Humanitarian Visas for Victims of Workplace Crimes

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SHOW OF HANDS

• Have you ever prepared a T or a U humanitarian visa application based on a crime occurring in the workplace?
  – T visa?
  – U visa?

• If you obtained a law enforcement certification, was it from a labor agency?
Goals

You will be able to:

• Identify potential cases based on workplace crimes.
• Better prepare and present such cases to USCIS, including those with complex criminal and immigration histories.
• Identify partnerships and work more effectively with potential labor law enforcement certifiers for such claims.
1. Workplace Crime: Risks of Reporting and Effective Screening
Risks of Reporting

Undocumented workers often experience:

• Low wages
• Job insecurity
• Lack of upward mobility
• High dependence on employer
• Unregulated working conditions
• Contingent hiring arrangements
• Limited language access
• Intersecting inequalities
Advantages of Reporting

- Relief for grassroots leaders willing to call attention to abuse
- Strengthens enforcement of labor laws
- Eligibility for remedies: reinstatement in employment or back wages, immigration relief
- Eligibility for LSC services
SCREENING EXAMPLES
Sexual Violence in the Workplace

- Did any of your supervisors/co-workers ever ask you out or offer you to go to lunch, call you outside of work, invite you to give you a ride home before or after work?
  - What happened if you said no? (potential punishment/retaliation)
  - Did your supervisor/co-worker ever touch you in an offensive way or in any manner?
    - How many times did it happen? Did anyone see it?
    - Did this happen to you ever? Did you tell anyone about it? Did anyone see it?
SCREENING EXAMPLES
Other Workplace Crimes

– Did your manager/employer ever threaten you (or anyone else)?
  • Threats of violence, reports to immigration, arrest, firing, cause legal problems, destroy reputation, destroy documents
  • Includes threats to family members

– Did your employer ever physically harm you in any way?

– Were you ever asked to make payments to your employer?
SCREENING EXAMPLES
Other Workplace Crimes

– Did your employer ever physically harm you in any way?

– Were you ever asked to make payments to your employer?

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

– Did you ever make payments to anyone in order to obtain work?

– Did you ever suffer from lack of food, housing, medical care, clothing, or other basic needs because of your employer?
Power & Control in the Workplace

OVERT ACTIONS
- Threats
- Sexual Harassment
- Public Correction
- Threaten Job Loss
- Constant Fault-Finding
- Name-calling
- "Cry Baby"
- Condescending Comments

COVERT ACTIONS
- Intimidation & Coercion
- Deny Promotion or Raise
- Deny Training Request
- Unfair Job Evaluation
- "The Look"
- Transfer to Lesser Job
- Office Gossip
- Violate Personal Space
- Non-communication

MANAGEMENT PRIVILEGE
- Playing Favorites
- Inflated Training or Travel Budgets
- Special Allowances
- Pyramiding Hours
- Subjective Guidelines

EMOTIONAL CONTROL
- Threaten Job Loss
- Deny Comp Hours
- Deny FMLA
- Restrict Access to Jobs
- Inadequate LOA (death, maternity)
- Inappropriate Jokes, Comments
- Put-downs, "Putting you in your place"

RESTRICTIONS
- Insurance Packages
- Inflexible Hours
- Reject Due Raises
- No Internal Recognition
- Activity Restriction
- Lack of Resources such as: On-Site Daycare, Gym, Cafeteria, Job-Sharing or Telecommuting

ISOLATION
- Isolate Physical Office
- Not Part of Team
- Keeping Employee Uninformed
- Provide Lesser Resources
- Keeping Employee Uninvolved
- Not Soliciting Feedback
- Not Accepting Viewpoints

TACTICS
- Broken Confidentiality
- Employee Sabotage
- Use Personnel Records as Deterrent
- Ignore Employee Complaints
- Shift Blame or Responsibility
- No Employee Resources
- "Walking on Eggshells" False Promises

ECONOMIC CONTROL
- Underpaid Positions
- More Responsibility, Less Pay
- Not Promoted but Expected to Train New Person
- Considered "at-will"
- Reducing Work Hours or Pay
- Denying Overtime Hours

American Institute on Domestic Violence
www.aidv-usa.com
info@aidv-usa.com
Trafficking & Labor Overview

• What is human trafficking?
  – What is a severe form of trafficking in persons?
  – What is labor trafficking?

