

JUSTICE FOR WORKPLACE CRIMES: AN IMMIGRATION LAW REMEDY

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ABSTRACT

Immigrant workers are particularly likely to be victims of occupational safety and health violations. However, many immigrant workers are fearful of reporting unsafe working conditions to government authorities due to concerns that their employers may retaliate by contacting immigration authorities. At the same time, the Occupational Safety and Health Administration (“OSHA”), the agency charged with enforcement of occupational safety and health laws, has very limited resources. Accordingly, OSHA largely relies on workers to report violations to the agency rather than independently detect such violations.

In 2008, as a response to concerns that immigrants were fearful of engaging with law enforcement, as well as for humanitarian purposes, Congress created U nonimmigrant status. U nonimmigrant status provides immigrants who have assisted law enforcement in the investigation and/or prosecution of certain crimes with a temporary lawful immigration status and the opportunity to adjust to “Lawful Permanent Resident Status.” To obtain U nonimmigrant status, an immigrant must obtain certification from a law enforcement agency that indicates that the immigrant has been, is being, or is likely to be helpful in the investigation or prosecution of a qualifying crime. The program has been quite successful: although the status is limited to 10,000 individuals per year, thousands more typically apply.

This article proposes expanding U nonimmigrant status to include victims of serious workplace health and safety violations. Because OSHA relies so heavily on workers interacting with the agency to carry out its mission, it is critical that workers be willing to engage with the agency regardless of their immigration status. If immigrant workers that report serious health and safety violations are afforded protection from immigration consequences, they will likely be more open to interacting with OSHA. Accordingly, this article suggests that (1) OSHA begin certifying U nonimmigrant status law enforcement certifications, a remedy that requires no additional statutory authority, and (2) Congress expand U nonimmigrant status to include serious OSH Act violations as qualifying “crimes” under the statute. This helps address the incongruity in a self-defeating system: currently OSHA relies on workers’ willingness to report health and safety concerns to the agency, but many workers in industries with the most numerous and serious occupational safety and health hazards fear interacting with the government. It also provides humanitarian relief to workers who have faced serious workplace hazards.

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INTRODUCTION

On July 29, 2013, five workers were severely burned at a Blue Rhino plant explosion in Taveras, Florida.¹ That day, thousands of propane tanks flew into the air, hospitalizing eight workers and damaging local businesses and homes.² Despite the severity of some of the injuries,³ and the Occupational Safety and Health Administration’s (“OSHA”) findings that Blue Rhino had committed 26 safety violations at the plant, 20 of which were

¹ Stephen Hudak, *OSHA Accuses Blue Rhino of Safety Violations in Taveras Plant Explosion*, ORLANDO SENTINEL (Feb. 5, 2014), available at http://articles.orlandosentinel.com/2014-02-05/news/os-blue-rhino-explosion-no-charges-20140205_1_blue-rhino-scott-brockelmeyer-ferrellgas, archived at <http://perma.cc/N3XU-S4VC>.

² Amanda Ober, *OSHA: Blue Rhino Plant had 20 Serious Safety Violations*, WESH ORLANDO (Feb. 6, 2014, 4:46 PM), available at <http://www.wesh.com/news/central-florida/osha-blue-rhino-plant-had-20-serious-safety-violations/24329682>, archived at <http://perma.cc/XB W4-RZ6U>.

³ See *id.* (noting that some workers suffered severe burns and faced months of rehabilitation).

serious,⁴ to date Blue Rhino has not faced any criminal charges.⁵ Instead, Blue Rhino was assessed a civil penalty of \$73,000.⁶

Approximately one year earlier, C.J.'s Seafood was cited for 11 serious Occupational Safety and Health Act ("OSH Act") violations, in addition to other labor abuses.⁷ The serious OSH Act violations included a lack of fire extinguishers, the use of temporary wiring, and a blocked exit.⁸ Most of the workers at C.J.'s were migrant workers from Mexico, working lawfully in the United States under the H-2B guest worker visa program.⁹ The Worker Rights Consortium, a monitoring group, conducted interviews with workers at C.J.'s and found that they were threatened with termination, deportation, and blacklisting for complaining about their working conditions.¹⁰ To ensure believability of these threats, the general manager reminded the C.J.'s Seafood workers that he had previously refused to rehire a worker who had complained about working conditions. That worker was subsequently unable to return to work in the United States.¹¹

Although OSHA exists to protect workers from hazards on the job,¹² the agency does not have the resources to conduct sufficient inspections to ensure safe workplaces. This results in the preventable death and injury of thousands each year.¹³ When OSHA penalties are imposed, they are largely

⁴ Hudak, *supra* note 1. For a copy of the OSHA citations, see *Citation and Notification of Penalty*, UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, available at <http://www.wesh.com/blob/view/-/24331334/data/2/-f8oi4gz/-/OSHA-citation-for-Blue-Rhino.pdf>, archived at <http://perma.cc/U2ZS-LCPP> (last visited Feb. 27, 2014) [hereinafter *Citation*].

⁵ *Id.*

⁶ *Citation*, *supra* note 4 at 32.

⁷ *C.J.'s Seafood of Breaux Bridge, La., Instructed to Pay Fines and Back Wages after US Department of Labor Investigations*, UNITED STATES DEPARTMENT OF LABOR (July 24, 2012), available at <http://www.dol.gov/opa/media/press/whd/WHD20121511.htm> (last visited Nov. 1, 2015), archived at <http://perma.cc/X7B3-NELH>. C.J.'s was also cited for numerous violations of the Fair Labor Standards Act, including violation of minimum wage, overtime, and record-keeping laws. *Id.*

⁸ *Id.*

⁹ WORKER RIGHTS CONSORTIUM ASSESSMENT OF C.J.'S SEAFOOD/WAL-MART STORES, INC. (BREAUX BRIDGE, LA) FINDINGS AND RECOMMENDATIONS, WORKER RIGHTS CONSORTIUM 2, available at <http://workersrights.org/freports/WRC%20Assessment%20re%20CJ%27s%20Seafood.%206-20-12.pdf>, archived at <http://perma.cc/76BR-627J>.

¹⁰ *Id.* at 25.

¹¹ *Id.* Visas under the H-2B program are tied to workers' specific employer, so if workers face poor working conditions and choose to quit their jobs, they must return to their home countries or remain in the United States unlawfully. Employers have discretion about whom to hire, resulting in workers fear of being blacklisted.

¹² See *About OSHA*, UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, available at <http://www.osha.gov/about.html>, archived at <http://perma.cc/2ZQS-LAGD> (last visited Nov. 1, 2015) ("Congress created [OSHA] to assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.").

¹³ *Commonly Used Statistics*, UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, available at <http://www.osha.gov/oshstats/commonstats.html>, archived at <http://perma.cc/M76Y-4SEJ> (last visited Jan. 5, 2014) [hereinafter *Commonly Used Statistics*] (stating that over 4000 workers were killed on the job in 2014). Non-employees are also affected by OSHA's limited enforcement capabilities. For example, fifteen people died and over 160 were injured on April 17, 2013, when a fertilizer plant in

civil—not criminal—and set at amounts that are too low to be a significant deterrent.¹⁴ This is exacerbated because the OSH Act only classifies a limited number of infractions as criminal.¹⁵ Further, even when OSH Act violations are criminal, it is rare for an employer to be criminally prosecuted for workplace health and safety violations.¹⁶ As such, criminal penalties for OSH Act violations are limited in number and efficacy.¹⁷

Occupational safety and health issues are of particular concern in the immigrant community because non-citizen workers¹⁸ often work in more dangerous jobs than citizens.¹⁹ However, many immigrant workers, like those at C.J.’s Seafood, are fearful to report occupational safety and health

West, Texas exploded. Richard Simon, *West, Texas fertilizer plant that exploded cited over safety violations*, LOS ANGELES TIMES (Oct. 10, 2013), available at <http://articles.latimes.com/2013/oct/10/nation/la-na-nn-west-texas-explosion-barbara-boxer-20131010>, archived at <http://perma.cc/B32D-TS8E>. The plant had not been inspected by OSHA officials since 1985, but, after the explosion, was cited for 24 safety violations, including “unsafe handling and storage” of chemicals. *Id.*

¹⁴ See, e.g. *Protecting America’s Workers Act (PAWA): Hearing Before The Senate Comm. on Health, Education, Labor, and Pensions*, 111th Cong. (2010) (testimony of David Michaels, Assistant Secretary, Occupational Safety and Health, Department of Labor) available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=1122, archived at <https://perma.cc/LN97-ZZRE> [hereinafter Michaels, *Protecting*] (“Swift, certain and meaningful penalties provide an important inducement to ‘do the right thing.’ However, OSHA’s current penalties are not large enough to provide adequate incentives.”); see also *id.* (stating that “[t]he criminal provisions in the OSH Act are weaker than virtually every other safety and health and environmental law” and that employers would be more likely to comply with OSHA regulations if they had a more real fear of going to prison for violating the Act) (stating that “[t]he criminal provisions in the OSH Act are weaker than virtually every other safety and health and environmental law” and that employers would be more likely to comply with OSHA regulations if they had a more real fear of going to prison for violating the Act).

