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U VISA PROTECTIONS FOR IMMIGRANT VICTIMS OF WORKPLACE CRIMES

By Eunice Hyunhye Cho

Eunice Hyunhye Cho
Skadden Fellow/Staff Attorney

Immigrant Worker Justice Project
National Employment Law Project
405 14th St. Suite 1400
Oakland, CA 94612
510.663.5707
echo@nelp.org

At least 16.4 percent of U.S. workers are noncitizens, and 5.4 percent of U.S. workers are undocumented.¹ Federal courts and state and federal agencies' consistent holding is that all workers, regardless of immigration status, are protected by core labor standards; among these standards are the right to organize, a minimum wage, and protection from discrimination. Nonetheless, undocumented workers face significant barriers to exercising their workplace rights.²

Undocumented immigrants work disproportionately in low-wage industries marked by abuse and exploitation, and these workers suffer exceedingly high rates of basic labor law violations. A recent study found that 37.1 percent of low-wage undocumented workers were paid less than the minimum wage, in comparison to 15.6 percent of native-born low-wage workers.³ Of undocumented workers 76 percent had worked off-the-clock without pay; 84.9 percent had not received overtime pay.⁴ Immigrant women workers in low-wage industries such as agricultural labor, domestic work, services, and food manufacturing and processing also face rampant sexual harassment, abuse, and violence on the job.⁵ Undocumented immigrants who consider ex-

¹Brookings, *Immigrant Workers in the U.S. Labor Force 2* (2012), <http://bit.ly/KQw3Kk>; Jeffrey S. Passel & D'Vera Cohn, *Pew Hispanic Center, A Portrait of Unauthorized Immigrants in the United States 12* (April 14, 2009), <http://bit.ly/Kl2gl6>.

²*Sure-Tan Incorporated v. National Labor Relations Board*, 467 U.S. 883, 892 (1984) (undocumented immigrants are "employees" under National Labor Relations Act); *Equal Employment Opportunity Commission v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (federal antidiscrimination laws apply to undocumented workers), overruled on other grounds by *Burlington Industries Incorporated v. Ellerth*, 524 U.S. 742 (1998); *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989) (Fair Labor Standards Act coverage of undocumented workers is consistent with Immigration Reform and Control Act).

³Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 42–48* (2009), <http://bit.ly/JjXs8D>.

⁴*Id.*

⁵Mary Bauer & Mónica Ramírez, *Southern Poverty Law Center, Injustice on Our Plates: Immigrant Women in the U.S. Food Industry 45–48* (2010); see also Amanda Clark, *A Hometown Dilemma: Addressing the Sexual Harassment of Undocumented Women in Meatpacking Plants in Iowa and Nebraska*, 16 *HASTINGS WOMEN'S LAW JOURNAL* 139 (2004); MARIA ONTIVEROS, *Lessons from the Fields: Female Farmworkers and the Law*, 55 *MAINE LAW REVIEW* 157 (2003); Diana Velloso, *Immigrant Latina Domestic Workers and Sexual Harassment*, 432 *AMERICAN UNIVERSITY JOURNAL OF GENDER AND LAW* 407 (1997).

exercising their workplace rights may also fear retaliation by employers due to their legal status. The U.S. Supreme Court's decision in *Hoffman Plastic Compounds Incorporated v. National Labor Relations Board*, holding that undocumented workers are not entitled to back-pay awards if they are illegally fired from their jobs in retaliation for union activities, has further emboldened employers to argue that undocumented workers have no employment rights.⁶

Certain immigrant workers who have faced abuse or exploitation at the hands of their employers and seek to exercise their workplace rights, however, may do so with the protection of "U nonimmigrant relief" or "U visa," a temporary nonimmigrant status available to non-citizen victims of certain crimes. Congress established the visa to strengthen law enforcement agencies' investigation and prosecution of crimes against immigrants and to protect victims whose immigration status makes them afraid to cooperate with law enforcement.⁷ Although advocates most often have sought U visas to protect immigrant victims of domestic violence or sexual abuse, recent action by federal and state agencies gives immigrants who are victims of crimes in the workplace greater access to U visa protections.⁸

