Did your employer ever prevent you from using the bathroom?

Did you ever feel that you could not leave your work because of your employer?

Did your employer ever limit you from leaving work, or limiting access to transportation?

Did your employer ever make you afraid to take time off for vacation or if you or a member of your family was sick?

Did you ever try to leave your position or change positions? If so, what happened?

If you were physically injured, did you ever go to the doctor or hospital? If so, do you have records? Did you take pictures or tell anyone else about what happened?

Did you live on the premises of your work? Did your employer provide you housing or food? If so, what were the conditions like? If you lived on the premises, did your employer ever threaten to evict you?

Did you ever suffer from lack of food, housing, medical care, clothing, or other basic needs because of your employer's mistreatment?

Sexual misconduct

Did your employer ever make comments about your clothing, behavior, or your body? Did he or she ever make sexual or sex-based jokes? If yes, what happened? Where and when?

Did your employer ever look at you in a sexual manner or make derogatory gestures or facial expressions of a sexual nature?

Did a manager or employer ever ask for sexual favors or ask you out repeatedly? Did he or she ever ask you to have sex with him or her, spread rumors, or make sexual comments? If so, what happened? Where did it happen, and when?

Did a manager or employer ever touch you inappropriately in a sexual way? Did he or she ever touch your clothes, kiss, hug, or pat you in a way that made you feel uncomfortable? If so, what happened? Where did it happen, and when?

Did a manager or employer ever force you to have unwanted sex? If so, what happened? Where, and when?

Did you ever report any of this mistreatment or complain to your supervisors? If so, what happened?

Did you ever feel scared, threatened, or harmed by an employer or manager outside of work?

Were you afraid of your employer or manager? Why? Did he or she ever say anything to you that made you scared?

Did you ever take pictures or documentation of your injury or mistreatment? (Police records, hospital records, photos?)

When you were having a difficult time at your job, did you ever talk to anyone about your difficulty, and how it was making you feel? If so, who? Do you think they would be willing to support your application?

Emotional impact

<p>Did things ever get so bad that you ever:</p>	<p>0= nunca / never 1= una o dos veces / 1 or 2 times 2= varias veces / sometimes 3=muchas veces / many times Please describe:</p>
Felt like crying	
Felt like quitting the job but couldn't	
Complained to other people about the problems	
Talked to a counselor, pastor, or other professional	
Used alcohol or drugs	
Felt angry	
Felt helpless	
Felt sick	
Couldn't sleep well or slept too much	
Sought help from someone	
I was bothered by things that usually did not bother me	
I did not want to eat, had a poor appetite	
I could not feel better even with the help of my family or friends	
I had problems thinking about what I was doing	
I was depressed	
I felt that everything I did was a great effort	
Thought that my life is a failure	
I was fearful	

I talked less than usual	
I felt lonely	
I felt that people did not like me/got along with me	
Felt pain in my body—head, neck, shoulders, etc. that I did not normally feel	
Anything else?	

Subscribe to E-mail Updates

 All DOL WHD [Advanced Search](#)

SUBSCRIBE

SEARCH

[A to Z](#) | [Site Map](#) | [FAQs](#) | [Forms](#) | [About DOL](#) | [Contact Us](#) | [Español](#)**Wage and Hour Division**[DOL Home](#) > [WHD](#) > [FIELD ASSISTANCE BULLETIN](#) > 2011-1

Wage and Hour Division (WHD)

U.S. Department of LaborWage & Hour Division
Washington D.C. 20210

April 28, 2011

FIELD ASSISTANCE BULLETIN NO. 2011-1

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
DISTRICT DIRECTORS

FROM: NANCY J. LEPPINK
Acting Administrator

SUBJECT: CERTIFICATION OF SUPPLEMENT B FORMS OF U NONIMMIGRANT VISA
APPLICATIONS

This memorandum discusses the guidelines and procedures the Wage and Hour Division (WHD) will follow to determine when and whether to complete and certify Supplement B of a I-918 petition for U Visa Nonimmigrant Visa Status. The Secretary of Labor has the authority to complete and certify Supplement B forms for U Nonimmigrant Visas (U Visas) under Section 1513(b) of the Victims of Trafficking and Violence Protection Act of 2000, as amended, 8 U.S.C. § 1101(a)(15)(U) and related Department of Homeland Security regulations, 8 C.F.R. § 214.14. The Secretary's Order 05-2010 delegated this authority to the WHD Administrator. This authority is being further delegated to the WHD Regional Administrators. WHD Regional and District Office representatives will work closely with Solicitor of Labor Regional Office (RSOL) attorneys to gather, document and review the facts and information to determine whether to complete and certify Supplement B form of a I-918 U-Visa petition.

WHD will regularly evaluate these protocols for effectiveness and efficiency and may revise as it deems necessary.

I. Background**A. Statute**

Under Section 1513(b) of the Victims of Trafficking and Violence Protection Act of 2000, as amended, 8 U.S.C. 1101(a)(15)(U), victims of qualifying criminal activities (QCAs) who have suffered substantial physical or mental abuse may apply for a U Visa if they are willing to assist law enforcement or other officials in the investigation or prosecution of those crimes. The U.S. Citizenship and Immigration Service (USCIS) has sole jurisdiction over all petitions for U nonimmigrant status. *See* 8 C.F.R. § 214.14(c).¹ Individuals who receive U Visas from USCIS may be authorized to stay in the United States for up to 4 years. *See* 8 C.F.R. § 214.14(g). USCIS will issue an Employment Authorization Document (EAD) to individuals who are granted a U Visa. *See* 8 C.F.R. § 214.14(c)(7) and (f)(7).

B. Form I-918

Nonimmigrants seeking U Visas must submit a completed Form I-918, Petition for U Nonimmigrant Status to USCIS for consideration. Supplement B of Form I-918 is to be completed by an agency such as the Department of Labor (DOL) that is authorized to complete and certify Supplement B forms as a result of its "responsibility for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity." *See* 8 C.F.R. § 214.14(c)(2)(i); Instructions for I-918, Supplement B at 2. In completing Supplement B, the agency must certify that the individual submitting the Form I-918 is a victim of certain qualifying criminal activity and is, has been, or is likely to be helpful in the investigation or prosecution of that activity. *See* 8 C.F.R. § 214.14(c)(2).² An agency's decision to complete and certify a Supplement B form is entirely discretionary. *See* Form I-918, Supplement B at 1. The applicant is responsible for submitting the entire Form I-918, including Supplement B, to USCIS for review and approval. *See* 8 C.F.R. § 214.14(c). The decision whether to approve or deny the Form I-918 Petition rests solely with USCIS.

C. Applicable Regulations

Department of Homeland Security (DHS) regulations specify that Federal or local law enforcement agencies, or other authorities that have "responsibility for the investigation or prosecution of a qualifying crime or criminal activity" may complete and certify Supplement B of Form I-918. *See* 8 C.F.R. § 214.14(a)(2). The regulations explicitly state that this includes the DOL, as well as other agencies such as the Equal Employment Opportunity Commission (EEOC). *Id.* Further, the regulations define "investigation or prosecution" to include "the detection or investigation of a qualifying crime or criminal activity." *See* 8 C.F.R. § 214.14(a)(5) (emphasis added). WHD will consider exercising its authority to certify Supplement B forms in cases in which it has detected a QCA and each of the following conditions are met: (1) the detected QCA is involuntary servitude, peonage, trafficking, obstruction of justice or witness tampering; (2) the alleged QCA arises in the context of a work environment or an employment relationship; and (3) there is a related, credible allegation of a violation of a law that WHD enforces. The procedures WHD and SOL will follow to determine whether to complete and certify a Supplement B form are outlined below.

II. WHD's Procedures

Each WHD Regional Administrator will designate a representative to serve as the coordinator for U Visa petitions for that region. Likewise, each Regional Solicitor will designate one attorney to coordinate U Visa petition issues for that SOL region. This will enable DOL to develop the necessary expertise to effectively and efficiently handle requests to certify Supplement B forms for U Visa applications. Although WHD intends to hire individuals to serve as regional U Visa coordinators, on an interim basis the regional Director of Enforcement (DOE) will serve in this capacity, unless a Regional Administrator determines otherwise. The regional WHD U Visa coordinator will work closely with the regional RSOL attorney designated to handle U Visa issues.

Generally speaking, the regional WHD U Visa coordinator will be responsible for overseeing incoming Supplement B form certification requests, providing guidance and assistance with related WHD investigations, and coordinating efforts with appropriate law enforcement agencies, social service organizations or outside entities representing U Visa applicants, as well as other DOL agencies and the designated RSOL attorney. The designated RSOL attorney will conduct any necessary legal research and analysis and provide legal guidance regarding the QCA. The RSOL attorney will prepare the Supplement B form I-918 and required supporting documentation, as described below.

The WHD U Visa coordinator will make a recommendation to the WHD Regional Administrator as to whether or not to certify Supplement B of Form I-918. In most cases, the WHD Regional Administrator will be the certifying official, pursuant to a delegation of authority from the WHD Acting Administrator.

The key steps in WHD's process for completing and certifying Supplement B forms are outlined below.

A. Investigation of a violation of a law that WHD enforces and detection of a related QCA

As mentioned above, WHD will consider requests for certification of Supplement B forms in cases in which the alleged QCA arises in the context of a work environment or an employment relationship and there is a related, credible allegation of a violation of a law that WHD enforces. There are a number of QCAs identified in the DHS regulations and the Form I-918. Of these, WHD has determined that it will consider requests to certify Supplement B forms predicated on the following QCAs: involuntary servitude, peonage, trafficking, obstruction of justice, and witness tampering.³ WHD believes that these QCAs are most likely to be found in connection with its workplace investigations and that it can effectively train its staff in the detection of these QCAs. WHD will document basic information and evidence concerning these QCAs when they are detected during a WHD investigation, but it does not have jurisdiction to investigate or prosecute these crimes. Thus, DOL's authority to complete and certify Supplement B forms will be based on its role as a law enforcement agency that has "detected" the crimes.

Because DOL does not have the authority to investigate and prosecute QCAs, WHD will refer the underlying QCA to appropriate law enforcement agencies in accordance with its normal protocols for referral of criminal laws not enforced by WHD. WHD's role would be to provide, where appropriate, detected information to the appropriate law enforcement agency charged with investigating and prosecuting the crime, and to pursue in coordination with that law enforcement agency the wage and hour or other workplace claims on behalf of the workers. Whether such a referral is made before or after a decision to complete and certify a Supplement B form will depend on the circumstances of a case. In all cases, the safety of the petitioner and his or her family should be a primary consideration, as well as the safety of other individuals who have been harmed or may be at risk of harm from the detected criminal activity. The regional U Visa coordinator will provide guidance as necessary to the local District Office (DO) as to how to manage the referral and will, as appropriate, work with social service organizations or representatives for the petitioner.

WHD anticipates that Supplement B form certification requests will arise in two primary contexts: (1) during a WHD workplace investigation, or after the investigation is completed, an individual connected with the investigation requests that WHD complete and certify a Supplement B form based on a detected or alleged QCA; (2) a U Visa petitioner contacts WHD with an allegation of both a violation of a law that WHD enforces and a related QCA and requests that WHD complete and certify a Supplement B form. In all cases, the regional U Visa coordinator will be the point of contact for the individual seeking Supplement B form certification.

(1) Requests for certification connected to current or completed WHD investigations If a U Visa petitioner contacts WHD to request certification connected to a current or completed WHD investigation, the U Visa coordinator will determine whether one of the five QCAs for which WHD will consider requests for certification was detected during the course of the WHD investigation. If the investigation is ongoing, the DO will proceed with normal investigation protocols, taking care to document separately any detected information related to the QCA, as discussed further below.

In any investigation, regardless whether there has been a U Visa request, upon detection of information related to a QCA the DO will alert the regional WHD U Visa coordinator. Although Wage and Hour Investigators (WHIs) will only receive training on detecting the five QCAs listed above (involuntary servitude, peonage, trafficking, obstruction of justice, and witness tampering), the DO will notify the U Visa coordinator of any QCA it has detected. If, during the course of a WHD investigation, the WHI has detected a QCA other than the five enumerated above, the U Visa coordinator and the Regional Administrator will determine how best to proceed based on the facts and circumstances of the case. In all cases, the WHD Regional U Visa coordinator will maintain information about the detected QCA for use in the event WHD receives a certification request connected with the wage and hour investigation. In any case where WHD has detected a QCA during the course of its investigation, when appropriate and feasible WHD will notify the victim of, or otherwise utilize the services of, community resources that may be able to assist the victim.

(2) Requests for certification concurrent with a WHD complaint If a U Visa petitioner contacts WHD claiming a workplace violation of a law that WHD enforces and a related QCA, along with requesting certification of a Supplement B form, the DO will proceed with normal intake of the underlying wage and hour complaint and forward the information related to the QCA and Supplement B form request to the regional WHD U Visa coordinator. The DO should assign the WH complaint for investigation consistent with its normal protocols. The petitioner should provide the U Visa coordinator with information that supports his or her allegation of a QCA and related violations of a law that WHD enforces and make him or herself available to be interviewed by a representative from WHD.

Regardless of how a request to certify a Supplement B form originates, the regional WHD U Visa coordinator will review the information detected during the WHD investigation, if any, and any information provided by the petitioner related to the QCA and in support of the Supplement B certification request, and make a preliminary determination as to whether WHD would potentially certify the Supplement B form. The primary factors the WHD U Visa coordinator should consider include whether:

- The QCA arises in the context of an employment relationship or work environment and there is a related, credible allegation of a violation of a law that WHD enforces;

- Petitioner alleges a QCA of either involuntary servitude, peonage, trafficking, obstruction of justice, or witness tampering;
- The Petitioner has demonstrated that he or she has been, is being, or is likely to be cooperative with law enforcement officials in any investigation or prosecution of the QCA;
- Another law enforcement agency is already engaged in the investigation or prosecution of the QCA or would be in a better position to certify the Supplement B form based on the facts presented; and
- Certification of the Supplement B form would assist WHD’s investigation of a violation of a law that it enforces.

The first three elements listed above are required in order to certify the Supplement B form and the remainder will be weighed in prioritizing requests. Although WHD’s detection of a QCA should be considered in the petitioner’s favor, in cases where there is an ongoing or completed WHD investigation the fact that WHD did not detect a QCA should not be the basis for denying a certification request.

If the regional WHD U Visa coordinator makes a preliminary determination that this is a case where WHD would potentially complete and certify a Supplement B form, the regional WHD U Visa coordinator should alert the DO that received the wage and hour complaint and also provide the designated RSOL attorney with basic information about the case. The RSOL attorney should advise the WHD U Visa coordinator regarding the necessary legal elements of the particular QCA and provide advice to WHD U Visa coordinator about the kind of information and evidence that will be needed to inform the certification decision. If necessary, as will be the case when there has not yet been a WHD investigation, the regional U Visa coordinator will interview the U Visa petitioner to gather and confirm any information needed for the Supplement B form certification decision.

If the WHD U Visa coordinator makes the preliminary determination that it is unlikely that WHD would certify the Supplement B form based on the above factors, the U Visa coordinator should inform the petitioner of that assessment in writing as soon as possible, along with information as to which other law enforcement agencies may be able to certify the petition so that the petitioner can explore other avenues for certification.

B. Investigator Action

For requests associated with ongoing WHD investigations, the regional WHD U Visa coordinator will work with the appropriate DO to make sure that evidence is gathered and documented consistent with the direction set out below to assist with determining whether to certify Supplement B of Form I-918. For requests received simultaneously with a complaint alleging a violation of a law WHD enforces, the WHD complaint will be directed to the appropriate DO for a determination whether to investigate in accordance with WHD’s Complaint Policy. WHD investigators will not initiate an investigation or return to a workplace for the sole purpose of detecting information about a QCA.

If necessary, such as when a request for certification is received simultaneously with the complaint, the regional U Visa coordinator will interview the U Visa petitioner to gather and confirm any information needed for the Supplement B form certification decision. For requests associated with an active investigation of a WH violation, the U Visa coordinator will alert the DO and Wage Hour Investigator (WHI) of the request and alleged QCA so that the DO knows to keep the U Visa coordinator informed of any relevant evidence detected during the course of the investigation.

As discussed, WHD does not have jurisdiction to conduct investigations of the QCAs. Consequently, WHD investigators should follow WHD training and guidance on detecting crimes that are enforced by other law enforcement agencies.

C. U Visa Coordinator Action

The detected facts related to the QCA will be recorded as part of a narrative statement prepared by the U-Visa coordinator. This statement should be a separate document and will not be incorporated into the WHD case file. Rather, a separate file folder should be created for the case information that is relevant to a particular U Visa petitioner. The narrative statement should:

- Address how the case came to WHD’s attention, and the current status of the WH complaint. For example, it should be noted whether WHD is pursuing injunctive and/or monetary remedies to address the WH claims.
- Provide a summary of the information provided by the petitioner to the U Visa coordinator or written information provided by the petitioner, which should be attached to the narrative statement, together with a credibility determination by the U Visa coordinator or, if the individual was interviewed during the course of a WHD investigation, the WHI.
- Include an assessment of the petitioner’s helpfulness in detecting the QCA and investigating the workplace violation claim, as well as an assessment as to whether the individual is likely to be helpful in any future investigation or prosecution of the QCA. This assessment can be made based on the helpfulness of the individual to the WHD investigation, the individual’s personal knowledge of the circumstances surrounding the QCA, and other observations made by the WHI and the U Visa coordinator concerning the individual’s general disposition and willingness to assist government officials.
- Address what, if anything, has been done or will be done to refer the case to the appropriate law enforcement agency that has jurisdiction to investigate and/or prosecute the QCA.
- Document any known injury to the petitioner, if available, and whether any of the petitioner’s family members are believed to have been involved in the criminal activity of which he or she is a victim. This information will be needed in order to complete Supplement B of Form I-918.

D. Legal analysis and review of documentation, and recommendation whether to certify

Upon completion of the narrative statement, the U Visa coordinator will consult with the designated RSOL attorney regarding whether the information set out in the narrative statement and any attachments is sufficient to recommend completion and certification of the Supplement B form. After receiving the RSOL attorney’s advice, the U Visa coordinator will make a recommendation to the Regional Administrator as to whether the application should be certified. If the U Visa Coordinator, after consultation with the Regional Administrator and the RSOL attorney, concludes that a recommendation to certify should be made, the RSOL will proceed to complete the Supplement B, Form I-918. If the conclusion is not to recommend certification, the U Visa coordinator will state in writing to the Regional Administrator the reasons for not recommending certification and submit the reasons and narrative statement to the Regional Administrator.

III. Certification Decision

A. Completion of Supplement B, Form I-918

The designated RSOL attorney will use the narrative statement provided by WHD and the completed legal research and analysis to complete the Supplement B of Form I-918. To complete Supplement B, the RSOL attorney will draft an attachment that includes information such as:

- A statement that WHD is involved because it is or was investigating or has received a complaint related to an alleged violation of a law that WHD enforces, and that the agency is seeking monetary and injunctive remedies for those violations (if applicable).
- A statement explaining the facts detected and/or alleged that support a finding that the individual has been a victim of a QCA.
- A statement regarding any known injury to the victim, if available, and the individual's helpfulness in investigating the matter.
- A summary of what has been done (or will be done), if anything, to refer the case to or share information with the appropriate criminal law enforcement agency.

B. Review and certification of Supplement B, Form I-918

Once RSOL has completed the Supplement B form, it will be sent to the Regional Administrator. In most instances, the final authority to certify will be delegated to the Regional Administrator. If the Regional Administrator certifies a Supplement B form, he or she should attach to the form a copy of the memoranda delegating the certification authority to the Administrator and further to the Regional Administrator. If the Regional Administrator decides not to certify the Supplement B form, the U Visa coordinator should inform the petitioner's representative of the decision in writing as soon as possible, along with information as to which other law enforcement agencies may be able to certify the petition so that the petitioner can explore other avenues for certification.

C. Timeliness and notification of WHD's certification decision

It is very important that all requests for U Visa certification be processed expeditiously and that WHD notify the petitioner and/or his or her representative of its decision in writing as soon as possible. The timely review of the petitioner's allegations and, where appropriate, the certification of a U Visa petition could help to protect the individual victims of QCAs who may be at risk of future harm, and whose cooperation with law enforcement officials will be helpful to investigating or prosecuting the alleged perpetrator(s) of the QCAs. In those cases where WHD determines it will be unable to certify a Supplement B form, the petitioner should be provided with information as to which other law enforcement agencies may be able to certify the petition.

WHD anticipates that it will take it three months to review a single U Visa certification request and make a determination as to whether or not to certify. This timeframe will vary, however, depending upon the complexity of the case and the overall volume of U Visa certification requests WHD's regional representatives are handling at any one time. This estimated timeline may be adjusted based on WHD's experience reviewing certification requests under the procedures outlined here.

D. Confidentiality

DOL officials are prohibited from using or disclosing information relating to the beneficiary of a pending or approved petition for U nonimmigrant status unless the disclosure is made to a sworn officer or employee of DHS, the Department of Justice, or the Department of State for legitimate agency purposes, or in certain other limited circumstances. *See* 8 C.F.R. §214.14(e) and 8 U.S.C. § 1367. If a WHD official is uncertain as to whether it is permissible to disclose information to a particular party, SOL should be consulted for advice.

IV. Conclusion

Additional guidance and training concerning investigation protocols and the handling of Supplement B form certifications will be provided to WHD and RSOL staff, and shared with other DOL worker protection agencies that may also encounter U Visa issues.

-
1. The certifying agency does not have to certify as to whether the petitioner suffered "substantial physical or mental abuse" as a result of the QCA. *See* 8 C.F.R. § 214.14(c)(2)(i). This is a determination that will be made by USCIS based on information submitted by the petitioner. *See* 8 C.F.R. § 214.14(b)(1) and (c)(2)(ii).
 2. The certifying agency does not have to certify as to whether the petitioner suffered "substantial physical or mental abuse" as a result of the QCA. This is a determination that will be made by USCIS based on information submitted by the petitioner. *See* 8 C.F.R. §214.14(b)(1) and (c)(2)(ii).
 3. If WHD receives a request to certify for any other QCA, the U Visa coordinator will work with the requestor to identify other federal and state agencies that may be willing to consider certifying the request.

Department of Labor U Visa Process and Protocols Question – Answer

What are U Visas?

U Nonimmigrant Visas (“U Visas”) were created by the Victims of Trafficking and Violence Prevention Act of 2000 (Public Law 106-386). Victims of qualifying criminal activities who have suffered substantial physical or mental abuse may apply for a U Visa if they are willing to assist law enforcement or other government officials in the investigation or prosecution of those crimes. Individuals who receive U visas may remain in the United States for up to four years, and may eventually apply for permanent residency. Among other requirements, a U Visa petitioner must ask a federal law enforcement agency or official to complete a certification form asserting that the U Visa petitioner “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of the criminal activity. The Department of Homeland Security, U.S. Citizenship and Immigration Services, administers this program and grants or denies U Visa petitions.

What authority does the Department of Labor have to complete U Visa Certifications?

Department of Homeland Security regulations (8 C.F.R. § 214.14(a)(2)) expressly list certain federal law enforcement agencies that may certify U Visa applications, including the Department of Labor. In doing so, the Department of Homeland Security recognized that Department of Labor investigators may detect evidence of qualifying criminal activity during the course of investigating violations of workplace laws. The Department of Labor’s authority to complete U Visa Certifications (Form I-918, Supplement B) is based on its role as a law enforcement agency that has detected the crimes.

What is Form I-918, Supplement B, U Visa Certification?

Form I-918, Supplement B, U Visa Certification, is the specific form that a petitioner asks the Department of Labor to complete and sign as part of his or her petition for a U Visa. The U Visa Certification does not provide individuals with a U Visa; rather, certification of the form is a required element in a U Visa petitioner’s petition to U.S. Citizenship and Immigration Services. In completing the U Visa Certification, the agency must certify that the individual submitting the Form I-918 is a victim of a certain qualifying criminal activity and is, has been, or is likely to be helpful in the investigation or prosecution of that activity. The Department of Labor has developed protocols to ensure the U Visa Certification process – the completion of the U Visa Certification – is efficient and an effective enforcement tool.

What agency within the Department of Labor has authority to complete U Visa Certification requests?

The authority to complete U Visa certifications has been delegated to the Wage and Hour Division. The Wage and Hour Division is responsible for enforcing some of the nation’s most comprehensive federal labor laws, including the minimum wage, overtime pay, child labor, the employment of persons with disabilities, family and medical leave, the employment of temporary or seasonal migrant workers, the use of lie detector tests, and prevailing wages for government service and construction contracts. While the Wage and Hour Division does not investigate violations of qualifying criminal activities, it does conduct investigations for minimum wage and overtime

violations. Because many wage and hour investigations take place in industries marked by vulnerable workers, the Wage and Hour Division is often the first federal agency to make contact with these workers and detect criminal activity in the workplace, which it may then refer to the appropriate authorities. Additional agencies may be delegated authority where appropriate.

Where will the authority to certify rest within the Wage and Hour Division?

The certification process has been delegated to the Wage and Hour Division's Regional Administrators located in five cities around the country. These senior agency officials will have the resources and training needed to make ultimate decisions about certification. Each official will be assisted by a regional coordinator, who will have additional training to ensure that requests for certification will be handled efficiently and effectively. Wage and Hour Division officials will work closely with the regional offices of the Solicitor of Labor in the consideration of certification. The final authority to complete U Visa Certifications will be delegated to the Regional Administrator.

What factors will the Wage and Hour Division consider in response to a request for completion of a U Visa Certification?

The primary factors that will be considered include: 1.) whether the qualifying criminal activity arises in the context of an employment relationship or work environment and there is a related, credible allegation of a violation of a law the Department of Labor enforces; 2.) if the petitioner alleges a qualifying criminal activity of involuntary servitude, peonage, trafficking, obstruction of justice or witness tampering; 3.) the petitioner has demonstrated that he or she has been, is being, or is likely to be helpful to law enforcement officials in any investigation or prosecution of the qualifying criminal activity; 4.) if another law enforcement agency is already engaged in the investigation of the qualifying criminal activity or would be in a better position to certify based on the facts presented; and, 5.) whether completion of the U Visa Certification would assist the Department's investigation of a violation of a law that it enforces.

Will the Department of Labor certify U Visa petitions based upon qualifying criminal activities that are unrelated to an investigation of a civil law under Wage and Hour Division jurisdiction?

No. The Wage and Hour Division will only certify for the five qualifying criminal activities identified above when they are detected in the process of investigating an allegation of a civil law under its jurisdiction, for example, the right to a minimum wage and overtime. The alleged qualifying criminal activity must arise in the context of a work environment or an employment relationship and there must be a related, credible allegation of a violation of a law that the Department of Labor enforces.

Why has the Department identified five specific qualifying criminal activities for certification?

The Department of Labor has determined it will consider completing U Visa Certifications where it has detected violations of any one of the following five qualifying criminal activities: involuntary servitude, peonage, trafficking, obstruction of justice, or witness tampering. It is most efficient and effective to train staff on the detection of these qualifying criminal activities, which are most likely to be found in connection with the agency's workplace investigations.

What should a petitioner and/or his or her representative expect when requesting certification of a Supplement B form for a U Visa?

All requests for completion of a U Visa Certification will be directed to the regional coordinator. In most cases the coordinator will interview the petitioner regarding their allegations to determine whether or not the request meets the requisite factors identified to consider certification. The petitioner's underlying minimum wage or overtime complaint will be addressed according to the Wage and Hour Division's standard complaint policy. Should the coordinator determine that the request is related to an ongoing Wage and Hour investigation, the coordinator will notify the appropriate Wage and Hour Division investigator. The coordinator will work as appropriate with colleagues in the Regional Solicitor of Labor's office in consideration of the request. The Department of Labor recognizes the importance of expeditious processing and timely responses and intends to notify the petitioner and/or his or her representative of its decision in writing as soon as possible.

The petitioner and/or his or her representative will be responsible for completing the remainder of the U Visa petition and submitting needed information to the Department of Homeland Security's U.S. Citizenship and Immigration Services. Should the Department of Labor determine a certification is appropriate, it will only complete one portion of the application, the Supplement B certification. Once the U Visa Certification is complete, it must be returned to the petitioner, who will then send it to U.S. Citizenship and Immigration Services as part of the entire U Visa petition package.

In some instances, it is possible that a Wage and Hour Division investigator will detect a qualifying criminal activity during the course of an investigation. Should this occur, the Wage and Hour Division investigator will provide information about the detection to the appropriate coordinator; the coordinator and the Regional Administrator will decide how best to proceed given the facts and circumstances of the case.

What should a petitioner expect if their request is denied?

If a decision is made not to certify the Supplement B form, the petitioner or their representative will be informed of the decision in writing as soon as possible, along with information as to which other law enforcement agencies may be able to certify the petition.

Is the Department obligated to complete every request for a U Visa Certification?

The U Visa Certification requires the Department of Labor to attest that the petitioner is a victim of certain qualifying criminal activity, and is, has been, or is likely to be helpful in the investigation or prosecution of that activity. The Department of Labor has established protocols that it will follow when considering a request to complete a U Visa Certification. Completion of a U Visa Certification is entirely discretionary.

Will the Department of Labor refer underlying qualifying criminal activities for prosecution?

The Wage and Hour Division will refer the underlying qualifying criminal activity to appropriate law enforcement agencies in accordance with its normal referral procedure. The Wage and Hour Division places paramount importance on the safety of a petitioner, his or her family, and other

individuals who have been harmed or who may be at risk. The timing and proper recipient of each referral will be made on a case-by-case basis. Proper confidentiality procedures will be followed in any referral.

How long does the Department of Labor expect the certification process to take?

The Department of Labor recognizes the importance of expeditious processing and timely responses. The Department anticipates that it will take it three months to review a single U Visa Certification request and make a determination as to whether or not to complete the Certification. This timeframe will vary, however, depending upon the complexity of the case and the overall volume of U Visa Certification requests the Department's regional representatives are handling at any one time. This estimated timeline may be adjusted based on the Department's experience reviewing certification requests under the procedures outlined. The Department intends to notify the petitioner and/or his or her representative of its decision in writing as soon as possible.

Does the Department of Labor's completion of a U Visa Certification result in the issuance of a U Visa?

The Department of Labor, like other federal and state law enforcement agencies and the Equal Employment Opportunities Commission, has authority to complete the portion of a petitioner's U-Visa petition known as Supplement B, U Visa Certification. The Department of Labor does not have the authority to issue a U Visa. The decision whether to approve or deny a U Visa petition rests solely with the Department of Homeland Security's U.S. Citizenship and Immigration Services. There is a single, statutory, annual cap on the number of principal applicants who may be admitted in U nonimmigrant status in any fiscal year, regardless of the origin of the certification. The Department of Labor does not have a separate allotment of U Visas at its discretion.

What training will Wage and Hour Division employees be provided on U Visas?

Guidance and initial training concerning investigation protocols and the handling of Supplement B form certifications has already been provided to certain key Wage and Hour Division and Regional Solicitor of Labor staff. Further training is planned for the future. Guidance will be shared with other Department of Labor worker protection agencies that may also encounter U Visa issues as appropriate.

Will the Department of Labor review these processes and procedures?

The Wage and Hour Division will regularly evaluate protocols for effectiveness and efficiency. Revisions may be made as deemed necessary.

Current: April 28, 2011

**U.S. Department of Labor Wage and Hour Division
Regional U Visa Coordinators
Contact Information (as of May 2014)**

NORTHEAST REGION:

Rachel Dinetz Christiansen
U Visa Coordinator, Northeast Region
U.S. Department of Labor
Wage and Hour Division
170 S. Independence Mall West
Suite 850 West
Philadelphia, PA 19106-3317
Tel: 267-687-4026
Fax: 267-687-4026
Email: Christiansen.Rachel@dol.gov
States: Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virginia, West Virginia

SOUTHEAST REGION

Daniel S. Chapman
Southeast Regional U Visa Coordinator
U.S. Department of Labor, Wage and Hour Division
61 Forsyth Street SW, Room 7M40
Atlanta, GA 30303
Tel: 678-237-0525
Fax: 678-237-0525
Email: chapman.daniel@dol.gov
States: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee

MIDWEST REGION

Anna Lusero
230 South Dearborn St. Room 530
Chicago, IL 60604
Tel: 312-596-7180
Fax: 312-596-7205
Email: Lusero.Anna@dol.gov
States: Illinois, Indiana, Iowa, Kansas, Missouri, Michigan, Nebraska, Ohio, Wisconsin

SOUTHWEST REGION

Esther Del Toro
525 S. Griffith St. Suite 800
Dallas, TX 75202
Tel: 972-850-2656
Fax: 972-850-2601
Email: DelToroOliver.Maria@dol.gov
States: Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Texas, Utah, Wyoming

WESTERN REGION

Jennifer Tse
90 7th St. Suite 13-100
San Francisco, CA 94103
Tel: 415-625-7700
Fax: 415-625-7699
Email: Tse.Jennifer@dol.gov
States: Alaska, Arizona, California, Hawaii, Idaho, Nevada, Oregon, Washington; American Samoa, Guam, Northern Mariana Islands

**EEOC PROCEDURES:
REQUESTING EEOC CERTIFICATION FOR
U NONIMMIGRANT CLASSIFICATION (U VISA) PETITIONS
IN EEOC CASES**

These procedures apply to requests for EEOC to certify petitions for U Nonimmigrant Status ("U visa") pursuant to the Victims of Trafficking and Violence Prevention Act of 2000, 8 U.S.C. §§ 1101(a)(15)(U) & 1184(p), and the interim final rule of the Department of Homeland Security, U.S. Citizenship and Immigration Services (DHS/USCIS), 72 Fed. Reg. 53014 (Sept. 17, 2007), 8 C.F.R. § 214.14. The Chair has designated the General Counsel as a certifying official with authority to issue U nonimmigrant status visa certifications on behalf of the EEOC.