¹⁵ See 29 U.S.C. §§ 651–678 (2012).

¹⁶ See Jordan B. Schwartz & Eric J. Conn, *OSHA Criminal Referrals on the Rise*, OSHA LAW UPDATE (Dec. 18, 2012), available at <http://www.oshalawupdate.com/2012/12/18/osha-criminal-referrals-on-the-rise/>, archived at <http://perma.cc/Q3KR-E3KJ> (stating that there have been over 400,000 workplace deaths since the OSH Act went into place, but fewer than 80 criminal prosecutions for OSH Act violations). However, the authors state that they received “off-the-record” information that OSHA now refers every case involving an employee fatality and a willful violation for criminal prosecution. *Id.*

¹⁷ See AFL-CIO, *DEATH ON THE JOB: THE TOLL OF NEGLIGENCE*, 15–19 (2013) available at <http://www.aflcio.org/content/download/79181/1933131/DOTJ2013.pdf>, archived at <http://perma.cc/E347-KYFL> [hereinafter *DEATH ON THE JOB*] (noting that OSHA penalties have increased under the Obama administration, particularly for severe violators, but nonetheless arguing for stronger penalties and for more frequent use of criminal penalties).

¹⁸ Throughout this paper, the term “immigrant worker” will be used to describe immigrants working in the United States who are neither naturalized citizens nor Lawful Permanent Residents. Some of these workers are undocumented, while others are lawfully present in the United States but lacking proper employment authorization. Others have visas that permit employment in the United States, but their visa (and thus their lawful presence in the United States) is tied to a specific employer. Lawful Permanent Residents, although they can accurately be described as immigrant workers, do not face the same struggles as other immigrant workers because their immigration status is not tied to their employment. As such, the arguments made in this paper are largely inapplicable to Lawful Permanent Residents.

¹⁹ E.g., Pia M. Orrenius & Madeline Zavodny, *Do Immigrants Work in Riskier Jobs?*, 46 *DEMOGRAPHY* 535, 548 (2009) (stating that their study demonstrates that “immigrants work in more dangerous industries and occupations” than native workers).

concerns to OSHA due to hesitance that making such a report may jeopardize their ability to remain in the United States.²⁰ Due to similar concerns about immigrant victims' reluctance to report serious crimes to law enforcement, Congress created U nonimmigrant status, an immigration remedy that gives immigrant victims of certain serious crimes lawful immigration status if they cooperate with law enforcement officials.²¹ However, no such protection exists for immigrant victims of workplace health and safety violations unless their employer's violation falls into one of the qualifying criminal categories for U nonimmigrant status. Furthermore, even if the violation falls into one of those categories, OSHA does not currently certify the required paperwork that an individual must obtain to receive U nonimmigrant status.

Qualifying for U nonimmigrant status requires (1) the immigrant be the victim of qualifying criminal activity and (2) certification²² from a law enforcement agency regarding the immigrant's helpfulness or willingness to be helpful in the investigation or prosecution of the crime.²³ Some workplace crimes are considered qualifying crimes under the statute, and the Department of Labor ("DOL") has statutory authority as a law enforcement agency to certify the requisite paperwork.²⁴ However, the DOL has chosen to delegate this power to the Wage and Hour Division ("WHD"),²⁵ consequently limiting the ability of workers who come into contact with other DOL sub-agencies, like OSHA, from obtaining the necessary certification. Because industries with large numbers of immigrant workers more frequently have workplace health and safety issues, these workers may be more likely to come into contact with OSHA rather than WHD officials. Additionally, OSHA's limited independent enforcement capacity depends on workers coming forward to report workplace health and safety concerns. Furthermore, many violations of the OSH Act are unlikely to be considered qualifying criminal activity for purposes of U nonimmigrant status, even if the violations result in severe injury or death. Victims of these violations would not be eligible for U nonimmigrant status, despite suffering significant harm and being willing to cooperate with agency officials.

This article argues that the DOL should promulgate regulations so that OSHA employees can serve as certifying officials for U nonimmigrant status

²⁰ See *infra* Part II(A) (explaining why this fear has become so significant).

²¹ See *infra* Part I(C)(1) (providing the history of U nonimmigrant status).

²² This certification consists of an eligible law enforcement official filling out and signing Form I-918 Supplement B, U Nonimmigrant Status Certification "Supplement B Forms". See U Nonimmigrant Status Certification (Form I-918 Supplement B), available at <http://www.uscis.gov/sites/default/files/files/form/i-918supb.pdf>, archived at <http://perma.cc/PR3N-N4XY>.

²³ See *infra* notes 97–108 and accompanying text (describing the requirements to petition for U nonimmigrant status).

²⁴ 8 C.F.R. § 214.14(a)(2) (2013).

²⁵ *Field Assistance Bulletin No. 2011-1*, UNITED STATES DEPARTMENT OF LABOR, Apr. 28, 2011, available at http://www.dol.gov/whd/FieldBulletins/fab2011_1.htm, archived at <http://perma.cc/Z94F-EVCV> (last visited Nov. 3, 2015).

law enforcement certifications,²⁶ which would allow qualifying immigrant workers who are helpful or are willing to be helpful to OSHA to receive U nonimmigrant status. Additionally, this article argues that the qualifying criminal activities that make an immigrant eligible for U nonimmigrant status should be expanded to include OSH Act violations that put workers at risk of death or serious bodily harm. A similar proposition was put forth in Senate Bill 744, which would have expanded Unonimmigrant status to include “covered violation[s].”²⁷ While the bill did not include details of what a “covered violation” was, this article argues they should include any violation that can be prosecuted criminally under the OSH Act, as well as any OSH Act violation where workers are put at risk of death or serious bodily harm. Expanding U nonimmigrant status in this way would comport with the enforcement and humanitarian goals of U nonimmigrant status while also enabling OSHA to better serve its regulatory mission.

This article first provides a background on workplace health and safety in the low-wage immigrant community, the OSH Act, and U nonimmigrant status. It then argues that OSHA should have the authority to certify Supplement B forms, which are required for an immigrant to apply for U nonimmigrant status. Next, this article contends that U nonimmigrant status eligibility should expand beyond “qualifying criminal activity” to include OSH Act violations that can be prosecuted criminally or that put workers at risk of serious bodily harm. Finally, this article advances the argument that expanding access to U nonimmigrant status will allow OSHA to better accomplish its mission while simultaneously furthering humanitarian goals by providing a remedy to some immigrant workers who have been harmed while working in the United States.

I. BACKGROUND

A. *Workplace Health and Safety for Low-Wage Immigrant Workers*

Immigrant workers are more likely to hold jobs with health and safety risks than native-born²⁸ workers.²⁹ This disparity exists in part due to immigrant workers’ typically lower levels of education, social capital, and English language abilities relative to native-born workers, as well as different perceptions of job risks than native-born workers.³⁰ Additionally, unskilled immigrant workers have very few opportunities to obtain a permit to work

²⁶ See *supra* note 22 (providing a description of Supplement B forms).

²⁷ S. 744, 113th Cong. § 3201(a)(5)(iv)(I) (2013).

²⁸ Native-born workers are workers born in the United States or born abroad to U.S.-citizen parents. See Orrenius, *supra* note 19.