Following the lead of the Equal Employment Opportunity Commission (EEOC), which has certified U visa petitions for a number of years, the U.S. Department of Labor and the National Labor Relations Board released new agency guidelines for certification of U visa petitions

in 2011. Some state agencies—among them the New York State Department of Labor and the California Department of Fair Employment and Housing—have also released U visa certification protocols, while other states' labor agencies have begun to explore certification of U visas. Moreover, judges may certify U visa petitions in cases involving immigrant victims of workplace exploitation, and some judges have done so.⁹ Because certification by a law enforcement agency or a judge is one key requirement for a U visa, the release of certification protocols by agencies responsible for investigating mistreatment of workers and for enforcing labor and civil rights law is a step toward more robust protection of the rights of immigrant workers.

The Basics: What a U Visa Is

Congress authorized the U visa as part of the Victims of Trafficking and Violence Prevention Act passed in 2000.¹⁰ Holders of U visas receive lawful status for up to four years, are eligible to adjust their status to that of lawful permanent resident after three years, and are authorized to work. Their qualifying family members may receive derivative visas.¹¹ This immigration relief protects workers against employer retaliation when workers are willing to call attention to workplace abuse and strengthens labor and civil rights law enforcement agencies in gaining workers' trust and cooperation in detecting and investigating crimes. The employment authorization that a U visa confers may also facilitate workers' access to employment remedies that

⁶*Hoffman Plastic Compounds Incorporated v. National Labor Relations Board*, 535 U.S. 137, 151–52 (2002); for an analysis of the impact of *Hoffman Plastic*, see Rebecca Smith et al., *Protecting the Labor and Employment Rights of Immigrant Workers*, 38 CLEARINGHOUSE REVIEW 329 (Sept.–Oct. 2004).

⁷Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a), 114 Stat. 1464, 1533 (2000) (detailing Congress' findings and purpose for U visa statute); 8 U.S.C. § 1101(a)(15)(U) (detailing statutory requirements to qualify for U Visa); New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014–15 (Sept. 17, 2007) (codified at 8 C.F.R. § 214.14 (2012)). The Act also created the T visa, which offers similar benefits for victims of trafficking.

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

⁹Orloff & Feldman, *supra* note 8; see, e.g., *Garcia v. Audobon*, No. 08-1291, 2008 WL 1774584 (E.D. La. April 15, 2008).

¹⁰Victims of Trafficking and Violence Prevention Act, Pub. L. No. 106-386, 114 Stat. 1464–1548 (2000).

¹¹8 U.S.C. § 1184(p).

might otherwise be foreclosed, such as reinstatement or back wages.

Note that 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.”¹²

Eligibility Requirements. To be eligible for a U visa an immigrant must

- have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity;
- have information concerning the qualifying criminal activity;
- have been helpful, be helpful, or be likely to be helpful in the detection, investigation, or prosecution of the qualifying criminal activity; and
- show that the qualifying criminal activity violated a local, state, or federal law or occurred in the United States.¹³

The Victims of Trafficking and Violence Prevention Act specifies a nonexhaustive list of twenty-six qualifying criminal activities that can trigger U visa eligibility for an immigrant crime victim; among these are the more commonly recognized categories of domestic violence

and sexual assault.¹⁴ Notably the qualifying criminal activity identified in the statute does not necessarily correspond to any single federal or state criminal provision. 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.”¹⁵ As the U.S. 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”¹⁶

Certification. After meeting the statutory eligibility requirements, a petitioner for a U visa must obtain certification from a law enforcement agency or judge confirming that the petitioner is a victim of a qualifying criminal activity and has been helpful in detecting, investigating, or prosecuting that crime.¹⁷ 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 Non-immigrant Status Certification, Form I-918 Supplement B (Form I-918B).¹⁸

Law enforcement agencies have broad discretion to certify U visa applications. For example, a law enforcement agency may complete a Form I-918B while an investigation is open or after a case is closed. Regulatory commentary explains that the helpfulness requirement “was written with several verb tenses, recognizing that an alien may apply for U

¹²Letter 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://1.usa.gov/KTHGjw>.

¹³8 U.S.C. § 1101(a)(15)(U).