I. Procedures for Requesting the General Counsel's Certification for U visa Petitions

- A. Requests for certification will initially be submitted (or referred) to the Regional Attorney (RA). The RA will conduct an inquiry into whether the individual seeking U visa status has been a victim of "qualifying criminal activity" and is being, has been, or is likely to be helpful to the investigation of that activity. "Qualifying criminal activity" is defined at 8 U.S.C. § 1101(a)(15)(U)(iii). The qualifying criminal activity must be related to the unlawful employment discrimination alleged in the charge or otherwise covered by the statutes the EEOC enforces. The factual inquiry must include an interview of the visa candidate. If the requirements for certification do not appear to be met, the RA can decline the request.
- B. If the RA determines that the certification requirements are satisfied as a factual and legal matter, the RA will present the recommendation to headquarters OGC for review. The information presented to OGC should include all materials described in Section II below (hereinafter "the package"). The General Counsel (GC) will review the package and authorize certification when based on the investigation by the field and a review of the applicable criminal law, the GC determines that conduct constituting employment discrimination is related to "criminal activity" within the meaning of the U visa statute and that the individual requesting certification for a U visa "has been, is being, or is likely to be helpful to an investigation" of that conduct. If the GC determines that certification is not appropriate, the GC will advise the RA to deny the request.
- C. When certification requests are submitted for more than one individual affected by the same employment practices that the district office believes constitute a "qualifying criminal activity," all individuals can be discussed in a single cover memorandum. However, because certifications are submitted to DHS/USCIS on an individual basis, and detailed facts on how each crime victim was affected by the unlawful employment practices will not be included in Part 3 of the I-918 Supplement B form, it is essential that the cover memorandum contain sufficient information to show whether each individual was affected by the employment practices in such a manner as to support the U visa crimes that the district office believes the individual was a victim of. The information should be sufficient to allow the GC to make an independent determination regarding the

Revised 2/5/13

individual's certification, including the appropriateness of the U visa qualifying crimes asserted for each individual. At the district office's option, this can be done in an appendix to the cover memorandum.

- D. If the GC concludes that EEOC should act as the certifying agency, the GC will notify the RA and designate the RA as the certifying official for that particular case. If the GC determines that EEOC should not act as the certifying agency, the GC will inform the RA in writing of this decision.
- E. In each case in which the GC determines that EEOC should act as the certifying agency, OGC will provide the RA a letter stating that the RA is designated as the certifying official for the named individual(s). This letter shall be sent by OGC to the RA. DHS/USCIS requires that each U visa petition include such a letter when the head of the certifying agency has designated someone else to exercise the certifying authority.

II. Information Required by OGC

For purposes of OGC's review of a request for EEOC to act as the certifying agency for a U visa petition, the requesting office should supply OGC with the following items:

- A. A narrative explaining how the case came to the EEOC's attention and the current status of the matter.
 - 1. An interview with the crime victim by a legal unit attorney should be conducted.
 - 2. Credibility determinations made by those who interviewed the crime victim should also be provided.
- B. A narrative explaining how the facts support the alleged crimes and the status of efforts to coordinate with criminal law enforcement.
 - 1. Field legal staff should independently research the criminal statutes that were allegedly violated and determine if the facts support a violation of those statutes. Field legal staff should also list the elements of each crime and any relevant case law or other legal authority that assisted in the determination that the laws in question were violated, in addition to the information provided in Supplement B concerning the specific criminal laws at issue (Part 3, Subpart 3).

2. Field legal staff should explain how the qualifying criminal activity is related to the unlawful employment discrimination alleged in the charge or otherwise under investigation by the EEOC.
3. Field legal staff should describe what has been or will be done to refer the case to an appropriate criminal law enforcement agency, including any collaborative efforts or information-sharing that EEOC has done or intends to do with local, state or federal criminal law enforcement agencies.

C. A draft of Form I-918 Supplement B, U Nonimmigrant Status Certification.¹

Supplement B includes 6 parts. All parts, except for Part 6 (the certification itself), should be completed in accordance with the instructions provided by DHS/USCIS. Particular attention should be paid to the following issues raised in Supplement B:

1. In Part 2, EEOC's "certifying agency category" should be listed as "Other." A statement should be attached explaining EEOC's authority as a certifying agency and that the EEOC came to be involved in the case through our investigation of a violation of the relevant EEO statute. Where the agency has sought, or may seek or will be seeking, monetary and injunctive remedies with respect to the employment discrimination violations that also constitute U visa qualifying crimes, this should be indicated.
2. Part 3 is divided into 6 subparts and includes the following questions:
 - a) Subpart 1 asks that the relevant criminal offenses be named. EEOC should conduct an independent review of the facts to determine which of the listed criminal offenses are involved.

¹ Supplement B is the form DHS/USCIS created for certifying agencies to submit in support of U visa petitions. Form I-918, Supplement B can be found at <http://www.uscis.gov/portal/site/uscis>, along with instructions and fact sheets explaining the requirements for certification, which should be consulted in preparing the package.

- b) Subpart 3 asks for a list of the statutory citations for the criminal activity being investigated or prosecuted. (See §II, B (1) and (2) above).
 - c) Subpart 5 asks the certifying agency briefly to describe the criminal activity being investigated and/or prosecuted and the involvement of the victim seeking U visa status in that activity.
 - d) Subpart 6 asks for a description of any known or documented injury to the victim. Provide a brief description of such harm.
3. Part 4 asks for a description of the helpfulness of the victim. This description should explain how the facts known to the victim would assist in the EEOC's enforcement efforts.

OFFICE OF THE GENERAL COUNSEL
Division of Operations Management

MEMORANDUM OM 11-62

June 7, 2011

TO: All Regional Directors, Officers in Charge,
and Resident Officers,

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Updated Procedures in Addressing Immigration Status
Issues that Arise During NLRB Proceedings

This memorandum provides a brief introduction to immigration status issues, and an update regarding how such issues should be addressed during NLRB investigations and proceedings. The NLRA protects all employees covered by the Act regardless of immigration status;¹ however, immigration status issues may affect remedies and occasionally present other practical difficulties for the enforcement of the Act. Supplementing GC 02-06, this memorandum provides further guidance for proceeding when immigration status issues arise during NLRB case handling. It also identifies immigration agencies that have discretion to provide immigration remedies and other assistance to discriminatees or witnesses in Board proceedings. Regions should contact DAGC Peter Sung Ohr in the Division of Operations-Management whenever issues arise that may require assistance from such immigration agencies as further described below.

A. Background

1. Immigration Agencies

Since the organization of the Department of Homeland Security (“DHS”) in 2002, primary responsibility for immigration issues has been split between three agencies within DHS:

- United States Citizenship and Immigration Services (“USCIS”) is responsible for adjudicating immigration benefits, such as visas;
- Immigration and Customs Enforcement (“ICE”) investigates immigration violations and enforces the law, including the prosecution of removal actions before immigration judges within the Department of Justice;
- Customs and Border Patrol (“CBP”) is responsible for securing the physical borders and points of entry.

Within the limits of the law, USCIS, ICE, and CBP have discretion to decide whether, when, and how to enforce the law in each particular case coming within their respective jurisdictions. See Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 483-87 (1999). In

¹ Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984); see Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002) (expressly reaffirming this principle, though limiting remedies in order to avoid conflict with immigration law).

exercising this discretion, immigration agencies will consider, among other things, “[c]urrent or past cooperation [by the individual] with . . . law enforcement authorities, such as the U.S. Attorneys, the Department of Labor, or National Labor Relations Board, among others.” Memorandum, “Exercising Prosecutorial Discretion,” Commissioner of Immigration and Naturalization Services Doris Meissner, p. 8 (November 17, 2000); see also Memorandum, “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens,” Assistant Secretary of Immigrations and Customs Enforcement John Morton p. 4 (June 30, 2010); OM Memo 97-11 “Relations with Immigration and Naturalization Service (INS) of the U.S. Department of Justice” (February 14, 1997).

2. Immigration Status

Non-citizens² may hold one of two general categories of lawful visa status:

- **Immigrant visas** confer status as a Lawful Permanent Resident, colloquially referred to as a “green card.” Lawful Permanent Residents generally have work authorization. This status does not expire but can be terminated in a variety of circumstances, including certain criminal convictions.
- **Nonimmigrant visas** are temporary and will expire within a specific defined term. There are many varied types of nonimmigrant visas, most often named after the statutory subsection in the Immigration and Nationality Act (“INA”), which creates each specific type. INA, Pub. L. 82-414, as amended, see 8 U.S.C. § 1101, et seq. For example, the “H-2B visa” refers to the temporary worker visa governed by INA § 101(a)(15)(H)(ii)(b), (see below). The scope and nature of work authorization varies considerably among the nonimmigrant visas:
 - **No work authorization** is provided by many of the most common nonimmigrant visa types, including B-1 visas for business, B-2 visas for tourists and short term visitors covered by the visa waiver program (visitors from, for example, Japan, Czech Republic, Italy, England, etc.).
 - **Limited work authorization** is provided by a number of visas, particularly those obtained through work (rather than family or asylum). Such work authorization is limited to a specific employer; indeed, the visa itself is terminated if the employment relationship ends, and the former employee is then required by law to leave the country. Visas of this sort include H-1 visas for professionals, H-2B visas for nonprofessionals, and L visas for intracompany transferees.
 - **Broader work authorization** that permits working for any employer is provided by some visas, including portions of the term of some student visas, K-1 fiancée visas, and T, U, and S,³ law enforcement visas (described more fully below).

² “All persons born or naturalized in the United States” are citizens under the Fourteenth Amendment. Citizens generally do not encounter immigration status issues when working in the United States.

³ The S visa was created in 1994 as a temporary program and made permanent in 2001 require certification by the Attorney General and are capped at 200 visas per year. They are available only for informants against criminal organizations or enterprises. 8 U.S.C. § 1101(a)(15)(S)(i). An additional 50 visas are available where the Secretary of State and the Attorney General provide certification for a reliable informant on terrorist organizations. 8 U.S.C. § 1101(a)(15)(S)(ii); 8 U.S.C. § 1184(k)(1).

Violations of visa terms—either by working when unauthorized or by “overstaying” after the expiration of a visa—can result in loss of visa status and removal from the country. In addition, entering the country without any valid immigration status violates immigration law and can result in removal; such persons are commonly referred to as “**undocumented.**”

B. Procedure for Addressing Immigration Status Issues

As noted, the NLRA protects covered employees regardless of immigration status. Therefore, immigration status (or lack thereof) is generally not relevant either in representation proceedings or at the merits stage of unfair labor practice proceedings. As stated, in GC 02-06, “Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.” p. 6:

- Regions generally should presume that employees are lawfully authorized to work. They should refrain from conducting a *sua sponte* immigration investigation and should object to questions concerning the discriminatee's immigration status at the merits stage.
- Regions should investigate the discriminatee's immigration status only after a respondent establishes the existence of a genuine issue [during the remedial stage].
- Regions should conduct an investigation by asking the Union, the charging party and/or the discriminatee to respond to the employer's evidence.

Regions should continue to follow this policy and consult GC 02-06 for additional direction.

Nonetheless, immigration issues are sometimes unavoidably interjected into NLRB proceedings. For example, NLRB discriminatees, witnesses, or voting-eligible employees may be taken into custody by ICE or CBP. In addition, immigration status may be inextricably intertwined with an unfair labor practice, such as where immigration threats or related conduct is the basis of the unfair labor practice allegation. Finally, the issue may be as simple as an employee volunteering information about immigration status or asking the Region for immigration advice or assistance.

Regions should not provide immigration advice. Resolution of these issues is best addressed when employees can obtain immigration advice through their union or from an independent immigration attorney. Regions may refer interested persons to the list of accredited immigration services providers maintained by the Department of Justice and found at <http://www.justice.gov/eoir/statspub/raroster.htm>.⁴ Individuals sometimes are mistaken about their immigration status and Regions should not assume that immigration status information volunteered by an unrepresented person is correct.

C. Seeking Assistance from Immigration Agencies Regarding Status Issues

As set forth below, in certain cases where immigration status is of particular significance, the Agency may decide to seek the assistance of one of the three immigration agencies to advance

⁴ As a public service, the Region could place copies of the listing of currently recognized organizations and accredited individuals in a binder in a designated area in the Regional office for the public's use.

the effective enforcement of the NLRA. Such agencies might assist in providing visa remedies, deferring immigration actions during the pendency of the NLRB proceeding, and/or releasing individuals from custody or providing access to witnesses in custody. Regions should consult with DAGC Peter Sung Ohr in the Division of Operations-Management when such issues arise.

Regions should also discuss with the Division of Operations-Management cases involving any of the following circumstances: 1) where the status of an individual involved in the case is lost, particularly because of protected concerted activities; 2) where the individual's presence in the country is important to the effectuation of the Act; 3) where NLRB or immigration processes are being abused by the employer; and/or 4) where the employer knew or was willfully ignorant of the employee's lack of status. These circumstances are merely illustrative and there may be others where consulting with the Division of Operations-Management would be prudent.

1. Loss of Status, Particularly Where Status is Lost Because of Protected Concerted Activities

Cases involving lawful immigration status that is illegally stripped from an employee as a direct result of an unfair labor practice are very compelling. For example, as previously noted, an employee holding a nonimmigrant work visa—such as the H or L visas—will be dependent upon continued employment by a specific employer in order to maintain immigration status and legally remain in the country. An employer who fired such an employee in violation of, for example, Section 8(a)(1) or 8(a)(3), also would have unlawfully deprived the employee of visa status. In addition, the investigation, prosecution, and remediation of the unfair labor practice would likely be impeded by the discriminatee's absence from the country. However, remaining in the country to pursue the unfair labor practice could subject the discriminatee to immigration penalties and could complicate remedial considerations—even though the employee had always complied with immigration law and has been illegally deprived of immigration status.

In addition, cases where individuals lost lawful immigration status for any of a variety of other reasons may also require assistance from immigration agencies in order to remain in the country to participate in NLRB proceedings. This category includes those cases where there is simply the expiration of a temporary nonimmigrant visa.

2. Importance of the Individual's Presence in the Country to the Effectuation of the Act

Immigration status issues may interfere with enforcement and effectuation of the NLRA by, for example, impacting the availability of discriminatees and important witnesses during NLRB proceedings. In such cases, it may be appropriate to seek the assistance of immigration agencies.

In addition, particular attention is required where the alleged ULP involves egregious conduct, such as physical coercion, involuntary servitude, blackmail, or violations of other laws. Examples of physical coercion and involuntary servitude may include taking an employee's passport or imposing illegal working conditions. Examples of blackmail may include interfering with protected activity through illegal threats of retaliation such as threats to call immigration authorities or threats to "blacklist" employees. In such cases, additional immigration remedies

may be available, including a law enforcement visa such as the U or T Visa.⁵ It is very important that Regions contact the Division of Operations-Management when such issues arise.

T Visas:

The T Visa category was created in 2000 by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386. This visa is available where the applicant is the victim of “severe forms of trafficking in persons,”⁶ and the victim must be present in the United States because of the trafficking. 8 U.S.C. § 1101(a)(15)(T)(i)(II). The victim must have either “complied with any reasonable request for assistance in the investigation or prosecution of acts of such trafficking in persons, or [i]s less than 15 years of age.” 8 U.S.C. § 1101(a)(15)(T)(i)(III). Additionally, the victim must also prove “extreme hardship involving unusual and severe harm” if the victim were deported. 8 C.F.R. § 214.11(i) (describing evidentiary standard for extreme hardship). There is also a numerical limit of 5000 T Visas per year.

T Visas last for a term of three years, and automatically include work authorization. 8 C.F.R. § 214.11(l)(4)(work authorization); § 214.11(p)(three year term). Family members of victims can also obtain T Visas; family member T Visas are not subject to the numerical cap. 8 C.F.R. § 214.11(o). T Visas also include a path to becoming a lawful permanent resident. 8 C.F.R. § 214.11(p)(2).

This visa could be applicable in some cases that come before the NLRB. For example, where a discriminatee is brought into the country under false pretenses and confined in sweatshop conditions, a T Visa may be available. However, in most cases, T Visas may not be available either because the individual came to the United States independent of any trafficking, or the circumstances do not rise to the level of severe trafficking required by USCIS.

In those cases where a T Visa may be applicable, the Regional Office should immediately contact DAGC Peter Sung Ohr in the Division of Operations-Management.

U Visa:

Like the T Visa, the U Visa category was created by the Victims of Trafficking and Violence Protection Act. The U Visa is available where the nonimmigrant applicant is the victim of one the following “qualifying crimes” while in the United States:

rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion;

⁵ Such visas are available to the victims of certain qualifying crimes who are cooperating with law enforcement agencies. 8 U.S.C. § 1101(a)(15)(T) & (U); 8 C.F.R. § 214.14.

⁶ Defined as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” 8 C.F.R. § 214.11(a).

manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

8 U.S.C. 1101(a)(15)(U)(iii).

Applicants for U Visas must submit a completed Form I-918, “Petition for U Nonimmigrant Status” to USCIS for consideration, along with a completed and certified Supplement B form completed by an agency responsible “for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity.” See 8 C.F.R. § 214.14(c)(2)(i); Instructions for I-918, Supplement B at 2. In completing Supplement B, the agency must certify that the individual submitting the Form I-918 is a victim of certain qualifying criminal activity and is, has been, or is likely to be helpful in the investigation or prosecution of that activity. See 8 C.F.R. § 214.14(c)(2).

USCIS has interpreted this list of U Visa qualifying crimes broadly, and stated in the relevant regulatory documents that this is a list “of general categories of criminal activity. It is also a non-exclusive list. Any similar activity to the activities listed may be a qualifying criminal activity.” New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, Interim Final Rule, 72 F.R. 53014, 53018 (September 17, 2007).

If a Regional Office receives a request to complete the Supplemental B form to certify a U Visa application, the Region should immediately contact DAGC Peter Sung Ohr in the Division of Operations-Management. Initially, it will be the Regional Office’s responsibility to investigate whether the nonimmigrant applicant has been a victim of a qualifying criminal activity and is being, has been, or is likely to be helpful to the investigation of that activity. The qualifying criminal activity must be related to the meritorious unfair labor practice alleged in the ULP under investigation by the NLRB.

Upon the conclusion of the Regional investigation, the Region should submit a written recommendation to the Division of Operations-Management addressing whether the ULP allegation is related to the qualified criminal activity within the meaning of the U Visa statute and whether the nonimmigrant applicant has demonstrated that he or she has been, is being, or is likely to be helpful to the investigation.

The U Visa should be applicable in a greater number of cases than the T Visa because of the breadth of the crimes which qualify. The list includes a number of crimes that may arise in the workplace, and which also constitute unfair labor practices in some cases, including “peonage; involuntary servitude; . . . unlawful criminal restraint; false imprisonment; blackmail; extortion; . . . felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.”

The remedy provided by the U Visa are substantially similar to those available with the T Visa: a term of generally three or four years (USCIS may extend the term beyond four aggregate years), work authorization, family member visas, and a path to becoming a lawful permanent resident. 8 C.F.R. § 214.14(g), (c)(6), (f), (g)(2), respectively.

3. Abuse of Process: Retaliation Using Immigration Status

Whether or not a T or U Visa may be available to an individual involved in a Board proceeding, Regions should contact the Division of Operations-Management in cases where an employer is taking advantage of immigration status issues in an attempt to abuse the NLRB process and thwart the effective enforcement of the law. Examples of this type of behavior include calling or threatening to call ICE in retaliation for protected concerted activities, citing immigration status as a pretext for unlawful firing, and alluding to immigration status in a menacing or suggestive way during representation or ULP proceedings.⁷

4. Employer Knowledge or Willful Ignorance of Individuals Undocumented Status

Regions should also contact the Division of Operations-Management in cases where a respondent employer commits ULPs against an employee knowing or with willful ignorance of such employee's lack of immigration work authorization. Such employers pose a significant threat to the enforcement of the NLRA because they deliberately take advantage of the employee's lack of status. In most such cases, the employees are aware or suspect that the employer knows of their immigration status, and are thus deterred from exercising their legal rights even where no overt immigration threats are made.

The kind of evidence that demonstrates that an employer knew or was willfully ignorant of the workers' status includes: failure to ask for I-9 documents,⁸ complicity in accepting fraudulent I-9 documents, and irregular pay arrangements. Threats to take action based on status or other statements acknowledging employees' status also reflect a knowing or willfully ignorant Employer.⁹

Conclusion

Although Regions should not raise immigration status issues *sua sponte*, in cases where such issues arise, immigration agencies may grant immigration remedies or favorably exercise discretion in order to assist the NLRB in the enforcement of the NLRA. Regions should contact DAGC Peter Sung Ohr in the Division of Operations-Management in all cases where the circumstances arguably justify using these mechanisms.

/s/
R.A.S.

cc: NLRBU
Released to the Public

⁷ Generally, an employer may raise immigration status during remedial ULP proceedings as a defense to back pay and reinstatement. GC 02-06; see Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002); NLRB v. Domsey Trading Corp., __ F.3d __, 10-3356, 2011 WL 563688 (2d Cir. February 18, 2011) (“[W]e find that employers may cross-examine backpay applicants with regard to their immigration status, and leave it to the Board to fashion evidentiary rules consistent with Hoffman.”).

⁸ Acceptable documents to establish a worker's identity and eligibility to work in the United States.

⁹ Seeking such information should be done consistent with the guidelines in GC 02-06.



**DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING
ENFORCEMENT DIVISION
DIRECTIVE**

**DIRECTIVE NUMBER
317**

**DISTRIBUTION DATE
May 6, 2010**

1. **SUBJECT: OBTAINING U VISAS IN INVESTIGATED CASES**
2. **PURPOSE:** To set forth the procedures for certifying, under limited circumstances, requests for a “*U Visa*.”¹
3. **BACKGROUND:** The federal *Victims of Trafficking and Violence Protection Act of 2000* created the *U Visa*, which is available to immigrant victims of serious crimes. The purpose behind the *U Visa* was to recognize that many undocumented crime victims fear that assisting law enforcement could lead to deportation. The *U Visa* encourages these victims to report crimes and assist in their prosecution by offering temporary legal status and work authorization. To obtain a *U Visa*, victims must demonstrate to the U.S. Citizenship and Immigration Services (USCIS), via certification by a law enforcement agency, their willingness to cooperate in a qualifying investigation or prosecution.

Because the Department of Fair Employment and Housing (DFEH) investigates claims under the Fair Employment and Housing Act (FEHA) and the Ralph Civil Rights Act, the DFEH may qualify as a law enforcement agency that can submit certifications to the USCIS on behalf of certain undocumented complainants. There are, however, several factors which would need to be present before DFEH could submit a *U Visa* certification.

4. **PROCEDURES:**

A. **When a *U Visa* is Appropriate:**

- 1) The first step in determining when a *U Visa* certification is appropriate would be that the case under investigation would have to allege acts covered under the FEHA or Ralph Act and where the allegations, if proven, would fall into one of the offenses covered by the *U Visa* program:²
 - a) Sexual Assault;
 - b) Sexual Exploitation;
 - c) Abusive Sexual Contact;

¹ This Directive may be applied to U Visas created by future amendments to the *Victims of Trafficking and Violence Protection Act*.

² 8 U.S.C. § 1101(a)(15)(U)(iii).

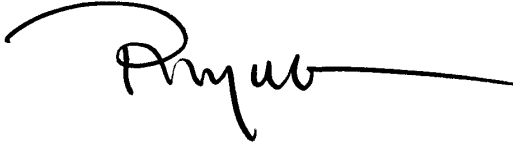
- d) Rape;
 - e) Trafficking;
 - f) Domestic Violence;
 - g) Murder;
 - h) Manslaughter;
 - i) Abduction;
 - j) Extortion;
 - k) Torture;
 - l) Incest; and
 - m) Prostitution.
- 2) The DFEH would have to be conducting an ongoing investigation into the complainant's FEHA or Ralph Act claim.
 - 3) The complainant would either have to be cooperating or willing to cooperate in DFEH's investigation.
 - 4) The complainant would have to request DFEH to submit the *U Visa* certification on his or her behalf.

B. Submitting the request for U Visa Certification:

- 1) If all the factors listed in 4. (A) (1-4) are present, the DFEH can, and should, prepare and submit a law enforcement certification form (Attached Form I-918, Supplement B, U Nonimmigrant Status Certification) to USCIS.
- 2) The Consultant should fill out the form including:
 - a) Details of the crime;
 - b) Complainant's personal data;
 - c) Knowledge of the incident; and
 - d) Helpfulness to the investigation or prosecution.
- 3) The Consultant should sign the form. Signing the form would not indicate the DFEH's sponsorship for the complainant/immigrant, and the DFEH may, and should, notify USCIS if the complainant failed to meet his or her ongoing responsibility to cooperate with the Department. Accordingly, while the DFEH's participation in this federal immigration program will likely be limited, a *U Visa* certification by the DFEH may, in certain circumstances, provide the Enforcement Division with another effective tool to ensure the thorough investigation of alleged FEHA or Ralph Act violations.
- 4) DFEH staff members are not to question complainants regarding their immigration status. The Department's new *U Visa* Practice does not change this approach. However, if a complainant voluntarily raises his or her immigration status with DFEH staff, and DFEH staff believes that pursuing a *U Visa* for the complainant would be

appropriate under the circumstances, then please contact immediately, through your District Administrator/Regional Administrator, Deputy Director, or Chief of Enforcement. The Chief of Enforcement will review any certification before it is submitted to USCIS.

5. **APPROVAL:**



Phyllis W. Cheng, Director

May 6, 2010

Date



[DATE]

[ADDRESSEE]

Re: Request for U-visa Certification

Dear Ms./Mr. _____:

You have inquired about the process for the Division of Labor Standards Enforcement (DLSE) to certify a petition for a U-visa from the U.S. Citizenship and Immigration Services (USCIS).

Petitions for U-visas are submitted to the USCIS on a Department of Homeland Security Form I-918. Along with the Form I-918, the petitioner must also submit a certification form (Supplement B of Form I-918) signed by a federal, state, or local law enforcement agency, such as the DLSE.

In order to consider a certification request, the DLSE will need the following materials:

- **Written authorization** indicating that the DLSE may discuss information about the petitioner's case with a representative, if the request for certification is made by that representative on behalf of the petitioner. The representative's phone number and email address should be included.
- A copy of the **Supplement B to Form I-918**, with Parts 1 to 5 filled out as completely as possible. The petitioner should make sure to include the information set out below.
 - Agency information (Part 2 of Supplement B). The petitioner should indicate the Case Status and the DLSE Case Number (corresponding to an underlying claim or investigation before the DLSE). The petitioner should not fill in the name of the certifying official.
 - Criminal acts (Part 3 of Supplement B). The petitioner should mark the criminal acts of which the petitioner is a victim and provide as complete a description as possible of the qualifying criminal activity that occurred, including the petitioner's knowledge of any details concerning the criminal activity, and the date(s) of occurrence. The description should include a chronology of relevant events and parties involved. The statutory citation(s) for the qualifying crime(s) should be provided; the representative should also set out the basic elements of each crime and how the specific facts of the situation satisfy those basic elements. This information may be provided on an additional page.

To the extent not already fully conveyed as part of the information above, the petitioner should also set forth the nature of the DLSE's role in the petitioner's case (*e.g.*, the qualifying crime was perpetrated in the context of an employment relationship, in furtherance of, in conjunction with, or in relation to an alleged violation of a labor law that the DLSE has investigated, is investigating, or may investigate; the qualifying crime was committed at the workplace, or in relation to or at a DLSE proceeding). The petitioner should describe and include information about any California labor law violation(s) that were perpetrated against the petitioner; the involvement of any DLSE staff (*e.g.*, DLSE investigator, hearing officer, etc.); and the date(s) of any pertinent DLSE investigation or proceeding, if any.

- Criminal acts (Part 3 of Supplement B). Include any details and supporting documentation that the petitioner would like to share about any physical or mental injury or harm suffered by the petitioner as a result of having been a victim of the qualifying crime(s).
- Helpfulness of the victim (Part 4 of Supplement B). Provide a full statement of how the petitioner has been, is being, or is likely to be helpful in the DLSE's detection and/or investigation of the qualifying crime.

The petitioner may also submit any other relevant information that would assist the DLSE in evaluating the certification request, including reports, witness statements, or the petitioner's timeline for needing a response.

These materials should be mailed or emailed to:

Mary Ramirez
DLSE Headquarters
455 Golden Gate Ave., 9th Floor
San Francisco, CA 94102
mramirez@dir.ca.gov

If mailed, the contents should be enclosed in a sealed inner envelope with the notation "**CONFIDENTIAL: U-VISA CERTIFICATION REQUEST**" clearly written on it. The inner envelope should then be sealed inside an outer envelope addressed to the DLSE as set forth above. If emailed, the subject line of the email should state, "**CONFIDENTIAL: U-VISA CERTIFICATION REQUEST.**" The DLSE cannot guarantee the security or confidentiality of email transmissions.

Because additional information may be needed, these materials should be submitted as completely and early as possible. Certification requests will be evaluated on a case-by-case basis. The DLSE cannot provide legal or immigration advice.

The enclosed information sheet contains additional information about U-visas and the DLSE's role as a certifying agency.

Sincerely yours,

Industrial Relations Counsel

Encl.

Page 2 of 2

**Julie A. Su**

California Labor Commissioner

U Visa Certification by the Division of Labor Standards Enforcement: Information for Immigrant Crime Victims

*This fact sheet contains general information about U Visas,
including the federal rules and regulations that apply to the DLSE as a certifying agency.*

Background on the U Visa

The U Visa is a special type of visa issued by the U.S. Citizenship and Immigration Services (USCIS) of the federal Department of Homeland Security (DHS). USCIS may grant a U Visa to an immigrant victim of “qualifying criminal activity” who has suffered “substantial physical or mental abuse” and is willing to assist law enforcement or other government officials in the detection, investigation or prosecution of the criminal activity.¹ In order to petition USCIS for a U Visa, an immigrant victim (“petitioner”) of a “qualifying crime” must submit a certification form from a federal, state, or local law enforcement agency along with his or her U Visa application.²

In recognition of the fact that immigrant crime victims might not have legal status and thus may be reluctant to step forward and report criminal activity, Congress created the U Visa in order to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute crimes that target immigrants, and to protect immigrant victims of such crimes. The U Visa extends critical protections to immigrant crime victims by providing temporary lawful status as a “U nonimmigrant” for up to four years, work authorization, an opportunity to adjust to lawful permanent resident status after three years of continuous physical presence in the United States from the date of admission as a U nonimmigrant, and derivative benefits for qualifying family members.³

In the course of enforcing state labor laws, the DLSE is often the first and only agency of the state to encounter and uncover criminal conduct perpetrated against California’s most vulnerable workers. A DLSE investigation, for example, may reveal working conditions indicating that immigrant workers have been illegally trafficked into the country and held against their will to perform forced, unpaid labor for an employer; or, in an illicit attempt to intimidate a worker into dropping a claim filed with the DLSE for unpaid wages, an employer may threaten the worker with deportation. Without the possibility of a U Visa, immigrant workers who fear adverse immigration consequences if they step forward to report a crime may instead risk ongoing exploitation, and unscrupulous employers will remain undeterred from committing crimes as part of their abusive labor practices. An immigrant worker’s ability to obtain a U Visa not only helps level the playing field for law-abiding employers, but also reinforces the fundamental principle under California law that labor protections apply regardless of immigration status. The DLSE therefore deems U Visa certification in appropriate cases as integral to its core mission to ensure robust enforcement of labor laws – a charge which would be undermined if immigrant workers victimized by an unlawful employer’s criminal conduct are not afforded necessary protections that enable them to assist in the detection and investigation of such conduct.