²⁹ See, e.g., *id.* at 548 (stating that immigrants work in riskier jobs as demonstrated by injury and fatality rates). Accurate data in this area is somewhat limited due to a likely underestimation overall of work-related injuries and illnesses, which is even more likely in industries where there are a disproportionate number of immigrant workers. *Id.*

³⁰ *Id.* at 536.

lawfully in the United States, leading many of these individuals to work without proper authorization.³¹ Many immigrants who are working lawfully are doing so through work authorization tied directly to their employer.³² This creates an environment more prone to exploitation than the typical employer-employee relationship, where employees can choose to leave for any reason and lawfully seek alternative employment.³³ Undocumented workers³⁴ and workers whose immigration status is tied to their employment³⁵ are consequently less likely to assert their workplace rights out of fear of the immigration consequences of doing so, and/or because they are unaware that they have such workplace rights.³⁶

The limited opportunities for immigrants to work lawfully in the United States has created an “atmosphere of fear” among immigrant workers.³⁷ Continuing this cycle, some employers prefer to hire immigrant workers because their fear and lack of knowledge about their rights makes them easier

³¹ See Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 968 (2006) [hereinafter Saucedo, *Employer Preference*].

³² See Elizabeth Johnston, Note, *The United States Guestworker Program: The Need for Reform*, 43 VAND. J. TRANSNAT'L L. 1121, 1139 (2010) (explaining that guestworker programs put immigrant workers in an exploitative situation because they lose their lawful immigration status if they leave their employers or if their employers fire them).

³³ See, e.g. Joseph DeGiuseppe, Jr., *The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 5–7 (1981) (explaining that at-will employment became the American rule when adopted in *Martin v. New York Life Insurance Co.*, 42 N.E. 416 (N.Y. 1895)).

³⁴ Throughout this paper, the term “undocumented worker” will refer to workers who do not currently possess lawful status to work in the United States.

³⁵ Certain visas, such as H-2A and H-2B visas, allow immigrants to lawfully work in the United States, but only for the specific employer that hired them. Thus, although these workers technically have lawful status to work, they experience similar exploitation as undocumented workers because leaving their employment means they must return home or become undocumented workers (if a guestworker began working for an employer other than the one that sponsored him to come to the United States, he would become an undocumented worker). See *Protecting U.S. and Guest Workers: The Recruitment and Employment of Temporary Foreign Labor: Hearing Before the H. Comm. on Educ. and Labor*, 110th Cong. 53–57 (2007) (statement of Jonathan P. Hiatt, Gen. Counsel, AFL-CIO), for an explanation of the chilling effect on labor rights when a worker’s immigration status is tied to his employer.

³⁶ A UCLA study discusses this phenomenon by incorporating workers’ narratives from a variety of industries. MARIANNE P. BROWN, ALEJANDRA DOMENZAIN, & NELLIANA VILLORIA-SIEGERT, VOICES FROM THE MARGINS: IMMIGRANT WORKERS’ PERCEPTIONS OF HEALTH AND SAFETY IN THE WORKPLACE, 16–20 (UCLA Labor Occupational Safety and Health Program 2002) available at <http://www.losh.ucla.edu/losh/resources-publications/pdf/voicesreport.pdf>, archived at <http://perma.cc/D85F-2Q4Z>. For example, one worker stated: “When you get hurt you shut your mouth . . . You go to the doctor and pay with your money . . . just to avoid complaining, to avoid losing your job.” *Id.* at 17. Another worker noted employers’ ability to take advantage of recently arrived immigrants who don’t know about their workplace safety rights: “[I]f you just arrived and you have an accident, and the employer knows you just arrived, he is going to scare you out and you refrain from reporting it.” *Id.* at 20.

³⁷ Saucedo, *Employer Preference*, *supra* note 31, at 968. For a discussion of the “chilling effect” that results from workers’ fear from speaking out about labor conditions, see Jayesh Rathod, *Beyond the “Chilling Effect”: Immigrant Workers Behavior and the Regulation of Occupational Safety Health*, 14 EMP. RTS. & EMP. POL’Y J. 267 (2010).

to exploit.³⁸ Immigrants are a significant and growing part of the US workforce,³⁹ making concerns about their exploitation of particular importance.

Immigrant workers' fear of deportation is perpetuated in a number of ways. In *Hoffman Plastic Compounds, Inc. v. NLRB*⁴⁰ the Supreme Court held that the enforcement of immigration laws trumps the enforcement of immigrants' workplace rights.⁴¹ This sent workers the message that even if their employers violate the law, they may not be fully protected.⁴² In recent years, the Obama administration has emphasized deportation⁴³ and Congress has failed to enact immigration reform, further sending the message that immigrant workers should "stay in the shadows."⁴⁴ Additionally, many employers have perpetuated the narrative that undocumented workers are not protected by labor and employment protections.⁴⁵ Finally, increased immigration enforcement actions by state and local governments have caused immigrants to stay out of the public eye, and made them hesitant to engage with law enforcement.⁴⁶ Consequently, although the stated intent of changes

³⁸ For an in-depth discussion of this issue, see Saucedo, *Employer Preference*, *supra* note 31 at 973–80. Saucedo explains that employers often hire immigrant workers because they "work harder, complain less, and are more reliable for the lower wage jobs." *Id.* at 980. Accordingly, employers target immigrant workers through a variety of practices, including low pay, worse working conditions, and limited opportunities for advancement that do not "fulfill [native born workers] expectations." *Id.*

³⁹ See BROOKINGS, IMMIGRANT WORKERS IN THE U.S. LABOR FORCE, 2 (2012) available at http://www.renewoureconomy.org/sites/all/themes/pnae/img/Immigrant_Workers_Brookings.pdf, archived at <http://perma.cc/SP7P-47TS> (showing that in 1970 immigrants were 5 percent of the population and the workforce, but in 2010 immigrants were 13 percent of the population and 16 percent of the workforce).

⁴⁰ 535 U.S. 137 (2002).

⁴¹ See *Hoffman*, 535 U.S. at 140 (holding that the National Labor Relations Board could not award backpay to an undocumented worker who was terminated for his union organizing activities in violation of the National Labor Relations Act).

⁴² See Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1100 (explaining that, between Immigration and Customs Enforcement (ICE) and the DOL, the regulation of immigration enforcement has largely taken precedent over the regulation of labor violations).

⁴³ See David Nakamura, *Obama Administration Deportations of Undocumented Immigrants Drop in 2013*, WASH. POST: POST POLITICS (Dec. 19, 2013), available at <http://www.washingtonpost.com/blogs/post-politics/wp/2013/12/19/obama-administration-deportations-of-undocumented-immigrants-drops-in-2013/>, archived at <http://perma.cc/2ARY-4AXF> (stating that the administration deported a record 410,000 people during fiscal year 2012, and 369,000 in 2013).

⁴⁴ See Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 899 (2008) [hereinafter Saucedo, *A New "U"*] (explaining that Congress' increased enforcement at the border, passing of the REAL ID Act, and failure to pass comprehensive immigration reform signal to immigrant workers that they should be silent rather than speak out about workplace abuses).

⁴⁵ See Eunice Hyunhye Cho, *U Visa Protections for Immigrant Victims of Workplace Crimes*, 46 CLEARINGHOUSE REV. 122, 123 (2012) (stating that *Hoffman Plastic Compounds* decision has "further emboldened employers to argue that undocumented workers have no employment rights"); see also Saucedo, *A New "U"*, *supra* note 44, at 894–95 (explaining how the *Hoffman Plastic Compounds* decision has "devastated workers' organizing efforts").