¹⁴*Id.* § 1101(a)(15)(U)(iii) (abduction, abusive sexual contact, being held hostage, blackmail, domestic violence, extortion, false imprisonment, felonious assault, female genital mutilation, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, torture, trafficking, unlawful criminal restraint, and witness tampering).

¹⁵*Id.* (emphasis supplied).

¹⁶New Classification for Victims of Criminal Activity: Eligibility for “U” Nonimmigrant status, 72 Fed. Reg. 53014, 53018 (Sept. 17, 2007) (codified at 8 C.F.R. § 214.14 (2012)).

¹⁷8 C.F.R. § 214.14(b)(2) (2011) 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 53019.

¹⁸8 C.F.R. § 214.14(a)(3)(i).

nonimmigrant status at different stages of the investigation or prosecution.”¹⁹ Moreover, 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 from the crime prosecuted.²⁰

Federal regulations broadly define law enforcement agencies’ authority to certify U visa petitions. For example, regulations define “investigation or prosecution” to include the “detection or investigation of a qualifying crime or criminal activity.”²¹ Commentary explains that the reason for this definition is that “the detection of criminal activity is within the scope of a law enforcement officer’s investigative duties.”²² Under this definition, agencies without criminal prosecution authority may nonetheless certify U visas for criminal activity detected or investigated in the course of law enforcement activity. This broad certification authority not only protects victims of crime but also may yield evidence useful for future law enforcement investigations or prosecutions.

Judges may also issue U visa certifications. In 2008 a federal district court ruled that judges presiding over civil litigation may certify U visa petitions for immigrant worker victims of qualifying criminal activity.²³ The decision also 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.²⁴ Since that decision, advocates have successfully requested judicial certification of U visa petitions for victims of crime in a variety of settings.²⁵

Citizenship and Immigration Services Determination. After a certifying official completes Form I-918B, within six months applicants must submit the complete U visa application—the I-918 “Petition for U Nonimmigrant Status,” the Form I-918B certification, a filing and biometrics fee or application for a fee waiver, supplemental evidence, including personal statements or other evidence of abuse, identity documents, and Form G-28 “Notice of Entry as Appearance of Attorney or Accredited Representative”—to U.S. Citizenship and Immigration Services.²⁶ The application should include, if relevant, additional forms requesting waivers of inadmissibility or a petition for qualifying family members to obtain U visas.²⁷

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.²⁸ The

¹⁹72 Fed. Reg. at 53019; U.S. Department of Homeland Security, U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Enforcement 10 (2011), <http://1.usa.gov/KIEaqm> (“[L]aw enforcement can still complete the Form I-918B for an investigation or case that is closed.”).

²⁰U.S. Department of Homeland Security, *supra* note 19, at 10, 13.

²¹8 C.F.R. § 214.14(a)(5).

²²72 Fed. Reg. at 53020.

²³*Garcia v. Audubon Communities Management*, No. 08-1291, 2008 WL 1774584, at *2–3 (E.D. La. April 15, 2008); see also Andrew Turner et al., *Case of First Impression: Federal Judge in Civil Case May Certify U Visa Applications of Undocumented Immigrant Human Trafficking Victims*, 42 CLEARINGHOUSE REVIEW 510 (Jan.–Feb. 2009).

²⁴*Audubon*, 2008 WL 1774584, at *3.

²⁵See, e.g., Memorandum of Points and Authorities in Support of Material Witnesses’ Motion for U-Visa Certification, *United States v. Hernandez*, No. 2:10-cr-01057 (C.D. Cal. April 25, 2011) (motion requesting judicial certification for U visa applications of undocumented material witnesses and victims of smuggling ring on basis of being held hostage, kidnapped, and falsely imprisoned).

²⁶8 C.F.R. § 214.14(c)(2)(i).

²⁷For further helpful and more comprehensive resources on filing a U visa application, see, e.g., Julie Dinnerstein, *The “New” and Exciting U: No Longer Just My Imaginary Friend*, in IMMIGRATION AND NATIONALITY LAW HANDBOOK, 2008–09 (2008); SALLY KINOSHITA ET AL., *THE U VISA: OBTAINING STATUS FOR IMMIGRANT VICTIMS OF CRIME* (2d ed. 2010); Susana Martinez & Sheila Neville, *Help for Undocumented Victims of Crime*, 44 CLEARINGHOUSE REVIEW 129 (July–Aug. 2010).

