IMMIGRATION STATUS FOR VICTIMS OF WORKPLACE CRIME

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Agenda

1. Risks of Reporting Workplace Violence
2. Effective Screening of Survivors of Workplace Violence
3. Immigration Relief for Survivors of Violent Crimes in the workplace
4. Strategies for Obtaining Law Enforcement Certifications from Labor Agencies
5. Litigation Strategies
What is Your Role in Addressing this Problem and Who should be Working with You?

Estela works at the poultry processing plant of “Niceruraltown” from 6am to 8pm Monday through Friday and then at the local Mexican restaurant cooking during the weekend. She got her jobs from a nice supervisor who invited her to come from her village in Guatemala.

Her partner assaulted her during the weekend and the neighbors called the police. Estela tells you that she deserves what she got because her partner found out about the sex at the plant.

When you ask her about whether she is being mistreated at work, she tells you that she has become increasingly uncomfortable because the owner of the restaurant often makes crude jokes about her and other employees. He has also started following her around the restaurant and has started making unwanted sexual advances at her. She is scared and confused.
RISK 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
Risks of Reporting
Dynamics

Consent-giving in-consent-continuum of violence-consent-coercion-consent-force-consent-intimidation-consent-threats
EFFECTIVE INTERVIEWING SKILLS
Lifetime Spiral of Gender Violence

Asian Pacific Islander Institute
Strengthening your interviewing skills

- What
- When
- How
  - Repeat

- Conversation starters
  - How are things at work?
  - Do you like your job?
  - What do you do there?
  - How many hours do you work?
Strengthening your interviewing skills

A step removed

- **Money**
  - Are they paying you all your hours, overtime?
  - How are they treating your co-workers? Any complaints?
  - What do you see?

- **Supervisors or anyone with perceived power**
  - How does your supervisor/co-workers treat you?
  - Has anyone mistreated or disrespected your peers? How?
  - Did any of it ever happen to you?
  - Has your supervisor/Co-worker ever made you feel uncomfortable? If so, how?

- **Did you complain about it or talked about it to**
  - a trusted person in the office/company or a peer? Human resources representative? Union leader? Nurse? Anyone else?

On sexual violence

- 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?
What does safety look like?

Perceived threats vs. Completed threats

- EEOC
- DOL
- OSHA
- Lawyer & advocate & SANE
- Religious leaders
- Police?
- Lawyers
- Co-worker?
- Union/promotoras
- Family
- Threats
WHAT IS A U VISA?

- The U visa for non-citizen victims of crime was created in October 2000 as part of the Victims of Trafficking and Violence Prevention Act. See INA § 101(a)(15)(U)

- Victims of crime 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.

- The U visa was created to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking and other crimes while offering humanitarian protection to victims of such crimes.

- Provides a mechanism to remain in the United States to assist in an investigation/prosecution of those who have perpetrated crimes against them.
OVERVIEW OF THE U VISA REMEDY
Principal U Visa Applicants Must Prove:

- Immigrant suffered substantial mental or physical abuse as a result of having been a victim of certain criminal activity; and
- Immigrant (or in the case of a child under 16, the parent or guardian) possesses information concerning that criminal activity; and
- The criminal activity violated U.S. law or occurred in the United States; and
- The immigrant has been helpful, is being helpful, or is likely to be helpful to a Federal, State or local authority investigating or prosecuting the crime

INA § 101(a)(15)(U); 8 C.F.R. § 214.14
Definition of Victim

8 C.F.R. § 214.14(a)(14)

Direct Victim

- Generally defined as one who is directly and proximately harmed by qualifying criminal activity

- Includes bystanders
  - Example: pregnant woman who witnesses violent crime and miscarries
Definition of Victim

Indirect Victim

• If actual victim is deceased due to murder or manslaughter, or is incompetent or incapacitated, then direct victim can also include:
  • Spouse
  • Children under 21 years of age
  • Parents (if direct victim is under 21)
  • Siblings (if direct victim is under 21 and sibling is under 18)

• What is the age of competence?
  • No clear answer – varies under immigration, state, and federal laws
  • For U visa purposes we typically look for victims under 16

• To whom must harm be shown in case with indirect victim?
  • Good practice to show harm to both direct and indirect victims
Possession of Information

• Must have knowledge of the details (specific facts) of the qualifying criminal activity that would assist in the investigation or prosecution

• If victim is less than 16 years or incompetent/incapacitated, a next friend may appear in lawsuit to provide information (may be parent, guardian, or other party who has the information)
  • Look at age of victim on date qualifying criminal activity first occurred to determine whether exception triggered
Substantial Physical or Mental Abuse

DEFINITION

• Physical or mental abuse is defined as “injury or harm to the victim’s physical person, or harm or impairment of the emotional or psychological soundness of the victim.” 8 C.F.R. § 214.14(a)(8).

• No single factor is prerequisite – a series of acts taken together may constitute substantial abuse even where no single act alone arises to that level.