⁴⁶ See Elizabeth McCormick, *Rethinking Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families*, 22 STAN. L. & POL'Y REV. 587, 588–89 (2011) (explaining that state and local governments, as well as some "private vigilante groups," have increased

implemented in the Immigration Reform and Control Act (IRCA) was not to reduce labor protections for immigrant workers, it has nonetheless contributed to an atmosphere in which immigrant workers are fearful to assert their workplace rights.⁴⁷

As such, immigrant workers employed in low-wage industries often face workplace abuse and exploitation.⁴⁸ Immigrant worker exploitation and abuse is particularly problematic in the occupational safety and health arena.⁴⁹ Furthermore, immigrant workers in low-skilled, low-paid jobs are at higher risk for work-related injuries, illnesses, and fatalities than non-immigrant workers.⁵⁰

Immigrant workers are often unaware of the opportunity to, or are fearful of, engaging⁵¹ with occupational safety and health officials. For example, in an ethnographic study of 75 low-wage immigrant workers in California, workers went to labor unions or worker centers for personal protective equipment and got advice on health and safety from medical clinics, friends, family and written materials.⁵² However, they never went to the California Occupational Safety and Health Administration and rarely went to their employers regarding occupational safety and health issues.⁵³

Immigrant workers are less likely to report health and safety violations when they do not have secure immigration status, permission to work in the

their role in enforcing federal immigration law, which has led undocumented individuals or those living with undocumented family members to be more hesitant to interact with law enforcement or government agencies). *But see* Lee, *supra* note 42 at 1101–02 (explaining that a national survey of police chiefs found that over half of the police chiefs prioritized gaining trust of the immigrant communities, recognizing that without that trust they may lose valuable contacts for investigating crimes).

⁴⁷ Lori Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 345 (2001) [hereinafter Nessel, *The Fallacy*].

⁴⁸ See Cho, *supra* note 45, at 122 (explaining that 37.1 percent of low-wage undocumented workers have been paid below minimum wage, 84.9 percent had not been properly compensated for their overtime work, and 76.3 percent had worked off-the-clock).

⁴⁹ See United States Department of Labor, Bureau of Labor Statistics, LABOR FORCE CHARACTERISTICS OF FOREIGN BORN WORKERS SUMMARY (May 22, 2013), available at <http://www.bls.gov/news.release/forbrn.nr0.htm>, archived at <http://perma.cc/8NXG-AQWB> (explaining that immigrant workers are more likely than native-born workers to be employed in service occupations, production, transportation and material moving occupations, and in natural resources, construction, and maintenance occupations). Many of these occupations have high risks of occupational injury. United States Department of Labor, Bureau of Labor Statistics, OCCUPATIONAL INJURIES AND ILLNESSES (ANNUAL) NEWS RELEASE (Nov. 7, 2013), available at http://www.bls.gov/news.release/archives/osh_11072013.htm, archived at <http://perma.cc/E2AU-ZVM3>.

⁵⁰ Center for Disease Control and Prevention, NEEDS, CHALLENGES IN ADDRESSING OCCUPATIONAL HEALTH DISPARITIES ARE DESCRIBED IN NEW ISSUE OF JOURNAL, (Feb. 4, 2010), available at <http://www.cdc.gov/niosh/updates/upd-02-04-10.html>, archived at <http://perma.cc/SAH2-PCKM>.

⁵¹ Engaging with OSHA would generally include reporting potential unsafe working conditions to the agency. Reports can be filed online, by mail or fax, or by phone. See HOW TO FILE A COMPLAINT WITH OSHA, available at <https://www.osha.gov/as/opa/worker/complain.html>, archived at <http://perma.cc/EF29-XVRH> (last visited Nov. 1, 2015).

⁵² Brown et al., *supra* note 36, at 41.

⁵³ *Id.*

United States that is not tied to their employer, or marketable job skills.⁵⁴ Workers who do report health problems face the risk of disciplinary reprisal, the denial of promotions or overtime compensation, stigmatization, harassment, or termination.⁵⁵ With regard to termination, low-wage immigrant workers are more likely than others to be threatened or fired for making complaints.⁵⁶

The concerns about occupational safety and health among immigrant workers are demonstrated by an examination of the low-wage Latino immigrant workforce. The Latino immigrant population is growing rapidly⁵⁷ and Latinos are disproportionately affected by health and safety issues at work.⁵⁸ While the fatality rate for all workers on the job was 3.5 per 100,000, it was 4 per 100,000 for Latino workers, with 68 percent of those fatalities occurring among workers born outside of the United States.⁵⁹ The DOL has recognized that Latino workers are more vulnerable to health and safety issues, and convened a conference on the issue in 2010.⁶⁰ Many Latino workers are unaware of their workplace rights or how to address workplace hazards, and many remain silent due to language barriers.⁶¹ Further, many Latino work-

⁵⁴ Lenore S. Azaroff, Charles Levenstein, & David Wegman, *Occupational Injury and Illness Surveillance: Conceptual Filters Explain Underreporting*, 92 AM. J. PUB. HEALTH 9, 1422 (2002).

⁵⁵ *Id.* at 1422.

⁵⁶ *Id.*

⁵⁷ See HECTOR E. SANCHEZ, ANDREA L. DELGADO, & ROSA G. SAAVEDRA, LATINO WORKERS IN THE UNITED STATES, LABOR COUNCIL FOR LATIN AMERICAN ADVANCEMENT, 9 (2011), available at http://www.lclaa.org/images/pdf/LCLAA_Report.pdf, archived at <http://perma.cc/3K65-KJCF> (showing that the Latino population has grown by 417 percent between 1970 and 2008 while the general population has grown by 49.6 percent); DEATH ON THE JOB, *supra* note 17, at 8 (stating that Latino workers face a 14 percent increased risk of job fatality compared with the rest of the population).

⁵⁸ See DEATH ON THE JOB, *supra* note 17 at 6, 8 (showing that the fatality rate for Latino workers was 14 percent higher than the general population's fatality rate at work, and that there were an increased number of workplace fatalities among Latino workers between 2010 and 2011 when the overall rate of workplace fatalities remained relatively stagnant during the same time period).

⁵⁹ See *id.* at 8.

⁶⁰ See News Release, DOL/OSHA schedules conference on Latino worker safety and health, United States Department of Labor Occupational Safety and Health Administration (Jan. 13, 2010), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17061, archived at <https://perma.cc/NA6M-37R7> (last visited Nov. 1, 2015) (explaining that the conference will bring together workers and representatives from a variety of other stakeholders, including "representatives from employer associations, labor unions, the faith community, community organizations, the medical community, safety and health professionals, educators, government officials, Consulates, the entertainment community and other non-traditional partners," and that the target industry will be construction, where Latinos are almost one-quarter of the workforce and suffer the highest rate of construction-related deaths). For more details about the conference, which occurred April 14–15, 2010, see *National Action Summit for Latino Worker Health & Safety*, UNITED STATES DEPARTMENT OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, available at <https://www.osha.gov/latinosummit/2010latino-summit.html>, archived at <https://perma.cc/H2MP-JLER> (last visited Nov. 1, 2015).

⁶¹ Hilda L. Solis, *A Preventable Epidemic: Latino Deaths in the Workplace*, HOUS. CHRON. (Apr. 21, 2010), available at <http://www.chron.com/opinion/outlook/article/A-pre>

ers are afraid to exercise their rights due to fear of retaliation.⁶² Fear of retaliation, alongside other factors, makes it especially difficult to improve working conditions for Latino immigrants in professions with a large number of other Latino immigrants.⁶³

B. The Occupational Safety and Health Act

Congress implemented the OSH Act in 1970 to ensure working people in the United States would not face undue risks on the job.⁶⁴ The OSH Act was implemented with two underlying goals: improving business outcomes and advancing workplace safety.⁶⁵ The business element related to the understanding that on-the-job injuries and illnesses are burdensome on commerce due to “lost production, wage loss, medical expenses, and disability compensation payments.”⁶⁶ The humanitarian objectives were rooted in ensuring “every working man and woman in the Nation [has] safe and healthful working conditions.”⁶⁷ Congress pursued these goals by requiring employers to follow outlined safety and health protocols and subjecting them to routine inspections.

The OSH Act created OSHA, a federal administrative agency dedicated to worker health and safety. OSHA’s mission is to “assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.”⁶⁸ OSHA is tasked with ensuring that nearly all workers in the United States are protected in the workplace. It does this either directly or through an approved state occupational safety and health program.⁶⁹

ventable-epidemic-Latino-deaths-in-the-1613096.php, archived at <http://perma.cc/7LUH-E3YJ>.

⁶² *Id.*

⁶³ Leticia Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 304 (2004) [hereinafter Saucedo, *The Browning*]. Saucedo explains that a “brown collar” worker is a Latino immigrant who has arrived to the United States within the past five years and works in an industry that has a high number or overrepresentation of other Latino workers. *Id.* Conditions in these industries decline for all workers when there are a large number of “brown collar” workers. *Id.*

⁶⁴ See 29 U.S.C. § 651(b) (2012) (“Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . .”).