²⁸8 C.F.R. § 214.14(c)(1), (b)(1).

agency may grant up to ten thousand U visas per year, not including qualifying dependents. After the cap is met, Homeland Security will grant deferred action, a temporary status with employment authorization, to U visa applicants.²⁹ The ten-thousand cap for U visas was reached for the first time in 2010.³⁰

U Visa Certifying Agencies for Immigrant Worker Victims

Agencies that investigate labor or civil rights violations, such as the Labor Department, the EEOC, the National Labor Relations Board, and their state equivalents, are often the first to identify victims of workplace crime and exploitation. Federal regulations define “certifying agency” for U visa purposes as local, state, and federal law enforcement agencies with “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 ... the Equal Employment Opportunity Commission and the Department of Labor.”³¹ State and local labor and civil rights law enforcement agencies also may certify U visa petitions.

Local police departments, state attorneys general, U.S. and district attorneys, the Federal Bureau of Investigation, and the U.S. 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.

Equal Employment Opportunity Commission. 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 obtain immigration protection, including the T visa, for undocumented immigrant workers involved in its investigations.³² Homeland Security promulgated interim U visa regulations in 2007, and in 2008 the EEOC released a memorandum detailing internal procedures governing U visa certification for immigrant victims of crimes.³³ The EEOC has since certified dozens of successful U visa petitions for immigrant workers.³⁴

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 under investigation by the EEOC on some other basis. The protocol does not otherwise restrict the qualifying crimes that the certification may cover. The EEOC must interview the U visa applicant in person.

The EEOC protocol requires that requests for U visa certification be submitted to an EEOC regional attorney, who investigates whether the petitioner is a victim of a qualifying criminal activity and has been helpful to law enforcement. The attorney must determine whether the case meets both factual and legal U visa certification requirements and prepare a narrative of the case for submission to the EEOC Office of General Counsel. The narrative must describe EEOC’s involvement, draw a conclusion on the petitioner’s credibility, document injury and help-

²⁹*Id.* § 214.14(d)(2).

³⁰Press Release, U.S. Citizenship and Immigration Services, USCIS Reaches Milestone: 10,000 U Visas Approved in Fiscal Year 2010 (July 15, 2010), <http://1.usa.gov/L40Wef>.

³¹8 C.F.R. § 214.14(a)(2).

³²Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 UNIVERSITY OF RICHMOND LAW REVIEW 891, 921–37 (2008).

³³Memorandum from Naomi C. Earp, Chair, Equal Employment Opportunity Commission, to District Directors and Regional Attorneys, EEOC Procedures for U Nonimmigrant Classification Certification (July 3, 2008), <http://bit.ly/KjyiGx>.

³⁴National Employment Law Project, U Visa Applications—Workplace Violations (April 9, 2012) (unpublished chart; in my files).

fulness, describe the qualifying criminal activity and cite relevant statutes, and include a draft Form I-918. If the general counsel recommends certification, the request is forwarded to the EEOC Office of the Chair for final review.³⁵

EEOC investigations of hostile work environment, sexual harassment, and discrimination may uncover facts that support U visa certification for the qualifying crimes of abusive sexual contact, rape, sexual assault, and sexual exploitation. EEOC cases have also involved facts that establish trafficking, peonage, and involuntary servitude.³⁶ When requesting U visa certification from the EEOC, advocates should present detailed facts about the qualifying criminal activity and how it relates to an underlying EEOC charge or investigation. Advocates should also give information on and analysis of state and federal criminal statutes triggered by the crime, related police reports, criminal or medical records, other evidence to support a finding of substantial harm or the applicant's credibility, and relevant items for the Form I-918B.

U.S. Department of Labor. In 2010 Labor Department Secretary Hilda Solis announced that the department would exercise its authority to certify U visas.³⁷ The secretary limited certification authority to the department's Wage and Hour Division, 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. One year later, that division released its U visa certification protocol.³⁸

Under the protocol the Wage and Hour Division certifies U visa petitions in cases that involve any of five qualifying criminal activities: involuntary servi-

tude, 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." The worker must also demonstrate helpfulness or willingness to be helpful to a Wage and Hour Division investigation.³⁹ Immigrant workers may request U visa certification when filing an allegation of a labor violation over which the division has jurisdiction or during or after the division completes an investigation.

