

The U Visa and How It Can Protect Workers

SEPTEMBER 2010

Unions and other worker advocates often witness first hand employer exploitation and abuse of immigrants in the workplace. Abusive practices may violate collective bargaining agreements, wage and hour laws, equal employment protections, or the right of workers to engage in protected concerted activity. Sometimes, however, employer abuse of workers will rise to the level of criminal activity. In those situations, depending on the crime and other factors, workers may be eligible for a U nonimmigrant visa. This form of immigration status provides important relief and an alternative for workers in abusive environments who fear losing their existing lawful immigration status through employer retaliation or who are targeted for lack of a current lawful status and, as a result, hesitate to report criminal activity to law enforcement. With the possibility of protection and relief through a willingness to assist law enforcement, workers are more able to hold employers accountable and can feel empowered to improve their workplace conditions.

■ What Is the U Visa's Purpose?

Congress created the U nonimmigrant visa in 2000 when it passed the Victims of Trafficking and Violence Protection Act. Its purpose was to encourage immigrants to report crimes to law enforcement and also to afford protection for those willing to cooperate. Congress intended that the law would protect victims of domestic and other violent crimes, but it also explicitly expressed its intent that the visa protect against qualifying workplace-related crimes.¹

■ What Are the Benefits of the U Visa?

U visa status benefits include the following:

- Lawful status for up to four years;
- Work authorization;
- Derivative benefits for qualifying family members; and
- Eligibility to adjust status to a lawful permanent resident after three years.

¹ U.S. Citizenship and Immigration Services (USCIS) reiterates the inclusion of workplace-related crimes and the certification authority of labor-enforcement agencies in its Sept. 5, 2007, fact sheet, "Certifying U Nonimmigrant Status: U Nonimmigrant Status Certification (Form I-918, Supplement B)."

■ When Is a Worker Eligible for a U Visa?

To be eligible for a U visa, a worker must meet the following criteria:

1. The worker has suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity;
2. The worker has information about the criminal activity;
3. The worker has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the crime; and
4. The criminal activity violated local, state, or federal law, or occurred in the U.S.

■ What Is the U Visa Petition Process?

To apply for a U visa, the worker or someone on the worker's behalf must complete the following:

- **Form I-918, Petition for U Nonimmigrant Status.** This form requests biographical information about the worker, the worker's family members, and additional questions to determine the worker's eligibility. The form is available at USCIS.gov.
- **Form I-918, Supplement A, Evidence to Establish Derivative U Nonimmigrant Status.** This supplement is optional for petitioners who wish to petition for qualifying family members. A separate Supplement A must be completed for each qualifying family member the worker wishes to file for. If the worker is under age 21, qualifying family members include siblings under 18, the worker's spouse, parents, and any children. Workers above age 21 cannot petition for their parents or siblings, but may petition for their spouse and children.
- **Form I-918, Supplement B, U Nonimmigrant Status Certification.** This supplement is a mandatory certification form that must be completed by a government entity with authority to certify U visas. That entity must certify that the petitioner is a victim of one of the categories of qualifying criminal activities; has knowledge of the activity; and has helped, is currently helping, or is likely to help in the investigation or prosecution of the crime.
- **Supplemental Evidence.** The worker must include a personal statement that provides a narrative of the crimes of which the worker is a victim and information about any resulting injuries. The worker also should submit evidence, including affidavits, doctors' reports, psychiatric evaluations, therapy session notes, court documents, police reports, or anything else that supports the worker's claim.

■ Which Government Entities Have Certifying Authority?

A number of government entities have the authority to certify U visas, including federal, state, or local law enforcement agencies, prosecutors, judges, or other authorities with responsibility for the investigation or prosecution of qualifying criminal activities. Also included in that list are federal, state and local agencies that enforce employment and labor

laws, such as the U.S. Department of Labor, the Equal Employment Opportunity Commission, and the National Labor Relations Board.²

Since the U visa is a relatively new visa, there is considerable confusion among government agencies regarding certifying authority and the identification of qualifying criminal activity. It is important to note, when working with an agency, that U.S. Citizenship and Immigration Services (USCIS) regulations permit U visa certification on the basis of a crime that is detected, even if the certifying agency has no authority to enforce that crime. This was partly to further Congress's "[intent] for individuals to be eligible for U nonimmigrant status at the very early stages of an investigation."³

■ What Constitutes Qualifying Criminal Activity?