⁶⁵ *Id.* § 651.

⁶⁶ *Id.* § 651(a).

⁶⁷ *Id.* § 651(b).

⁶⁸ About OSHA, *supra* note 12.

⁶⁹ See OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, ALL ABOUT OSHA 6 (2015) available at https://www.osha.gov/Publications/all_about_OSHA.pdf, archived at <https://perma.cc/5MGU-W5X9> [hereinafter ALL ABOUT OSHA] (stating that 22 states or territories have OSHA-approved state programs).

OSHA accomplishes its mission by setting and enforcing occupational safety and health standards.⁷⁰ It then uses its inspection program as the mechanism to ensure compliance with these standards.⁷¹ These inspections are triggered for various reasons, including: compliance inspections conducted without advance notice, scheduled inspections based on imminent danger, catastrophes such as fatalities or hospitalizations, worker complaints and referrals, inspections targeting particular hazards or high injury rates, and follow-up inspections.⁷²

Even so, OSHA's limited resources make it impossible for a thorough and expansive enforcement program to exist. This problem has worsened over time. In the late 1970s, OSHA's ratio of inspectors to workers was 1 to 30,000.⁷³ Today, the ratio has ballooned to approximately 1 compliance officer for every 59,000 workers.⁷⁴ Although there are over eight million workplaces covered by OSHA,⁷⁵ only 92,094 inspections were performed by federal and state OSHA inspectors in 2011.⁷⁶ This means the vast majority of workplaces go uninspected for several years. The AFL-CIO estimates that federal OSHA inspectors have the resources to inspect a workplace once every 131 years, while state OSHA inspectors can complete inspections once every 76 years.⁷⁷ Without a significant increase in the number of OSHA inspectors, it is impossible for OSHA to inspect workplaces with enough frequency to prevent health and safety violations in the workplace.⁷⁸ Meaningful OSHA enforcement therefore must rely on workers' willingness to engage with the agency and report safety and health concerns when they become apparent.

Currently, OSHA can impose a variety of civil and criminal penalties on employers who have violated its standards. Criminal sanctions are applicable for the most serious violations. For example, one OSHA violation subject to criminal penalties is when an employer willfully violates an OSHA standard that leads to the death of an employee.⁷⁹ The penalty for

⁷⁰ See 29 U.S.C. § 655(b) (2012) (outlining the procedure for creating, modifying, or revoking OSHA standards).

⁷¹ ALL ABOUT OSHA, *supra* note 69, at 6.

⁷² See *id.* at 14–15. For a detailed explanation of the types of inspections see Heather Malone Garrison, *Confusion Reigns Supreme: The United States Supreme Court's Refusal to Grant Certiorari in L.R. Wilson and Sons, Inc. v. OSHRCPerpetuates the Split Among Circuits in OSHA Employee Misconduct Cases*, 101 W. VA. L. REV. 475, 479–481 (1998).

⁷³ MARTHA McCLUSKY, THOMAS MCGARITY, SIDNEY SHAPIRO, RENA STEINZ & MATTHEW SHUDTZ, CENTER FOR PROGRESSIVE REFORM, THE NEXT OSHA: PROGRESSIVE REFORMS TO EMPOWER WORKERS, 2 (2012) available at http://www.progressivereform.org/articles/Next_Generation_OSHA_1207.pdf, archived at <https://perma.cc/7V9P-NE7C> [hereinafter McCLUSKY ET AL., PROGRESSIVE REFORMS].

⁷⁴ *Commonly Used Statistics*, *supra* note 13.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ DEATH ON THE JOB, *supra* note 17, at 2.

⁷⁸ See, e.g., Brad Plumer, *Was Lax Oversight to Blame for the Texas Fertilizer Explosion?*, WASH. POST (Apr. 19, 2013) (showing that the most recent OSHA inspection of a fertilizer plant that exploded in 2013 occurred in 1985).

⁷⁹ 29 U.S.C. § 666(e) (2012).

this violation is imprisonment for up to six months and/or a fine of up to \$10,000; where the conviction is not the employer's first, the maximum fine increases to \$20,000 and the prison term increases to one year.⁸⁰ Additionally, giving advance notice of an inspection without authority can be punished criminally under the OSH Act, and the penalty is a fine of up to \$1,000 and/or imprisonment of up to six months.⁸¹ Finally, making a false statement, representation, or certification can be punished criminally, with a fine of up to \$10,000 and/or imprisonment of up to six months.⁸²

Still, most OSH Act violations are only subject to civil penalties. Employers who willfully or repeatedly violate an OSHA standard face the most serious civil penalties, with a minimum fine of \$5000 for a willful violation and a maximum of \$70,000.⁸³ Employers cited for either a serious⁸⁴ or non-serious violation face a penalty of up to \$7,000.⁸⁵ Employers can further be assessed a civil penalty of up to \$7,000 when they been cited and fail to correct the violation.⁸⁶

OSHA's limited resources and limited penalties have serious consequences, particularly for workers. Some employers are undeterred by the prospect of violating OSHA standards because they know how unlikely it is that an independent OSHA inspection will occur. This prevents workers from receiving valuable occupational safety and health protections.⁸⁷ OSHA enforcement is further criticized because even when penalties are implemented, they are too low to deter businesses from violating the law.⁸⁸

⁸⁰ *Id.*

⁸¹ *Id.* § 666(f).

⁸² *Id.* § 666(g).

⁸³ *Id.* § 666(a).

⁸⁴ Serious violations occur when "there is a substantial probability that death or serious physical harm could result" from an existing condition or practice used by the employer, unless the employer did not or should not have known about the violation. *Id.* § 666(k).

⁸⁵ 29 U.S.C. § 666(b)-(c) (2012).

⁸⁶ *Id.* § 666(d).

⁸⁷ See McCLUSKY ET AL., PROGRESSIVE REFORMS, *supra* note 73 at 4–5 (explaining that workers don't have a means to enforce their rights outside of the agency process because OSHA lacks a citizen suit/private right of action provision).

⁸⁸ See e.g., *id.* at 6 (explaining that an employer who willfully violates an OSHA standard which causes a worker's death is subject to a Class B misdemeanor, the same punishment as a person convicting of digging up wild ginseng roots in a national park); Michaels, *Protecting*, *supra* note 14; DEATH ON THE JOB, *supra* note 17 (noting that OSHA penalties have increased under the Obama administration, particularly for severe violators, but nonetheless arguing for stronger penalties and for more frequent use of criminal penalties).

C. *The U-Visa*

1. General Background and Benefits

U nonimmigrant status,⁸⁹ or a U-Visa, is an immigration remedy for victims⁹⁰ of certain serious crimes.⁹¹ While first introduced in the Violence Against Women Act of 2000, the Department of Homeland Security did not issue regulations to implement the status for several years. Consequently U nonimmigrant status is a newer remedy, first being granted in 2007.⁹² U nonimmigrant status allows immigrant victims of certain serious crimes to remain lawfully in the United States.⁹³ In order to qualify for U nonimmigrant status, an immigrant must demonstrate: 1) that he has been the victim of qualifying criminal activity,⁹⁴ 2) that he has information about the crime, 3) that he was, will be, or is likely to be helpful to a law enforcement agency investigating the crime, and 4) that he has suffered severe physical or mental abuse as a result of the crime.⁹⁵ U nonimmigrant status is a powerful immigration remedy because of the many benefits that it affords recipients. Such benefits include work authorization, temporary lawful immigration status, and the opportunity to become a lawful permanent resident after three years.⁹⁶

U nonimmigrant status has two articulated purposes: (1) to assist law enforcement in the detection, investigation, and prosecution of certain serious crimes,⁹⁷ and (2) to offer immigrant victims of those crimes protection.⁹⁸

⁸⁹ U nonimmigrant status is often referred to as a “U-Visa.” SALLY KINOSHITA, SUSAN BOWER, JESSICA FARB, AND CATHERINE SEITZ, *THE U VISA: OBTAINING STATUS FOR IMMIGRANT VICTIMS OF CRIME* 12 (2012) [hereinafter KINOSHITA ET AL., *THE U VISA*]. However, the two are not totally identical, as an immigrant can obtain a U nonimmigrant status, which allows him to remain lawfully in the United States, without obtaining a visa, which is a document placed in an individual’s passport that allows him to enter and exit the United States. *Id.* For the purposes of this paper, the two terms will be used interchangeably.