The Labor Department designated a coordinator in each of the Wage and Hour Division'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, who must ensure that the petitioner is interviewed in person, make a preliminary determination of eligibility for certification, and prepare a narrative statement of the case. A regional solicitor reviews the narrative statement and completes the Form I-918B, which the Wage and Hour Division regional administrator must then review.

Advocates requesting U visa certification should give the regional coordinator a completed draft Form I-918B, detailed 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. At writing, the Labor Department has certified dozens of U visa petitions nationwide.

³⁵Earp, *supra* note 33.

³⁶In such cases, advocates should consider whether a T visa would be more appropriate (8 U.S.C. § 1101(a)(15)(T)).

³⁷Press Release, U.S. Department of Labor, Secretary Solis Announces the Department to Exercise Its Authority to Certify U Visas (March 15, 2010), <http://1.usa.gov/JdxUbn>.

³⁸Memorandum from Nancy J. 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 (April 28, 2011), <http://1.usa.gov/K9rwVH>.

³⁹*Id.*

National Labor Relations Board. In 2011 the National Labor Relations Board released guidelines for U visa certification in a departmental memorandum on immigration status issues.⁴⁰ The board enforces the National Labor Relations Act, which bars employers from engaging in unfair labor practices against workers engaged in organizing and collective bargaining; the Act applies to all workers, regardless of immigration status.⁴¹ 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 to the board.

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.⁴² Advocates have been advised to wait until the board makes an unfair labor practice determination before requesting certification.

The board'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.⁴³

At writing, the National Labor Relations Board has received only a few U visa requests. Advocates who approach the board for certification should consider including a completed draft Form I-918B, detailed facts about unfair labor practices that constitute qualifying criminal activity for U visa purposes, an 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.

California Division of Fair Employment and Housing. In 2010 California's Department of Fair Employment and Housing, the state equivalent of the EEOC, issued a directive on its certification of U visas.⁴⁴ 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.⁴⁵ Under its protocol the agency certifies U visa petitions where it is actively investigating a California Fair Employment and Housing Act or Ralph Act claim of an individual who requests certification. Cases in private litigation for which the department has issued a right-to-sue letter without an ongoing investigation are typically ineligible for U visa certification. The Department of Fair Employment and Housing certifies U visas for thirteen qualifying crimes: sexual assault, sexual exploitation, abusive sexual contact, rape, trafficking, do-

⁴⁰Memorandum from Richard A. Siegel, Associate General Counsel, National Labor Relations Board, to All Regional Directors, Officers in Charge, and Resident Officers, Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings (June 7, 2011), <http://bit.ly/J2eZBI>.

⁴¹29 U.S.C. §§ 151–169 (2012); *Sure-Tan Incorporated v. National Labor Relations Board*, 467 U.S. 883, 892 (1984). Some remedies may be limited due to *Hoffman Plastics*.

⁴²Siegel, *supra* note 40, at 5–6.

⁴³*Id.* at 4.

⁴⁴Memorandum from Phyllis W. Cheng, Director, California Department of Fair Employment and Housing, Enforcement Division Directive: Obtaining U Visas in Investigated Cases (May 6, 2010), <http://bit.ly/IY5Ndf>.

⁴⁵CAL. GOV'T CODE §§ 12900–12996 (West 2012); CAL. CIV. CODE § 51.7 (West 2012).

mestic violence, murder, manslaughter, abduction, extortion, torture, incest, and prostitution.

Advocates who request certification should submit to the department's consultant a draft Form I-918B, detailed 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.⁴⁶

New York State Department of Labor.

The New York State Department of Labor has issued a U visa certification memorandum that is considerably broader than that issued by the U.S. Labor Department.⁴⁷ To certify a U visa petition, the state agency must have jurisdiction to investigate the case, and the allegations must make the petitioner a victim of one of the twenty-six 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.