• What do we mean by workplace crimes?
• **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**. The term “sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

• **Labor trafficking:** 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.
Examples of Workplace Crimes

Trafficking, Involuntary Servitude, Peonage

• Labor trafficking, involuntary servitude, peonage: fraud, force, coercion to compel a worker to provide labor.

• Coercion includes physical, psychological, financial, reputational harm.

• Threats; withholding of documents; debts; desperate living conditions.

• Always check eligibility for T visas.
Examples of Workplace Crimes

Obstruction of Justice, Witness Tampering, Perjury

Examples:
• Employers attempt to thwart investigation by labor investigators;
• Threats to fire, deport, evict, engage in abuse, if workers do not withdraw claims;
• Substantial abuse: must demonstrate that perpetrator committed offense to: 1) avoid justice; 2) further exploitation/abuse.
Examples of Workplace Crimes

Extortion and Blackmail

Examples:

• Wrongful use of threatened force, violence, or fear to obtain property from another;
• Threats of violence, report status to law enforcement to obtain worker’s property;
• CA, VA, CO: specific state statutes that include threats of immigration status as extortion.
Examples of Workplace Crimes

Kidnapping and False Imprisonment

• Unlawful restraint “so as to interfere substantially with his/her liberty”

• Knowingly holding an employee against his or her will:
  – Forbidding a worker to leave (blocking doors, locking workers into worksite)
  – Severe sexual harassment—restraint of victim against her/his will
  – Often linked to forced labor/human trafficking
Examples of Workplace Crimes

Fraud in Foreign Labor Contracting

• Must meet 18 U.S.C. Sec. 1351.
• Contractor “knowingly” and “with intent to defraud” recruits, solicits, or hires a person outside the U.S. “by means of fraudulent pretenses” regarding employment.
• Currently discussions re: extraterritorial application of statute.
Examples of Workplace Crimes

Felonious Assault

• Intentional attempt to injure another person;
• Involves use of dangerous or deadly weapon with intent to cause bodily injury, or with intent to commit felony.
• Physical violence by employer, weapon, etc.
Examples of Workplace Crimes

Sexual violence crimes
- Includes rape, abusive sexual contact, sexual assault.
- Check state statutes; some may/may not have sexual assault statutes.
- Be sure to review victim advocate guides to working with victims of sexual assault.
2. Immigration Relief
Rapid Review: About the U Visa

Purpose:

• To strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking, and other crimes while offering humanitarian protection to crime victims and their family members.
• Temporary, non-immigrant status for non-citizen victims of crime
• Provides lawful status for up to 4 years
• Work authorization
• Eligibility to adjust status to lawful permanent resident after 3 years
• Derivative visas for dependents (Form I-918A)
• Form I-918
Rapid Review: U Visa Requirements

• Victim of **qualifying criminal activity**
• “Is being, has been, or is likely to be helpful” in the investigation or prosecution of criminal activity
• Law enforcement certification is **mandatory** (I-918 Supp. B). See INA 214(p)
• “Substantial physical or mental abuse” resulting from criminal activity
U Visa Qualifying Criminal Activities
Most often relevant in workplace crime cases

Includes attempt, conspiracy, solicitation

Abduction
Abusive sexual contact
Being held hostage
Blackmail
Domestic violence
Extortion
False imprisonment
Felonious assault
Female genital mutilation
Fraud in Foreign Labor Contracting
Incest
Involuntary servitude
Kidnapping
Manslaughter
Murder
Obstruction of justice
Peonage
Perjury
Prosecution
Rape
Sexual assault
Sexual exploitation
Slavery trade
Stalking
Torture
Trafficking
Unlawful criminal restraint
Witness tampering
An employer failed to pay wages or overtime, and kept a false set of books. Workers organized due to employer’s failure to pay wages, and considered filing a lawsuit. When the employer found out, he told workers that if they did not sign a waiver, that they would be fired and reported to immigration. The employer also instructed workers to lie to authorities about their working conditions. On a separate occasion, one of the managers beat up a worker with a frying pan.