⁹⁰ Victims are those who have “suffered direct and proximate harm” as a result of the criminal activity. 8 C.F.R. § 214.14(a) (2013). In situations where the direct victim is deceased, incompetent, or incapacitated, immigrant spouses and children under 21 are considered the victims. *Id.* For a discussion of indirect victims who may be eligible for U-Visas, see McCormick, *supra* note 46.

⁹¹ KINOSHITA ET AL., *THE U VISA*, *supra* note 89, at 12. The U-Visa statute enumerates the following crimes as criminal activities that are eligible for U-Visa certification: “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; fraud in foreign labor contracting (as defined in section 1351 of Title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.” 8 U.S.C. § 1101(a)(15)(U)(iii) (2014).

⁹² *Id.* at 1-3 to 1-4.

⁹³ *Id.* at 1-2.

⁹⁴ See, *supra* note 91 (providing a list of qualifying crimes).

⁹⁵ 8 U.S.C. § 1101 (2014).

⁹⁶ See *infra* Part II(C) (discussing the benefits of U nonimmigrant status).

⁹⁷ 8 U.S.C. § 1101(a)(2)(B) (2014). “Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victim-

Essentially, Congress created U nonimmigrant status both to improve law enforcement's ability to investigate and prosecute crimes against immigrants, as well as to protect victims, especially those fearful of cooperating with law enforcement due to their immigration status.⁹⁹

U nonimmigrant status eligibility requires an immigrant to meet several characteristics. First, the individual must be the victim¹⁰⁰ of qualifying criminal activity.¹⁰¹ In addition to the enumerated list of crimes, the statute allows victims of similar activities to be eligible for U nonimmigrant status.¹⁰² Additional requirements for eligibility include: the immigrant having "suffered substantial physical or mental abuse"¹⁰³ as a result of the criminal activity; possessing information about the criminal activity;¹⁰⁴ and having "been helpful, being helpful, or likely to be helpful" to government officials investigating or prosecuting the crime.¹⁰⁵

ized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions." *Id.*

⁹⁸ 8 U.S.C. § 1101(a)(2)(B) (2014). "Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States." *Id.*; see also McCormick, *supra* note 46, at 602 (articulating that the humanitarian goals are clear not only from the statutory language but also by other elements of the program, including the reduced evidentiary burden required to obtain a U-Visa, the waiver of most inadmissibility grounds for U-Visa applicants, the requirement to refer victims to services, granting victims work authorization, and allowing victims to petition for certain family members as derivatives who can remain with them in the United States).

⁹⁹ See Cho, *supra* note 45, at 123 (explaining that U-Visas have most frequently been used to protect victims domestic violence or sexual abuse, but actions by federal and state agencies have given immigrant victims of workplace crimes more access to U-Visas).

¹⁰⁰ The victim is an immigrant who has suffered "direct and proximate" harm due to qualifying criminal activity. 8 C.F.R. § 214.14(a)(14) (2013). If the direct victim is deceased due to the qualifying crime or incapacitated, the immigrant spouse and children under 21 are considered victims. 8 C.F.R. § 214.14(a)(14)(i) (2013). If the direct victim is under 21, parents and unmarried siblings under 18 are considered the victim(s). *Id.* For the crimes of witness tampering, obstruction of justice or perjury, the victim must have been directly harmed by the individual perpetrating the crime and the crime must have been committed in large part to either avoid bringing the perpetrator to justice or continue the perpetrator's abuse of the victim. 8 C.F.R. 214.14(a)(14)(ii) (2013).

¹⁰¹ See *supra* note 91 for a list of qualifying crimes. Qualifying criminal activity can also include similar activity to the listed crimes. See *infra* note 102.

¹⁰² 8 U.S.C. § 1101(a)(15)(U)(iii) (2014). 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 all criminal activities. 8 C.F.R. 214.4(9) (2013). Crimes may fall under "any similar activity" because the state criminal statute may have a different name from those listed in the INA, or because a crime may fall into the general category of one of the listed crimes. KINOSHITA ET AL., THE U VISA, *supra* note 89, at 2-4.

¹⁰³ 8 U.S.C. § 1101(a)(15)(U)(i)(I) (2014). Substantial physical or mental harm is determined by United States Customs and Immigration Services (USCIS) based on information provided by the petitioner. 8 C.F.R. § 214.14(b)(1) and (c)(2)(ii) (2013).

¹⁰⁴ *Id.* § 1101(a)(15)(U)(i)(II). The alien must possess "credible and reliable information" showing he has knowledge of the qualifying criminal activity, including specific facts that would be helpful to the investigation or prosecution of the criminal activity. 8 C.F.R. § 214.14(b)(2).

¹⁰⁵ *Id.* § 1101(a)(15)(U)(i)(III). The alien must have been, is, or is likely to be helpful and, since "the initiation of cooperation" has provided the information and assistance that was reasonably requested of him. 8 C.F.R. § 214.14(b)(3) (2013).

“Helpfulness” to law enforcement is verified through “U Nonimmigrant Status Certification,” or Form I-918 B (“Supplement B Form”)¹⁰⁶, which must be signed by a certifying official.¹⁰⁷ The form must state that the signatory is a qualified certifying official; that the petitioner has been a victim of qualifying criminal activity that the signatory’s agency is investigating or prosecuting; that the petitioner has information about the qualifying criminal activity; and that he has been, is being, or is expected to be cooperative with the investigation and/or prosecution of the criminal activity.¹⁰⁸ Petitioners must also include a signed statement describing the facts of the “victimization” that resulted from the qualifying criminal activity.¹⁰⁹ The burden is on the petitioner to demonstrate that he is eligible for U-nonimmigrant status,¹¹⁰ and petitioners may include any additional evidence demonstrating their eligibility for the status.¹¹¹ Ultimately, the decision to grant U nonimmigrant status is discretionary.¹¹²

U nonimmigrant status allows an individual to remain in the United States lawfully for four years,¹¹³ and to apply to become a lawful permanent resident after three.¹¹⁴ Additionally, immigrants with U nonimmigrant status can obtain employment authorization to work lawfully in the United States.¹¹⁵ Lastly, U nonimmigrant status allows the individual to apply for certain other family members as derivatives on his or her application, which allows those family members to also obtain lawful immigration status in the United States.¹¹⁶ Importantly, U nonimmigrant status is subject to a distribution cap of 10,000 annually. This cap has been reached for each of the past

¹⁰⁶ U Nonimmigrant Status Certification (Form I-918 Supplement B).

¹⁰⁷ 8 C.F.R. § 214.14(c)(2)(i). Certifying officials are the head of the certifying agency or individual in the agency that is designated to issue the certifications, or prosecutors, judges or other authorities responsible for the “detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity.” *Id.*

¹⁰⁸ *Id.* § 214.14(c)(2)(i).

¹⁰⁹ *Id.* § 214.14(c)(2)(iii).

¹¹⁰ *Id.* § 214.14(c)(4).

¹¹¹ *Id.* § 214.14(c)(2)(i).

¹¹² *Ordóñez Orozco v. Chertoff*, No. B-07-153, 2008 WL 5155728, *1, *4 (S.D. Tex. 2008).

¹¹³ 8 U.S.C. § 1184(p)(6) (2015). This time may be extended if a certifying law enforcement official or judge prosecuting the qualifying criminal activity certifies that the immigrant is still needed to further the investigation or prosecution of the crime. *Id.* Additionally, the amount of time may be extended if the Secretary of Homeland Security determines an extension is necessary due to exceptional circumstances. *Id.*

¹¹⁴ *Id.* § 1255(m)(1) (2015). Notably, the standard for converting to lawful permanent residence for immigrants who possess U nonimmigrant status is fairly permissive compared to many other forms of immigration relief. As long as an immigrant is not inadmissible due to participation in Nazi persecution, genocide, torture or extrajudicial killing, immigrants who have been physically present in the United States for at least 3 years since obtaining U nonimmigrant status and whose continued presence in the United States can be justified because of humanitarian grounds, in order to unify a family, or otherwise in the public interest can adjust their status to that of lawful permanent resident. *Id.* § 1255(m)(1) (2015); 8 U.S.C. § 1182(3)(E) (2013).