¹ See 8 U.S.C. § 1101(a)(15)(U); 8 C.F.R. § 214.14(b).

² See 8 C.F.R. § 214.14(c)(2)(i).

³ See 8 U.S.C. § 1184(p)(3), (p)(6); 8 U.S.C. § 1255(m)(1); 8 C.F.R. § 214.14(c)(7), (f).

U Visa Certification

USCIS has issued an Interim Rule (“New Classification for Victims of Criminal Activity: Eligibility for ‘U’ Nonimmigrant Status”) that governs the petition and certification procedures for U Visas.⁴ Individuals applying to USCIS for a U Visa must submit a certification (Supplement B of Form I-918) from a federal, state, or local law enforcement official that affirms the following:

- The petitioner has been a victim of qualifying criminal activity;
- The petitioner possesses information concerning the qualifying criminal activity of which he or she has been a victim; and
- The petitioner has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying criminal activity.⁵

The DLSE’s decision to provide a certification is discretionary and made on a case-by-case basis. A certification by the DLSE is not a determination of the petitioner’s eligibility for a U Visa and does not confer lawful status on the petitioner. USCIS, not the DLSE, issues U Visas and determines whether U Visa eligibility requirements are met (including whether the certification is sufficient and whether the petitioner has demonstrated substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity).

Qualifying Criminal Activity

“Qualifying criminal activity” includes **any of the following categories of offenses, in violation of federal, state or local criminal law**: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury;⁶ fraud in foreign labor contracting (as defined in 18 U.S.C. § 1351); or attempt, conspiracy, or solicitation to commit any of the foregoing crimes.⁷ This non-exclusive list of “general categories” of criminal activity “represents the myriad types of behavior that can constitute domestic violence, sexual abuse, or trafficking, or are crimes of which vulnerable immigrants are often targeted as victims.”⁸ “Any similar activity” (*i.e.*, where the nature and elements of the criminal offense are substantially similar to any of the activities listed) may constitute a qualifying crime for U Visa purposes.⁹ Furthermore, USCIS has noted that qualifying criminal activity may occur during the commission of non-qualifying criminal activity.¹⁰

⁴ See 72 Fed. Reg. 53014-53042 (Sept. 17, 2007).

⁵ See 8 C.F.R. § 214.14(c)(2)(i). Though Supplement B also requests that the certifying agency provide a description of any known or documented injury to the petitioner, it is the petitioner who carries the burden of proving the nature and extent of harm from the criminal activity.

⁶ With respect to the crimes of witness tampering, obstruction of justice, or perjury, a petitioner may be considered a victim of one of these crimes if the petitioner has been directly and proximately harmed by the perpetrator of the crime and there are “reasonable grounds to conclude that the perpetrator committed [such a crime]... at least in principal part, as a means: (1) To avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity; or (2) To further the perpetrator’s abuse or exploitation of or undue control over the petitioner through manipulation of the legal system.” 8 C.F.R. § 214.14 (a)(14)(ii); 72 Fed. Reg. 53017 (Sept. 17, 2007). Moreover, USCIS has clarified that the crimes of witness tampering, obstruction of justice, or perjury do not have to be committed in relation to another qualifying crime listed in the statute but may instead qualify “independently” from the other qualifying crimes. See 72 Fed. Reg. 53017 (Sept. 17, 2007).

⁷ See 8 U.S.C. § 1101(a)(15)(U)(iii); 8 C.F.R. § 214.14(a)(9). In 2013, stalking and fraud in foreign labor contracting were added as qualifying crimes by Congress. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4 §§ 801, 1222 (March 7, 2013).

⁸ 72 Fed. Reg. 53015, 53018 (Sept. 17, 2007).

⁹ See 8 C.F.R. § 214.14(a)(9); 72 Fed. Reg. 53018 (Sept. 17, 2007) (commenting that “[t]he rule’s definition of ‘any similar activity’ takes into account the wide variety of state criminal statutes in which criminal activity may be named differently than criminal activity found on the statutory list, while the nature and elements of both criminal activities are comparable”).

¹⁰ See 72 Fed. Reg. 53018 (Sept. 17, 2007).

Basis for DLSE Certification

As a certifying agency, the DLSE must affirm that it has responsibility for the “detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity.”¹¹ Certifying agencies include traditional law enforcement branches and other agencies that have criminal investigative jurisdiction in their respective areas of expertise.¹² Thus, USCIS has explicitly recognized the authority of the U.S. Department of Labor to act as a certifying agency.¹³ The U.S. Department of Homeland Security has also specifically noted that “State Departments of Labor” may be certifying agencies.¹⁴

As the state agency charged with enforcing the California Labor Code, the DLSE exercises both civil and criminal investigative jurisdiction. The DLSE may certify petitions based on “qualifying criminal activity” that it **detects** and/or **investigates** in the course of its enforcement efforts. For example, qualifying crimes may be perpetrated by an employer in furtherance of, in conjunction with, or in relation to violations of the Labor Code, including wage theft¹⁵ or other civil or criminal labor law abuses¹⁶; a qualifying crime may also be committed in relation to a DLSE proceeding or investigation of a Labor Code violation. When criminal conduct occurs in the context of an employment relationship and relates to a violation of the California Labor Code, the DLSE may exercise its authority to investigate the matter.

In order to certify a petition, the DLSE must also affirm that the petitioner “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of the qualifying criminal activity. USCIS has commented that “Congress intended for individuals to be eligible for U nonimmigrant status at the very early stages of an investigation.”¹⁷ According to USCIS’ broad definition of “investigation,” this includes when a qualifying crime is first detected.¹⁸ Moreover, actual criminal charges or prosecution of the qualifying criminal activity need not ensue for certification to be proper.¹⁹ Any lack of prosecution does not detract from the petitioner’s cooperation and assistance in detecting or investigating the crime, nor lessen the risk taken by the petitioner in reporting criminal activity (in fact, the risk may be even greater if the perpetrator is not prosecuted or convicted).

Accordingly, in line with the dual Congressional purpose behind creation of the U Visa (to encourage immigrant victims to report crimes, and to protect those who do), the DLSE’s ability to certify petitions based on the detection or investigation of qualifying crimes aimed at exploiting immigrant workers serves an invaluable law enforcement goal. Certification does not depend upon the completion of any related DLSE investigation of labor law violations or resolution of an underlying wage or retaliation claim.

¹¹ See 8 C.F.R. 214.14(c)(2)(i); 8 C.F.R. 214.14(a)(5); 72 Fed. Reg. 53019-20 (Sept. 17, 2007). USCIS has defined the term “investigation or prosecution” broadly, to include the “detection” of a qualifying crime or criminal activity.

¹² See 8 C.F.R. § 214.14(a)(2); 72 Fed. Reg. 53019 (Sept. 17, 2007).

¹³ See 72 Fed. Reg. 53019 (Sept. 17, 2007).

¹⁴ See “U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement,” Department of Homeland Security, p.2-3, available at <http://www.dhs.gov/u-visa-law-enforcement-certification-resource-guide#1>.

¹⁵ California is one of a handful of states that criminalizes theft of labor, as specified in both the state Labor Code and Penal Code. See, e.g., Cal. Lab. Code §§ 216, 1197.2, 1199; Cal. Penal Code §§ 487(a), 532(a).

¹⁶ Most violations of the California Labor Code result in not only civil but also criminal liability. For example, the contravention by any person of Labor Code provisions relating to wages, hours, and working conditions may result in criminal fines or imprisonment. See, e.g., Cal. Lab. Code §§ 553, 1199. Moreover, the refusal to allow the DLSE free access to a place of labor or to furnish information requested by the DLSE is punishable as a misdemeanor. See Cal. Lab. Code § 90.

¹⁷ See 72 Fed. Reg. 53019 (Sept. 17, 2007).

¹⁸ See note 11, *supra*.

¹⁹ See 72 Fed. Reg. 53020 (Sept. 17, 2007) (noting that there is no “require[ment] that the prosecution [of the crime] actually occur, since the statute only requires an alien victim to be helpful in the investigation or the prosecution of the criminal activity”); 72 Fed. Reg. 53018 (Sept. 17, 2007) (stating that for various reasons, the perpetrator of a qualifying crime may not be charged or prosecuted for qualifying criminal activity but instead for non-qualifying criminal activity).

Confidentiality

The DLSE recognizes the highly sensitive and personal nature of the information provided by petitioners and views its obligation to protect confidential information with the utmost gravity. Under the law, the use or disclosure (other than to a sworn officer or employee of DHS, the Department of Justice, or the Department of State for legitimate department, bureau, or agency purposes) of any information relating to the beneficiary of a pending or approved U Visa petition is prohibited, subject to certain limited exceptions.²⁰

As a general matter, an individual worker's immigration status is irrelevant to the DLSE's enforcement of state labor laws. The DLSE does not make referrals to ICE or USCIS.

²⁰ See 8 C.F.R. § 214.14(e); 8 U.S.C. § 1367.

IDOL POLICY MEMORANDUM

- I. **SUBJECT:** **OBTAINING U-VISA’S IN INVESTIGATED CASES**
- II. **PURPOSE:** To set forth the procedures for certifying, under limited circumstances, requests for a “U-Visa.” Certification.¹
- III. **BACKGROUND:** Many undocumented crime victims do not cooperate with law enforcement out of fear that such contact could lead to deportation. In order to encourage these victims to report crimes and to cooperate with criminal investigations, Congress passed the federal Victims of Trafficking and Violence Protection Act of 2000. Under the Victims of Trafficking and Violence Protection Act of 2000, undocumented immigrant victims of serious crimes may obtain a “U-Visa” from the U.S. Citizenship and Immigration Services (“USCIS”) which will grant them temporary legal status to remain in the United States and work authorization. The U-Visa was created with the express purpose of strengthening the ability of law enforcement agencies to detect, investigate and prosecute crimes committed against undocumented immigrants, while simultaneously offering protection to the victims. To obtain a U-Visa, victims must demonstrate to USCIS, via certification by a law enforcement agency, their willingness to cooperate in a qualifying investigation or prosecution.

It is the policy of the Illinois Department of Labor (“IDOL”) not to inquire into the immigration status of complainants. However, IDOL recognizes that undocumented immigrant victims of labor-related criminal offenses may nevertheless be reluctant to assist in the investigation or prosecution of that criminal activity out of fear of deportation. Because IDOL enforces the Illinois Wage Payment Act (“IWPCA”) and the Minimum Wage law (MWL), IDOL qualifies as a law enforcement agency that can submit certifications to the USCIS on behalf of certain undocumented complainants. There are, however, several factors which would need to be present before IDOL could submit a U-Visa certification. The purpose of this Policy Memorandum is to set forth the procedures which must be followed in responding to a request for a U-Visa certification.

¹ This Policy Memorandum may be applied to U-Visas created by future amendments to the Victims of Trafficking and Violence Protection Act.

IV. PROCEDURES: These are the procedures to be followed if an IDOL employee receives a request from a Complainant for a U-Visa certification.

A. The Director of IDOL may designate his or her authority to issue a U-Visa certification on behalf of IDOL to a designee².

B. A Complainant who believes he or she has been a victim of a qualifying criminal activity, and who is a party to an IDOL investigation that also concerns that alleged criminal activity, may submit a request for a U-Visa certification.

1. The request can be oral or written.
2. The request for a U-Visa certification must come from the Complainant or the Complainant's representative and must be submitted to an IDOL employee.
3. Mere information that a Complainant is or may be undocumented will not be considered a request for a U-Visa certification. In order for IDOL to consider completing a U-Visa certification, the Complainant or the Complainant's representative must specifically request a U-Visa certification from IDOL.
4. Under no circumstances should an IDOL employee inquire into the immigration status of a Complainant or give a Complainant advice about obtaining a U-Visa. This includes discussing with Complainant the possibility of obtaining a U-Visa from IDOL, unless initiated by Complainant or Complainant's representative.
5. The Complainant must submit an I-918 Supplement B, U Nonimmigrant Status Certification form, with Part I (Victim Information) filled in along with the Request. Complainants or their representatives are encouraged to fill in as much information as they can regarding the other parts of the form, but a I-918 Supplement B, U Nonimmigrant Status

² Upon delegation, the Director shall submit a letter to the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services certifying the U-Visa designee's certifying authority.

Certification form will not be rejected solely because only Part I is completed. A copy of the I-918 Supplement B, U Nonimmigrant Status Certification form is attached to this Policy Memorandum. IDOL will not consider a request for a U-Visa certification without the I-918 Supplement B, U Nonimmigrant Status Certification form. Additionally, IDOL will only consider certifying the I-918 Supplement B, U Nonimmigrant Status Certification form and will not substitute any other form for the I-918 Supplement B, U Nonimmigrant Status Certification form.

6. It is the obligation of the Complainant or his or her representative to obtain the I-918 Supplement B, U Nonimmigrant Status Certification form. Department employees are not responsible for obtaining an I-918 Supplement B, U Nonimmigrant Status Certificate form for the Complainant or for providing Complainant advice as to how the form can be completed, other than what is set forth in this policy. The Department may inform the Complainant or his or her representative that it does not provide the I-918 Supplement B, U Nonimmigrant Status Certification form, but that the form may be downloaded from the USCIS' website (USCIC.gov).
 7. In order to expedite the processing of a U-Visa certification request, Complainants are also encouraged to provide a brief cover letter with the Complainant's name and the Department charge number, if known. However, the Department will not deny a request for a U-Visa certification solely because Complainant has not provided a cover letter.
- C. If the Complainant or the Complainant's representative makes a request for a U-Visa certification and submits an I-918 Supplement B, U Nonimmigrant Status Certification form, the IDOL employee receiving the request must notify his or her immediate supervisor as soon as possible. The immediate supervisor will forward the request to the Director or his or her U-Visa designee as soon as possible.

1. The IDOL employee should keep the request for a U-Visa certification and the I-918 Supplement B, U-Nonimmigrant Status Certification form confidential. Copies of the I-918 Supplement B, U-Nonimmigrant Status Certification form or any other documents relating to Complainant's request for a U-Visa Certification should not be kept in the Department's investigation file.
 2. After the IDOL employee forwards the request for a U-Visa certification to his or her supervisor, any inquiry into the status of the U-Visa certification request by Complainant should be referred to the Director or his or her U-Visa designee.
- D. Upon notification that a Complainant has requested a U-Visa certification from IDOL, the Director or his or her designee shall determine if a U-Visa certification is appropriate. A factual inquiry should be conducted to determine if a U-Visa certification is appropriate. This inquiry may include discussing with the IDOL staff person assigned to the case the Complainant's participation in the IDOL investigation. A U-Visa certification is appropriate if:
1. IDOL has jurisdiction to investigate the charge of discrimination under the laws it enforces.
 2. IDOL is conducting an ongoing investigation into the Complainant's charge.
 3. The Complainant is either cooperating or willing to cooperate in IDOL's investigation of the charge of discrimination.
 4. The factual allegations asserted by Complainant in his or her charge, if proven, would also make the Complainant a victim of one of the offenses listed in the U-Visa statute. These offenses include:
 - (a) Rape
 - (b) Torture
 - (c) Trafficking
 - (d) Incest

- (e) Domestic violence
- (f) Sexual assault
- (g) Abusive sexual contact
- (h) Prostitution
- (i) Sexual exploitation
- (j) Female genital mutilation
- (k) Being held hostage
- (l) Peonage
- (m) Involuntary Servitude
- (n) Slave trade
- (o) Kidnapping
- (p) Abduction
- (r) Unlawful criminal restraint
- (s) False Imprisonment
- (t) Blackmail
- (u) Extortion
- (v) Manslaughter
- (w) Murder
- (x) Felonious assault
- (y) Witness tampering
- (z) Obstruction of justice
- (aa) Perjury
- (bb) Attempt, conspiracy, or solicitation to commit any of the above mentioned crimes

5. There is no requirement that the crime be charged or prosecuted.

E. If the Director or his or her U-Visa designee determines that the Complainant meets all the requirements listed herein, the Director or his or her designee may complete the certification form (USCIS Form I-918, Supplement B, U Nonimmigrant Status Certification) for the Complainant's submission to the USCIS.

1. The Director or his or her U-Visa designee shall complete the I-918 Supplement B, U Nonimmigrant Status Certification form, including:
 - (a) Agency Information (Part 2)
 - (b) Criminal acts and details of the crime (Part 3)
 - (c) The helpfulness of the Complainant (Part 4)
 - (d) Family members implicated in criminal activity (Part 5)
2. The Director or his or her U-Visa designee shall sign the certification form (Part 6).
3. IDOL shall return the completed I-918 Supplement B, U Nonimmigrant Status Certification form to the Complainant or his or her representative for submission to the USCIS.
 - (a) The signing of the I-918 Supplement B, U Nonimmigrant Status Certification form does not indicate the IDOL's sponsorship for the Complainant.
 - (b) IDOL reserves the right to notify the USCIS if the Complainant fails to meet his or her ongoing responsibility to cooperate with IDOL.
4. In order to protect eligible victims from deportation, the Director or his or her U-Visa designee shall issue or deny a certification as soon as possible, but no later than thirty (30) days from the date the request was received, unless impractical to do so.
5. The role of IDOL in the U-Visa process is to certify that the Complainant is cooperating in the IDOL investigation, not to determine the applicant's eligibility for a U-Visa or whether

the applicant has sufficient harm to merit a U-Visa. USCIS will adjudicate the U-Visa petition.

- F. If the Director or his or her U-Visa designee determines that the Complainant does not meet all the requirements listed herein, the Director or his or her U-Visa designee will notify the Complainant or his or her representative in writing of the Department's decision to reject the request for a U-Visa certification.
1. The written notice will explain the reason for the rejection of the request for a U-Visa certification.
 2. The Department will return the certification form (USCIS Form I-918, Supplement B, U Nonimmigrant Status Certification) to Complainant or his or her representative with the written notice.
 3. If Complainant is able to remedy the basis for the rejection of the request for a U-Visa certification, Complainant or his or her representative may resubmit the request for a U-Visa certification.
 4. If the Director or his or her U-Visa Designee determines that Part I of the certification form (USCIS Form I-918, Supplement B, U Nonimmigrant Status Certification) is incomplete, the Director or his or her U-Visa designee may contact the Complainant or his or her representative to obtain the missing information.



New York State Department of Labor

Andrew M. Cuomo, *Governor*

Colleen C. Gardner, *Commissioner*

**NEW YORK STATE DEPARTMENT OF LABOR
MEMORANDUM & ORDER REGARDING CERTIFICATION OF U VISA PETITIONS**

1. PURPOSE

The purpose of this order is to establish guidelines and procedures for U visa certifications signed by the New York State Department of Labor (NYSDOL).¹

2. BACKGROUND

Congress created the U visa in 2000 in recognition of the fact that many undocumented immigrant crime victims do not cooperate with law enforcement out of fear that such contact could lead to their deportation. The U visa encourages these victims to report crimes and cooperate in criminal investigations by offering temporary legal status and work authorization. The U visa was created with the express purpose of strengthening the ability of law enforcement agencies to detect, investigate and prosecute crimes committed against undocumented immigrants, while simultaneously offering protection to the victims.

While it is the policy of the NYSDOL not to inquire into the immigration status of claimants or witnesses, or to share witness information with the immigration authorities, the NYSDOL recognizes that undocumented victims of labor-related criminal offenses may nevertheless be reluctant to assist in the investigation or prosecution of that criminal activity out of fear of deportation. The U visa allows the NYSDOL to more aggressively pursue perpetrators of criminal labor violations while building trust in immigrant communities.

**3. THE NEW YORK STATE DEPARTMENT OF LABOR IS AN APPROPRIATE
CERTIFYING AGENCY**

Crime victims applying for a U visa must submit a certification completed by a law enforcement agency to the United States Citizenship and Immigration Services ("USCIS") affirming that the applicant has been, is being, or is likely to be helpful to that agency in the investigation or prosecution of the criminal activity. As a state law enforcement agency with the jurisdiction to detect and/or investigate certain U visa-qualifying crimes under the New York State Labor Law, the NYSDOL is an appropriate U visa certifying agency.

¹ This order may be applied to U visas created by future amendments to relevant immigration statutes.

4. PROCEDURE

a. WHEN A U VISA IS APPROPRIATE

- i. The NYSDOL must have jurisdiction to investigate the case (i.e., the case must contain allegations of violations of New York State Labor Law) and the allegations, if proven, must make the claimant a victim of one of the offenses listed in the U visa statute. These offenses include

Rape	Being held hostage	Manslaughter
Torture	Peonage	Murder
Trafficking	Involuntary servitude	Felonious assault
Incest	Slave trade	Witness tampering
Domestic violence	Kidnapping	Obstruction of justice
Sexual assault	Abduction	Perjury
Abusive sexual contact	Unlawful criminal	Attempt, conspiracy, or
Prostitution	restraint	solicitation to commit
Sexual exploitation	False imprisonment	any of the above
Female genital	Blackmail	mentioned crimes
mutilation	Extortion	

The above list of qualifying criminal activities is a list of “general categories” of qualifying crimes which are not tied to any particular statutory definition. The list is not exhaustive and similar activities may serve as qualifying criminal activity where the nature and elements of the offenses are substantially similar to offenses included in the list.

- ii. The request for certification must be submitted at any time during, or within a reasonable time after the conclusion of, the NYSDOL’s investigation or involvement in the detection of the qualifying crime.
- iii. The potential U visa applicant must currently be, have been, or be likely to be helpful in the NYSDOL’s investigation. The individual must have actually provided, or be willing to provide, relevant testimony to the NYSDOL during its investigation, even if that testimony is not subsequently used at trial. There is no requirement that the crime be charged or prosecuted; if the case is prosecuted there is no requirement that the victim testify or the perpetrator be convicted.

b. SUBMITTING A REQUEST FOR U VISA CERTIFICATION

If all the factors listed in Section 4(a)(i) through (iii) are present, the NYSDOL may prepare a law enforcement certification form (USCIS Form I-918, Supplement B, U Nonimmigrant Status Certification) for the claimant/witness' submission to the USCIS.

i. PROCEDURE

1. The Commissioner of Labor may delegate her/his authority to issue U visa certifications on behalf of the NYSDOL.²
2. Claimants or witnesses in a NYSDOL investigation who believe they have been victims of a qualifying criminal activity and are being, have been, or are likely to be helpful to the NYSDOL detection or investigation of that criminal activity may submit a request for U Visa certification to the Commissioner of Labor or her/his designee.
3. In submitting the request for U visa certification, the claimant or witness should include the NYSDOL claim number and the name of any NYSDOL staff involved in the claim, if known. The claimant or witness should also fill out as much of the certification form (USCIS Form I-918, Supplement B) as possible, including:
 - a. The victim's personal data;
 - b. The details of the crime, including
 - i. Any known dates,
 - ii. A description of the criminal activity being investigated and the victim's knowledge of and involvement in the investigation, and
 - iii. A description of any known or documented injuries to the victim, including physical or mental abuse; and
 - c. The victim's statement as to his or her helpfulness in the investigation and/or prosecution of the criminal activity.

Claimants or witnesses may attach additional pages as necessary, including copies of any relevant reports or findings.

² Please refer to *Letter of designation of certifying authority*.

4. Requests for U Visa certification will also be accepted from advocates representing NYSDOL claimants or witnesses. For the NYSDOL to communicate with said advocate regarding the claim and/or the request for U Visa certification, the claimant or witness should submit a written statement to the NYSDOL authorizing the NYSDOL to communicate directly with the advocate.

5. TIMELINE

In order to protect eligible victims from deportation, certifications should be sought as soon as potential applicants meet the eligibility requirements listed in Section 4(a).

The individual designated by the Commissioner to issue U visa certifications shall issue or deny a certification as soon as possible, but no later than thirty (30) days from the date the request was received.

6. ADDITIONAL CONSIDERATIONS

- a. NYSDOL enforces New York's Labor Laws regardless of the immigration status of any individuals involved. NYSDOL staff will not question claimants or witnesses about their immigration status, unless it is to discuss the possibility of a U Visa certification. Pursuant to Sec. 4(b)(i)(3) of this order, NYSDOL staff will not discuss the possibility of U Visa certifications with claimants or witnesses until after receiving authorization to do so from a supervisor, who would have by then discussed the matter with the Commissioner of Labor or her/his designee. In any conversation regarding the possibility of U Visa certification, NYSDOL staff shall explain to the claimant or witness that NYSDOL does not make referrals to the USCIS or ICE. Under no circumstances will NYSDOL staff give immigration legal advice to any victim.
- b. The role of the NYSDOL in the U Visa process is to certify the helpfulness of the claimant or witness in the NYSDOL investigation, not to determine the applicant's eligibility for a U visa or whether the applicant has suffered sufficient harm to merit a visa. USCIS will adjudicate the U Visa petition.
- c. In addition to direct victims, the U Visa encompasses certain indirect victims, such as the victims of witness tampering, obstruction of justice and perjury, which are not crimes against a person. The claimant or witness may be considered a victim of

witness tampering, obstruction of justice, or perjury, including any attempt, conspiracy, or solicitation to commit one or more of those offenses if:

- i. The victim has been directly and proximately harmed by the perpetrator of the witness tampering, obstruction of justice, or perjury; and
 - ii. There are reasonable grounds to conclude that the perpetrator committed the witness tampering, obstruction of justice, or perjury offense, at least in principal part, as a means:
 1. To avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity; or
 2. To further the perpetrator's abuse or exploitation of or undue control over the petitioner through manipulation of the legal system.
- d. If the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, even after the certification has been submitted to the USCIS, the NYSDOL may notify the USCIS by sending a written statement to the address listed on the USCIS Form I-918, Supplement B.

SAMPLE LETTER – REQUEST FOR CERTIFICATION FROM AGENCY

Dear [U VISA CERTIFIER],

I am an attorney at NON-PROFIT ORGANIZATION, which represents CLIENT. I write on CLIENT's behalf to request a U-Visa Certification, pursuant to the U.S. Department of Labor's (US DOL) Field Assistance Bulletin and U Visa Process and Protocols.¹ CLIENT's authorization permitting me to communicate with your agency is attached.

CLIENT is the victim of the qualifying criminal activities of **involuntary servitude** which arose in the context of his employment with EMPLOYER. These allegations are related to violations of law enforced by the U.S. DOL Wage and Hour Division (WHD). WHD has begun to investigate CLIENT's complaint in CASE NUMBER. CLIENT has been and is likely to be helpful in any investigation or prosecution. CLIENT is available for interview in order to verify the facts as stated in this letter.

A. BACKGROUND INFORMATION

CLIENT worked for EMPLOYER in CITY, STATE, between [DATES]. Upon arrival, CLIENT was instructed that his duties would include packing food products, mopping, and fixing equipment at LOCATION. During CLIENT's employment, he also resided on company property at LOCATION. All workers slept on the floor, and were required to pay rent to the EMPLOYER.

CLIENT worked for EMPLOYER for approximately 70-80 hours per week, and was not paid the promised wage due in violation of federal law. About a week after CLIENT arrived, MANAGER collected all the workers passports and social security cards, allegedly to take care of tax matters. CLIENT never got his passport and visa back.

CLIENT also worked in an atmosphere of extreme intimidation and fear. MANAGER frequently berated CLIENT and other co-workers, threatening CLIENT with reports to local law enforcement and immigration enforcement officials if he did not comply with his orders to work extended hours. On several occasions, CLIENT suffered severe injuries. When he reported these injuries to the manager, MANAGER simply told him to stop complaining.

¹ USDOL Field Assistance Bulletin No. 2011-1, "Certification of Supplement B Forms of U Nonimmigrant Visa Applications", § (2)(A) (April 28, 2011); Department of Labor U Visa Process and Protocols Question-Answer (April 28, 2011). By certifying the enclosed Form I-918, Supplement B, USDOL is in no way making a judgment as to the merits of CLIENT's U Visa application. The form is *only* an acknowledgement that he "has been, is being or is likely to be helpful in the investigation and/or prosecution of the criminal activity." 8 U.S.C. § 1101(a)(15)(U)(i).

CLIENT unsuccessfully requested his identity documents on numerous occasions, and continued to work in spite of the low pay, threats, and injuries, because he hoped to get his passport back. Eventually, when CLIENT once again requested his passport, his employer attempted to hit him and threatened to send men to beat him up. Mr. Martinez was able to escape, and was forced to hide for a few days before he could make arrangements travel to STATE.

B. CLIENT IS A VICTIM OF INVOLUNTARY SERVITUDE

18 U.S.C. § 1584 prohibits holding a person in involuntary servitude, which occurs when an employer knowingly compels a worker's labor for a period of time against the worker's will by the use of force, the threat of force, or the threat of legal coercion. See *United States v. Kozminski*, 487 U.S. 931 (1988); see also 22 U.S.C. § 7102(5) (defining involuntary servitude).

CLIENT is a victim of involuntary servitude by EMPLOYER. He worked for EMPLOYER for a period of [SEVERAL] months, under conditions of severe abuse. CLIENT felt compelled to work for EMPLOYER due to EMPLOYER's threats of deportation and physical violence. Due to fear of EMPLOYER, CLIENT endured harsh working and living conditions, including unpaid and underpaid wages, illegal deductions, long work days with insufficient break time, and uninhabitable housing. CLIENT could not access basic identity and travel documents, which further led to feelings of entrapment. In addition, CLIENT's status as an undocumented worker placed him in a particularly vulnerable position.

C. CLIENT HAS BEEN AND WILL BE HELPFUL IN ANY INVESTIGATION OR PROSECUTION OF EMPLOYER.

CLIENT has provided information to US DOL against EMPLOYER, and has been interviewed by US DOL WHD in its investigation. CLIENT has proven to be a reliable and cooperative witness who would likely be helpful with any future prosecution, and is available for further interview.

Based on the foregoing, we respectfully submit that CLIENT is a victim of involuntary servitude, and has been helpful, and will be helpful in US DOL's detection, investigation, and prosecution of this qualifying criminal activity. We request your assistance in support of his U visa application with issuance of a Form I-918 Supplement B.

Should you need any additional information or if I may assist in any way to further this certification, please do not hesitate to contact me at CONTACT INFORMATION.

Sincerely,

ATTORNEY

Not Reported in F.Supp.2d, 2008 WL 1774584 (E.D.La.)
(Cite as: 2008 WL 1774584 (E.D.La.))



Only the Westlaw citation is currently available.

United States District Court,
E.D. Louisiana.

Fredi GARCIA, Misbel Garcia, Jose Salvadoe Valladares, Denis Amadordiaz, Emilio Salgueto, Reyes Agulia-Garcia, Gustavo Garcia, Ilsa Canales Jose Efrain Garcia-Hernandez, Edgar Govanti Garcia-Martinez, and Santos Lara, on Behalf of Themselves and all others Similarly Situated

v.

AUDUBON COMMUNITIES MANAGEMENT, LLC, Audubon-Algiers, LLC, and Charles Rehyer.

Civil Action No. 08-1291.
April 15, 2008.

Vanessa Spinazola, The ProBono Project, New Orleans, LA, for Fredi Garcia, Misbel Garcia, Jose Salvadoe Valladares, Denis Amadordiaz, Emilio Salgueto, Reyes Agulia-Garcia, Gustavo Garcia, Ilsa Canales Jose Efrain Garcia-Hernandez, Edgar Govanti Garcia-Martinez, and Santos Lara, on Behalf of Themselves and all others Similarly Situated.

ORDER AND REASONS

HELEN G. BERRIGAN, District Judge.

*1 Before the Court are Emergency Motions for U Visa Certification, filed by the plaintiffs, Fredi Garcia, Misbel Garcia, Jose Salvadoe Valladares, Denis Amador-Diaz, Emilio Salgueto, Reyes Agulia-Garcia, Gustavo Garcia, Ilsa Canales Jose Efrain Garcia-Hernandez, Edgar Govanti Garcia-Martinez, and Santos Lara (“Plaintiffs”) (Rec. Docs. 10 & 24). The defendants, Audubon Communities Management, LLC, Audubon-Algiers, LLC, and Charles Rehyer (“Defendants”), oppose the motions.^{FN1} The motions are before the Court on the briefs without oral argument. Having considered the memoranda and arguments of counsel, the record, and the applicable law, the Court finds

that certification of the U-Visa applications is appropriate.

FN1. The Defendants initially assert that the Court “does not have the authority to issue the requested U-Visas.” The Court agrees. However, the Plaintiffs’ motion merely requests that the Court certify “Supplement B” of Form I-918 so that the Plaintiffs may apply for U-Visas. The Department of Homeland Security (Vermont Service Center) is responsible for making U-Visa determinations.