On what basis could the agency certify the I-918B form?
A) Obstruction of justice
B) Felonious assault
C) Obstruction of justice, witness tampering, perjury, felonious assault
D) Involuntary servitude, perjury, felonious assault
U Visa Qualifying Crimes Exercise

An employer failed to pay wages or overtime, and kept a false set of books. Workers organized due to employer’s failure to pay wages, and considered filing a lawsuit. When the employer found out, he told workers that if they did not sign a waiver, that they would be fired and reported to immigration. The employer also instructed workers to lie to authorities about their working conditions. On a separate occasion, one of the managers beat up a worker with a frying pan.

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Preparing Workplace U Visa Case for USCIS

• Preparing the declaration: Identify facts directly related to the **qualifying crime** and resulting harm (focus **less** on underlying labor claims)
  – Highlight effects of qualifying crime on victim
  – Establish clear nexus between the crime and the harm itself
  – Look at prior trauma experienced by client
  – Consider psychological evaluations, letters of support from organizers
  – Clear detail in declaration

• I-192 Waivers: Make sure to include any false use of SSNs, names for employment purposes (more in a moment...)
RFEs / Challenges at USCIS

• Framing qualifying crimes and substantial abuse
  – See letter to CIS for suggested context (USB)
  – See recent successful AAO appeals at http://nipnlg.org/WorkplaceCrimes.html

• USCIS follow-up
  – What’s happening with your cases?
    • Were they included in examples in the letter?
    • If not, we need to flag them for CIS
    • If they were, we need updates so we can follow-up with HQ
      – i.e., revocations is exactly the opposite of what they should be doing
U Visa Inadmissibility and Waivers

• Broad inadmissibility waiver available for U visas. INA § 212(d)(14),(Form I-192)

• Common inadmissibility grounds in workplace U visa cases:
  – Unlawful presence, immigration violations
  – Criminal convictions
  – Disclose: unauthorized employment; use of false SSNs; false USC attestation
More on Waivers

• Factors:
  – Number and severity of offenses
  – Violent/dangerous crimes; security grounds: favorable discretion only in extraordinary circumstances.
  – *Matter of Hranka* factors: risk of harm to society; seriousness of prior convictions; reason for admission
  – Rehabilitation

• Denials / Review

• 212 (d)(3) waiver
EXERCISE

After Sonia’s employer failed to pay her any wages for the past 6 weeks, she decided to file a complaint with the DOL to recover her pay. When her employer found out, he called the local police, because he knew she had used a false SSN. The local police charged and convicted her for identity theft.

• How does this conviction affect her U visa application/inadmissibility?
U Visa: Adjustment of Status

- After-acquired inadmissibility
- INA § 245(m), 8 USC § 1255(m)
- 8 CFR § 245.24
- “Committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns”
Before the T Visa

• What is “Continued Presence”?  
• What is Certification?
Rapid Review: T Visa

• Temporary, non-immigrant status
• Enables certain victims of human trafficking to live and work in U.S. for four years
• Can apply for adjustment of status to lawful permanent resident after three years with T visa /or/ completion of case (shorter)
• Derivative visas for dependents (Form I-914A)
• Form I-914
Rapid Review: T Visa Requirements

• is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of title 22;
• is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking;
Rapid Review: T Visa Requirements

• has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;

• in consultation with the Attorney General, as appropriate, is unable to cooperate with a request due to physical or psychological trauma; or

• has not attained 18 years of age; and
Rapid Review: T Visa Requirements

- the alien would suffer **extreme hardship** involving unusual and severe harm upon removal.
T Visa: Inadmissibility and Waivers

– Related to unlawful presence
– Crimes
– Immigration violations

• Waiver at INA § 212(d)(13), 8 U.S.C. 1182(d)(13)
• 8 CFR § 212.16, Form I-192
• Caused by or were incident to the victimization (with exceptions)
• National interest
T Visa: Adjustment of Status & Waivers