¹¹⁵ *Id.* § 1184(p)(6) (2015).

¹¹⁶ See KINOSHITA ET AL., THE U VISA, *supra* note 89, at 1-1.

five years.¹¹⁷ However, even after reaching the cap, United States Customs and Immigration Services will continue to review applications and will notify eligible petitioners that they remain on a waiting list until more visas become available.¹¹⁸

2. Certification of U-Visa Supplement B Forms

The OSH Act allows a variety of authorities to certify the Supplement B form. This includes law enforcement agencies at the federal, state, and local levels, as well as prosecutors, judges, and other authorities responsible for investigating or prosecuting a qualifying crime. Agencies with “criminal investigative jurisdiction” are also allowed to certify the form.¹¹⁹ The regulations specifically list the DOL, Child Protective Services (“CPS”), and the Equal Employment Opportunity Commission (“EEOC”) as agencies that may certify an immigrant’s petition for U nonimmigrant status.¹²⁰ Further, agencies that are not listed in the regulations, including agencies at both the federal and state level, have released protocols for certifying Supplement B Forms.¹²¹

Even though many agencies have the authority to certify Supplement B Forms, an agency’s decision to certify forms generally, or to certify any particular petitioner’s Supplement B form, is still discretionary.¹²² For example, although the DOL is listed in the regulations as a certifying agency, it did not begin certifying Supplement B forms for U-visa petitioners until 2010.¹²³

¹¹⁷ *USCIS Reaches U Visas Cap for Fiscal Year 2014*, 90 No. 47 INTERPRETER RELEASES 2393 (2014).

¹¹⁸ *Id.*

¹¹⁹ § C.F.R. § 214.14(a)(2) (2013).

¹²⁰ *Id.*

¹²¹ *See Cho, supra* note 45, at 123 (explaining that the National Labor Relations Board, the New York State Department of Labor, and the California Department of Fair Housing and Employment all have developed protocol for certifying Supplement B forms).

¹²² The instructions for Form I-918, Supplement B, state: “An agency’s decision to provide a certification is entirely discretionary; the agency is under no legal obligation to complete a Form I-918, Supplement B, for any particular alien. However, without a completed Form I-918, Supplement B, the alien will be ineligible for U nonimmigrant status.” INSTRUCTIONS FOR FORM I-918 SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION, available at <http://www.uscis.gov/sites/default/files/files/form/i-918supbinstr.pdf>, archived at <http://perma.cc/NJJ8-YF73> (hereinafter INSTRUCTIONS). Some reasons that law enforcement agencies may be resistant to certify forms are: not understanding the process, internal agency bureaucracy, lack of resources to properly respond to requests to certify Supplement B forms, or an anti-immigrant sentiment. KINOSHITA ET AL., THE U VISA, *supra* note 89, at 3-16. Generally, agency protocol explaining the circumstances under which a particular agency is willing to certify a Supplement B form, as well as delineating a process for the certification, are immensely helpful in ensuring that victims are treated similarly in this process. *See* NATIONAL IMMIGRANT FAMILY VIOLENCE INSTITUTE, PROMOTING U VISAS WITH LOCAL OFFICIALS 3, available at <http://www.nifvi.org/Promoting%20U%20Visas%20with%20Local%20Officials.pdf>, archived at <http://perma.cc/MD7P-T537> (explaining the challenges of an ad hoc approach of educating local law enforcement about the Supplement B certification process).

¹²³ *US Labor Department to Exercise Authority to Certify to Certify Applications for U Visas*, UNITED STATES DEPARTMENT OF LABOR (Mar. 15, 2010) available at <http://www.dol.gov/opa/media/press/opa/OPA20100312.htm>, archived at <http://perma.cc/X7LP-EWPF>.

To do so, the DOL designated the authority to certify Supplement B forms to its Wage and Hour Division (“WHD”).¹²⁴ The WHD is responsible for enforcing a variety of labor laws, including those regarding minimum wage, overtime, child labor, employment of disabled workers, family and medical leave, and the employment of temporary and migrant workers.¹²⁵ Currently the WHD certifies U-visa Supplement B forms for five qualifying criminal activities: involuntary servitude, peonage, trafficking, obstruction of justice, and witness tampering.¹²⁶ To certify a Supplement B form, the WHD requires: 1) that the criminal activity have occurred during “a work environment or an employment relationship” and 2) that there was a credible allegation that a law enforced by the WHD was violated.¹²⁷ However, the WHD does not require that it have jurisdiction to prosecute or investigate the qualifying criminal activity. Rather, it expects that it may detect these crimes during the course of its investigations¹²⁸ and thus has the authority to certify the Supplement B form.¹²⁹ The WHD’s decision to limit the certification to a set list of crimes is only a result of the agency’s internal protocol: the regulations themselves do not require an agency to limit its certification of Supplement B forms to any particular crimes.

Other agencies dealing with workplace violations also certify Supplement B forms. The EEOC, for example, issued a memorandum regarding its procedures for certifying Supplement B forms in July 2008.¹³⁰ Unlike the WHD, the EEOC does not restrict the qualifying crimes it will certify.¹³¹ The National Labor Relations Board (“NLRB”), which is not listed as a certifying agency in the regulations, also certifies Supplement B forms in instances of unfair labor practices that constitute a qualifying criminal activ-

¹²⁴ See *Field Assistance Bulletin*, *supra* note 25 (stating that the Secretary of Labor’s Order 05-2010 delegated the DOL’s authority to certify Supplement B forms to the Wage and Hour Division).

¹²⁵ *Fact Sheet*, UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/opa/media/press/opa/opa20100312-fs.htm>, archived at <http://perma.cc/G2QY-LDFW> (last visited Nov. 1, 2015).

¹²⁶ *Field Assistance Bulletin*, *supra* note 25.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ The regulations explain that investigation and prosecution include “the detection . . . of a qualifying crime or criminal activity.” 8 C.F.R. § 214.14(a)(5) (2013).

¹³⁰ *EEOC Procedures for U Nonimmigrant Classification Certification: Memorandum from Naomi C. Harp, Chair, United States Equal Employment Opportunity Commission to Ronald S. Cooper, General Counsel and Nicholas M. Inzeo, Director, Office of Field Programs*, U.S. EEOC OFFICE OF THE CHAIR (July 3, 2008) available at http://iwp.legalmomentum.org/immigration/u-visa/government-memoranda-and-factsheets/U%20VISA_EEOC%20Certification%20Memo_7.3.08.pdf, archived at <http://perma.cc/SVV9-MN7G> (last visited Nov. 1, 2015). The EEOC has since released updated procedures for Supplement B certification, which are available on the EEOC website at http://www.eeoc.gov/eeoc/foia/u_visu.cfm, archived at <http://perma.cc/AY5C-LBC5> (last visited Nov. 1, 2015).

¹³¹ Cho, *supra* note 45, at 126. Because EEOC investigations relate to hostile work environment, sexual harassment, and discrimination, likely qualifying criminal activities that the EEOC would encounter are abusive sexual contact, rape, sexual assault, sexual exploitation, trafficking, peonage, and involuntary servitude. *Id.* at 127.

ity.¹³² Although the exact practice varies, multiple agencies tasked with enforcing workplace rights certify Supplement B Forms.

3. Proposed Changes to the U-Visa in the Senate Immigration Bill (S.744)

Senate Immigration Bill S.744, would have made some notable changes to U nonimmigrant status related to immigrant workers. Instead of making U nonimmigrant status only available for immigrant workers who are victims of qualifying criminal activity, the proposed bill would extend U nonimmigrant status eligibility to victims of “covered violations.”¹³³ Covered violations related to the workplace include serious workplace abuse, exploitation, retaliation, or a violation of whistleblower protections that violate any federal, state, or local law.¹³⁴ While there are few details about this proposed expansion, this provision signals at least some desire on Congress’s part to expand the U-Visa to be more inclusive of occupational safety and health violations. The Senate Bill also provides for an expansion in the annual number of U-visas issued, raising the cap from 10,000 to 18,000 per fiscal year, with a maximum of 3,000 issued for victims of “covered violations.”¹³⁵ Although it is unlikely S.744 will be passed in the near future, expansion of the U nonimmigrant status is on the minds of some lawmakers.