I. Background

The plaintiffs are non-documented workers who have filed suit against their former employer alleging that the Defendants improperly withheld wages. In addition, the Plaintiffs allege claims under the Fair Labor Standards Act (“FLSA”) and the Victims of Trafficking Protection Act, 18 U.S.C. § 1581 *et seq.* Specifically, the Plaintiffs allege that the employer-defendants promised housing and weekly salaries in exchange for labor. The Plaintiffs state that they were consistently underpaid, and that complaints were met with threats of eviction. The Plaintiffs note that shortly after they filed this lawsuit to recoup their wages, agents of the Department of Homeland Security and Immigration and Customs Enforcement raided the employer-defendant’s workplace and apprehended several of the named plaintiffs. The Plaintiffs now seek U-Visa certifications because the apprehended Plaintiffs have been detained since February 27, 2008, and are facing deportation.

II. Law & Analysis

According to the regulations promulgated by the Department of Homeland Security, the purpose of the U nonimmigrant classification is to provide a safe-harbor for non-documented victims of qualifying crimes. 72 Fed.Reg. 53014-15. The regulations state:

Alien victims may not have legal status and, therefore may be reluctant to help in the investigation or prosecution of criminal activity for fear of removal from the United States. In passing this legislation, Congress intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes while offering protection to victims of such crimes. See BIWPA, ^{FN2} sec. 1513(a)(2)(A). Congress also sought to encourage law enforcement officials to better serve immigrant crime victims.

FN2. BIWPA stands for the “Battered Immigrant Women Protection Act of 2000.”

Id.

There are several criteria in order to obtain U-Visa status. The applicant(s) must demonstrate: (1) that they have suffered substantial physical or mental abuse as a result of having been the victim of qualifying criminal activity; (2) they must possess information concerning the qualifying criminal activity; and (3) they must have been helpful, are being helpful, or are likely to be helpful in the investigation or prosecution of the qualifying criminal act. 8 U.S.C. § 1101(a)(15)(U)(i). In addition, applicants must submit Supplement B to Form I918 to file for a U-Visa. Supplement B is also known as “U Nonimmigrant Status Certification,” and requires a qualified “certifying official” to affirm:

*2 the person signing the certificate is the head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency, or is a Federal, State, or local judge; the agency is a Federal, State, or local law enforcement agency, or prosecutor, judge or other authority, that has responsibility for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity; the applicant

has been a victim of qualifying criminal activity that the certifying official's agency is investigating or prosecuting; the petitioner possesses information concerning the qualifying criminal activity of which he or she has been a victim; the petitioner has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying criminal activity; and the qualifying criminal activity violated U.S. law, or occurred in the United States, its territories, its possessions, Indian country, or at military installations abroad.

8 C.F.R. § 214.14(c)(2)(i); *see also* 72 Fed.Reg. 53023-24.

In their motions, the Plaintiffs request that the undersigned act as the “certifying official” for their U-Visa applications. It is undisputed that a federal judge is qualified to “certify” U-Visa applications. 8 U.S.C. § 1101(a)(15)(U)(i)(III); 8 C.F.R. § 214.14(a)(3)(ii).^{FN3} However, the Defendants assert that the Plaintiffs are not eligible for U-Visa status, and thus, the undersigned should not “certify” their applications. Essentially, the Defendants argue that they were not the perpetrators of any of the alleged qualifying criminal activity because outside contractors were responsible for hiring and firing the Plaintiffs. In addition, the Defendants contend that the Plaintiffs have not alleged “substantial physical or mental abuse” as required to obtain U-Visas. Finally, the Defendants assert that the Plaintiffs are not entitled to U-Visa certification because the Plaintiffs' allegations are confined to a civil complaint, instead of criminal charges.

FN3. The regulations specifically states, “[j]udges neither investigate crimes nor prosecute perpetrators. Therefore, USCIS believes that the term ‘investigation or prosecution’ should be interpreted broadly as in the AG Guidelines.” 72 Fed.Reg. 53020.

Based on the complaint and the exhibits attached to the Emergency Motions for U-Visa Certification, the Court finds that the Plaintiffs have made a prima facie ^{FN4} showing that they have

been a victim of qualifying criminal activity,^{FN5} that they possess information concerning the qualifying criminal activity, and that they are likely to be helpful to an investigation or prosecution of that qualifying criminal activity. Specifically, the Plaintiff's statements are evidence that legal coercion was used against the Plaintiffs to continue working without pay. Indeed, the allegations detail a pattern of conduct by the employer-defendants to force the plaintiff-employees to work by taking advantage of the plaintiff-employees undocumented immigration status. The statutory definition of "Involuntary Servitude" states:

FN4. "Prima Facie" has two (2) definitions in Black's Law Dictionary: 1. "Sufficient to establish a fact or raise a presumption unless disproved or rebutted." 2. As an adjective, "at first sight; on first appearance but subject to further evidence or information." Both definitions apply in this matter.

FN5. The Plaintiffs assert that they have been victims of several "qualifying crimes," including: Involuntary Servitude and Human Trafficking.

*3 The term "involuntary servitude" includes a condition of servitude induced by means of-

(A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or

(B) the abuse or threatened abuse of the legal process.

22 U.S.C. § 7102(5). In this matter, the Plaintiffs specifically allege that when they complained of failure to remit wages in a timely fashion, they were told that they "didn't have any rights in this county and that we should shut up and keep working if we didn't want [to be deported]." ^{FN6} Rec. Doc. 10, Exhibit 2, ¶ 11. The Plaintiffs al-

lege that their demands for wages were met with the threatened abuse of the legal process. Stated another way, the Plaintiffs allege that their employers used the threat of deportation to force continued labor. Thus, there is sufficient evidence for a prima facie showing of Involuntary Servitude.

FN6. One plaintiff alleges that he "continued working without pay because [he] was afraid that the bosses would call the police to deport [him] as they had said." Rec. Doc. 10, Exhibit 2, ¶ 12.

Furthermore, the Court notes that on-going criminal investigation may not be necessary to certify a U-Visa application because the regulations contemplate the future helpfulness of the applicant(s):

USCIS interprets 'helpful' to mean assisting law enforcement authorities in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim ... The requirement was written with several verb tenses, recognizing that an alien may apply for U nonimmigrant status at different stages of the investigation or prosecution. By allowing an individual to petition for U nonimmigrant status upon a showing that he or she **may be helpful at some point in the future**, USCIS believes that Congress intended for individuals to be eligible for U nonimmigrant status at the very early stages of an investigation. This suggests an ongoing responsibility to cooperate with the certifying official while in U nonimmigrant status.

72 Fed.Reg. 53019 (emphasis added). Indeed, part of the regulations in the CFR state, "U nonimmigrant status certification means Form I-918, Supplement B, 'U Nonimmigrant Status Certification,' which confirms that the petitioner has been helpful, is being helpful, **or is likely to be helpful** in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim." **8 C.F.R. § 214.14(a)(12)**. Therefore, the Defendants' argu-

Not Reported in F.Supp.2d, 2008 WL 1774584 (E.D.La.)
 (Cite as: 2008 WL 1774584 (E.D.La.))

ment that the Plaintiffs do not qualify for U-Visa certification is unconvincing. The Court concludes that the Plaintiffs are entitled to U-Visa certification because they have provided sufficient evidence to show that they “may be helpful at some point in the future” to an investigation regarding qualifying criminal activity.

The Defendants argument that the Plaintiffs have failed to allege facts sufficient to constitute “substantial physical or mental abuse” is not convincing. The Defendants note that the Plaintiffs have neither alleged that they were victims of “battery or physical violence,” nor victims of “extreme cruelty.” The Court finds that “physical or mental abuse” is not commensurate with “battery or physical violence.” The regulations regarding “substantial physical or mental abuse” state:

*4 Whether abuse is substantial is based on a number of factors, including but not limited to: The nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions. No single factor is a prerequisite to establish that the abuse suffered was substantial. Also, the existence of one or more of the factors automatically does not create a presumption that the abuse suffered was substantial. A series of acts taken together may be considered to constitute substantial physical or mental abuse even where no single act alone rises to that level.

8 C.F.R. § 214.14(b)(1). In addition, the regulations state, “[p]hysical or mental abuse means injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim.” 8 C.F.R. § 214.14(a)(8). In this matter, the Plaintiffs have alleged mental and physical suffering because of the living conditions they were forced to endure. The Plaintiffs state that without steady pay, they had to

find food “in the trash.” Not only have the Plaintiffs alleged feeling “shameful” and “sad” because they could not afford to buy food; they also allege physical distress from the lack of nourishment. Rec Doc. 10, Exhibit 3 ¶ 14; Rec. Doc. 10, Exhibit 2 ¶ 10. Therefore, the Court finds that the Plaintiffs have made a prima facie showing of substantial mental and physical suffering.

Finally, the Defendants' contention that the Plaintiffs are not entitled to U-Visa certification because the allegations pertain to “the conduct of third parties,” not the conduct of Audubon itself, is unconvincing. The regulations state that applicants for U-Visa certification must be victims of qualifying crimes. The regulations do not mandate that a specific entity be the alleged perpetrator of the qualifying crimes. Consequently, at this point in the proceedings, the Plaintiffs have made a prima facie showing that they are entitled to U-Visa certification.

III. Conclusion

Accordingly,

The Plaintiffs' Emergency Motions for U-Visa Certification are GRANTED (Rec. Docs. 10 & 24). The Court will certify the Plaintiffs' U-Visa applications by signing the submitted “Supplement B” forms, so long as no additions, deletions, or alterations are made to the “Attachment A” forms.

E.D.La.,2008.

Garcia v. Audubon Communities Management, LLC

Not Reported in F.Supp.2d, 2008 WL 1774584 (E.D.La.)

END OF DOCUMENT

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

[REDACTED]

Plaintiffs,

v.

No. [REDACTED]

[REDACTED]

Defendants.

MOTION FOR U-VISA CERTIFICATION

For the reasons set forth in the accompanying Memorandum of Law, Plaintiffs respectfully request that the Court certify that moving Plaintiff [REDACTED] “has been helpful, is being helpful, or likely will be helpful” in the investigation or prosecution of Defendants’ violations of NMSA 1978 § 30-24-3 (Intimidation of a Witness), NMSA 1978 § 30-25-1 (Perjury) and NMSA 1978 § 30-22-5 (Tampering with Evidence). Plaintiffs request that the Court sign the attached Form I-918 so that Plaintiff [REDACTED] may petition the U.S. Customs and Immigration Service (USCIS) for U visa relief, which – if granted – would permit him to remain in the United States to complete presentation of his claims brought pursuant to the New Mexico Minimum Wage Act (NMSA § 50-4-1 *et seq.*) and the above-listed criminal charges. Counsel for Plaintiffs conferred in good

faith with counsel for Defendants via email message on [REDACTED] and Defendants declined to concur in this Motion.

Respectfully submitted,

[REDACTED]

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this [REDACTED] I served a true and correct copy of the foregoing pleading on all parties entitled to notice via the electronic file and serve system.

[REDACTED]

I. Procedural History

Plaintiffs filed the instant lawsuit on [REDACTED] on their own behalf and on behalf of a class of similarly-situated employees to recover unpaid minimum and overtime wages they are owed by Defendants. In their Complaint, Plaintiffs also allege that Defendants unlawfully retaliated against Plaintiff [REDACTED] by terminating his employment when he attempted to recover the wages he is owed. Plaintiffs filed their Motion to Proceed as a Collective Action on [REDACTED]. Defendants filed a Motion to Compel Discovery on [REDACTED]. Both Motions are currently pending before the Court.

II. This Court Should Certify Plaintiff Soy Lopes' Application for U Visa Relief.

A. Plaintiff [REDACTED] Offers a Preliminary Showing that He Is Qualified for a Nonimmigrant U Visa.

Congress created the U visa program with the passage of the Victims of Trafficking and Violence Prevention Act of 2000 ("TVPA"). See Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533-37; see also 72 FR 53014-15. The purpose of the U visa program is to strengthen the ability of law enforcement agencies to investigate and prosecute crimes enumerated in the TVPA (which include witness tampering, obstruction of justice and perjury) by granting qualifying witnesses to those crimes nonimmigrant status to remain in the United States to assist law enforcement in the investigation or prosecution of such crimes. 8 U.S.C. § 1101(a)(15)(U)(iii); 72 Fed. Reg. 53014-15 ("Alien victims may not have legal status and, therefore may be reluctant to help in the investigation or prosecution of criminal activity for fear of removal from the United States.") ("Congress also sought to encourage law enforcement officials to better serve immigrant crime victims.").

To be eligible for U visa relief, a person (1) must have “suffered substantial physical or mental abuse as a result of having been a victim of [a] criminal activity” enumerated by the Act; (2) must “posses[] information” concerning the qualifying criminal activity; and (3) must have “been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of the qualifying criminal act. See 8 U.S.C. § 1101(a)(15)(U)(i). The TVPA’s qualifying criminal acts include, *inter alia*: (1) witness tampering; (2) obstruction of justice; and (3) perjury, as well as “any similar activity in violation of federal, state, or local criminal law.” See 8 U.S.C. § 1101(a)(15)(U)(iii).

i. Plaintiff [REDACTED] Is A Victim of Witness Intimidation.

In New Mexico, the crime of Intimidation of a Witness is committed when any person knowingly:

intimidat[es] or threaten[s] any witness or person likely to become a witness in any judicial, administrative, legislative or other official cause or proceeding for the purpose of preventing such individual from testifying to any fact, to abstain from testifying or to testify falsely...

NMSA 1978 § 30-24-3(A)(2)

It is not necessary that a judicial proceeding be underway when an act of intimidation occurs for criminal liability to adhere to a defendant who intimidates a witness. *State v. Clements*, 146 N.M. 745, 749 (N.M. App. 2009); certiorari denied 147 N.M. 362. (Statute criminalizing intimidation of a witness does not require that a judicial proceeding be instituted at the time defendant engaged in the improper intimidation of a “person likely to become a witness in any judicial proceeding.”). Further, proof that the potential witness was actually intimidated is not required -- it is the defendant’s intent to intimidate that is queried. *State v. Fernandez*, 117 N.M. 673, 679-680 (N.M. App. 1994).

Here, on [REDACTED], Plaintiff [REDACTED] delivered to Defendants a letter declaring that he and other workers at the [REDACTED] had formed a “workers committee” to attempt to resolve a series of problems that these employees were experiencing in the workplace. See Pl. Ex. 1, Letter to [REDACTED], [REDACTED] Plaintiff [REDACTED] wrote to Defendants that “[t]he most pressing of these problems is that some of us are not being paid the city minimum wage of \$9.85 or overtime pay.” *Id.* In response, Defendants summarily terminated Mr. [REDACTED] employment.²

Defendants violated the criminal anti-retaliation provisions of the New Mexico Minimum Wage Act (NMSA 1978 §§ 50-4-26(A), 50-4-26.1) and the federal Fair Labor Standards Act (29 U.S.C. §§ 215, 216) when they terminated Plaintiff [REDACTED] in retaliation for bringing forth his wage claim. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (Employers are prohibited from retaliating against employees for making informal, non-judicial and non-administrative complaints regarding unpaid wages.).

Defendants also committed an act of witness intimidation in violation of NMSA § 1978 30-24-3(A)(2) when they terminated Plaintiff [REDACTED]’ employment. Defendants did so by demonstrating to Plaintiff [REDACTED] that, should he pursue his wage claims, they would take action against him. Though Defendants did not directly inform Plaintiff [REDACTED] that they fired him in order to prevent him from pursuing and testifying in a wage case, such proof is not required. *State v. McGee*, 2003, 135 N.M. 73, 77 (Proof of defendant's intent to retaliate or to exact “pay back,” for purposes of offense of

² The other signatory to the letter, Plaintiff [REDACTED] had already terminated his employment with Defendants when the letter was delivered.

retaliation against a witness, is rarely provable by direct evidence, and thus circumstantial evidence must often be relied upon for its proof.) Indeed, Defendants' message was clear: Should Plaintiff ██████ seek to recover the wages he worked for, Defendants would (and did) take action against him. Thus, Defendants violated NMSA § 1978 30-24-3(A)(2) when they terminated Plaintiff ██████ employment in an attempt to prevent him from participating in the instant lawsuit.

ii. Plaintiff ██████ Is A Victim of Tampering with Evidence.

Tampering with evidence consists of destroying, changing, hiding, placing or fabricating any physical evidence with intent to prevent the apprehension, prosecution or conviction of any person...³ NMSA 1978 § 30-22-5. In a prosecution for tampering with evidence, when there is no other evidence of the specific intent to disrupt an investigation, intent is often inferred from an overt act of the defendant. *State v. Garcia*, 149 N.M. 185, 192 (2011) (“[Defendant’s] multiple overt acts made clear his intent to thwart law enforcement by jettisoning key evidence.”).

Here, Defendants sought to evade civil and criminal liability for failing to pay their employees minimum and overtime wages by “discarding” records of their employees’ hours worked. See Pl. Ex. 2, Letter to ██████, dated ██████. They did so despite the fact that they were required by law to maintain such records. NMSA 1978 § 50-4-9. When Defendants destroyed what would be the key evidence in an investigation/prosecution of civil and criminal violations of the New Mexico Minimum

³ Failure to pay wages owed is a criminal offense. NSMA 1978 §50-4-26(A) (“An employer who violates any of the provisions of the Minimum Wage Act is guilty of a misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.”).

Wage Act, they made clear their intent to thwart law enforcement, and thus committed an act of Tampering with Evidence.

Similarly, Defendants falsified wage records submitted to the New Mexico Department of Workforce Solutions (“DWS”) in an attempt to evade law enforcement notice of their criminal refusal to pay wages for hours worked. Compare Pl. Ex. 3, “Employer’s Quarterly Wage and Contribution Reports” submitted by Defendants to DWS with Pl. Ex. 4, Plaintiff [REDACTED]’ records of hours worked. For example, in the fiscal quarter running from [REDACTED] through [REDACTED], Plaintiff [REDACTED] earned approximately \$ [REDACTED] in wages. For this period, Defendants reported to DWS that they paid only \$ [REDACTED] in wages to Plaintiff [REDACTED]. Similarly, during the [REDACTED] through [REDACTED] quarter, Defendants reported to the State of New Mexico that they paid Plaintiff [REDACTED] \$ [REDACTED] in wages when they in fact paid him approximately \$ [REDACTED] in wages. Defendants thus committed another act of Tampering with Evidence.

iii. Plaintiff [REDACTED] is a Victim of Defendants’ Perjury.

A person commits an unlawful act of perjury when they make “a false statement under oath, affirmation or penalty of perjury, material to the issue or matter involved in the course of any judicial, administrative, legislative or other official proceeding or matter, knowing such statement to be untrue.” NMSA 1978 § 30-25-1; *State v. Gallegos*, 98 N.M. 31, 31 (NM. App. 1982) overruled on other grounds by *State v. Benavidez*, 127 N.M. 189 (1999).

In New Mexico, employers are required to submit quarterly “Wage and Contribution” reports to the Department of Workforce Solutions wherein each employer

must certify the wages paid to its employees for that quarter so that the State can determine each employer's Unemployment Insurance tax responsibility. See NMSA 1978 § 51-1-9; NMAC 11.3.400 *et seq.* Employers are required to sign the Wage and Contribution reports that they submit. NMAC 11.3.400.404.B. When such reports are signed, the employer certifies that the report "is true and correct according to law and department regulations..." See Pl. Ex. 3, "Employer's Quarterly Wage and Contribution Reports" submitted by Defendants.

In this case, Defendants paid Plaintiff [REDACTED] in cash, "off-the-books" during much of his tenure and thus committed perjury when they submitted reports to the New Mexico Department of Workforce Solutions that vastly under-reported the wages paid to Plaintiff [REDACTED]. Compare Pl. Ex. 3 with Pl. Ex. 4. For example, in the fiscal quarter running from [REDACTED] through [REDACTED], Plaintiff [REDACTED] earned approximately \$ [REDACTED] in wages. For this period, Defendants reported to DWS that they paid only \$ [REDACTED] in wages to Plaintiff [REDACTED]. Similarly, during the [REDACTED] [REDACTED] quarter, Defendants reported to the State of New Mexico that they paid Plaintiff [REDACTED] \$ [REDACTED] in wages when they in fact paid him approximately \$ [REDACTED] in wages. Defendants thus committed acts of perjury when they submitted sworn and untruthful reports to DWS.

B. Plaintiff [REDACTED] Suffered Substantial Mental Abuse as a Result of Defendants' Crimes.

To be eligible for U visa relief, an alien must have "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity" enumerated by the Act. See 8 U.S.C. §1101(a)(15)(U)(iii)(1). To determine whether suffered abuse is substantial, a number of factors may be considered, including:

The nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health or physical or mental soundness of the victim... A series of acts taken together may be considered substantial physical or mental abuse even where no single act alone rises to that level.

8 C.F.R. §214.14(b). Ultimately, the determination for eligibility for U visa interim relief, is made by USCIS on a "case-by-case [basis], using [these] factors as guidelines... Through these factors, USCIS will be able to evaluate the kind and degree of harm suffered by the individual applicant, based upon the applicant's experience." 72 FR 53018.

Plaintiff [REDACTED] suffered substantial mental abuse as a result of Defendants' criminal activities. In her attached evaluation, Licensed Psychotherapist [REDACTED], LPCC, describes how, after Plaintiff [REDACTED] was unlawfully terminated from his employment, he "fell into a deep depression and anxiety regarding his inability to acquire any work and support his family." See Pl. Ex. 5, Psychotherapist evaluation dated [REDACTED]. The psychotherapist notes that "[Plaintiff [REDACTED]] was angry at himself" and that "he questioned himself for having reported the exploitation." *Id.* She notes that "[h]e would feel so bad that he often cried alone during the day" and that "[w]hen his family returned for the day, he would be distraught, listless and not willing or able to take part in their activities. He did not want anything to do with others." *Id.*

The psychotherapist goes on to note that "Mr. [REDACTED] had a history of experience with peonage, and he found himself trapped in it again. It recently took him over two years to finally decide to try to do something about it. His efforts only resulted in his

being fired.” *Id.* The psychotherapist describes how Plaintiff ██████████ “felt like he would rather give up trying than continue to live in that exploitative manner” and that “[h]e lost his appetite since all food was tasteless to him.” The report finds that ██████████ continues to feel the effects of the long-term exploitation by his former employers” and that “[h]e often feels that he will never be able to overcome the struggles that have stemmed from his abusive financial and emotional exploitation.” *Id.*

C. Plaintiff ██████████ Possesses Information about Defendants’ Involvement in the Crimes of Intimidation of a Witness, Tampering with Evidence and Perjury.

To receive U visa relief, a person must “possess[] information” concerning the alleged criminal activity. See 8 U.S.C. §1101(a)(15)(U)(i)(II); see also 8 C.F.R. § 214.14(b)(2) (the petitioner must have “knowledge of the details” and “possess specific facts” sufficient to show that the petitioner “has, is, or is likely” to assist in the prosecution of the crimes.) Because Plaintiff ██████████ is the principal witness to the circumstances of his unlawful termination and his actual hours worked, he possesses information about Defendants’ commission of the crimes of Witness Intimidation, Tampering with Evidence and Perjury described above.

D. Plaintiff ██████████ Will Be Helpful in the Investigation and Prosecution of Defendants’ Crimes.

The final requirement for U visa relief is that the petitioner “has been helpful, is being helpful, or is likely to be helpful” to the law enforcement agency or judge investigating or prosecuting the crime. See 8 U.S.C. §1101(a)(15)(U)(i).

Here, Plaintiffs have brought their charges before the Santa Fe County District Attorney. Plaintiff ██████████ will make himself available to the district attorney should

she initiate an investigation. If criminal prosecution ensues, Plaintiff [REDACTED] will assist the district attorney in any way requested.

III. This Court May Certify that Plaintiff [REDACTED] Is Assisting or Will Assist in the Investigation of Defendants' Crimes.

As set forth above, a person applying for U nonimmigrant status must provide a certification from a law enforcement official or judge that the person “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of an enumerated crime. See 8 U.S.C. §1184(p)(1). State court judges may certify U visa applications. See 8 U.S.C. § 1101(a)(15)(U)(i)(III); 8 C.F.R. § 214.14(a)(3)(ii); *Garcia v. Audubon Communities Mgmt., LLC*, 2008 WL 1774584 *2 (E.D. La. 2008). Above, Plaintiff [REDACTED] makes a prima facie showing that he will be eligible for U visa relief because he is the victim of enumerated crimes, has suffered substantial mental abuse as a result of those crimes, and he is being and will be helpful in the investigation and prosecution of those crimes.

Where a petitioner makes a prima facie showing that they will be eligible for U visa relief, USCIS regulations direct the certifying official to complete and sign Form I-918 Supplement B, “U Nonimmigrant Status Certification.” See 8 C.F.R. § 214.14(c)(2)(i). A proposed completed Form I-918 is attached hereto [REDACTED].

WHEREFORE, Plaintiff [REDACTED] respectfully requests that the Court grant Plaintiffs’ Motion for U Visa Certification and sign [REDACTED] Form I-918, so that Plaintiff Soy Lopes may apply to the USCIS for nonimmigrant U visa relief.

By email:

U.S. Department of Labor, Wage & Hour Division
170 S. Independence Mall West, Suite 850 W
Philadelphia, PA 19106-3317

Re: Request for U-Visa Certification – MM
Employer: KMM¹

Dear _____,

I am writing on behalf of MM for whom I requested a U-Visa Certification pursuant to the U.S. Department of Labor (USDOL) Field Assistance Bulletin and U-Visa Process and Protocols.² Ms. M alleged the qualifying criminal activity of fraud in foreign labor contracting, which arose in the context of her employment with Mr. M. During a telephone conversation on October 24, 2013, you alerted me to the likelihood that the USDOL will narrowly interpret the fraud in foreign labor criminal statute as to apply only to contracting that occurred on U.S. soil, thereby curtailing the USDOL’s ability to certify U-Visas under this qualifying criminal activity for a broad range of exploitative and unlawful behavior. Such an interpretation is contrary to established case law, would constrain the scope of the law, and would exclude a significant population of vulnerable and exploited workers from immigration remedies to which they are entitled.

I. BACKGROUND ON FRAUD IN FOREIGN LABOR CONTRACTING

The 2008 Reauthorization of the Trafficking Victims Protection Act created a new federal criminal activity of fraud in foreign labor contracting. 18 U.S.C. § 1351. Violations are punishable by imprisonment for not more than five years. One engages in fraud in foreign labor contracting when an individual “knowingly and with intent to defraud recruits, solicits, or hires a person outside the United States or causes another person to recruit, solicit, or hire a person outside the United States, or attempts to do so, for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment....” 18 U.S.C. § 1351. The 2013 Reauthorization of the Violence Against Women Act added fraud in foreign labor contracting as a qualifying criminal activity for U-Visa certification. 8 U.S.C. § 1101(a)(15)(U)(iii).

¹ Although they share a last name, MM and KMM are not related.

² USDOL Field Assistance Bulletin No. 2011-1, “Certification of Supplement B Forms of U Nonimmigrant Visa Applicants”, § (2)(A) (April 28, 2011); Department of Labor U Visa Process and Protocols Question-Answer (April 28, 2011). By certifying the enclosed Form I-918, Supplement B, USDOL is in no way making a judgment as to the merits of Ms. Moeletsi’s U-Visa application. The form is *only* an acknowledgement that she “has been, is being or is likely to be helpful in the investigation and/or prosecution of the criminal activity.” 8 U.S.C. § 1101(a)(15)(U)(i).

II. THE FRAUD IN FOREIGN LABOR CONTRACTING STATUTE PROVIDES FOR EXTRATERRITORIAL JURISDICTION.

A. Federal Criminal Statutes May Have Extraterritorial Reach Even Where It Is Not Explicitly Articulated In The Statute.

It is well-settled that federal criminal statutes may be interpreted to provide for extraterritorial effect even when it is not specifically articulated in the statutory language itself. In *United States v. Bowman*, 260 U.S. 94 (1922), the Supreme Court held that a presumption against extraterritoriality is not appropriate for certain criminal statutes “which are, as a class, not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated.” *Bowman*, 260 U.S. at 97-98. As numerous federal courts of appeals have recognized, “*Bowman* established the rule that Congress need not expressly provide for extraterritorial application of a criminal statute if the nature of the offense is such that it may be inferred.” *United States v. Plummer*, 221 F.3d 1298, 1304-1305 (11th Cir. 2000) (quoting *United States v. McAllister*, 160 F.3d 1304, 1307-08 (11th Cir. 1998), *reh'g and reh'g en banc denied*, 176 F.3d 496 (11th Cir. 1999), *cert. denied*, 528 U.S. 853 (1999)).

Relying on *Bowman*, courts across the country have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm. *See, e.g., United States v. Kapordelis*, 569 F.3d 1291 (11th Cir. 2009) (production of child pornography photographs abroad); *United States v. Benitez*, 741 F.2d 1312, 1316-17 (11th Cir. 1984) (conspiracy to murder government agents and assault of government agents abroad); *United States v. Perez-Herrera*, 610 F.2d 289, 290 (5th Cir. 1980) (attempt to import marijuana into the United States); *United States v. Baker*, 609 F.2d 134, 137-39 (5th Cir. 1980) (possession with intent to distribute and conspiracy to import marijuana); *see also United States v. Vasquez-Velasco*, 15 F.3d 833, 839 n.4 (9th Cir. 1994) (murder abroad to further a drug-trafficking enterprise); *United States v. Harvey*, 2 F.3d 1318, 1329 (3d Cir. 1993) (possession of child pornography made abroad); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991) (accessory after-the-fact to kidnapping and murder of government agent abroad); *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984) (conspiracy to import drugs into the United States).

The Supreme Court’s decision in *EEOC v. Arabian American Oil Company*, 499 U.S. 244 (1991) – which held that Title VII of the Civil Rights Act of 1964 does not have extraterritorial reach because it lacks a clear Congressional statement on the matter – does not change the *Bowman* analysis as it applies to *criminal* statutes. *See Plummer*, 221 F.3d at 1305, n.4; *United States v. Dawn*, 129 F.3d 878, 882 n. 7 (7th Cir. 1997) (“*Bowman* recognizes an exception to the presumption against extraterritorial intent for ‘criminal statutes ...’”); *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 71 (2d Cir. 1994).

B. The Plain Language of the Statute Clearly Demonstrates Congressional Intent for Extraterritorial Jurisdiction.

The statute's title, "Fraud in Foreign Labor Contracting," and statutory provisions that provide for the "hiring of a person outside the United States" demonstrate clear intent of extraterritorial jurisdiction.³ Courts have confirmed Congressional intent to provide for extraterritoriality of criminal statutes with similar language. *See Pasquantino v. United States*, 544 U.S. 349, 371-72 (2005) (noting that the federal criminal wire fraud statute's prohibition of frauds executed "in interstate or foreign commerce" indicates that "this is surely not a statute in which Congress had only domestic concerns in mind" (internal quotation marks omitted)); *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006) (finding extraterritorial jurisdiction of statute titled "Engaging in illicit sexual conduct in foreign places" and reaching people "who travel[] in foreign commerce"); *see also United States v. Weingarten*, 632 F.3d 60, 66 (2d. Cir. 2011). The statute's plain language, which describes the international scope of the unlawful act as the "hiring of a person outside the United States . . . for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises," clearly demonstrates Congress's intent to prohibit acts that are not only of "domestic concerns." *Pasquantino*, 544 U.S. at 371.

Beyond the plain extraterritorial language in the fraud in foreign labor contracting criminal statute, an intention of extraterritoriality "may be 'inferred from . . . the nature of the harm the statute is designed to prevent,' from the self-evident 'international focus of the statute,' and from the fact that 'limit[ing] [the statute's] prohibitions to acts occurring within the United States would undermine the statute's effectiveness.'" *United States v. Belfast*, 611 F.3d 783, 810-811 (11th Cir. 2010) (quoting *Plummer*, 221 F.3d at 1310). It is hard to dispute that the fraud in foreign labor contracting statute has anything but an "international focus." Further, one can easily infer an intention of extraterritoriality based on the harm the statute intends to prohibit, the practice of recruiting foreign workers, in their home countries, with promises of fair working conditions and wages, only to exploit them after they have arrived in the United States. The fraud in foreign labor contracting criminal statute was passed to address this common and inhumane practice. 154 Cong. Rec. H10904 (Dec 10, 2008). In an explanatory statement drafted by the Judiciary Committee of the House of Representatives, Representative Berman explained that the primary purpose of the fraud in foreign contracting provision was to create accountability for employers who "lured" people to the United States under false pretenses, particularly under guest visa programs. To limit its reach to domestic contracting only would significantly "undermine the statute's effectiveness," and run counter to the purpose articulated by lawmakers. *Id.*

³ By comparison, the 2008 Amendments to the Trafficking Victims Protection Act established extraterritorial jurisdiction over certain peonage and trafficking offenses that are otherwise inherently domestic crimes and contain no reference to extraterritoriality. *See* 18 U.S.C. § 1581 (peonage); 1583 (enticement into slavery); 1584 (sale into involuntary servitude); 1589 (forced labor); 1590 (human trafficking); 1591 (sex trafficking).