The following is a list of criminal behaviors that were recognized as ones that are often directed against immigrants and that therefore constitute qualifying criminal activity for purposes of U visa eligibility. The list includes categories of federal, state, or local criminal violations, and it attempts to paint the picture of the variety of activities that may qualify.

There are a few important points to note before reviewing this list:

1. The list names different categories of crime but is not exhaustive. Other crimes substantially similar to the listed crimes may also qualify.
2. "Investigation or prosecution" of a crime includes the detection or investigation of a qualifying crime or criminal activity, as well as prosecution, conviction, or sentencing of the perpetrator of such crime or criminal activity. USCIS intended this term to be interpreted broadly, since entities such as judges have certifying authority, though they do not investigate or prosecute crimes.⁴ Similarly, labor enforcement agencies are permitted to certify U visas on the basis of qualifying criminal activity they detect, even if they lack the authority to prosecute it.

LIST OF CRIMINAL BEHAVIORS

- Rape
- Sexual assault
- Abusive sexual contact
- Trafficking
- Unlawful criminal restraint
- False imprisonment
- Blackmail
- Involuntary servitude
- Witness tampering
- Obstruction of justice
- Felonious assault
- Extortion
- Torture
- Incest
- Domestic violence
- Kidnapping

² Department of Homeland Security, Interim Final Rule, 8 CFR Parts 103, 212, 214, 274a and 299, "New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status," at 22.

³ *Id.* at 22.

⁴ *Id.* at 23.

- Abduction
- Forced prostitution
- Sexual exploitation
- Being held hostage
- Peonage
- Manslaughter
- Murder
- Female genital mutilation

EXAMPLE

Scenario: During a union organizing campaign, a few workers in the plant are terminated because of their involvement in the worker committee. The union filed a charge with the National Labor Relations Board (NLRB). While the NLRB was investigating the merits of the charge, the Board agent discovered that the employer had taken and locked up the passports for several of the workers, forcing them to stay in their jobs. Those workers were also forced to live at the employer's property so the employer could keep track of what they were doing and who they were talking to. The employer threatened that if the workers ever left the plant, he would call U.S. Immigration and Customs Enforcement (ICE).

Response: In this case, the workers may be victims of several crimes, including involuntary servitude and extortion. The NLRB may certify U visas for any workers able to assist with investigation of the detected crimes, even though the NLRB itself has no enforcement authority over those crimes. The workers would have to demonstrate separately in their U visa petitions that they incurred substantial mental or physical injury from the crime. That aspect is not the NLRB's responsibility to disclose.

LOOKING FORWARD

Legislative Advocacy to Expand the Rights of Immigrant Workers

While workers may be able to receive a U visa under current law, legislative proposals are underway to try and expand protections for immigrant workers facing egregious workplace retaliation that does not rise to the level of a U visa qualifying crime.

On April 14, 2010, Senator Robert Menendez (D-NJ) introduced the Protect Our Workers from Exploitation and Retaliation (POWER) Act (S.3207), which is designed to provide important labor protections for immigrants and contains vital safeguards against retaliation by employers. In addition to other changes, the POWER Act would expand the U visa's reach by allowing workers to receive a U visa if they are involved in a civil workplace claim and reasonably fear or have actually been threatened with force, physical restraint, serious harm, or other abuses. POWER's provisions would ensure that workers involved in labor disputes will not be deported without an opportunity to speak with labor enforcement agents, such as U.S. Department of Labor DOL or Equal Employment Opportunity Commission investigators.

FOR MORE INFORMATION, CONTACT

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