• INA § 245(l), 8 USC § 1255(l)
• 8 CFR § 212.18, 8 CFR § 245.23
• Form I-601

• Caused by or were incident to the victimization (with exceptions)
• National interest
• Good moral character
• Criminal conduct (commission vs. conviction)
Trafficking Resources

• Freedomnetworkusa.org (NGOs)
• National Human Trafficking Resource Center (NGO)
  – 1-888-373-7888
  – Text: HELP to BeFree (233733)
  – nhtrc@polarisproject.org | www.traffickingresourcecenter.org
• Blue Campaign (Government) http://www.dhs.gov/blue-campaign
• The Human Trafficking Pro Bono Legal Center http://www.htprobono.org/
Immigration Technical Assistance on Workplace Crimes Cases

- NIPNLG nipnlg.org
- ASISTA asistahelp.org
- SPLC splcenter.org
3. Certification by Labor Authorities in Workplace U Visa Cases
Potential Certification

• WEIGH YOUR OPTIONS
Potential Certification

– Federal Labor and Employment Agencies:
  • U.S. Department of Labor
  • Equal Employment Opportunity Commission
  • National Labor Relations Board
– State Labor and Employment Agencies
  • State Departments of Labor
  • State EEOC equivalents/Human Rights Department
– Federal or State Judges
– Local Police Departments
– Attorney General’s Office/State Attorney’s Office
SHOW OF HANDS

– Do you know the name of the state agency handling labor issues in Texas? In your state?

Overcoming Challenges to U Visa Certification by Labor Law Enforcement Authorities

• Evaluate which law enforcement (labor) agencies may be able to qualify, and any restrictions on QCAs.
• Partner with other groups, e.g., workers’ centers
• Identify all potential qualifying criminal activity.
• Ensure eligibility; work with partners to file underlying complaint or U visa certification request.
• Patience may be key.
For now, certification limited to 7 qualifying crimes: extortion, fraud in foreign labor contracting, involuntary servitude, peonage, trafficking, obstruction of justice, witness tampering

And an 8th, “forced labor”

Must be under jurisdiction of Wage and Hour Division (not OSHA)

U.S. Equal Employment Opportunity Commission

- EEOC will certify for any qualifying criminal activity

- Qualifying criminal activity must be related to unlawful employment discrimination alleged in EEOC complaint
National Labor Relations Board

• NLRB: conducts elections for labor unions, investigates unfair labor practices against workers organizing/collective bargaining.
• No restrictions on qualifying criminal activity
• Must be related to meritorious unfair labor practice under investigation by NLRB
State/Local Labor Agencies

• California Department of Fair Employment and Housing
• California Division of Labor Standards Enforcement
• Illinois Department of Labor
• New York Department of Labor
• Local law enforcement officials
Judicial Certifications


• Prima facie requirement, detection of qualifying criminal activity

• Motions for judicial certification of workplace-based crimes
Areas of Developing Advocacy

• USCIS: Education on workplace-related U visas; substantial abuse issues; U visa deferred action issues
• U.S. DOL/EEOC: Recent success in broadening QCAs; T visa certification; fraud in foreign labor contracting
• State agencies: Establish U visa protocols
• State legislative advocacy: Extortion laws; anti-retaliation bills
• Federal legislative advocacy: Support POWER Act
Strategic Litigation Tips

• Employment counsel should file protective orders to restrict inquiries into immigration status. See, e.g., *Rivera v. NIBCO*, 364 F.3d 1057 (9th Cir. 2004).
• Assume communications with law enforcement agencies may be discoverable in litigation.
• Ensure that U visa affidavits are consistent with testimony in litigation.
• Erect firewalls between immigration and labor/employment counsel.
General Tips and Resources

• Intake processes:
  – Immigration counsel should integrate workplace treatment questions;
  – Employment counsel: inquire about immigration related questions;
  – Integrate questions about substantial harm/abuse
    • See letter to CIS

• Resources:
  – NIPNLG Workplace Crimes Resource Page
    [http://nipnlg.org/WorkplaceCrimes.html](http://nipnlg.org/WorkplaceCrimes.html)

  – U Visas for Victims of Workplace Crime: A Practice Manual,

  – Workplace U visa listserv: contact ellen@nipnlg.org.
Panelist Contact Info

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