Because the statute’s language, intent, and legislative history assume extraterritorial jurisdiction, the U-Visa regulations’ requirement that the “qualifying criminal activity occurred in the United States . . . or violated a U.S. federal law that *provides for* extraterritorial jurisdiction to prosecute the offense in a U.S. federal court” is met. 8 C.F.R. § 214.14(b)(4) (emphasis added).⁴ Indeed, in at least one instance, criminal defendants were convicted in federal court under this statute without question as to the extraterritorial application of the statute. *United States v. Askarkhodjaev*, 09-00143-01-CR-W-ODS (W.D. Mo.).

III. MS. M, A VICTIM OF FRAUD IN FOREIGN LABOR CONTRACTING, EXPERIENCED THE KIND OF VICTIMIZATION THE LAW WAS INTENDED TO PROHIBIT.

Ms. M was recruited by Mr. M, a friend of her extended family, in her home country of XXXX. Mr. M sought Ms. M’s labor as a domestic worker in the United States, where he was to be posted as the Legal Counsellor of the Mission of XXXX to the United Nations. Mr. M met with Ms. M’s family, gained their trust, and made important promises to Ms. M and her mother about the terms and conditions of her employment, most of which were memorialized in a contract signed by both parties in XXXX. Upon arrival in the United States, Ms. M quickly learned that Mr. M had no intention of adhering to any of the agreed-upon terms of her employment; Mr. M knowingly made those promises “with intent to defraud . . . by means of materially false or fraudulent pretenses, representations or promises.” 18 U.S.C. § 1351.

This fact pattern is all too common. *See, e.g.*, Statement of Martina E. Vandenberg, Attorney Jenner & Block, LLP, *Legal Options to Stop Human Trafficking: Hearing Before*

⁴ The Federal Register commentary that addresses the U-Visa regulation, issued by the Department of Homeland Security, supports this reading of the regulation. The commentary explains that:

this rule provides that criminal activity that has occurred outside of the United States, but that fits within a type of criminal activity listed in Section 101(a)(15)(U)(iii) of the INA, will constitute a qualifying criminal activity if it violates a federal statute that specifically provides for extraterritorial jurisdiction. . . . Congress has enacted a variety of statutes governing criminal activity occurring outside the territorial limits of the United States. These statutes establish extraterritorial and federal, criminal jurisdiction. Statutes establishing extraterritorial jurisdiction generally require some nexus between the criminal activity and U.S. interests.

72 Fed. Reg. 53014, 53020. The commentary goes on to cite several statutes as examples, which do not explicitly articulate extraterritorial jurisdiction but have been interpreted by courts to apply extraterritorially: “[f]or example, pursuant to 18 U.S.C. 2423(c), the United States has jurisdiction to investigate and prosecute cases involving U.S. citizens or nationals who engage in illicit sexual conduct outside the United States, such as sexually abusing a minor. *See also* 18 U.S.C. 32 (destruction of an aircraft); 15 U.S.C. 1 (extraterritorial application of the Sherman Act governing antitrust laws).”

Subcomm. on Human Rights and the Law of the Senate Comm. on Judiciary, 110th Cong. 24 (2007) (describing the frequency of individuals trafficked to work as domestic workers for diplomats); Statement of Florrie Burke, Safe Horizon, *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing Before House Comm. on the Judiciary*, 110th Cong. 83 (2007) (relating frequent instances of workers coming to the United States with promises of work conditions and format that were never fulfilled by their traffickers). It is not unusual for employers to exploit personal relationships with victims or their families to gain their trust or prey on cultural or ethnic familiarity. See Vandenberg Statement, 110th Cong. 24 (providing examples when traffickers travel to small villages and convince entire families that a job opportunity will be good for the family). This form of recruitment inherently occurs on foreign soil. Interpreting the fraud in foreign labor contracting statute to exclude this type of unlawful activity drastically undermines the law's effectiveness. The statute prohibits actions that are "quintessentially international in scope" and warrants extraterritorial application. *Belfast*, 611 F.3d at 811.

* * * * *

Ms. M respectfully requests that you find she has presented credible allegations of qualifying criminal activity by her former employer and she has been and is likely to be helpful in any investigation or prosecution, and accordingly certify Form I-918, Supplement B. If you need any additional information or have questions, please contact me at (718) 943-8641.

Sincerely,

Dana Sussman
Attorney for MM

COVER LETTER FOR U VISA APPLICATION

Date

Department of Homeland Security
USCIS – Vermont Service Center
VAWA Unit – U Visa Petition
75 Lower Welden Street
St. Albans, VT 05479-0001

RE: LAST NAME, First Name

- **I-918 Application for U Nonimmigrant Visa**
- **Application for Advance Permission on Form I-192**

RE: DERIVATIVE NAME

- **Petition for Qualifying Family Member of U-1 Recipient on Form I-918A**
- **Application for Advance Permission on Form I-192**
- **Application for Work Authorization on Form I-765**

Via Certified Mail

Dear Adjudicating Officer,

We are writing to submit the above mentioned application for a U visa.

The applicant meets the U visa eligibility requirements under 8 U.S.C. § 1101(a)(15)(U)(i), as she is the victim of CRIMES. The criminal activity occurred in the United States in CITY, STATE. [FURTHER DESCRIPTION OF CRIMINAL ACTIVITY.] [FURTHER DESCRIPTION OF HARM SUFFERED]. [FURTHER DESCRIPTION OF HELPFULNESS IN INVESTIGATION.]

We enclose Form I-192 to waive the grounds of inadmissibility because she entered without inspection. Please consider all of the enclosed documentation in support of both the I-918 and I-192.

Enclosed in support of her U visa application please find the following:

1. Form G-28 authorizing my representation,
2. Form I-912, Request for Fee Waiver
3. Form I-918, Petition for U Nonimmigrant Status
4. Form I-192, Application for Advance Permission to Enter as Nonimmigrant
5. Form I-918B, Certification form from the LAW ENFORCEMENT AGENCY, dated _____, certifying that the applicant has been helpful in the investigation and/or prosecution of the criminal activity,
6. AGENCY Certification Protocol;
7. A copy of relevant Penal Code sections,
8. The applicant's declaration with translation,
9. A letter from the applicant's therapist,

10. A copy of the identity page of the applicant's passport,
11. A copy of the applicant's birth certificate with translation,
12. Birth certificates of the applicant's U.S. Citizen children,
13. Letters of support from the victim's community members

In support of her DERIVATIVE application as a derivative, we enclose the following:

14. Form G-28 authorizing my representation,
15. Fee waiver request in lieu of the biometrics fee,
16. Form I-918A,
17. Form I-192 with fee waiver request,
18. A copy of birth certificate with translation showing the relationship,
19. A copy of the identity page of her valid passport, and
20. Form I-765, fee waiver request, and 2 photographs for the issuance of her (a)(20) EAD if her I-918A is approved.

Thank you very much for your consideration and assistance. If you require anything further, please contact me.

Sincerely,

Attorney at Law
Address
City, State Zip
Telephone
Email



**Notice of Entry of Appearance
as Attorney or Accredited Representative**
Department of Homeland Security

DHS
Form G-28
OMB No. 1615-0105
Expires 02/29/2016

Part 1. Information About Attorney or Accredited Representative

Name and Address of Attorney or Accredited Representative

1.a. Family Name (Last Name)

1.b. Given Name (First Name)

1.c. Middle Name

2. Name of Law Firm or Recognized Organization

3. Name of Law Student or Law Graduate

4. State Bar Number

5.a. Street Number

5.b. Street Name

5.c. Apt. Ste. Flr.

5.d. City or Town

5.e. State 5.f. Zip Code

5.g. Postal Code

5.h. Province

5.i. Country

6. Daytime Phone Number () -

7. E-Mail Address of Attorney or Accredited Representative

Part 2. Eligibility Information For Attorney or Accredited Representative

(Check applicable item(s) below)

1. I am an attorney eligible to practice law in, and a member in good standing of, the bar of the highest court(s) of the following State(s), possession(s), territory(ies), commonwealth(s), or the District of Columbia.

1.a.

1.b. I (choose one) am not am subject to any order of any court or administrative agency disbaring, suspending, enjoining, restraining, or otherwise restricting me in the practice of law. (If you are subject to any order(s), explain fully in the space below.)

1.b.1.

2. I am an accredited representative of the following qualified nonprofit religious, charitable, social service, or similar organization established in the United States, so recognized by the Department of Justice, Board of Immigration Appeals pursuant to 8 CFR 292.2. Provide the name of the organization and the expiration date of accreditation.

2.a. Name of Recognized Organization

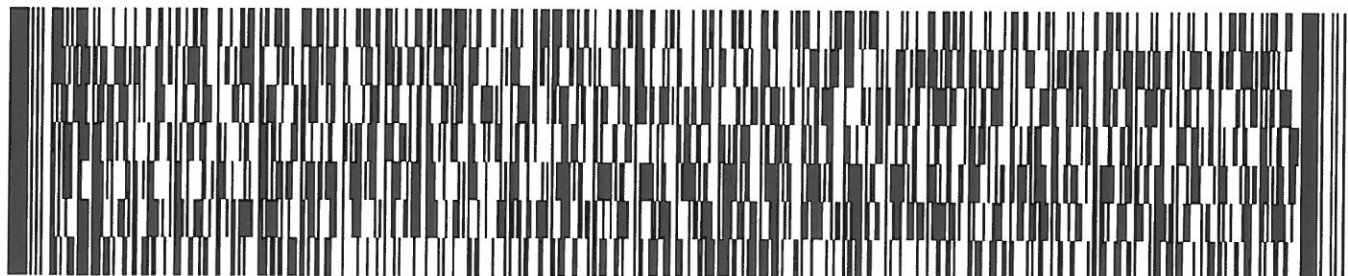
2.b. Date Accreditation expires
(mm/dd/yyyy) ▶

3. I am associated with

3.a.

the attorney or accredited representative of record who previously filed Form G-28 in this case, and my appearance as an attorney or accredited representative is at his or her request. If you check this item, also complete **number 1 (1.a. - 1.b.1.) or number 2 (2.a. - 2.b.) in Part 2 (whichever is appropriate).**

4. I am a law student or law graduate working under the direct supervision of the attorney or accredited representative of record on this form in accordance with the requirements in 8 CFR 292.1(a)(2)(iv).



Part 3. Notice of Appearance as Attorney or Accredited Representative

This appearance relates to immigration matters before (select one):

- 1. USCIS - List the form number(s)
1.a. I-918 I-192 I-765
- 2. ICE - List the specific matter in which appearance is entered
2.a.
- 3. CBP - List the specific matter in which appearance is entered
3.a.

I hereby enter my appearance as attorney or accredited representative at the request of:

- 4. Select only one: Applicant Petitioner Respondent (ICE, CBP)

Name of Applicant, Petitioner, or Respondent

- 5.a. Family Name (Last Name) Client Last Name
- 5.b. Given Name (First Name) Client First Name
- 5.c. Middle Name Client Middle Name
- 5.d. Name of Company or Organization, if applicable

NOTE: Provide the mailing address of Petitioner, Applicant, or Respondent and not the address of the attorney or accredited representative, except when a safe mailing address is permitted on an application or petition filed with Form G-28.

- 6.a. Street Number and Name 455 Home Street
- 6.b. Apt. Ste. Flr. A
- 6.c. City or Town Metroville
- 6.d. State CA 6.e. Zip Code 12345

- 7. Provide A-Number and/or Receipt Number

A 123456789

Pursuant to the Privacy Act of 1974 and DHS policy, I hereby consent to the disclosure to the named Attorney or Accredited Representative of any record pertaining to me that appears in any system of records of USCIS, ICE, or CBP.

- 8.a. Signature of Applicant, Petitioner, or Respondent

- 8.b. Date

(mm/dd/yyyy) ▶

Part 4. Signature of Attorney or Accredited Representative

I have read and understand the regulations and conditions contained in 8 CFR 103.2 and 292 governing appearances and representation before the Department of Homeland Security. I declare under penalty of perjury under the laws of the United States that the information I have provided on this form is true and correct.

- 1. Signature of Attorney or Accredited Representative

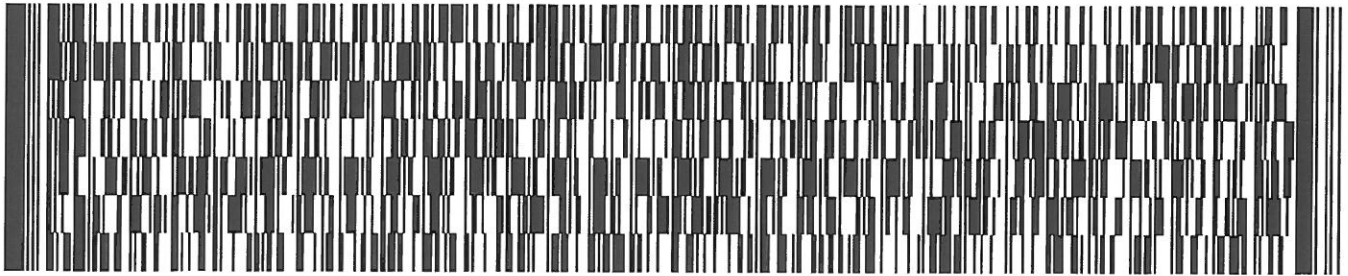
- 2. Signature of Law Student or Law Graduate

- 3. Date

(mm/dd/yyyy) ▶

Part 5. Additional Information

- 1.



Before you fill out this form, please read the instructions.

FOR USCIS USE ONLY

Section 1. Information About You

Line 1. a. Family Name (Last Name)

Line 1. b. Given Name (First Name)

Line 1. c. Middle Initial

Line 2. Alien Registration Number (A-Number) (numbers only)

Line 3. U.S. Social Security Number (SSN) (9 numbers only)

Line 4. Date of Birth
(mm/dd/yyyy)

Line 5. Marital Status Never Married Married Marriage Annulled
 Legally Separated Divorced Widow(er)

Application Received At
(check only one box):

USCIS Field Office
 Fee Waiver Approved
Date: _____
 Fee Waiver Denied
Date: _____

USCIS Service Center
 Fee Waiver Approved
Date: _____
 Fee Waiver Denied
Date: _____

Line 6. Applications and Petitions (Enter the form number(s) of the application(s) and/or petition(s) for which you are requesting a fee waiver.

Biometrics services fees, where applicable, will be included in the fee waiver request.

Section 2. Additional Information if Dependent(s) are Included in This Request

Line 7. Complete the Table below if applicable. *(If you need more space, attach a separate sheet of paper.)*

Name (First, MI, Last)	A-Number (If applicable)	SSN (If applicable)	Date of Birth (mm/dd/yyyy)	Relationship to You
Spouse Name	A-		date	spouse
Daughter Name	A-		date	daughter
	A-			
	A-			
	A-			
	A-			
	A-			

Section 3. Basis for Your Request (Check any that apply. For additional information, see the form instructions.)

- Line 8. a. I am or a relevant member of my household is currently receiving a means-tested benefit. (complete Sections 4 and 7)
- Line 8. b. My household income is at or below 150% of the Federal Poverty Guidelines. (complete Sections 5 and 7)
- Line 8. c. I have a financial hardship. (complete Sections 5, 6 and 7)

Section 4. Means-Tested Benefit

Line 9. Complete the Table Below (If you need more space, attach a separate sheet of paper.)

Name of Person Receiving the Benefit	Name of Agency Awarding Benefit	Date Benefit Was Awarded	Is This Benefit Being Received Now?
Daughter Name	SNAP (food stamps)	date	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Daughter Name	Medicaid	date	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
			<input type="checkbox"/> Yes <input type="checkbox"/> No
			<input type="checkbox"/> Yes <input type="checkbox"/> No
			<input type="checkbox"/> Yes <input type="checkbox"/> No
			<input type="checkbox"/> Yes <input type="checkbox"/> No
			<input type="checkbox"/> Yes <input type="checkbox"/> No
			<input type="checkbox"/> Yes <input type="checkbox"/> No

Section 5. Household Income (Provide evidence of monthly income or other support.)

Line 10. How many dependents (for tax purposes) live with you?
 (round to the nearest dollar)

Line 11. Average monthly wage income from household members

Line 12. Other money received each month (child support, spousal support, unemployment, etc.)

Total (USCIS will compare this amount to Federal Poverty Guidelines)

Section 6. Financial Hardship

Line 13.

Describe your particular situation. Be sure to include how this situation has caused you to incur costs (and what the costs were) or loss of income that you have experienced (and what that loss was). *(If you need more space, attach a separate sheet of paper.)*

I am facing particular financial hardship due to the hospitalization of my wife last summer, in DATE. My wife was hospitalized for three days due to ILLNESS, and I was not able to work during that time. In addition, we incurred medical bills of AMOUNT, which we continue to pay on a monthly installment plan.

If you are currently unemployed, you must complete Lines 14 and 15.

Line 14.

Date that you became unemployed

Line 15.

Amount of unemployment compensation (monthly) that you are receiving (enter dollars)

Line 16.

List your assets and the value of your assets. *(If you need more space, attach a separate sheet of paper.)*

Type of Asset	Value (enter dollars)
Honda Civic 1988	\$800.00
Savings account	\$500.00
TOTAL Value of Assets	\$1300.00

Section 6. Financial Hardship (Cont'd)

List your average monthly costs, and provide evidence of monthly payments where possible. *(If you need more space, attach a separate sheet of paper.)*

Type of Cost	Value (Enter Dollars)	Type of Cost	Value (Enter Dollars)
Line 17. Rent	\$700.00	Insurance	
Mortgage		Loan Payment	
Food	\$300.00	Commuting Costs	
Utilities	\$100.00	Medical	\$200.00
Child/Elder care		School	
		TOTAL Monthly Costs	\$1300.00

Section 7. Your Signature and Authorization

Do not sign your Form I-912 until it is complete and you are ready to file.

I take full responsibility for the accuracy of all the information provided, including all supporting documentation. I authorize the release of any information, including the release of my Federal tax returns, that USCIS needs to determine my eligibility.

Each person applying for a fee waiver request must sign Form I-912. This includes individuals identified in Sections 1 and 2 if 14 years of age or older. (If you need more space, attach a separate sheet of paper.)

Line 18.	Your Signature	<input type="text"/>	Date	<input type="text"/>
	Additional Signature	<input type="text"/>	Date	<input type="text"/>
	Additional Signature	<input type="text"/>	Date	<input type="text"/>
	Additional Signature	<input type="text"/>	Date	<input type="text"/>
	Additional Signature	<input type="text"/>	Date	<input type="text"/>
	Additional Signature	<input type="text"/>	Date	<input type="text"/>
	Additional Signature	<input type="text"/>	Date	<input type="text"/>
	Additional Signature	<input type="text"/>	Date	<input type="text"/>

Department of Homeland Security
U.S. Citizenship and Immigration Services

I-918, Petition for U Nonimmigrant Status

START HERE - Please type or print in black ink.

Part 1. Information about you. *(Person filing this petition as a victim)*

Family Name: Last Name: _____ Given Name: First Name: _____ Middle Name: _____

Other Names Use (Include maiden name/nickname):

Home Address - Street Number and Name: 123 Main St. Apt. #: _____

City: _____ State/Province: State: _____ Zip/Postal Code: 12345

Safe Mailing Address (if other than above) - Street Number and Name: _____ Apt. #: _____

C/O (in care of):

City: _____ State/Province: _____ Zip/Postal Code: _____

Home Telephone # (with area code): _____ Safe Daytime Phone # (with area code): _____ E-Mail Address (optional): _____

A # (if any): if any _____ U.S. Social Security # (if any): _____ Gender: Male Female

Marital Status: Single Married Divorced Widowed

Date of Birth (mm/dd/yyyy): _____ Country of Birth: Mexico

Country of Citizenship: Mexico Passport #: 1234567

Place of Issuance: New Orleans, LA Date of Issue (mm/dd/yyyy): 12/03/2012

Place of Last Entry: Arizona Date of Last Entry (mm/dd/yyyy): _____

I-94 # (Arrival/Departure Document): N/a Current Immigration Status: EWI

For USCIS Use Only.

Returned	Receipt
Date	
Date	
Resubmitted	
Date	
Date	
Reloc Sent	
Date	
Reloc Rec'd	
Date	

U.S. Embassy/Consulate:

Validity Dates
From: _____
To: _____

Remarks

Conditional Approval
Stamp #: _____ Date: _____

Action Block

To Be Completed by
Attorney or Representative, if any.
 Fill in box if G-28 is attached to represent the applicant.

ATTY State License #
123456



Part 2. Additional information.

Answers to the questions below require explanations and supporting documentation. Attach relevant documents in support of your claims that you are a victim of criminal activity listed in the Immigration and Nationality Act (INA), section 101(a)(15)(U). You must also attach a personal narrative statement describing the criminal activity of which you were the victim. If you are only petitioning for U derivative status for a qualifying family member(s) subsequent to your (the principal petitioner) initial filing, evidence supporting the original petition is not required to be submitted with the new Form I-918.

Attach additional sheets of paper as needed. Write your name and Alien Registration Number (A #), if any, at the top of each sheet and indicate the number of the item that refers to your answer. Include the Part and letter or number relating to the additional information you provided (example: Part 2, Z).

Check either "Yes" or "No" as appropriate to each of the following questions.

- 1. I am a victim of criminal activity listed in the INA at section 101(a)(15)(U). Yes No

- 2. I have suffered substantial physical or mental abuse as a result of having been a victim of this criminal activity. Yes No

- 3. I possess information concerning the criminal activity of which I was a victim. Yes No

- 4. I am submitting a certification from a certifying official on Form I-918 Supplement B, U Nonimmigrant Status Certification. Yes No

- 5. The crime of which I am a victim occurred in the United States including Indian country and military installations) or violated the laws of the United States. Yes No

- 6. I am under the age of 16 years. Yes No

- 7. I want an Employment Authorization Document. Yes No

- 8. Have you ever been in immigration proceedings? Yes No

If "Yes," what type of proceedings? (Check all that apply.)

<input checked="" type="checkbox"/> Removal Date (mm/dd/yyyy) <input style="width: 100px; height: 20px;" type="text" value="date"/>	<input type="checkbox"/> Exclusion Date (mm/dd/yyyy) <input style="width: 100px; height: 20px;" type="text"/>	<input type="checkbox"/> Deportation Date (mm/dd/yyyy) <input style="width: 100px; height: 20px;" type="text"/>	<input type="checkbox"/> Recission Date (mm/dd/yyyy) <input style="width: 100px; height: 20px;" type="text"/>	<input type="checkbox"/> Judicial Date (mm/dd/yyyy) <input style="width: 100px; height: 20px;" type="text"/>
---	---	---	---	--

9. List each date, place of entry and status under which you entered the United States during the five years preceding the filing of this petition.

Date of Entry (mm/dd/yyyy)	Place of Entry	Status at Entry
date	Arizona	EWI



Part 2. Additional information. (Continued.)

10. If you are outside the United States, give the U.S. consulate or inspection facility you want notified if this petition is approved.

Type of Office (Check one): Consulate Pre-flight inspection Port of Entry

Office Address (City)

U.S. State or Foreign Country

n/a

Safe Foreign Address Where You Want Notification Sent - Street Number and Name

Apt. #

City

State/Province

Country

Zip/Postal Code

Part 3. Processing information.

Please answer the following questions about yourself. For the purposes of this petition, you must answer "Yes" to the following questions, if applicable, even if your records were sealed or otherwise cleared or if anyone, including a judge, law enforcement officer or attorney, told you that you no longer have a record. (Answering "Yes" does not necessarily mean that you will be denied U nonimmigrant status.)

1. Have you EVER:

- a. Committed a crime or offense for which you have not been arrested? Yes No
- b. Been arrested, cited or detained by any law enforcement officer (including DHS, former INS and military officers) for any reason? Yes No
- c. Been charged with committing any crime or offense? Yes No
- d. Been convicted of a crime or offense (even if violation was subsequently expunged or pardoned)? Yes No
- e. Been placed in an alternative sentencing or a rehabilitative program (for example: diversion, deferred prosecution, withheld adjudication, deferred adjudication)? Yes No
- f. Received a suspended sentence, been placed on probation or been paroled? Yes No
- g. Been in jail or prison? Yes No
- h. Been the beneficiary of a pardon, amnesty, rehabilitation, or other act of clemency or similar action? Yes No
- i. Exercised diplomatic immunity to avoid prosecution for a criminal offense in the United States? Yes No

If you answered "Yes" to any of the above questions, complete the following table. If you need more space, use a separate sheet of paper to give the same information.

Why were you arrested, cited, detained or charged?	Date of arrest, citation, detention, charge. (mm/dd/yyyy)	Where were you arrested, cited, detained or charged? (City, State, Country)	Outcome or disposition. (e.g., no charges filed, charges dismissed, jail, probation, etc.)
see attached			



Part 3. Processing information. (Continued)

2. Have you ever received public assistance in the United States from any source, including the U.S. government or any State, county, city or other municipality (other than emergency medical treatment), or are you likely to receive public assistance in the future? Yes No
-
3. Have you:
- a. Engaged in prostitution or procurement of prostitution or do you intend to engage in prostitution or procurement of prostitution? Yes No
 - b. Ever engaged in any unlawful commercialized vice, including, but not limited to illegal gambling? Yes No
 - c. Ever knowingly encouraged, induced, assisted, abetted or aided any alien to try to enter the United States illegally? Yes No
 - d. Ever illicitly trafficked in any controlled substance, or knowingly assisted, abetted or colluded in the illicit trafficking of any controlled substance? Yes No
-
4. Have you ever committed, planned or prepared, participated in, threatened to, attempted to, or conspired to commit, gathered information for, solicited funds for any of the following:
- a. Highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle) Yes No
 - b. Seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained? Yes No
 - c. Assassination? Yes No
 - d. The use of any firearm with intent to endanger, directly or indirectly, the safety of one or more individual or to cause substantial damage to property? Yes No
 - e. The use of any biological agent, chemical agent, or nuclear weapon or device, or explosive, or other weapon or dangerous device, with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property? Yes No
-
5. Have you ever been a member of, solicited money or members for, provided support for, attended military training (as defined in section 2339D(c)(1) of title 18, United States Code) by or on behalf of, or been associated with an organization that is:
- a. Designated as a terrorist organization under section 219 of the Immigration and Nationality Act? Yes No
 - b. Any other group of two or more individuals, whether organized or not, which has engaged in or has a subgroup which has engaged in: Yes No
 - c. Highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle) Yes No
 - d. Seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained? Yes No
 - e. Assassination? Yes No
 - f. The use of any firearm with intent to endanger, directly or indirectly, the safety of one or more individual or to cause substantial damage to property? Yes No



Part 3. Processing information. (Continued.)

g. The use of any biological agent, chemical agent, or nuclear weapon or device, or explosive, or other weapon or dangerous device, with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property? Yes No

h. Soliciting money or members or otherwise providing material support to a terrorist organization? Yes No

6. Do you intend to engage in the United States in:

a. Espionage? Yes No

b. Any unlawful activity, or any activity the purpose of which is in opposition to, or the control or overthrow of the government of the United States? Yes No

c. Solely, principally, or incidentally in any activity related to espionage or sabotage or to violate any law involving the export of goods, technology, or sensitive information? Yes No

7. Have you ever been or do you continue to be a member of the Communist or other totalitarian party, except when membership was involuntary? Yes No

8. Have you, during the period of March 23, 1933 to May 8, 1945, in association with either the Nazi Government of Germany or any organization or government associated or allied with the Nazi Government of Germany, ever ordered, incited, assisted or otherwise participated in the persecution of any person because of race, religion, nationality, membership in a particular social group or political opinion? Yes No

9. Have you EVER ordered, committed, assisted, helped with, or otherwise participated in any act that involved:

a. Torture or genocide? Yes No

b. Killing, beating, or injuring any person? Yes No

c. Displacing or moving any persons from their residence by force, threat of force, compulsion, or duress? Yes No

d. Engaging in any kind of sexual contact or relations with any person who was being subjected to force, threat of force, compulsion, or duress? Yes No

e. Limiting or denying any person's ability to exercise religious beliefs? Yes No

f. The persecution of any person because of race, religion, national origin, membership in a particular social group, or political opinion? Yes No

If you answer "Yes," please describe the circumstances on a separate sheet(s) of paper.

10. Have you EVER advocated that another person commit any of the acts described in the preceding question, urged, or encouraged another person, to commit such acts? (If you answer "Yes," describe the circumstances on a separate sheet(s) of paper.) Yes No



Part 3. Processing information. (Continued.)

11. Have you EVER been present or nearby when any person was:

- a. Intentionally killed, tortured, beaten, or injured? Yes No
- b. Displaced or moved from his or her residence by force, compulsion or duress? Yes No
- c. In any way compelled or forced to engage in any kind of sexual contact or relations? Yes No

If you answer "Yes," please describe the circumstances on a separate sheet(s) of paper.

12. Have you (or has any member of your family) EVER served in, been a member of, or been involved in any way with:

- a. Any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerrilla group, or insurgent organization? Yes No
- b. Any prison, jail, prison camp, detention camp, labor camp, or any other situation that involved guarding prisoners? Yes No
- c. Any group, unit, or organization of any kind in which you or other persons possessed, transported, or used any type of weapon? Yes No

If you answer "Yes," please describe the circumstances on a separate sheet(s) of paper.

13. Have your EVER received any type of military, paramilitary or weapons training? (If you answer "Yes," please describe the circumstances on a separate sheet(s) of paper.) Yes No

14. a. Are removal, exclusion, rescission or deportation proceedings pending against you? Yes No
- b. Have removal, exclusion, rescission or deportation proceedings EVER been initiated against you? Yes No
- c. Have you EVER been removed, excluded or deported from the United States? Yes No
- d. Have you EVER been ordered to be removed, excluded or deported from the United States? Yes No
- e. Have you EVER been denied a visa or denied admission to the United States? (If a visa was denied, explain why on a separate sheet of paper.) Yes No
- f. Have you EVER been granted voluntary departure by an immigration officer or an immigration judge and failed to depart within the allotted time? Yes No
-

15. Are you under a final order or civil penalty for violating section 274C (producing and/or using false documentation to unlawfully satisfy a requirement of the Immigration and Nationality Act)? Yes No

16. Have you ever, by fraud or willful misrepresentation of a material fact, sought to procure, or procured, a visa or other documentation, for entry into the United States or any immigration benefit? Yes No

17. Have you ever left the United States to avoid being drafted into the U.S. Armed Forces? Yes No



Part 3. Processing information. (Continued.)

18. Have you ever been a J nonimmigrant exchange visitor who was subject to the two-year foreign residence requirement and not yet complied with that requirement or obtained a waiver of such? Yes No
19. Have you ever detained, retained, or withheld the custody of a child, having a lawful claim to United States citizenship, outside the United States from a United States citizen granted custody? Yes No
20. Do you plan to practice polygamy in the United States? Yes No
21. Have you entered the United States as a stowaway? Yes No
22. a. Do you have a communicable disease of public health significance? Yes No
- b. Do you have or have you had a physical or mental disorder and behavior (or a history of behavior that is likely to recur) associated with the disorder which has posed or may pose a threat to the property, safety, or welfare of yourself or others? Yes No
- c. Are you now or have you been a drug abuser or drug addict? Yes No

Part 4. Information about spouse and/or children.

1. Spouse

Family Name	Given Name	Middle Name	
Last name	First name		
date	Mexico	spouse	
Date of Birth (mm/dd/yyyy)	Country of Birth	Relationship	Current Location
			Morton, MS

2. Children

Family Name	Given Name	Middle Name	
Last name	First name		
date	U.S.A.	daughter	
Date of Birth (mm/dd/yyyy)	Country of Birth	Relationship	Current Location
			Morton, MS

Family Name	Given Name	Middle Name	
Date of Birth (mm/dd/yyyy)	Country of Birth	Relationship	Current Location

(If more space is needed, attach additional sheet(s) of paper.)



Part 5. Filing on behalf of family members.