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 claim and submit a completed draft I-918B form. Advocates should submit thorough information about the details of the crime, the injury to the victim, the victim's statement of helpfulness in the investigation, and the victim's written authorization for the agency to communicate directly with the advocate. At writing, the New York State Department of Labor has received and

certified a number of U visa petitions, although all are pending approval by Citizenship and Immigration Services.

What Workplace Crimes Trigger U Visa Eligibility

The federal statute specifies twenty-six criminal activities of which a U visa applicant must have been a victim; two are the more commonly recognized categories of domestic violence and sexual assault. The statute lists other criminal activities that may take place in a low- or no-wage workplace.⁴⁸ Advocates should note that "qualifying criminal activity" means "any similar activity in violation of federal, state, or local criminal law" and that some criminal statutes are identified differently from those in the U visa statute.⁴⁹ Below is a list of qualifying criminal activities and examples of fact patterns in successful U visa petitions for immigrant workers.

- Abusive sexual contact/rape/sexual assault/sexual exploitation: rape, unwelcome sexual contact, assault, or exploitation by coworkers, employers, or clients.
- Blackmail and extortion: (1) threats to blacklist workers for organizing; coercion, including threats or actual force, violence, or fear, to obtain property, including wages and kickback of wages, by an employer; (2) threats to report someone to immigration authorities in order to obtain money or another item of value with the worker's consent expressly constituting extortion under some state statutes.⁵⁰
- Felonious assault: abusive touching, battery, beating, or use of a weapon by an employer resulting in a worker's substantial mental or physical harm.
- Involuntary servitude/peonage/labor trafficking: (1) employer's threats of physical, psychological, financial, or

⁴⁶Cheng, *supra* note 44.

⁴⁷Memorandum from New York State Department of Labor, Memorandum and Order Regarding Certification of U Visa Petitions (2011) (unpublished protocol for U Visa certification requests; in my files).

⁴⁸U.S.C. § 1101(a)(15)(U)(ii).

⁴⁹*Id.*

⁵⁰COLO. REV. STAT. § 18-3-207(1.5) (2012); VA. CODE ANN. § 18.2-59 (2011).

reputational restraint or harm compelling an individual to continue work; (2) threats to contact local law enforcement or immigration authorities by an employer in order to compel continued work; (3) confiscation or withholding of identity documents, passports, or other travel documents by an employer. Supporting facts could be 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 (which may also constitute U visa-eligible criminal activities of false imprisonment or unlawful criminal restraint).⁵¹

- Obstruction of justice/perjury/witness tampering: (1) evidence of visa fraud, false statements in seeking certification for labor, misuse of visas by an employer, fraudulent wage-and-hour records; (2) employer instructions to lie to law enforcement investigators; (3) intimidation of workers who seek to comply with law enforcement investigations or affirmative complaints, such as threats to contact local law enforcement or immigration authorities, against an employer. Petitioners must show that they have “been directly and proximately harmed by the perpetrator of witness tampering, obstruction of justice, or perjury” and that there are reasonable grounds to conclude that the offense was committed to “avoid or frustrate” efforts to bring the perpetrator to justice, or

to “further the perpetrator’s abuse or exploitation ... through manipulation of the legal system.”⁵² Many petitions identifying these crimes have included other qualifying crimes, and advocates should carefully document injury to the worker to demonstrate the required substantial physical or mental harm caused by the qualifying crime.

The U visa can help labor and civil rights law enforcement agencies gain the trust and cooperation of immigrant workers who are victims of workplace crime. U visas may also support worker-organizing efforts by offering 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 make plaintiffs eligible for broadened remedies in workplace actions. The highly individual nature of U visa relief may pose challenges in broader organizing contexts, where not all workers encounter similar abusive treatment by an employer. Nevertheless the U visa is a valuable tool to protect immigrant workers, especially in predominantly immigrant work sites, and advocates and law enforcement agencies alike should be mindful of its importance and pursue it where appropriate on behalf of immigrant workers.

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⁵¹In such cases, advocates should consider whether a T visa would be more appropriate (8 U.S.C. § 1101(a)(15)(T)).

⁵²8 C.F.R. § 214.14(a)(14)(ii).



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