• USCIS will consider (but not limited to):
  • Nature of injury inflicted or suffered
  • Severity of perpetrator’s conduct
  • Severity of harm suffered
  • Duration of the infliction of harm
  • The extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including the aggravation of pre-existing conditions.
Cooperation with Law Enforcement

• **Helpful means**: assisting law enforcement in the investigation or prosecution of the qualifying criminal activity of which he/she is a victim.

  • For those under 16, or incompetent or incapacitated, then parent, guardian, or next friend may provide that information.

• **Requires an ongoing responsibility** on the part of the victim to be helpful, assuming there is an ongoing need for the victim’s assistance.

• USCIS excludes from eligibility those victims who, after initiating cooperation, refuse to provide continuing assistance when reasonably requested. See 8 C.F.R. § 214.14(b) (3)

  • ***CAREFULLY REVIEW Form I-918, Supplement B and all police/court documents***
Inadmissibility Issues
What are inadmissibility issues?

- Related to unlawful presence
- Crimes
- Immigration violations
Identify them clearly

- Cite the statute
- Cite (d)(14) – form says (d)(3)
- Provide documents they may want up front
Waiver arguments

• National or public interest
• Unlawful presence related to fear of reporting and crime itself in workplace cases
• Immigration violations similar plus think good moral character, VAWA extreme hardship factors
  • Children and victim needs for judicial systems, services, support networks
  • Lack of above in home country
Crimes

- Why it happened
  - Especially if related to being crime victim
  - BUT not enough
- Think convincing your neighbors that
  - This person has changed his or her life so
  - It won’t happen again
- Juvenile delinquent derivatives
  - Key to principal’s ability to cope/survive
Filing U Visa Applications for Workplace Crime
## Qualifying Criminal Activities

Most often relevant in workplace crime cases

<table>
<thead>
<tr>
<th>Abduction</th>
<th>Fraud in foreign labor contracting*</th>
<th>Rape</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abusive sexual contact</td>
<td>Incest</td>
<td>Sexual assault</td>
</tr>
<tr>
<td>Being held hostage</td>
<td>Involuntary servitude</td>
<td>Sexual exploitation</td>
</tr>
<tr>
<td>Blackmail</td>
<td>Kidnapping</td>
<td>Slave trade</td>
</tr>
<tr>
<td>Domestic violence</td>
<td>Manslaughter</td>
<td>Stalking</td>
</tr>
<tr>
<td>Extortion</td>
<td>Murder</td>
<td>Torture</td>
</tr>
<tr>
<td>False imprisonment</td>
<td>Obstruction of justice</td>
<td>Trafficking</td>
</tr>
<tr>
<td>Felonious assault</td>
<td>Peonage</td>
<td>Unlawful criminal restraint</td>
</tr>
<tr>
<td>Female genital mutilation</td>
<td>Perjury</td>
<td>Witness tampering</td>
</tr>
</tbody>
</table>
|                       | Prostitution | }
Challenges with the I-918B

• Bad police reports = bad certifications
• Advocate for clients when crimes are recorded improperly or law enforcement mischaracterizes their cooperation
• Weigh your options
  • Attorney General’s Office
  • Department of Children and Family Services
  • Department of Human Rights
  • Department of Labor (state and federal)
  • Equal Employment Opportunity Commission (state and federal)
  • Federal or State Judge
  • National Labor Relations Board
  • Police Department
  • State’s Attorney’s Office
Educating Law Enforcement

- No specific requirement defining “how” victim must be helpful – USCIS interprets to refer to “detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity”

- Ongoing helpfulness with “no unreasonable refusal” – USCIS is responsible for interpreting this

- In some cases, close family members are allowed to meet the “helpfulness” requirement for the victim
Educating Law Enforcement

- No requirement that the signer’s agency have investigated or prosecuted, but minimum requirement of detection

- Must be head of certifying agency or in a supervisory role and assigned by head of agency to certify

- U Visa Law Enforcement Certification Resource Guide
U.S. Department of Labor

- Certification limited to 5 qualifying crimes: involuntary servitude, peonage, trafficking, obstruction of justice, witness tampering

- 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 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
Overcoming Challenges in Obtaining U Visa Certification

• Evaluate which law enforcement agencies may be able to qualify, and any restrictions on QCAs.
• Identify all potential qualifying criminal activity.
• Ensure eligibility; work with partners to file underlying complaint or U visa certification request.
• Patience may be key.
Overcoming USCIS Adjudication Challenges

• 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
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.
Areas of Developing Advocacy

• **USCIS**: Education on workplace-related U visas; substantial abuse issues; U visa deferred action issues

• **U.S. DOL/EEOC**: 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
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

Resources:

• Workplace U visa listserv: contact ellen@nipnlg.org.
Resources

Ellen Kemp, National Immigration Project of the National Lawyers Guild
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