I am now petitioning for one or more qualifying family member(s). (If "Yes," complete and include Form I-918, Supplement A and Supplement B, for each family member for whom you are petitioning.) Yes No

Part 6. Attestation, release and signature. (Read information on penalties in the instructions before completing this part.)

I certify, under penalty of perjury under the laws of the United States of America, that the information provided with this petition is all true and correct. I certify also that I have not withheld any information that would affect the outcome of this petition.

Signature

Date (mm/dd/yyyy)

NOTE: If you do not completely fill out this form or fail to submit required documents listed in the instructions, you may not be found eligible for the benefit sought and this petition will be denied.

Part 7. Signature of person preparing form, if other than above. (Sign below.)

I declare that I prepared this petition at the request of the above person, and it is based on all information of which I have knowledge. I have not knowingly withheld any material information that would affect the outcome of this petition.

Attorney or Representative: In the event of a Request for Evidence, may USCIS contact you by Fax or E-Mail? Yes No

Preparer's Signature

Date (mm/dd/yyyy)

Preparer's Printed Name

Preparer's Firm Name (if applicable)

Preparer's Address

Daytime Phone Number (with area code)

Fax Number (if any)

E-Mail Address (if any)



**Addendum for FORM I-918, Petition for U Nonimmigrant Status for CLIENT
NAME, (Alien Number if applicable)**

Part 2. Additional Information

Question 8:

I received an order of removal in absentia on DATE, as I did not receive notice of my hearing date. I am planning to file a motion to reopen this order of removal.

Part 3. Processing Information

Question 1(b), (c), and (d):

I was arrested by immigration officials on DATE and cited for entry without inspection. I was later ordered removed in absentia on DATE, as I did not receive notice of my hearing date.

I have been stopped while driving on a few occasions between DATES for traffic violations, including speeding, no seat belt, running a stop sign, and driving without a license or insurance in TOWN, STATE, and nearby, perhaps in TOWN, STATE. I have paid in full for every traffic citation I have been issued.

Question 1(g)

I have been detained by Immigration and Customs Enforcement on DATE due to a prior order of removal.

Question 2

I do not receive public benefits on my own behalf, but my U.S. citizen daughter is enrolled in publicly-funded medical insurance, and receives food stamps.

Question 11(a), (e)

Please see my attached sworn declaration. At EMPLOYER, where I worked, I was present when my employer sexually harassed other female employees, including touching them inappropriately.

Question 14(b), (d)

I was ordered removed in absentia on DATE, as I did not receive notice of my hearing date.

SWORN DECLARATION OF CLIENT NAME

I, CLIENT, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following information is true and accurate to the best of my knowledge:

1. My name is CLIENT. My date of birth is BIRTHDATE. I currently live in CITY, STATE.
2. I was born and raised in CITY, Mexico, and then migrated to the United States to join my family—my mother and father. I had been living with my grandparents in Mexico, and we had a very difficult life. I wanted to join my parents here, and I thought that I could build a better life in the United States.
3. I entered the United States without permission in DATE, crossing into Arizona by foot, and then travelled to STATE to join my family.
4. I began working for EMPLOYER, in CITY, STATE on DATE. I was very happy at first to be working there. I worked doing TASKS.
5. But things got much worse when I began to work for MANAGER at EMPLOYER. I was transferred to the DEPARTMENT of the EMPLOYER in YEAR. That is when MANAGER became my direct supervisor during the night shift.
6. MANAGER harassed me and other immigrant employees who worked in my department. He would sometimes call us things like “wetback” or “aliens,” or “dirty,” which I did not like. He always yelled at us if we ever said anything back to him, as if we were defying him. It made me feel uncomfortable to be around him.
7. When I started working with MANAGER, my co-workers told me to watch out for him. They said that he liked to touch the women in inappropriate places and say unpleasant things to them.
8. For the first few weeks, I was able to avoid MANAGER. But after a few weeks, it was harder and harder to avoid him because many people had quit, and there were only a few of us left in the DEPARTMENT. At first, MANAGER approached me and looked at me in a sexual way, and make comments that made me feel uncomfortable.
9. But after a while, he started to come up behind me while I was working and touch my bottom and inside my legs. The first time he did it, I couldn't believe it was happening. I felt like I could not move. I was so scared. I tried to say something but I felt like I was frozen. He just

breathed on me and laughed, and then turned and walked away like nothing had happened.

10. My co-worker and I talked a lot about what to do in the break room. She told me that there were other women who had problems with MANAGER in the past. She told me that she had heard that MANAGER had even violated another girl in the past in the storage room, but that the girl had just quit because she was too scared to report what had happened to the management. When I heard this, I felt very scared.
11. I was afraid to come to work, because I was scared that MANAGER would hit me, fire me, or call immigration against me. I had to support my family, so I kept coming to work. I tried to avoid MANAGER, but it was difficult. For the next few months, MANAGER kept coming up to me and touching me while I was working. Sometimes he would touch my legs and my bottom. Sometimes he would reach around and grab my breasts. Each time he would laugh and call me his “baby.”
12. I felt anxious and nervous about going to work. My chest felt heavy, and my heart felt like it was always beating too fast. I was upset and sad about what was happening at work and I did not want to do things I used to do. I got headaches, stomachaches, and threw up sometimes. I was so frustrated because I could not say anything about what MANAGER was doing to me and the other workers. I felt like I was being silenced.
13. One day, it just became too much for me. That day, MANAGER told me that he’d be waiting for me after work and that he was going to take me out for a good time. I was so scared that he was going to try to force me to sleep with him. I didn’t know what to do, so I texted my cousin, and asked her to meet me after work, and if she could bring her boyfriend with her. They came to meet me, so I avoided having to deal with MANAGER. They knew I was very scared and upset. COUSIN made me tell her what was happening with MANAGER. She told me that it was not my fault and that I could get help. I decided that I had to quit because I was too scared to work. I never called my work; I just stopped going. My cousin picked up my last paycheck for me the week after.
14. I never tried to report MANAGER to his boss or the police at the time, because I was scared. I was so scared he would do something against me, that he would hit me or do something worse. I was afraid he would call immigration. I had to keep silent because my job was on the line and my whole life was on the line because of deportation.
15. My COUSIN helped me to get in touch with COMMUNITY ORGANIZATION, where I met with a lawyer. The lawyer told me that what was happening to me was illegal, even though I was undocumented. My lawyer told me

that she was going to help me file a complaint with the EEOC to fix what was happening. I wanted to tell the EEOC everything that had happened. I wanted them to know my perspective and to let them know how wrong it was. One of my co-workers told me that there was a lawyer from the EEOC that I could talk to and that it would be confidential, and that nothing would happen to me if I talked to her, because I was still afraid of being deported if my MANAGER found out I had talked to them.

- 16. Since then, I have talked with the EEOC lawyer several times. She took my statement for the case. I have talked with them two or three times and want to help them out more if they need.

- 17. I still feel terrified of MANAGER. Every time I ride the bus near my old work, I start shaking and feel really scared. I still have nightmares that MANAGER is coming around the corner. It has taken me a long time to be able to talk to people about what is happening. I cry a lot and sometimes feel like I can't do anything to make my life better.

- 18. I hope that I can stay in the United States to take care of my family and to continue to pursue this case with the EEOC. I have been living with my new boyfriend and baby girl. I have been attending CHURCH, and I like being part of this community. I hope that I can keep going to this church because I want to give thanks to God for my beautiful family, and that no one has to be treated like this again.

This statement has been read to me in my native language of Spanish. I declare under penalty of perjury that the following is true and correct to the best of my knowledge.

NAME

DATE

**DECLARATION OF CLIENT
IN SUPPORT OF U-NONIMMIGRANT STATUS**

I, CLIENT, declared the following:

1. My name is CLIENT. I was born on DATE in CITY, Mexico. Please contact me through my attorney, ATTORNEY, at the ORGANIZATION. She can be reached at ADDRESS.
2. I am submitting this declaration in support of my application for a U nonimmigrant visa. I have been the victim of witness tampering and obstruction of justice at the hands of my former Employer, EMPLOYER. EMPLOYER is the owner of COMPANY, a janitorial service that cleans commercial locations. After EMPLOYER refused to pay me many months of wages he owed me, I filed reports of wage theft with the United States Department of Labor. After I sought these legal remedies EMPLOYER subjected me to threats, stalking, and harassment in an attempt to intimidate me and get me to abandon these legal processes. Because of this I have suffered severe anxiety, depression, and fear that has affected my entire life, as well as lost my job and many months of wages. I have been forced to seek an Anti-harassment Order for Protection against EMPLOYER and have made several reports to the police about his stalking and harassment.
3. Growing up in Mexico, my parents and I had border crossing cards that allowed us to enter the United States. We made about six visits a year, mostly to Nogales and Tucson. My mother would go shopping and I spent summer vacations with friends in Yuma, Arizona. I last entered the United States on DATE on a B1/B2 Tourist Visa. I have remained in the U.S. since that date.
4. In Mexico I worked as a technical coordinator of communications for a bank in Mexico, and for a company that helped United States tourists coming to Sonora. I have four children who still live in Mexico and who are now ages 25, 22, 18, and 16. I divorced from their mother in Mexico. I currently live in CITY, STATE, with my girlfriend and two of her young children who I help support as a parent.
5. I started working as a janitor for EMPLOYER and his COMPANY in DATE. At first I cleaned at BUSINESS in CITY. Later I also cleaned the offices of a nonprofit group in Seattle, and another company. From April until December of YEAR I worked seven days a week. After that I worked five or six days a week. I usually worked about 55 hours every week, depending on how many places I was cleaning.
6. After working for about a month, I still had not been paid by EMPLOYER. When I asked the manager who supervised us, MANAGER, she told me that my first month's wages were going to be withheld as a deposit. At the beginning of July I still had not been paid. Finally, I received my first paycheck in mid-July for April and May. After that my checks were always delayed.

7. There was no system to track how many hours I was working, so it was really difficult to tell how much I was actually making per hour. Any time I would start cleaning at a new job site my wages for the first month of work there would be delayed a month.
8. In December of 2009, EMPLOYER's payment for my worked started to be even further behind than normal. He owed me for October, November, and December. I asked EMPLOYER about the payment he owed me for the work I had done. He told me that he was having economic troubles and the Department of Labor was investigating janitorial companies, so he could not pay me. He also told me that if I continued insisting on being paid that he himself would call immigration authorities to report me.
9. After these threats I began to have anxiety and panic attacks because I was so afraid that EMPLOYER would report me and I would lose my job. I was anxious because I needed to work to be able to support my children in Mexico. I would send my children \$500 to \$600 every month, which they depended on. When their school fees were due I sent more money. Two of my children got really sick, and because I had not been paid I was not able to send money for the medical care they needed. I wanted to provide for my family, but I was working and not getting paid. I called Mexico one night only to find out the phone had been disconnected for lack of payment. I started having problems focusing and constantly worried about making ends meet for my family. My stress prevented me from sleeping.
10. I was intimidated and scared, but I needed to continue working with the hope I would get paid. I felt like I had no other option to provide for my family. I was finally paid in January, but again the payments were behind. MANAGER also told me I needed to submit my own invoices from then on because I was an independent contractor, being paid as if I had a business of my own. I had thought I was an employee of EMPLOYER's, but she said I was wrong. I learned later that they tried to tell us we were independent contractors so that they would not have to pay us as much. All of my jobs always took several hours longer than EMPLOYER told me they would take. When I asked EMPLOYER about the overtime I was working he told me that I was an independent contractor, not a full-time employee, so it was my responsibility to finish in the time I was assigned. He sharply reminded me that I was unauthorized to work and told me that if I didn't want to wait to get paid I could just leave it, because 100 people were waiting in line ready to take my job.
11. EMPLOYER used foul language towards me at work when he ordered me to do things. I was struggling to maintain any concentration at work and began having regular anxiety attacks because I was so afraid that I would lose my job and or that EMPLOYER would report me to immigration authorities.
12. EMPLOYER's payments of my wages got behind again in spring of YEAR. By July, EMPLOYER owed me for May, June and 15 days of July. I asked him several times about it, and he would just give me excuses, telling me that he couldn't print the checks that day or that he had not been paid by his accounts. Finally, EMPLOYER responded by yelling at me "I can call immigration on you – you know that, you son of a b****!" I felt trapped and intimidated, afraid that EMPLOYER would do something to hurt me or turn me over to immigration if I tried to seek any legal help in my situation. I was scared, depressed and

hopeless because I could not pay for my basic needs like rent, gas, or send support to my children because of the situation he trapped me in.

13. I finally decided I could not stand EMPLOYER's abuse any longer. On DATE, I told EMPLOYER I could not work for him any longer if I did not get paid the following day. I tried to talk to EMPLOYER about my children's hardship, but he refused to listen. That night I suffered panic and anxiety attacks and could not sleep. I was desperate – I did not know what to do and I worried all night. The next day when I asked about my wages I was told there was no check and to go home and not come back.
14. That evening MANAGER, the SMI Manager, came to my home and told me to return the facility keys from my worksite, because I was no longer employed by EMPLOYER. I was hesitant to turn over the key because it had been issued personally to me by worksite. MANAGER started cursing at me, yelling and threatening to call the police. At the time, I was renting a room in a house and I did not want to cause any problems for me or the family renting me the place. I was forced to give her the keys out of fear she would call the police.
15. The next day I had to return to the worksite, to gather some personal things from my locker. EMPLOYER was there and followed me to the basement of the building. I tried to talk to him about the situation, but he began to threaten me. He told me “if you try to recover this money you are going to know who I am. I have had this contract for five years and I have fired eight people like you and nothing has happened to me, so don't act like a dumb a** and go to the directors because they are not going to help you. And if you talk to them then I will call ICE.”
16. I was so afraid that I left the building. As I was leaving, a NON-PROFIT ORGANIZATION staff member stopped me to check in. NON-PROFIT ORGANIZATION is a nonprofit that helps low-income people. I had built relationships with several staff members and they were really supportive. NON-PROFIT STAFF asked me to return later to explain what happened. The next day, I told the staff that EMPLOYER had not paid me and had intimidated me with threats. They gave me information about WORKER CENTER, where I could get help. After verifying that EMPLOYER had abused me and other workers, they cancelled their contract with EMPLOYER.
17. After Compass cancelled the contract, both EMPLOYER and MANAGER called me to threaten me. EMPLOYER told me over the phone “te voy a chingar”- “I'm going to screw you.” He said it was my fault they cancelled the account, and that I could forget about the money and that I was going to “find out who he was.” MANAGER called and also threatened me. She told me I didn't know who EMPLOYER was yet and that he was going to screw me. She also said that her husband worked for the FBI and was going to “f*** you up.”
18. I had no more work and had not been paid thousands of dollars EMPLOYER owed me. I started to seek help from advocates at WORKER CENTER, where they help workers who have been cheated by their Employers. In November of YEAR, I decided I had to take some strong action and report my situation to law enforcement. With help from WORKER

CENTER advocates, I filed a report of the wages that had not been paid to me with the U.S. Department of Labor. During the process, we found out that there had been other similar complaints made against EMPLOYER by former employees. I cooperated with all of DOL's requests for information and provided them with information about my case. In January 2011, DOL determined that EMPLOYER owed me \$7,693.75. They sent EMPLOYER a letter informing him of this and telling him that he needed to pay me or respond.

19. Because EMPLOYER was not yet responding to communication from DOL and because I knew that other workers had also suffered wage theft by EMPLOYER, I decided to also work with advocates at WORKER CENTER on direct efforts to get EMPLOYER to pay my wages. We began to approach Clients of EMPLOYER's business, to enlist their help in securing the wages. We talked to them, wrote them letters, and even did some peaceful pickets to ask these Clients to put pressure on EMPLOYER to pay the wages he owed to his employees. I was scared of what EMPLOYER might do, but at this point I felt I had no other options.
20. Through this process I became involved with the Workers Defense Committee at WORKER CENTER. As I heard people's stories, I realized that a lot of people were suffering like me from wage theft. I began to help people in their cases and support their efforts to get paid the wages they were owed. I became very interested in this issue because people's situations were so difficult and many had children and spouses to support.
21. When I asked the staff at WORKER CENTER about doing more to help the other workers, they told me about their work to change some of the wage theft laws in CITY. I volunteered to help. I ended up telling my story publicly to explain to people why wage theft was a big problem. I shared my testimony twice with the CITY Council in the efforts to pass a wage theft city ordinance, on DATE and DATE. I began visiting schools, churches, and radio shows to tell my story. I received some media coverage of these testimonies.
22. After my public testimony, EMPLOYER and others began to intimidate me in an effort to get me to stop seeking legal remedies and publicizing EMPLOYER's abuse of his workers. I was first informed that EMPLOYER might be trying to harm me when ACQUAINTANCE, said he was trying to help me with my case, told me that EMPLOYER was looking for people to beat me up. Later, I began to be suspicious that EMPLOYER had hired ACQUAINTANCE to follow me and that he was just pretending to be helpful. EMPLOYER managed to know my whereabouts every time ACQUAINTANCE offered to help me. I lived about 30 minutes outside of Seattle and would have to go to the city to work on my case. Somehow, every time I went to Seattle EMPLOYER would call and threaten me. Later, ACQUAINTANCE called me and told me that EMPLOYER was serious and not a person to mess with, and that I should "back off or else."
23. MANAGER also began to call me. At first she pretended that she was on my side and tried to gain my trust. I thought I could trust her and told her about my case against EMPLOYER and my efforts to recover my unpaid wages. Eventually I realized that she was just trying to get information for EMPLOYER. When I confronted her about this, MANAGER began to threaten me. She threatened to accuse me of crimes to the police or call immigration on me.

24. Around March of YEAR I also began to notice that I was being followed. A white van with two people inside began following and watching me. I saw this same van outside WORKER CENTER in Seattle. I also saw it outside my house and outside my workplace. The same two young people were always inside. The van followed me from the parking lot, and I saw them outside my second workplace that night. The van did not have a license plate in front.
25. On another occasion when I was driving on the freeway with my new Employer, a car was following us. It swerved in front of us and cut us off, then threw something at our car. We pulled off the freeway to inspect the car and someone in the other car yelled at us as we exited. We found that the car door was damaged. I was afraid this was EMPLOYER or someone he sent to follow me to try to harm me.
26. I became really afraid for my safety because of EMPLOYER and MANAGER's threats. Because of the people EMPLOYER sent to stalk and harass me, I knew he was capable of following through with causing me serious bodily harm. My life became unbearable because I was scared of everything and everyone around me. I did not think I could trust anyone after ACQUAINTANCE and MANAGER turned out to be working for EMPLOYER. All of this was incredibly intimidating and I believe EMPLOYER took these actions to try to get me to stop the fight to recover my wages and to drop my claims with DOL.
27. I was also extremely depressed because of the economic harm EMPLOYER had caused me. I could not provide for my children because of the wages I had not been paid and because EMPLOYER had fired me for trying to be paid my wages. I became physically ill due to the fear and hardship of my situation – I suffered from toothaches, migraines, and loss of appetite and sleep because I worried about my safety.
28. The staff at WORKER CENTER encouraged me to seek a protection order because they shared concerns for my safety. I petitioned for an Anti-harassment Order for Protection in Superior Court. After a hearing where the Judge questioned EMPLOYER and me, the anti-harassment protection order was granted on DATE. The order required EMPLOYER to stay away from me, WORKER CENTER, and my home.
29. In June, I decided to pursue a private action to try to recover my wages in Superior Court, with hopes that this new tactic might hold EMPLOYER accountable for the wages he owed me. To do this you have to withdraw your specific claims with DOL, so that you can file a complaint with another attorney directly in the court. I filed the complaint on DATE and the case is still pending. I am still available to cooperate with DOL and can serve as a witness in their ongoing investigation of EMPLOYER. I want EMPLOYER to be held accountable and to keep him from being able to harm even more workers, and I will assist DOL if they need any further testimony from me.
30. On DATE, I and members from WORKER CENTER, and WORKER CENTER advocates, were doing a peaceful protest outside SITE around 7pm. This was part of our efforts to pressure EMPLOYER into paying the wages he owed to me and other workers. EMPLOYER arrived while we were there. He walked up in front of us and took my picture

with his telephone. Before he left he got close enough to talk to me and said “I’m going to f**k you up” and made a threatening gesture with his hand.

31. WORKER CENTER STAFF called the police because EMPLOYER was violating the Order for Protection. When the police arrived I talked to them and explained that I had a protection order and was afraid because EMPLOYER was there in violation of the order. The police officers then found EMPLOYER and talked to him. They made him leave the property. When the judge issued the order he explained very clearly to EMPLOYER that he was not to come within 100 feet of my person. EMPLOYER intimidated me by getting close to me to take a photograph, making intimidating signs at me with his hands, and threatening me with his words.
32. After this incident, I wouldn’t leave my home except for work or when accompanied by a friend or WORKER CENTER member. I was terrified that EMPLOYER would show up again and do something to harm me. I could not stop worrying about EMPLOYER planning more ways of retaliating against me for the complaints I had made to DOL. Because of this incident and the many threatening phone calls I had received from MANAGER, I decided I needed to make a full report of all the threatening behavior to make sure there was a record. On DATE, I went to the Sheriff’s office to make a report. I showed them a copy of the protection order and explained what had happened at SITE. They asked me to write a declaration about the events there and the phone threats, which I did.
33. The staff at WORKER CENTER also encouraged me to move somewhere where EMPLOYER would not be able to find where I lived. I could not afford to move out of my current residence on my own, but WORKER CENTER offered me a one-time loan to help me find a new place for safety purposes. I moved in DATE, and then again in DATE because I did not feel safe anywhere.
34. Because of all these threats by EMPLOYER and others that he sent to intimidate me, I continue to suffer from severe anxiety and fear that he will find me and do harm to me. This has caused me many sleepless nights and even migraines and toothaches. I have become constantly afraid for my security and afraid even to walk down the street because of the stalking and harassment. I have had to move multiple times for fear of my safety. I lost my work and many months of wages owed me which added significant economic stress to my situation. NON-PROFIT ORGANIZATION and WORKER CENTER have helped me economically, but I have not been able to support my children in Mexico like I used to.
35. I recently was finally able to find work as a janitor and at a door and window factory. I am starting to rebuild my life after all the harassment EMPLOYER put me through to deter me from seeking legal remedies. I currently live in CITY with my girlfriend and two of her children. I support her and the children as my own family. I also communicate with my own children in Mexico very often, over the phone or on Facebook. I still suffer from anxiety about my safety and fear that EMPLOYER will do something to me, and I worry about my family in Mexico because I cannot provide all the support they need due to the economic hardship EMPLOYER caused me.

36. I want to remain in the United States to continue working on my case to recover my wages. EMPLOYER still has not paid me the wages that the DOL found he owed me. My civil complaint against EMPLOYER is still pending in the courts. The case DOL has been investigating, on behalf of my complaint and other workers who were not paid by EMPLOYER is also ongoing. That case will go to trial next year, and I believe it is very important that I am available to assist if necessary.
37. I also want to remain in this country to receive protection from the harm EMPLOYER could cause me. Because of rumors I have heard, I believe EMPLOYER is part of a larger web of criminal activity. If I had to leave this country I am very afraid that he would send people to harm me in retaliation for sharing my story.
38. Another reason it is personally important for me remain in this country is to continue to receive the support that I need to recover from the stress, fear, and anxiety caused by EMPLOYER's harassment and stalking. I have received so much support from the advocates at WORKER CENTER and from some of the people at the NON-PROFIT ORGANIZATION. This has been essential to my safety and my well being these last years. I also want to be able to help other workers in their difficult situations. I am a part of the Workers Defense Committee at WORKER CENTER and help others in their efforts to reclaim unpaid wages. I do not want to be forced to leave this support network, and I also want to be able to continue to help support others. I have started to rebuild a safe and healthy life after all that I have suffered, and I want a chance to stay in the United States to continue healing from so much fear and anxiety and gaining stability again.

I, CLIENT, affirm, under penalty of perjury, that all of the foregoing statements are true and correct to the best of my knowledge.

Signature

Date

CERTIFICATE OF TRANSLATION

I, Translator, hereby certify, under penalty of perjury, that I am competent to translate from Spanish to English; that I have translated this Spanish language verbal declaration of CLIENT into English; and that the English translation is complete and accurate.

Signature

Date

Department of Homeland Security
U.S. Citizenship and Immigration Services

**I-918 Supplement B,
U Nonimmigrant Status Certification**

START HERE - Please type or print in black ink.

Part 1. Victim information.

Family Name Last Name	Given Name CLIENT Name	Middle Name
Other Names Used (Include maiden name/nickname)		
Date of Birth (mm/dd/yyyy) Month, Date 1985		
Gender <input type="checkbox"/> Male <input checked="" type="checkbox"/> Female		

Part 2. Agency information.

Name of Certifying Agency United States Equal Employment Opportunity Commission (EEOC)		
Name of Certifying Official Regional Attorney Name	Title and Division/Office of Certifying Official Regional Attorney/Region	
Name of Head of Certifying Agency Jacqueline Berrien, Chair		
Agency Address - Street Number and Name Address		Suite #
City	State/Province State	Zip/Postal Code Zip
Daytime Phone # (with area code and/or extension) Phone		Fax # (with area code)
Agency Type <input checked="" type="checkbox"/> Federal <input type="checkbox"/> State <input type="checkbox"/> Local		
Case Status <input checked="" type="checkbox"/> On-going <input type="checkbox"/> Completed <input type="checkbox"/> Other: _____		
Certifying Agency Category <input type="checkbox"/> Judge <input type="checkbox"/> Law Enforcement <input type="checkbox"/> Prosecutor <input checked="" type="checkbox"/> Other: See attachment		
Case Number CASE NUMBER	FBI # or SID # (if applicable)	

For USCIS Use Only.

Returned	Receipt
Date	
Date	
Resubmitted	
Date	
Date	
Reloc Sent	
Date	
Date	
Reloc Rec'd	
Date	
Date	

Remarks

Part 3. Criminal acts.

1. The applicant is a victim of criminal activity involving or similar to violations of one of the following Federal, State or local criminal offenses. (Check all that apply.)

<input type="checkbox"/> Abduction	<input type="checkbox"/> Female Genital Mutilation	<input type="checkbox"/> Obstruction of Justice	<input type="checkbox"/> Slave Trade
<input checked="" type="checkbox"/> Abusive Sexual Contact	<input type="checkbox"/> Hostage	<input type="checkbox"/> Peonage	<input type="checkbox"/> Torture
<input type="checkbox"/> Blackmail	<input type="checkbox"/> Incest	<input type="checkbox"/> Perjury	<input type="checkbox"/> Trafficking
<input type="checkbox"/> Domestic Violence	<input type="checkbox"/> Involuntary Servitude	<input type="checkbox"/> Prostitution	<input type="checkbox"/> Unlawful Criminal Restraint
<input type="checkbox"/> Extortion	<input type="checkbox"/> Kidnapping	<input type="checkbox"/> Rape	<input type="checkbox"/> Witness Tampering
<input type="checkbox"/> False Imprisonment	<input type="checkbox"/> Manslaughter	<input checked="" type="checkbox"/> Sexual Assault	<input type="checkbox"/> Related Crime(s)
<input type="checkbox"/> Felonious Assault	<input type="checkbox"/> Murder	<input type="checkbox"/> Sexual Exploitation	<input type="checkbox"/> Other: (If more space needed, attach separate sheet of paper.)
<input checked="" type="checkbox"/> Attempt to commit any of the named crimes	<input type="checkbox"/> Conspiracy to commit any of the named crimes	<input type="checkbox"/> Solicitation to commit any of the named crimes	



Part 3. Criminal acts. (Continued.)

2. Provide the date(s) on which the criminal activity occurred.

Date (mm/dd/yyyy)	Date (mm/dd/yyyy)	Date (mm/dd/yyyy)	Date (mm/dd/yyyy)
01/2008			

3. List the statutory citation(s) for the criminal activity being investigated or prosecuted, or that was investigated or prosecuted.

California Penal Code Section 243.4

4. Did the criminal activity occur in the United States, including Indian country and military installations, Yes No or the territories or possessions of the United States?

a. Did the criminal activity violate a Federal extraterritorial jurisdiction statute? Yes No

b. If "Yes," provide the statutory citation providing the authority for extraterritorial jurisdiction.

c. Where did the criminal activity occur?

City, State

5. Briefly describe the criminal activity being investigated and/or prosecuted and the involvement of the individual named in Part 1. Attach copies of all relevant reports and findings.

CLIENT was the victim of the qualifying criminal activities of abusive sexual contact and sexual assault. CLIENT was subject to unwanted sexual touching for the purpose of sexual arousal and sexual gratification of her perpetrator and supervisor, MANAGER, for an extended period of time. MANAGER brushed his groin against CLIENT, touched her buttocks, thighs, and shoulder in a sexual manner, and tried to grab her breasts. This illegal touching took place in the context of extreme sexual harassment. MANAGER made several unwelcome comments, and told her that he liked her breasts. He suggested that he was going to take her home with him and make her engage in sexual intercourse with him.

6. Provide a description of any known or documented injury to the victim. Attach copies of all relevant reports and findings.

The victim has suffered severe mental and emotional distress as a result of the abusive sexual contact and attempted sexual assault by MANAGER. She suffers from recurring nightmares, nervousness, bouts of crying, and fear. She has suffered from depression and difficulty sleeping as a result.

Part 4. Helpfulness of the victim.

The victim (or parent, guardian or next friend, if the victim is under the age of 16, incompetent or incapacitated.):

1. Possesses information concerning the criminal activity listed in Part 3. Yes No

2. Has been, is being or is likely to be helpful in the investigation and/or prosecution of the criminal activity detailed above. (Attach an explanation briefly detailing the assistance the victim has provided.) Yes No

-
3. Has not been requested to provide further assistance in the investigation and/or prosecution.
(Example: prosecution is barred by the statute of limitation.) (Attach an explanation.) Yes No
-
4. Has unreasonably refused to provide assistance in a criminal investigation and/or prosecution
of the crime detailed above. *(Attach an explanation.)* Yes No

Part 4. Helpfulness of the victim. (Continued.)

5. Other, please specify.

CLIENT has personal knowledge of the abusive sexual contact and attempted sexual assault that she experienced during employment and EMPLOYER. CLIENT has cooperated with U.S. Equal Employment Opportunity Commission during the prosecution of its lawsuit captioned EEOC v. EMPLOYER, Case No. ####, filed in the Eastern District of STATE. She has been interviewed by EEOC legal staff and provided information related to the discriminatory conduct she and others experienced. She is participating in the EEOC's suit and is expected to be a witness at trial.

Part 5. Family members implicated in criminal activity.

1. Are any of the victim's family members believed to have been involved in the criminal activity of which he or she is a victim? Yes No

2. If "Yes," list relative(s) and criminal involvement. (Attach extra reports or extra sheet(s) of paper if necessary.)

Full Name	Relationship	Involvement

Part 6. Certification.

I am the head of the agency listed in Part 2 or I am the person in the agency who has been specifically designated by the head of the agency to issue U nonimmigrant status certification on behalf of the agency. Based upon investigation of the facts, I certify, under penalty of perjury, that the individual noted in Part 1 is or has been a victim of one or more of the crimes listed in Part 3. I certify that the above information is true and correct to the best of my knowledge, and that I have made, and will make no promises regarding the above victim's ability to obtain a visa from the U.S. Citizenship and Immigration Services, based upon this certification. I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he/she is a victim, I will notify USCIS.

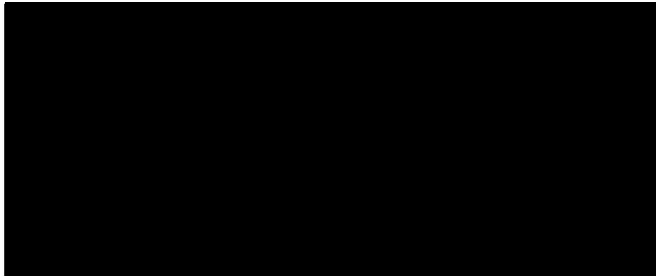
Signature of Certifying Official Identified in Part 2.

Date (mm/dd/yyyy)



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel



Dear Mr. [REDACTED]

Pursuant to 8 C.F.R. § 214.14(a)(3)(i), I hereby designate you as the Certifying Official for issuance of a U Nonimmigrant Status Certification for [REDACTED] one of the individuals for whom the Equal Employment Opportunity Commission is seeking relief in [REDACTED]

Sincerely,

A handwritten signature in blue ink, appearing to read "P. David Lopez".

P. David Lopez
General Counsel
Equal Employment Opportunity Commission



New York State Department of Labor
Andrew M. Cuomo, Governor
Colleen C. Gardner, Commissioner

[REDACTED]

RE: U Visa Petition for Certification

Dear Sir or Madam:

The New York State Department of Labor ("NYSDOL") has received your request to certify your U Nonimmigrant Status. After careful review of the files, your statement and accompanying documents, the NYSDOL has decided to complete and sign the enclosed Form I-918, Supplement B, U Nonimmigrant Status Certification.

The NYSDOL, as the certifying agency, issues this certification pursuant to and consistent with federal and state statutory and regulatory guidelines.

Pursuant to 8 C.F.R. § 214.14(a)(2) (2011), a certifying agency means:

[A] Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.

The regulations further state that "[i]nvestigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity." 8 C.F.R. § 214.14(a)(5) (2011).

The NYSDOL qualifies as a certifying agency because it has broad authority to detect or investigate a qualifying crime or criminal activity in violation of New York Labor Law. N.Y. Lab. Law § 21 (2011). Specifically, employees of the NYSDOL have the power to enter and inspect the premises of every place they have reasonable cause to believe is affected by the provisions of the Labor Law, N. Y. Lab. Law § 25 (2011), and to inspect the papers, books, records or other documents required to be kept by employers pursuant to the Labor Law, N. Y. Lab. Law § 26 (2011). With regard to the payment of wages, the Commissioner of Labor has the power to investigate, and attempt to adjust equitably, controversies between employers and employees. N. Y. Lab. Law § 196 (2011). With regard to minimum wages, the Commissioner has the power to investigate the wages of all persons in any occupation in the state and to investigate the payment of wages in the state. N. Y. Lab. Law § 660 (2011).

W. Averell Harriman State Office Campus
Building 12, Room 500, Albany, NY 12240
www.labor.ny.gov

In prosecuting these criminal violations of the Labor Law, New York District Attorneys and the New York State Office of the Attorney General use evidence gathered by the NYSDOL investigators as the basis for their criminal prosecutions. While almost all violations of the New York State Labor Law regarding payment of wages are chargeable as criminal offenses, the Commissioner and the District Attorneys and Attorney General have discretion over which cases will be criminally prosecuted. The NYSDOL's Office of Special Investigations, formed in 2007 to serve as a liaison between the NYSDOL and law enforcement agencies, assists in making these discretionary determinations by providing advice regarding criminal investigation and prosecution to the Commissioner of Labor and NYSDOL staff. When NYSDOL investigators detect criminal activity in the course of their investigations that is not covered by the NYSDOL's jurisdiction, our policy is to refer this information to the appropriate District Attorney's office or to the Attorney General's Office.

Further, in the course of exercising NYSDOL's standard investigatory authority into wage payment violations, NYSDOL employees occasionally detect employer conduct that constitutes qualifying criminal activity for U visa purposes, such as felonious assault, sexual assault, false imprisonment, extortion, witness tampering, obstruction of justice, and perjury. When this conduct is related to controversies between employers and employees with regard to the payment of wages, the NYSDOL has the authority to investigate it. Similar to the example mentioned in the preamble to the U visa regulations, this qualifying criminal activity occurs in conjunction with other criminal activity (the criminal violations of the Labor Law). New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,018 (Sept. 17, 2007).

If you, your attorney, or the United States Citizenship and Immigration Services wishes to contact the NYSDOL to discuss this matter further, please contact my designee, Vilda Vera Mayuga, Director of the Bureau of Immigrant Workers' Rights, at (212) 775-3676.

Sincerely,


Colleen C. Gardner

**I-192, Application for Advance
Permission to Enter as Nonimmigrant
[Pursuant to Section 212(d)(3)(A)(ii) of the INA]**

Department of Homeland Security
U.S. Citizenship and Immigration Services

**(Read instructions to the form.)
Type or Print in Black Ink**

<p>Fee Stamp</p>

File No. A- _____

I hereby apply to the Secretary of Homeland Security for permission to enter the United States temporarily under the provisions of section 212(d)(3)(A)(ii) of the Immigration and Nationality Act (INA).

1. Full Name Client Full Name	2. Date of Birth (mm/dd/yyyy) date
3. Place of Birth (City-Town, State/Province, Country) City, State, Mexico	4. Present Citizenship/Nationality Mexico
5. Present Address, Telephone Number, and E-Mail address 123 Main St. City, State 12345	
6. All addresses at which I have resided during the past 5 years (Use a separate sheet of paper, if necessary.) _____ _____ _____	

7. Desired Port of Entry into the United States N/A -- present in the U.S.	8. Means of Transportation n/a
9. Proposed Date of Entry present	10. Approximate Length of Stay in the United States indefinite

11. My purpose for entering the United States is: (Explain fully)
I would like to stay in the United States in order to help the AGENCY in their case against my employers by being a witness. I also want to stay in the United States to have a better life, to work, and to take care of my family.

12. I believe that I may be inadmissible to the United States for the following reason(s) and no others:
I entered the United States without permission. I received an order of deportation from an Immigration Judge. I also request a waiver for any other inadmissibility grounds that USCIS detects.

13. have have not previously filed an application for advance permission to enter as a nonimmigrant
on _____, _____, at _____.

If you are an applicant for T and U nonimmigrant status, you do not need to answer questions 14 through 17.

14. Have you ever been in the United States for a period of 6 months or more? If yes, when, for how long, and in what immigration status?

N/A



15. Have you ever filed an application or petition for immigration benefits with the U.S. Government, or has one ever been filed on your behalf? If yes, list the applications and/or petitions, the filing locations, and describe the outcome of each application/petition (for example: denied, approved, pending).

N/A

16. Have you ever been denied or refused an immigration benefit by the U.S. Government, or had a benefit revoked or terminated (including but not limited to visas)? Describe in detail.

N/A

17. Have you ever, in or outside the United States, been arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding minor traffic violations? Describe in detail. Include all offenses where impaired driving may have been an issue.

N/A

18. Applicant's Signature and Certification

I understand that the information herein contained may be used in any proceedings (including civil, criminal, immigration, or any other judicial proceeding) hereafter instituted against me.

I certify that the statements above and all attachments hereto are true and correct to the best of my knowledge and belief.

(Signature of Applicant) (Date)

Signature of the Applicant/Signature of Guardian or Family Member (if Applicant is unable to sign)

19. Preparer's Signature and Certification

I declare that this document was prepared by me at the request of the applicant or qualified relative/legal guardian of the applicant, and it is based on all information of which I have knowledge and/or was provided to me by the above named person in response to the exact questions contained on this form. I have not knowingly withheld any information.

(Signature) (Address) (Date)

RECEIVED	TRANS. IN	RET'D TRANS. OUT	COMPLETED



March 28, 2013

Laura Dawkins
Chief, Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security

CC: Maureen Dunn
Division Chief, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security

Colleen Renk Zengotitabengoa
Associate Counsel, Office of Chief Counsel
U.S. Citizenship and Immigration Services
Department of Homeland Security

Scott Whelan
Adjudications Officer
Office of Policy and Strategy, USCIS

Rena Cutlip-Mason
Ombudsman, USCIS
Department of Homeland Security

Tracey Parsons
Assistant Center Director, Vermont Service Center

Karl Labor
Section Chief, USCIS

CC: Tamara J. Kessler
Acting Officer
Office of Civil Rights and Civil Liberties
Department of Homeland Security

Laura M. Olson
Section Lead, Immigration Section
Office of Civil Rights and Civil Liberties
Department of Homeland Security

RE: Substantial Abuse Determinations for U-Visa Victims of Workplace Crimes

Dear Ms. Dawkins:

We write to you to raise concern with the Department of Homeland Security's Bureau of U.S. Citizenship and Immigration Service's (USCIS) treatment of petitions for U Nonimmigrant Status (U visa) in cases involving workplace-based crime. Specifically, we raise concern with its substantial abuse determinations in cases where crimes have taken place in the workplace, and adjudication of cases involving the qualifying criminal activities of witness tampering and obstruction of justice.

As federal regulations have established, law enforcement agencies that conduct their enforcement largely in the workplace, including the Equal Employment Opportunity Commission (EEOC), the Department of Labor (DOL), and equivalent state and local agencies may certify U visa petitions. 8 C.F.R. § 214.14(a)(2). In recent years, these agencies have released U visa certification protocol, and have appointed personnel to coordinate U visa

certification.¹ As a result, USCIS has adjudicated, and will likely adjudicate an increasing number of U visa applications based on qualifying criminal activity in the workplace.

Although USCIS has handled many of these workplace-based U visa petitions without issue, USCIS has issued Requests for Evidence (RFE) or denied several U visa applications of victims of workplace-based crime, concluding that applicants have not shown that they have suffered “substantial physical or mental abuse” as a result of qualifying criminal activity. We believe some of these denials reflect lack of education about the context and experience of workplace crime victims, not failure to meet the requirements of the statute. Although USCIS staff are familiar with determining the degree of physical and mental abuse in cases involving domestic violence and sexual assault-related crimes, additional training on the specific dynamics of vulnerability and abuse experienced by victims of workplace-based crime would improve access to U visas. This issue is particularly significant for victims of obstruction of justice and witness tampering by their employers.

We ask that you provide further internal guidance and training to USCIS staff to ensure that victims of workplace-based crime are adequately protected and to strengthen the ability of labor and civil rights law enforcement agencies to detect, investigate, and prosecute criminal activities. We provide some suggestions below on issues and content for such training and request an opportunity to meet with you in the near future to further discuss these concerns. We appreciate your commitment to making these aspects of the law work and look forward to deepening our collaboration with you and to hearing your responses to our concerns.

A. “Substantial Physical or Mental Abuse” for Victims of Workplace Crime

When determining whether an applicant has suffered substantial physical or mental abuse, USCIS considers the “nature of the injury inflicted or suffered; the severity of the perpetrator’s conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.” 8 C.F.R. § 214.14(b)(1). USCIS has concluded that it is reasonable to consider both “the severity of the injury suffered by the victim” and “the severity of abuse inflicted by the perpetrator.” 72 Fed. Reg. 53014, 53018 (Sept. 17, 2007). “No single factor is a prerequisite to establish that the abuse was substantial A series of acts taken together may be considered to constitute substantial physical or mental abuse even where no single act alone rises to that level.” 8 C.F.R. § 214.14(b)(1).

¹ Memorandum from Richard A. Seigel, National Labor Relations Board, to All Regional Directors, Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings (June 7, 2011); Memorandum from Nancy Leppink, Acting Administrator, Wage and Hour Division, U.S. Department of Labor, to Regional Administrators and District Directors, Certification of Supplement B Forms of U Nonimmigrant Visa Applications (Apr. 28, 2011); Memorandum from New York State Department of Labor, Memorandum and Order Regarding Certification of U Visa Petitions (2011); Memorandum from Phyllis W. Cheng, Director, California Department of Fair Employment and Housing, Enforcement Division Directive: Obtaining U Visas in Investigated Cases (May 6, 2010); Memorandum from Naomi Earp, Chair, Equal Employment Opportunity Commission, to District Directors and Regional Attorneys, EEOC Procedures for U Nonimmigrant Classification Certification (July 3, 2008).

Undocumented workers and guestworkers are particularly vulnerable to victimization in the workplace. Economic dependency, power differentials between the employer and employee, and employee isolation because of limited access to culturally and linguistically-appropriate support systems heighten workers' vulnerability. An abusive employer or supervisor may feel safe in the knowledge that an undocumented worker or guestworker may not bring charges or report abuse due to fear of retaliation, or would not call the police or other law enforcement agencies to report crime out of fear of deportation.² Employers may also prey upon unique vulnerabilities such as a worker's gender, or ethnic or cultural background.

Many immigrant victims of workplace crime may thus be unable to leave their jobs to escape abuse and crime at the hands of their employers, with significant psychological consequences. Many immigrant victims of workplace crime may choose to engage in passive coping strategies out of fear that engaging in active strategies may lead to loss of a job, exposure to law enforcement, harm to their family members in the country of origin, or detention and deportation. The inability to leave a job may result in prolonged and frequent exposure to abuse, associated with more severe psychological harm.³ Moreover, victims of abuse in the workplace who are economically dependent on abusive employers due to lack of job mobility suffer often greater psychological harm than those who may be able to leave a job.⁴

1. Forms of Abuse in the Workplace

In general, abuse in the workplace may take several forms, including physical, sexual, psychological, immigration, and economic abuse. In the case of minors, USCIS adjudicators should also consider negligence as a form of psychological abuse. The injury suffered by victims of such abuse may manifest as physical or mental injury. Such forms of employer abuse may manifest itself in the following ways. We also attach a table with concrete examples of such abuse in the workplace as Exhibit A.

- **Physical abuse:** Physical abuse includes the intentional use of physical force with the potential for causing death, disability, injury, or harm. It may include, but is not limited to physical assault and attempted assault.⁵ In the workplace, physical abuse is unique due to the power differential between the perpetrator (employer) and victim (worker), and the perpetrator's use of physical abuse to further establish power over the victim. Physical abuse may range from behaviors such as shoving or hitting a worker to full-scale attacks. In most cases, a perpetrator may feel safe in the knowledge that an undocumented worker or guestworker will not bring charges or report the abuse to superiors for fear of retaliation or other repercussions. Physical abuse may also include the employer's maintenance of a dangerous workplace environment that leads to injury or potential

² See, e.g. Rebecca Smith and Eunice Cho, WORKERS' RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS (2013), available at <http://www.nelp.org/page/-/Justice/2013/Workers-Rights-on-ICE-Retaliati-on-Report.pdf?nocdn=1>.

³ Pamela Lutgen-Sandvik, et al., *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree, and Impact*, 44 J. OF MANAGEMENT STUD. 835-860 (2007).

⁴ Bennett Tepper, *Abusive Supervision in Work Organizations: Review, Synthesis, and Research Agenda*, 33 J. OF MGMT 261 (2007).

⁵ J.E. Saltzman, et al., *INTIMATE PARTNER VIOLENCE SURVEILLANCE: UNIFORM DEFINITIONS AND RECOMMENDED DATA ELEMENTS*, Centers for Disease Control and Prevention (2002).

harm, or preventing workers from attending to basic bodily needs, such as using the bathroom or taking care of medical needs. It may also include assigning dangerous jobs or arduous jobs as punishment, as well as forcing an employee to stay after his or her shift for longer hours than agreed or required, leading to physical exhaustion and other injuries.

- **Sexual abuse:** The continuum of activities that constitute sexual abuse include acts ranging from unwelcome propositions or comments, disguised fondling, and unwelcome touching, to rape in the workplace by a supervisor, co-workers, or customers. In some situations, an employer may send a message that working conditions will not improve or that wages will be withheld unless an employee submits to a sexual encounter or unwelcome touching. Other examples of activities include spreading rumors or making offensive comments about a worker's sexual life or sexual orientation, or making insults of a sexual nature. Sexual abuse also includes an employer's failure to discipline or enforce rules against sexual harassment or assault by supervisors, co-workers or clients, as well as the creation of an unsafe environment where employees are hyper-vigilant and on the defense against sexual assault at any time.
- **Psychological abuse:** Psychological abuse in the workplace can include verbal abuse, emotional abuse, intimidation, and manipulation that diminish a worker's self-worth and independence. Verbal abuse includes yelling, screaming, name-calling, insulting, using racial or other derogatory epithets, and belittling by an employer. Emotional abuse may include unwarranted blaming, shaming, isolation, threats, demands of obedience to whims, anger when tasks are not completed perfectly, and indifference to a worker's pressing needs. Intimidation may include intense surveillance, making fun of a worker, making a worker perform humiliating or demeaning tasks, monitoring a worker's personal time, or making threats. Manipulation may include statements or actions designed to turn other people against a worker, using others to pressure a worker into an action, shifting from a nurturing to a punishing stance without provocation, threatening a worker with punishment, and forcing participation in a criminal activity. Employers can psychologically terrorize immigrant employees by utilizing strategies of abuse by using issues that are culturally meaningful to the employee.
- **Immigration abuse:** Immigration abuse occurs when an abuser of an undocumented immigrant victim threatens deportation and/or actively uses their power over a victim's immigration status to exploit the victim's fear of deportation. The aim of this abusive strategy is to prevent a worker from seeking help or contacting law enforcement.⁶ In the workplace, immigration abuse takes place when a worker's immigration status is used to exploit, keep a worker trapped in harmful working conditions, or prevent a worker from cooperating with law enforcement officials. It also includes instances where the employer

⁶ N.H. Ammar, et al., *Calls to Police and Police Response: A Case Study from Latina Immigrant Women in the U.S.*, 7 J. OF INT'L POLICE SCI. AND MGMT, 230 (2005); M. Natarajan, *Domestic Violence among Immigrants from India: What We Need to Know—and What We Should Do*, 26 INT'L J. OF COMP. AND APPL. CRIM. JUSTICE 301 (2003); L. Orloff, et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S LAW J. 43 (2003); A. Raj, et al., *Immigration Policies Increase South Asian Immigrant Women's Vulnerability to Intimate Partner Violence*, 60 J. OF THE AM. MED. WOMEN'S ASS'N 26 (2005).

or supervisor tells workers that they have paid ICE to refrain from enforcing immigration laws in their workplace.

- **Economic abuse.** Economic need is one of the most important barriers that impede immigrant workers from leaving an abusive workplace. Lack of money to support the worker and the worker's family, often in the home country, is a significant factor for undocumented workers or guestworkers who have come to the United States in search of better conditions. Workers may fear not being able to find other employment due to their lack of authorization, particularly those who live paycheck to paycheck. Employers may also fail to pay the correct amount of money for hours worked, withhold leave, provide economic punishment for minor infractions, or charge workers for items that should be provided by the employer, such as uniforms and safety equipment. Employers may also threaten workers that they will not renew contracts, mislead workers about their rights as employees, and withhold information about relevant procedures and protections.

2. Effects of Abuse on Victims of Crime in the Workplace

A large body of research has established that workplace abuse produces a wide range of physical and psychological problems in victims.⁷ Abuse and exploitation at work not only affects direct victims, but also impacts co-workers who witness the abuse of their peers and thus fear for themselves. These effects may include psychological harm, physical harm, and social harm.

- **Psychological harm.** Victims of workplace abuse often report experiencing higher levels of general stress and anxiety. Victims may exhibit symptoms including insomnia, constant worry, daily sadness, irritability, extreme fatigue, lack of interest in things that interested them in the past, lack of motivation, poor appetite, crying spells, nightmares, feelings of hopelessness and worthlessness, and somatic symptoms such as migraines and digestive problems.⁸

Abuse in the workplace may also be associated with acute clinical mental health symptoms and diagnosable disorders. Mental health problems such as depression, anxiety, mood disorders, dissociation, substance abuse, suicide attempts, acting out, and post traumatic symptoms are often found in victims of abuse and maltreatment.⁹ Workers may develop symptoms compatible with the diagnosis of post-traumatic stress disorder, somatization, and depression.¹⁰ Working in stressful conditions may produce chronic

⁷ See D. Ajdukovic, *Social Contexts of Trauma and Healing*, 20 MEDICINE, CONFLICT, AND SURVIVAL 120 (2004).

⁸ See, e.g. Lutgen-Sandvick, et al., *supra* note 3; N.A. Bowling, et al., *Why Do You Treat Me Badly? The Role of Attributions Regarding the Cause of Abuse in Relation to Subordinates' Responses to Abusive Supervision*, 25 Work and Stress 343 (2011); C. Brotheridge & R. Lee, *Restless and Confused: Emotional Responses to Workplace Bullying*, 15 Career Dev. Int'l 687 (2010); N.A. Bowling & T.A. Beehr, *Workplace Harassment from the Victim's Perspective: A Theoretical Model and Meta-Analysis*, 91 J. of Applied Psychology 998 (2006).

⁹ J.G. Allen, et al., *Complexities in Complex Post-Traumatic Stress Disorder in Inpatient Women: Evidence from Cluster Analysis of MCMI-III Personality Disorder Scales*, 73 J. PERSONALITY ASSESSMENT 73 (1999).

¹⁰ See, e.g. J. Escartin, et al., *Development and Validation of the Workplace Bullying Scale "EAPA-T"*, 10 INT'L J. CLINICAL AND HEALTH PSYCHOLOGY 519 (2010); Heinz Leymann & Annelie Gustafsson, *Mobbing at Work and the Development of Post-traumatic Stress Disorders*, 5 EUROPEAN J. OF WORK AND ORG. PSYCHOLOGY 251 (1996).

trauma—which consists of single stressful events that accumulate over time and combine with a toxic environment—multiplies the maladaptive effects of a traumatic event. Where specific traumatic experiences are added to the cumulative effect of repeated psychological abuse and deprivation, significant personality changes may occur. When a person’s identity is organized around internal distress, fear, and a sense of fragility, personal and emotional growth are likely to be stunted.

- **Physical harm.** Workplace abuse is associated with negative physical health consequences. In addition to the direct physical injuries caused by the abuse itself or dangerous working conditions, victims of workplace abuse report a wide range of secondary somatic symptoms, including, but not limited to headaches and sleep disturbances, heart-related health issues, sexually-transmitted diseases and unhealthy weight loss or gain. Victims of abuse may also engage in unhealthy behaviors as a coping mechanism to deal with high levels of psychological stress.¹¹
- **Social harm.** The experience of abuse in the workplace can adversely impact victims’ interpersonal relationships. Victims of workplace abuse may deplete their cognitive and physical resources coping with the stress of the abuse, leaving little resources available for use when interacting outside the workplace environment. This may lead to a decreased quality of social relationships and conflict in their intimate relationships. A survey of employees has reported that workplace abuse is associated with high levels of family conflict.¹²

Because USCIS is likely to encounter greater numbers of U visa applications from victims of crime in the workplace, we recommend that the agency provide additional training to U visa adjudicators on the specific forms and effects of abuse in the workplace. As advocates and clinicians with experience in this field, we would be happy to support additional training in any way.

B. Substantial Abuse Determinations for the Qualifying Criminal Activities of Obstruction of Justice, Witness Tampering, and Perjury

In many cases, victims of workplace crime may receive certification by law enforcement agencies for the qualifying criminal activity of obstruction of justice, witness tampering, and perjury. Under U visa standards, a person is considered a victim of witness tampering, obstruction of justice, or perjury, including any attempt, solicitation, or conspiracy to commit one or more of those offenses, if: (A) The petitioner has been directly and proximately harmed by the perpetrator of the witness tampering, obstruction of justice, or perjury; and (B) there are reasonable grounds to conclude that the perpetrator committed the witness tampering, obstruction of justice, or perjury offense, at least in principal part, as a means (1) to avoid or

¹¹ M.K. Duffy, et al., *Social Undermining in the Workplace*, 45 ACAD. OF MGMT. J. 31 (2002); Annie Hogh et al., *Individual Consequences of Workplace Bullying/Mobbing*, in BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENTS IN THEORY, RESEARCH, AND PRACTICE (2011); R. Glaser, et al., *Stressed-Induced Immune Dysfunction: Implications for Health*, 5 NATURE REVIEWS IMMUNOLOGY 243 (2005); J.K. Kiecolt-Glaser, et al., *Depression and Immune Function: Central Pathways to Morbidity and Morality*, 53 J. PSYCHOSOMATIC RESEARCH 873 (2002).

¹² Tepper, *supra* note 4.

frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity; or (2) to further the perpetrator's abuse or exploitation of or undue control over the petitioner through manipulation of the legal system. 8 C.F.R. § 214.14(14)(ii).

Employers who seek to obstruct justice or prevent witnesses from participating in official proceedings or investigations often use abusive methods and/or build upon prior patterns of abuse in order to achieve their ends. Victims of such crimes have typically suffered abuse at the hands of their employers, whose obstructive activity, witness tampering, and perjury to avoid detection and prosecution are symptomatic of a larger pattern of harm and exploitation. Indeed, employers' actions to obstruct justice, tamper with witnesses, and commit perjury may often manifest as substantial abuse for employees who have endured multiple violations in the workplace.

Based on experience with these cases, we believe that USCIS adjudicators would benefit from additional training on this issue. USCIS has issued Requests for Evidence (RFE) or denied several U visa applications of victims of obstruction of justice and witness tampering in the workplace, concluding that applicants have not shown that they have suffered "substantial physical or mental abuse." We believe that many of these determinations are based on a misunderstanding of the unique nature of abuse in the workplace. We attach one such example to this letter as Exhibit B.

Typical cases involving obstruction of justice, witness tampering, and perjury in the workplace may involve employers' attempts to avoid detection and investigation for violations of workplace standards, including wage and hour violations, false record-keeping, underage labor, and health and safety violations. Often, employers may issue threats, retaliate against workers who may ask for unpaid wages or assert their workplace rights, or engage in physical, economic, and verbal abuse to further their control over workers. For example, employers who are under threat of investigation may engage in the following activities:

- Direct or indirect threats of firing, physical harm to the employee or family members, or of potential reports of worker or worker's friends/family to immigration enforcement or local law enforcement if workers do not withdraw claims, cooperate/collaborate with employer, or lie to investigators;
- Confiscation of workers' personal identification documents, passports, or work permits, limiting mobility of the worker or ability to leave;
- Retaliation, harassment, stalking, intimidation, isolation, demotion, transfer to inferior position, insulting remarks, derogatory comments, and denial of privileges, wages, payment, or further work;
- Denial of access to food, water, housing, or basic needs if workers do not withdraw claims, cooperate/collaborate with employer, or lie to investigators.¹³

¹³ Significantly, these activities mirror the dynamics of power and control inherent in a situation of domestic violence involving an immigrant victim. *See, e.g.* Nat'l Center on Domestic and Sexual Violence, *Immigrant Power and Control Wheel*, available at: http://www.ncdsv.org/images/Immigrant%20P&C%20wheel%20NO%20SHADING%20-%20NCDSV-ICE_updated2009.pdf (last accessed Mar. 21, 2013).

Victims of these crimes in workplace settings often suffer serious consequences as a result of the employer's criminal activity. In many cases, victims of witness tampering, obstruction of justice, or perjury are particularly vulnerable to aggravation of underlying chronic stress or trauma caused by long-term abuse. For example, workers who are chronically abused may learn to submit and comply with abusive conditions in order to survive. An employer's interference in a worker's attempt to break the cycle of abuse by cooperating with law enforcement officials may thus provoke heightened fear and even more severe psychological harm as described above.

As awareness of the U visa on the part of victims and agencies that enforce laws protecting immigrant workers increases, we predict that USCIS will encounter more U visa applications from victims of obstruction of justice, witness tampering, and perjury in the workplace. We suggest that now is the time for USCIS to provide additional trainings to U visa adjudicators on the particular abuse suffered by victims of obstruction of justice, witness tampering, and perjury by their employers. We would like the opportunity to discuss with you the experts and materials that USCIS could use to train its staff.

USCIS's commitment to protecting victims of crime provides key protections for the most vulnerable in our society, as well as our communities as a whole. We appreciate your efforts, and hope that this letter provides an opportunity for further discussion of the particular challenges faced by victims of workplace-based crime. We look forward to continued collaboration and to your response. Please contact Eunice Cho at echo@nelp.org or at 510-663-5707 with any questions.

Sincerely,



Eunice Hyunhye Cho
Staff Attorney
National Employment Law Project
405 14th St. Suite 1400
Oakland, CA 94612
510-663-5707
echo@nelp.org

/S/

Dr. Giselle Hass
Clinical Psychologist
VA Lic. #081000-2022; DC Lic. # PSY 145231
Adjunct Professor
Center for Applied Legal Studies
Georgetown University Law Center
703-577-4094
giselle.hass@gmail.com

/S/

Gail Pendleton and Sonia Parras Konrad
Co-Directors
ASISTA
2925 Ingersoll Ave. Suite 3
Des Moines, IA 50312
gailpendleton@comcast.net
sonia@asistahelp.org

EXHIBIT A: EXAMPLES OF ABUSE IN THE WORKPLACE

Table 1. Examples of Physical Abuse in the Workplace

Throw something	Burning, scalding	Restrict from taking medication
Push, grab, shove, wrestle, twist arm or bend hand	Using or threatening with a weapon	Physically restraining, locking the person in an enclosed space
Scratch, pinch, hair pulling	Use of restraints, holding down	Use car to create a dangerous situation (i.e. driving or forcing person out of the car)
Slap, spank, slam	Smother, strangle, choke, hang	Put/expose to a dangerous substances
Kick, hit, beat, drag, pull	Shaking	Fail to seek out medical treatment when the employee is ill and asked for help
Bite	Pulled hair	Force or threat to force taking drugs or alcohol
Hit with something	Force or threat to restrict from eating or drinking	Force or threat to restrict from attending to hygiene
Damage employee's property	Deprive of food and shelter	Endangerment

Table 2. Examples of sexual abuse in the workplace

Raping a person vaginally or anally by physical force, threat, or blackmail	Required to wear provocative clothes or cleavage	Unwanted advances	Double entendres
Forcing a person to perform sexual favors other than intercourse by force, threat or blackmail	Touch or pinch directly or through clothing any sexual area	Unwanted caresses, fondling	Intimate references
Showing, displaying degrading sexual images or obscene materials	Talk or make allusions to sexual activity or preferences	Indiscrete glances	Blackmail/threats to force victim to engage or accept unwanted sexual abuse
Spreading rumors of the person's sexual preference or sexual habits	Indecent proposals	Kissing	Denying benefits to a worker who did not respond to sexual advances
Force nudity or forced to undress	Obscene language or gestures	Discrimination to pregnant workers	Stalking a worker inside or outside the workplace
Threaten to out an LGBTQ victim	Sexual innuendo	Sexual stimulation	Getting too close physically while working

Table 3. Examples of psychological abuse in the workplace

<i>Verbal abuse</i>	<i>Emotional abuse</i>	<i>Intimidation</i>		<i>Manipulation</i>
		Coercion	Control	
Yelling, screaming	Blaming	Intense surveillance, monitoring or micromanaging		Crazy making
Name-calling	Shaming	Making fun of the worker		Turning other people against the worker
Insulting	Isolation	Making threatening faces or gestures		Blackmailing
Using racial or cultural derogatory terms	Threats	Making the worker do humiliating or demeaning activities		Using other people to pressure the worker into something
Putting down the worker's family, race, place of origin, or culture	Doing something to spite the worker	Monitoring the worker personal time (their phone calls, use of the bathroom, lunch breaks)		Discriminating against a worker
Belittling of the worker's ideas, feelings, perceptions, physical or personality characteristics	Demanding obedience to whims	Hitting or kicking walls, doors, furniture, or machines		Shifting from a nurturing to a punishing stance without provocation
	Sulking and refusing to talk to the worker or stumping out of the room			Playing good cap-bad cap with other superiors against workers
	Getting angry when duties were not completed perfectly			Threatening the worker with punishment
	Acting indifferently to the worker's pressing needs			Force participation in criminal activity (including obstruction of justice and witness tampering)

Table 4. Examples of immigration abuse in the workplace

Make the worker purchase illegal documents	Force the worker to use false documents	Pretend that they are filing for immigration relief for the worker or his or her family
Take the worker's passport	Threat deportation	Smuggle the worker into the US

or social security card		
Threat to report worker to immigration authorities	Pretend that they have an arrangement with immigration authorities and only working there they would be safe	Use information regarding the worker entrance to the country or use of illegal documents to blackmail the worker
Threats to report to local authorities		

Table 5. Examples of economic abuse in the workplace

Charging for things the worker has a right to (use of bathroom, a change of shift, a work uniform).	Decreasing worker's breaks	Forcing the worker to make purchases they would otherwise would not do
Taking away money with lies (payment to immigration authorities, inspectors, etc)	Punishing the worker with lack of work or payment when they displeased the supervisor	Coerced or force the worker to accept unfair working conditions (i.e. longer hours, no vacation, etc)
Not paying for hours worked or not paying overtime	Stealing or destroying the worker's personal possessions	Interfere with work performance (i.e. forcing worker to share tools with a new worker, etc)
Decreasing working hours		



**National Employment
Law Project**



May 6, 2014

Alejandro Mayorkas
Deputy Secretary
Department of Homeland Security

Lori Scialabba
Acting Director
U.S. Citizenship and Immigration Services

CC:
Ron Rosenberg
Chief of the Administrative Appeals Office
U.S. Citizenship and Immigration Services

Laura Dawkins
Chief, Regulatory Coordination Division
Office of Policy and Strategy, USCIS

Maureen Dunn
Division Chief, Office of Policy and Strategy
USCIS

Colleen Renk Zengotitabengoa
Associate Counsel, Office of Chief Counsel
USCIS

Scott Whelan
Adjudications Officer
Office of Policy and Strategy, USCIS

Rena Cutlip Mason
Ombudsman
USCIS

Tracey Parsons
Assistant Center Director, Vermont Service Center

Karl Labor
Section Chief, USCIS

Tamara Kessler
Acting Officer
Office of Civil Rights and Civil Liberties
Department of Homeland Security

M. Patricia Smith
Solicitor
U.S. Department of Labor

P. David Lopez
General Counsel
Equal Employment Opportunity Commission

Richard F. Griffin, Jr.
General Counsel
National Labor Relations Board

Tyler Moran
Deputy Policy Director for Immigration
Domestic Policy Council, White House

VIA EMAIL

RE: U Visas Based on Crimes in the Workplace: USCIS Substantial Abuse Interpretations

Dear Mr. Mayorkas and Ms. Scialabba:

On behalf of the undersigned organizations, we write to raise concerns with U.S. Citizenship and Immigration Service's (USCIS) treatment of U visa applications in cases involving qualifying crimes in the workplace. Specifically, we raise concern with USCIS's understanding and application of the "substantial physical or mental abuse" standard in cases involving U visa crimes in the workplace.¹ The crimes suffered by U visa applicants in these cases include several of the qualifying categories of crimes in the U visa statute, most notably witness tampering, obstruction of justice, perjury, and extortion, usually taking place in the workplace setting, often where employer offenders attempt to thwart investigations into their unlawful practices.

The National Employment Law Project (NELP) and ASISTA have served as a national clearinghouse for advocates filing U visas for victims of crime in the workplace.² Based on reports from advocates nationwide and our work with USCIS to address these cases, it appears the Administrative Appeals Office (AAO) and Vermont Service Center (VSC) have wrongly denied a substantial number of workplace-based U visa petitions. In doing so, AAO and VSC have employed varying interpretations of "substantial abuse" contrary to USCIS practice in cases based on other crimes. These varying interpretations appear to have created a higher set of standards for evaluating abuse in cases arising in the workplace. Nothing in the statute justifies such a higher standard. Attached is a more lengthy discussion of the issues arising in such cases, with legal analysis of why these denials violate the law, reflect a need for training on workplace-based abuse, or both.

Recent Requests for Evidence (RFE), Notices of Intent to Deny (NOID), and denials have resulted in lengthy delays for relief for victims of crime in vulnerable situations, and have taxed the scarce resources of non-profit organizations working on behalf of low-wage immigrant communities. This development is especially troubling at a time when other federal agencies most likely to detect crime in the workplace have recently implemented comprehensive U visa certification policies. These agencies include the U.S. Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), the National Labor Relations Board (NLRB), and equivalent state and local agencies.

To address this issue, we request that the AAO halt any denials in such cases until USCIS implements corrective measures. Corrective measures should feature new training for VSC and AAO officers on the nature and context of workplace-based crimes (as was done in the past for domestic violence and sexual assault). We also request a meeting with you and relevant USCIS officers who develop and implement policies concerning U visas on this matter, and suggest USCIS's active consultation with the EEOC, DOL, NLRB, and equivalent state and local agencies with U visa certification programs.

¹ 8 C.F.R. § 214.14(b)(1).

² For your reference, we also attach a copy of a letter addressed to USCIS last year on March 28, 2013, regarding Substantial Abuse Determinations for U Visa Victims of Workplace Crimes, which provides concrete examples of substantial abuse and harm experienced by victims of workplace crime.

We are grateful for USCIS's demonstrated dedication to successful implementation of the U visa program, and offer these recommendations to further ensure the agency's effectiveness in protecting immigrant victims of crime in the workplace.

Sincerely,



Eunice Cho
Staff Attorney
National Employment Law Project
Board Member, ASISTA
echo@nelp.org



Gail Pendleton
Co-Director
ASISTA Immigration Assistance
gail@asistahelp.org

LIST OF ENDORSING ORGANIZATIONS:

National Organizations

1. American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)
2. American Federation of State, County and Municipal Employees (AFSCME)
3. American Immigration Lawyers Association (AILA)
4. ASISTA
5. Break the Chain Campaign
6. Catholic Legal Immigration Network, Inc. (CLINIC)
7. Change to Win
8. Economic Policy Institute
9. Freedom Network USA
10. National Day Laborer Organizing Network
11. National Domestic Workers Alliance
12. National Employment Law Project
13. National Farmworker Women's Alliance (Alianza Nacional de Campesinas)
14. National Guestworker Alliance
15. National Immigrant Justice Center
16. National Immigration Law Center
17. National Immigration Project of the National Lawyers Guild
18. Restaurant Opportunities Centers United
19. Service Employees International Union (SEIU)
20. Southern Poverty Law Center
21. Women's Refugee Commission

State/Local Organizations

22. Advocates for Basic Legal Equality, Inc. (ABLE)
23. Americans for Immigrant Justice, Inc.
24. Asian Americans Advancing Justice—Los Angeles

25. Asian Pacific Islander Legal Outreach
26. Apoyo Legal Migrante Asociado (ALMA)
27. Ayuda
28. Bet Tzedek
29. California Immigrant Policy Center
30. California Labor Federation
31. California Rural Legal Assistance Foundation
32. Campesinos Sin Fronteras
33. Casa Latina
34. Central American Resource Center of Northern California – CARECEN
35. Central West Justice Center
36. Centro de los Derechos del Migrante, Inc.
37. Centro Legal de la Raza
38. Cincinnati Interfaith Workers Center
39. Coalition to Abolish Slavery and Trafficking
40. Community Legal Aid
41. Florence Immigrant & Refugee Rights Project
42. Friends of Farmworkers
43. Greater Boston Legal Services
44. Hispanic Interest Coalition of Alabama
45. Immigration Center for Women and Children
46. Immigrant Law Center of Minnesota
47. Jesuit Social Research Institute/Loyola University New Orleans
48. Just Neighbors
49. Kentucky Coalition for Immigrant and Refugee Rights (KCIRR)
50. Kentucky Immigration Reform Committee (KIRC)
51. La Raza Centro Legal
52. Legal Aid Society-Employment Law Center
53. Legal Aid Society of Cleveland
54. Legal Aid Society-New York
55. Los Angeles Center for Law and Justice
56. Lutheran Social Services of New England
57. Maintenance Cooperation Trust Fund (MCTF)
58. Nationalities Service Center
59. New Orleans Workers' Center for Racial Justice
60. Opening Doors, Inc.
61. Public Justice Center
62. SEIU 32BJ
63. Transgender Law Center
64. United Workers Center of New Mexico
65. Urban Justice Center
66. Vermont Immigration and Asylum Advocates
67. Worker Justice Center of New York
68. Workplace Justice Initiative
69. Worksafe

Immigration Law Scholars

- Caitlin Barry, Visiting Assistant Professor, Farmworker Legal Aid Clinic, Villanova University School of Law
- Kristina M. Campbell, Director, Immigration and Human Rights Clinic, University of the District of Columbia, David A. Clarke School of Law
- Erin B. Corcoran, Professor of Law, University of New Hampshire School of Law
- Alan Hyde, Distinguished Professor and Sidney Reitman Scholar, Rutgers University School of Law
- Kathleen Kim, Professor of Law, Loyola Law School Los Angeles
- Kenneth A. Mayeaux, Assistant Professor of Professional Practice, Louisiana State University Paul M. Hebert Law Center
- Alizabeth Newman, Clinical Law Professor, Immigrant & Refugee Rights Clinic, CUNY School of Law
- Blake Nordahl, Assistant Professor, Pacific McGeorge School of Law
- Sarah H. Paoletti, Practice Professor and Director, Transnational Legal Clinic, University of Pennsylvania Law School
- Leticia Saucedo, Professor of Law and Director of Clinical Legal Education, UC Davis Law School
- Veronica T. Thronson, Director, Immigration Law Clinic, Michigan State University College of Law
- Prof. Sheila I. Vélez Martínez, Assistant Clinical Professor of Law, Immigration Law Clinic, University of Pittsburgh - School of Law
- Alex Vernon, Acting Director of Asylum and Immigrant Rights Law Clinic, Ave Maria School of Law
- Shoba Sivaprasad Wadhia, Esq., Samuel Weiss Faculty Scholar, Pennsylvania State Dickinson School of Law
- Deborah M. Weissman, Reef C. Ivey II Distinguished Professor of Law, School of Law, University of North Carolina at Chapel Hill

Workplace-Based U Visa Petitions: Summary of Problematic Denials, NOIDs, and RFEs by USCIS

USCIS’s treatment of U visa petitions arising from workplace-based crime reveals the following areas of concern:

- 1) **USCIS has applied an inconsistent and higher standard for a showing of “substantial physical or mental abuse”** for victims of workplace crime than for victims of more commonly filed U visa crimes, including domestic violence. In these cases, adjudicators have (1) denied cases on the basis that harm suffered by the victim was not permanent; and (2) concluded that symptoms of harm that ordinarily lead to a finding of substantial abuse in domestic violence cases were not sufficient in cases involving workplace crime.
- 2) **USCIS needs more training and education on the context of workplace-based crimes.** USCIS adjudications indicate confusion and misunderstanding of the context and elements of qualifying criminal activities commonly found in the workplace setting. In particular, USCIS adjudicators (1) seem confused about the ways broader labor violations contribute to qualifying abuse suffered by victims of workplace-based crime; (2) disregard or inadequately consider aggravation of prior injury to applicants; and (3) impose unreasonable and inconsistent standards of proof to show a nexus between the qualifying criminal activity and the abuse suffered by victims.
- 3) **USCIS issues generic and template RFEs failing to articulate evidence of substantial abuse supplied in the original petition and why evidence supplied is insufficient.** We realize USCIS is aware of the general problem of template RFEs; we wish to highlight, however, how it is impeding proper consideration of workplace-based cases.

We include illustrative examples of these issues below; a summary of relevant cases are included in the attached Appendix. Please contact Eunice Cho at echo@nelp.org for a copy of full documents, which we have omitted for ease of electronic transmission due to the number of recipients.

I. USCIS Applies a Higher And Inconsistent Standard for Showing “Substantial Abuse” in Workplace-Based U Visa Petitions

As noted above, USCIS has issued troubling denials, NOIDs, and RFEs in cases involving workplace crime, reflecting inconsistent and higher standards for a showing of “substantial abuse” for victims of workplace crime than for victims of more common U visa crimes, including domestic violence. We address examples of the problematic analysis below.

A. USCIS Requires Permanent Harm

USCIS has issued several denials concluding that applicants have not suffered substantial abuse because the harm suffered was not permanent, particularly where the victim had shown some measures of improvement and recovery.

For example, in a recent denial, the AAO stated:

“[The psychologist’s] evaluation and the other evidence in the record fails to demonstrate *any permanent or serious harm* to the petitioner’s overall health, appearance or mental soundness as a result of the criminal activity perpetrated against her.”³

This victim of witness tampering was diagnosed with dysthymic disorder and post-traumatic stress. The psychological evaluation found that “[a]lthough [the petitioner] has been partially successful by pushing through pain and stress to continue functioning, she is at risk of coping poorly with any added stresses and become more even more distraught . . . the experience at [employer] made [petitioner] more vulnerable psychologically for future challenges.”⁴ In its denial, however, the AAO repeatedly noted evidence of the petitioner’s improved functioning to conclude that the harm was insufficient.

In another denial, the AAO noted that:

while [the social worker] and the petitioner described her feeling anxious, fearful and powerless . . . , *the petitioner also indicated that her life has improved since she cooperated with the DOL investigation. The record does not demonstrate that, as a victim of witness tampering, the petitioner has endured any permanent or serious harm* to her appearance, health, or physical or mental soundness.⁵

In a third denial, the AAO noted that “the petitioner also states that things are better in her life now that she is no longer working for her former employer.”⁶ These statements imply that USCIS considers resiliency a negative factor.

Nothing in the statute or regulations governing U visas requires that harm be permanent to constitute substantial abuse; permanent harm is only one of many factors that USCIS may consider in making a determination.⁷ Even a casual observer would realize that were USCIS to apply this standard to survivors of domestic violence, few would qualify for the U visa.⁸ Indeed, USCIS’s insistence that harm suffered by victims of crime be permanent contradicts the goals of the U visa program itself: one reason the U visa is helpful to noncitizen victims of crimes is that

³ Case 9, [REDACTED], USCIS AAO Decision, *3, [REDACTED] (emphasis supplied). *See also* [REDACTED], USCIS AAO Decision, *4, [REDACTED] (“The petitioner and her friend . . . both indicate that the petitioner is doing better.”).

⁴ Case 9, [REDACTED], Dr. [REDACTED], Psy.D., Report of Psychological Evaluation in the Matter of [REDACTED].

⁵ Case 1, [REDACTED], USCIS AAO Decision, *4, [REDACTED] (emphasis added).

⁶ Case 16, [REDACTED]. In re [REDACTED], USCIS AAO Decision, *4, [REDACTED].

⁷ USCIS may consider “the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim” as one of several factors in determining substantial abuse. 8 C.F.R. § 214.14(b)(1).

⁸ *See, e.g.* Immigrant Legal Resource Center, *The U Visa: Obtaining Status for Immigrant Victims of Crime*, Appendix S (2010) (discussing methods to substantiate substantial mental and physical abuse with examples of successful U visa petitions for victims of domestic violence).

it offers a path to surviving and thriving, not remaining a perpetual “victim.”⁹ We doubt Congress would agree with denying status to “survivors” *because* they no longer consider themselves purely as “victims” and are able to overcome the harm they’ve suffered from a qualifying crime.

B. USCIS Requires Greater “Harm” for Workplace-Based U Visa Petitions Than for Cases Involving Sexual Assault or Domestic Violence

The VSC has issued denials articulating facts as inadequate that, if applied to domestic violence cases, would result in finding sufficient harm. VSC frequently states in RFEs for workplace-based U visas that “nervousness, anxiety and distress” and “fear, stress and anxiety” are not substantial physical or mental abuse.¹⁰ For example, in one recent revocation of an approved workplace-based U visa, VSC found that “nervousness, headaches, and sleeplessness are not substantial physical or mental abuse.”¹¹ In another case, VSC found that headaches and feelings of fear and nervousness, which led a forensic social worker and a psychologist to diagnose the petitioner with Post Traumatic Stress Disorder, were not sufficient to demonstrate substantial abuse.¹²

Were USCIS to apply this approach to victims of domestic violence and sexual assault, they would deny most U visas based on those crimes. Nervousness, fear, distress, sleeplessness, stress, and anxiety have been and should continue to be sufficient harm for a showing of substantial abuse for U visa applications based on sexual assault or domestic violence. They are textbook examples of the harm commonly suffered by such survivors.¹³ Moreover, USCIS’s summary conclusion that these symptoms do not constitute substantial mental abuse is inconsistent with widely understood clinical diagnoses linking these symptoms to psychological

⁹ “The purpose of the U nonimmigrant classification is to strengthen the ability of law enforcement agencies . . . while offering protection to alien crime victims in keeping with the humanitarian interests of the United States.” New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53014 (Sept. 17, 2007).

¹⁰ *See, e.g.*, Case 1, [REDACTED], USCIS Vermont Service Center, Denial of U Visa Petition, [REDACTED] (concluding that “nervousness, anxiety and distress are not substantial physical or mental abuse”); Case 2, [REDACTED], USCIS Vermont Service Center, Denial of U Visa Petition, [REDACTED] (concluding that “fear, stress and anxiety are not substantial physical or mental abuse”); Case 9, [REDACTED], USCIS Vermont Service Center, Denial of U Visa Petition, [REDACTED] (concluding that “nervousness, anxiety, and distress are not substantial physical or mental abuse”).

¹¹ Case 3, [REDACTED]. In re [REDACTED], USCIS Vermont Service Center Decision, *4, [REDACTED]. This petitioner has since received a diagnosis of Major Depressive Disorder and Post Traumatic Stress disorder. *See* Case 3, [REDACTED], Psy.D., Report of Psychological Evaluation in the Matter of [REDACTED].

¹² Case 6, [REDACTED], USCIS Vermont Service Center, Notice of Intent to Revoke, [REDACTED] (notice of intent to revoke approval of U visa previously granted); Letter from [REDACTED], LMSW, to USCIS, Re: [REDACTED]; Dr. [REDACTED], Psy.D., Report of Psychological Evaluation, In the Matter of [REDACTED], Mar. 27, 2014.

¹³ *See, e.g.* Immigrant Legal Resource Center, *The U Visa: Obtaining Status for Immigrant Victims of Crime*, Appendix S (2010) (discussing methods to substantiate substantial mental and physical abuse with examples of successful U visa petitions for victims of domestic violence).

disorders that impair a victim's soundness and functioning, including depression, somatization, and Post-Traumatic Stress Disorder.¹⁴

In the domestic violence context, USCIS has received training on how mental and emotional harm reveals the profound impact of sexual assault and domestic abuse on those who experience them. Many survivors of domestic violence and sexual assault, for instance, say that overcoming psychological harm is much harder than recovering from abrasions and broken bones. We suggest that there is no rationale for finding such harm insufficient for other kinds of crimes. USCIS should apply a consistent analysis of harm to victims of workplace-based crime, including witness tampering, obstruction of justice, perjury, and extortion.¹⁵

II. USCIS Needs Additional Training and Education on the Context of Workplace-Based Crimes

USCIS's adjudication of U visa petitions indicates a need for training and education on the context of workplace-related crimes. One reason USCIS applies a more helpful standard for domestic violence cases is the regular and extensive training adjudicators receive on domestic violence *and its context*.

As domestic violence and sexual assault training has shown in the past, an understanding of the context of the crime for the individual is essential to understanding the harm an individual suffers, which is framed as "substantial abuse" for U visa applicants. For instance, adjudicators are trained to understand that abuse may be both objective and subjective, and that the facts of an individual case, seen in a broader context, often elucidate the subjective harm experienced by a victim.¹⁶ Many examples of abusive behavior in domestic violence cases are not qualifying crimes (i.e., humiliation and economic control), but the harm these forms of abuse may cause is directly related to qualifying criminal acts by abusers (such as assault). Perpetrators may, for example, use gestures that to others would be meaningless but to their victims means "I will hit you, kill you, or harm our child if you don't comply." Similarly, the threats that employers use against employees who fight back against their unlawful labor practices are particularly effective and harmful because they are rooted in the context of exploitation and abuse that workers have suffered at the worksite.

We respectfully suggest that the AAO and VSC halt any denials of workplace-based cases until USCIS has conducted training on the context of such crimes.

¹⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (2013); J.G. Allen, et al., *Complexities in Complex Post-Traumatic Stress Disorder in Inpatient Women: Evidence from Cluster Analysis of MCMI-III Personality Disorder Scales*, 73 *J. Personality Assessment* 449 (1999). See also Project REACH, *Utilizing Trauma-Informed Approaches to Trafficking Related Work* (2014), available at: http://www.traumacenter.org/resources/H-O%20Trauma-Informed%20Case%20Study_final_2.pdf (listing symptoms of trauma in victims of human trafficking).

¹⁵ See 5 U.S.C. § 706(2)(a) (regarding unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

¹⁶ "USCIS has concluded that it is reasonable to consider both" "the severity of the abuse inflicted by the perpetrator" and "the severity of the injury suffered by the victim" in its substantial abuse determinations. 72 Fed. Reg. 53014, 53018.

A. USCIS Adjudicators Need Training on the Relationship between Labor Violations and Substantial Abuse in Workplace Obstruction of Justice, Witness Tampering and Perjury Cases

U visa regulations acknowledge, to some degree, that the underlying context of abuse is relevant in cases involving obstruction of justice, witness tampering, and perjury. They require petitioners who are victims of obstruction of justice, witness tampering, and perjury to establish that the perpetrator committed the offense to avoid efforts to bring the perpetrator to justice, or to *further the perpetrator's abuse or exploitation or undue control over the petitioner through manipulation of the legal system.*¹⁷ This language explicitly acknowledges, and ties eligibility to, the context of employer exploitation and control.

Underlying labor violations warranting intervention from federal and state labor and employment agencies, such as wage and hour violations, might not, in themselves, constitute qualifying criminal activity. Such violations do, however, inform the broader context of abuse, intimidation, and control in which the qualifying crimes by employers take place. Employers may seek to derail investigations of their misconduct through witness tampering, obstruction of justice, and perjury. As in domestic violence cases, the resulting harm suffered by victims of these crimes is grounded in the broader context of the employment relationship. USCIS, however, seems confused by the context of these cases, often assuming that the existence of underlying labor violations nullifies the qualifying crime and the harm it causes. For example, in one denial of a witness tampering case, VSC stated that

It appears that you were a victim of New York State Department of Labor (NYSDOL) pay violation . . . in addition to other violations. However, these are not considered qualifying criminal activities as defined above, nor have you demonstrated that the similarities are substantial. The evidence provided with your filing does not include sufficient information to conclude that N.Y. Labor law violations and witness tampering are similar.¹⁸

The applicant did not argue that labor law violations are similar to witness tampering; she merely showed that the witness tampering took place *because* she was challenging underlying labor violations. Without the underlying labor violations, the perpetrator/employer would not need to engage in witness tampering. If USCIS will only consider witness tampering as a qualifying crime when there are no underlying labor law violations, then it is eliminating most workplace-based crimes as qualifying U crimes. There is no basis in the statute or regulations for this result.

B. USCIS Adjudicators Need Training on Evaluating “Aggravation of Prior Injury” and a “Series of Acts” Showing Substantial Abuse

¹⁷ 8 C.F.R. 214.14(a)(14)(ii).

¹⁸ Case 3, [REDACTED], USCIS Vermont Service Center, Denial of U Visa Petition, [REDACTED].

Under the regulations, adjudicators must account for the aggravation of a victim’s pre-existing conditions when making a substantial abuse determination.¹⁹ Adjudicators also should consider a series of acts (a form of “totality of circumstances” test) as demonstrating substantial abuse by the perpetrator, even if no single act alone rises to that level.²⁰ The regulations accurately reflect well-established concepts of trauma.²¹ USCIS adjudicators, however, have dismissed or ignored credible evidence of pre-existing conditions suffered by victims of crime in the workplace and often seem more inclined to deny than grant when presented with a pattern of harm.

In particular, the AAO seems unaware of “aggravation of prior injury” prong of the regulations. In one denial, the AAO noted:

“[The psychologist’s] evaluation primarily focuses on childhood experiences and events at the petitioner’s former place of employment unrelated to the qualifying criminal activity, witness tampering.”²²

In another case, the AAO concluded that

“[The psychologist’s] evaluation, which discusses many events in the petitioner’s life, does not sufficiently demonstrate that the petitioner’s dysthymic disorder is directly related to the witness tampering.”²³

These statements reveal inadequate training on (1) USCIS’s own regulations, as well as (2) the interpretation of those regulations in the context of the complex trauma that takes place in workplace-base crimes and (3) how employer threats may trigger trauma symptoms within an abusive workplace context. Prior trauma, pre-existing conditions and the history of workplace trauma all are relevant to the harm triggered by witness tampering, obstruction of justice, perjury, and other qualifying crimes in the workplace.

C. USCIS Adjudicators Need Training on Satisfactory Proof of Nexus between the Qualifying Criminal Activity and the Abuse Suffered by Victims of Workplace-Based Crime

Petitioners must establish that the harm suffered by the victim is the result of the qualifying criminal activity.²⁴ USCIS adjudicators, however, have erroneously denied petitions

¹⁹ “Whether abuse is substantial is based on a number of factors, including but not limited to: . . . the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, *including aggravation of pre-existing conditions.*” 8 C.F.R. § 214.14(b)(1).

²⁰ “A series of acts taken together may be considered to constitute substantial physical or mental abuse even where no single act alone rises to that level.” 8 C.F.R. § 214.14(b)(1).

²¹ Marylene Cloitre et al., *A Developmental Approach to Complex PTSD: Childhood and Adult Cumulative Trauma as Predictors of Symptom Complexity*, 22 J. Traumatic Stress 399 (2009); Kristine Jentoft Kinniburgh et al., *Attachment, Self-Regulation and Competency*, 35 Psychiatric Annals 424 (2005).

²² Case 1, [REDACTED]. In re [REDACTED], USCIS AAO Decision, *4, [REDACTED].

²³ Case 9, [REDACTED]. In re [REDACTED], USCIS AAO Decision, *3, [REDACTED].

and frequently issue RFEs where petitioners have submitted clear and conclusive evidence of a nexus between the qualifying crime and the harm suffered by the applicant.²⁵

USCIS adjudicators summarily dismiss credible and reasonable evidence, including declarations and evaluations by psychologists or licensed social workers establishing that the harm suffered by victims was caused by the employer's criminal activity. For example, adjudicators have found a nexus lacking between the crime and the harm suffered by the victim because the petitioner experienced exploitation or mistreatment beyond that which was identified as the qualifying criminal activity by the certifying agency. For example, the AAO offered the following analysis in its denial:

[The psychologist] diagnoses the petitioner with dysthymic disorder, stating that the petitioner's mental health conditions are related not only to the certified crime, but also to other activities that occurred at the petitioner's former place of employment, such as sexual harassment, sexual exploitation, extortion, and dangerous working conditions. The harm that USCIS assesses under the standards and factors of 8 C.F.R. § 214.14(b)(1) derives from the certified criminal activity.²⁶

The abuse, exploitation and control mentioned here are relevant to the aggravated injury caused by later threats and retaliation when workers attempt to hold the employer accountable for violating the law. As with sexual assault and domestic violence cases, such prior harm need not flow from the qualifying crime. Under the AAO's analysis, however, harm derived from more than one cause is not considered qualifying harm at all. This "single cause" nexus is required neither in the statute nor the regulations and, if applied to many domestic violence and sexual assault cases, would result in denials.

III. USCIS Adjudicators Need Training on Crafting RFEs that Articulate the Evidence of Substantial Abuse Supplied by Petitioner, and Why Such Evidence Is Insufficient

As in other types of U visa petitions, USCIS routinely issues RFEs requesting additional documentary evidence of substantial abuse in cases involving crime in the workplace. This is true even where petitioners have submitted significant amounts of credible evidence, including declarations, news articles, and supplemental letters from witnesses discussing the abuse and

²⁴ In order to qualify for a U visa, an individual "must have suffered substantial physical or mental abuse *as a result* of having been a victim of qualifying criminal activity." 8 U.S.C. § 1101(a)(15)(U)(i)(I). As the DHS has explained, "federal statutory provisions consistently define 'victim' as one who has suffered direct harm or who is directly and proximately harmed as a result of the commission of a crime." 72 Fed. Reg. 53,014, 53,016 (citations omitted).

²⁵ See, e.g. Case 7, ██████████. Ms. ██████████ was a victim of extortion, conspiracy of trafficking, and attempted involuntary servitude. Her petition included a diagnosis of depression and PTSD by a psychologist and a licensed social worker, ██████████ with a supporting physician letter, personal declaration, supporting declarations, and medical records. VSC denied the petition for lack of substantial abuse. In its denial, VSC noted only that "[t]he medical notes do not appear to reference any physical or mental abuse you suffered as a result of the incident . . . you do not provide evidence of a linkage between the incident and the information provided on ██████████." USCIS Vermont Service Center, Denial of Petition, ██████████, *3, ██████████. See also Case 16, ██████████, Dr. ██████████, Psy.D., Report of Psychological Evaluation in the Matter of ██████████.

²⁶ Case 9, ██████████. In re ██████████, USCIS AAO Decision, *3, ██████████.

harm suffered by the victim in the original petition.²⁷ In addition, some adjudicators seem to have difficulty identifying the elements of force, the threat of force, or the threat of legal coercion in cases involving involuntary servitude and trafficking, even where the petitioner has provided clear evidence of these elements.²⁸ In one case, the petitioner submitted a detailed affidavit and Form I-918B describing abusive and coercive working conditions:

[REDACTED]

VSC, however, issued an RFE stating that

There is no evidence contained in the record to suggest that [employer] forced you to work for them. It also cannot be concluded that you were forced to remain working for [employer] against your will, that you were threatened or abused while at work, or that you were forced to engage in misleading conduct.³⁰

The same RFE instructed the petitioner to “[s]ubmit a signed statement in your own words describing the facts of your victimization Please provide evidence to demonstrate that you are the victim of substantial physical or mental abuse as a result of qualifying criminal activity.”³¹

²⁷ See, e.g. Case 4, [REDACTED]; Case 5, [REDACTED]; Case 8, [REDACTED]; Case 10, [REDACTED]; Case 11, [REDACTED]; Case 12, [REDACTED]; Case 13, [REDACTED]; Case 14, [REDACTED]; Case 15, [REDACTED].

²⁸ 18 U.S.C. § 1584 prohibits holding a person in involuntary servitude, which occurs when an employer knowingly compels a worker’s labor for a period of time against a worker’s will by the use of force, the threat of force, or the threat of legal coercion. 18 U.S.C. § 1589 also prohibits forced labor by means of psychological and nonviolent coercion. 22 U.S.C. § 7102(9)(B) defines “severe forms of trafficking in persons” as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” State anti-trafficking and involuntary statutes may include broader definitions. Polaris Project, 2013 State Ratings on Human Trafficking Laws (2013), available at http://www.polarisproject.org/storage/documents/POC/2013-State-Ratings_pamphlet-3pgr.pdf. See also Kathleen Kim, *The Coercion of Trafficked Workers*, 96 Iowa L. Rev. 409 (2011) (describing elements of coercion in cases involving involuntary servitude, trafficking, and forced labor).

²⁹ Case 4, [REDACTED]. In re [REDACTED], Index to Supporting Documentation (quoting Affidavit).

³⁰ Case 4, [REDACTED], *4, [REDACTED]. USCIS Vermont Service Center, Request for Evidence, [REDACTED].

³¹ Case 4, [REDACTED], *4, [REDACTED]. USCIS Vermont Service Center, Request for Evidence, [REDACTED]. The U.S. DOL’s certification also substantiated the conditions of the petitioner’s abusive work environment, stating “[petitioner] suffered substantial mental and emotional harm as a result of the coercive work environment perpetrated by [employer]. He worked in a state of persistent fear due to the managers’ intimidating abuse and threat of deportation.” In re [REDACTED], Index to Supporting Documentation (quoting I-918B U Visa Certification Form Signed by Regional Administrator, U.S. DOL).

In another example, VSC issued a summary RFE requesting additional evidence of substantial abuse for a victim of involuntary servitude, obstruction of justice, and witness tampering at the hands of his employer. The petitioner had provided a declaration describing the slave-like conditions of his labor and the physical and psychological injuries suffered as a result; medical records; and several newspaper articles describing the abuses and poor living conditions endured by laborers. VSC, however, requested that the petitioner “provide evidence to demonstrate that you are the victim of substantial physical or mental abuse [sic] as a result of qualifying criminal activity.”³²

VSC has issued generic and template RFEs that fail to articulate evidence of substantial abuse supplied by the petitioner, even where petitioners have included declarations and supporting documents that speak directly to the non-financial mental or physical harm suffered by victims. Instead, a number of RFEs for workplace-related U visa cases include only a blanket statement that labor violations involving lost wages do not constitute substantial abuse. Again, a recent RFE stated: “regulation does not expressly reference crimes involving financial losses, therefore, loss [sic] wages would not establish that you were victim [sic] of substantial physical or mental abuse.”³³ Several other RFEs have noted that “[r]egulation does not expressly reference crimes involving financial loss. Therefore, such crimes are not included as qualifying criminal activity for U nonimmigrant status.”³⁴ The applications did not solely rely on financial harm to meet the substantial harm requirement, yet the adjudicators seem to seize on the mention of financial harm to dismiss entirely the evidence supplied.

These RFEs suggest that VSC adjudicators need additional training, oversight and review of decisions on workplace-specific crimes.

IV. Conclusion

For these reasons, we request that the AAO and VSC halt any denials in U visa applications based on workplace-based crimes until USCIS implements new training for both VSC and AAO officers on the nature and context of workplace-based crimes (as was done in the past for domestic violence and sexual assault). We would be happy to provide the agency with suggestions for trainers and background information on this subject.

We appreciate USCIS’s commitment to protecting victims of crime, and raise these issues in the spirit of collaboration and cooperation. We hope to meet with those of you involved in implementing this aspect of the law, either by phone or in person. For more information on any of the RFEs, NOIDs, and denials attached, or if you have any questions, please contact Eunice Cho at echo@nelp.org, or Gail Pendleton at gail@asistahelp.org at any time.

³² Case 5, [REDACTED]. USCIS Vermont Service Center, Request for Evidence, [REDACTED] [REDACTED], Jan. 15, 2014.

³³ *Id.*

³⁴ Case 12, [REDACTED]. USCIS Vermont Service Center, Request for Evidence, [REDACTED]; Case 13, [REDACTED]. USCIS Vermont Service Center, Request for Evidence, [REDACTED]; Case 15, [REDACTED]. USCIS Vermont Service Center, Request for Evidence, [REDACTED].