II. OSHA SHOULD CERTIFY SUPPLEMENT B FORMS AND U-VISA QUALIFYING “CRIMES” SHOULD BE EXPANDED TO INCLUDE SERIOUS OSHA VIOLATIONS

OSHA’s limited resources and weak enforcement provisions render it powerless to fully satisfy its regulatory mission and ensure all employers comply with its enabling statute.¹³⁶ Providing OSHA with sufficient funding and the authority to issue more serious sanctions on violators are important components of improving OSH Act compliance.¹³⁷ Still, such measures are

¹³² *Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings: Memorandum from Richard A. Siegel, Associate General Counsel, National Labor Relations Board, to All Regional Directors, Officers in Charge, and Resident Officers, OFFICE OF THE GENERAL COUNSEL (June 7, 2011) available at <http://apps.nlr.gov/link/document.aspx/09031d45818801f9>, archived at <https://perma.cc/6WHP-7GCR?type=source> (last visited Nov. 1, 2015).* For example, an employer’s confiscation of a passport could constitute involuntary servitude. *Id.* at 4. Additionally, interfering with protected organizing activity, including threats to call immigration or to blacklist workers, could constitute blackmail. *Id.*

¹³³ S. 744, 113th Cong. § 3201(a)(5)(iv)(I) (2013).

¹³⁴ *Id.*

¹³⁵ *Id.* at § 3406.

¹³⁶ The General Duty Clause states that all employers shall provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm . . . [and] shall comply with the standards promulgated under [the OSH Act].” 29 U.S.C. § 654 (2012).

¹³⁷ See McCLUSKY ET AL., PROGRESSIVE REFORMS, *supra* note 73, at 6, 11 (arguing for increased civil and criminal enforcement).

unlikely to serve as immediate fixes in the current fiscal and political climate. Accordingly, OSHA should consider new and innovative approaches to tackle its regulatory deficiency.

The U-Visa program's successes cannot be ignored. Law enforcement officials have noted the mitigating effects it has had for immigrants in reporting crimes.¹³⁸ The program has also reached its visa cap for the past five years,¹³⁹ demonstrating its success in providing humanitarian relief and encouraging immigrants to engage with law enforcement officials. Hence, similarly allowing victims of certain occupational safety and health violations to be eligible for U-visas would allow OSHA to better serve its regulatory mission while recognizing the gravity of the occupational safety and health hazards that many immigrants face in the workplace.

A. *OSHA Could Better Serve its Mission by Certifying
Supplement B Forms*

The U-visa and OSHA have similar goals: both seek to improve and aid law enforcement¹⁴⁰ while serving a humanitarian purpose.¹⁴¹ Because of the number of immigrant workers in industries with serious occupational safety and health concerns, these two programs overlap in serving the low-wage immigrant population. However, because the DOL has not delegated authority to OSHA to certify Supplement B forms, there is little room for the agency to interact with the U-visa program in its current form. Allowing OSHA to certify Supplement B forms would provide an avenue for immigrant victims of crime to engage with OSHA while mitigating immigration-related concerns.

Agencies that investigate labor violations “are often the first, and perhaps the only, opportunity to identify victims of workplace crime and exploitation.”¹⁴² Expanding the number of agencies that certify Supplement B Forms to include those that frequently interact with immigrant workers

¹³⁸ See, e.g., Shoshana Walter, *U Visa Aids Immigrant Crime Victims*, S.F. GATE, October 30, 2012, available at <http://www.sfgate.com/bayarea/article/U-visa-aids-immigrant-crime-victims-3994601.php>, archived at <http://perma.cc/3YGX-BRW8> (explaining that the Oakland Police Department has expanded to U-Visa program because it “builds trust”). *But see id.* (stating that Lt. Dennis Kahane, who reviews applications for the Contra Costa County sheriff’s office, “has not found that the visas offer a sufficient incentive for undocumented immigrants to help the police”).

¹³⁹ *USCIS Reaches U Visas Cap*, *supra* note 117.

¹⁴⁰ See 8 U.S.C. § 1101(a)(15)(U)(iii) (2012) (discussing the law enforcement goals of U nonimmigrant status); 29 U.S.C. § 651(a) (2012) (explaining Congress’ desire to limit workplace injury and illness for purposes of improving workplace and overall economic productivity).

¹⁴¹ See Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (as cited in 8 U.S.C. § 1101(a)(15)(U)(iii) (2014)) (explaining the humanitarian goal of assisting aliens who have been “severely victimized” in the United States); 29 U.S.C. § 651(b) (2012) (explaining Congress’ “purpose and policy” of ensuring “safe and healthful” working conditions in the United States).

¹⁴² Cho, *supra* note 45, at 126.

would better serve the humanitarian purpose of U nonimmigrant status by ensuring that eligible immigrants are identified and informed. Because immigrants disproportionately work in sectors with high rates of occupational injury, OSHA inspectors have the potential to frequently come into contact with immigrant workers, some of whom are likely eligible for U nonimmigrant status.

The goals of offering U nonimmigrant status are only effective to the extent that it is available to immigrants who are willing to report violations of the law. OSHA lacks the enforcement resources necessary to fulfill its mission,¹⁴³ so worker engagement with the agency is a necessary component of a comprehensive enforcement program.¹⁴⁴ OSHA's statutory mandate requires such engagement,¹⁴⁵ accordingly the large number of immigrant workers experiencing occupational safety and health violations¹⁴⁶ would be well served by OSHA certifying Supplement B Forms. No doubt, this would be a logical extension of the DOL's power to certify Supplement B forms: increasing the number of avenues in which workers can get Supplement B forms certified, especially from agencies that are likely to come into contact with immigrant workers, "is a step toward more robust protection of the rights of immigrant workers."¹⁴⁷ More still, encouraging immigrant workers to report unsafe working conditions has the potential to benefit non-immigrant workers who suffer the same unsafe conditions.¹⁴⁸

OSHA's struggle to engage with immigrant workers stems partially from undocumented workers' general desire to refrain from being involved with any government agency.¹⁴⁹ While all regulatory agencies struggle to reach full enforcement due to limited resources, lack of information, and political pressure,¹⁵⁰ "status-indifferent"¹⁵¹ agencies that rely on worker engagement particularly struggle to help undocumented individuals.¹⁵² The need for workers to report to and engage with OSHA is further exacerbated

¹⁴³ See 29 U.S.C. § 651(b) (1970) (stating OSHA's mission).

¹⁴⁴ See Lee, *supra* note 42, at 1100 (explaining that the DOL generally relies on complaints initiated by workers to locate employers who are violating the law).

¹⁴⁵ *Id.*

¹⁴⁶ See *infra* Part I(A) (discussing the increased occupational safety and health issues in the immigrant workforce).

¹⁴⁷ Cho, *supra* note 45, at 123.

¹⁴⁸ See McCormick, *supra* note 46, at 599 (explaining that protecting immigrant crime victims leads to safer communities, which ultimately benefits the entire community, not just the crime victim).

¹⁴⁹ See Lee *supra* note 42 at 1100 (explaining that Immigration and Customs Enforcement's (ICE) practices for enforcement of immigration law lead workers to mistrust other agencies, including the DOL, which hinders the DOL's ability to engage with unauthorized workers who face workplace exploitation).

¹⁵⁰ Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection* 12 DUKE ENVTL. L. & POLY'Y F. 39, 43 (2001).

¹⁵¹ Lee, *supra* note 42, at 1100 (explaining that "status-indifferent" refers to agencies who have an interest in helping individuals assert their rights regardless of immigration status).

¹⁵² *Id.* at 1100-01 (explaining that "status neutral" agencies face the challenge of communicating to undocumented immigrants that seeking help will not have negative immigration consequences).

due to the OSH Act's lack of a private right of action.¹⁵³ Thus, although a worker who is concerned about safety and health violations can request a worksite inspection,¹⁵⁴ he cannot bring a lawsuit against his employer for violating OSHA regulations or for not complying with an OSHA directive. As such, the only remedy workers have regarding workplace health and safety is to engage with OSHA.¹⁵⁵ Workers fearful of interacting with the agency are thereby left without alternatives.

A market-based argument demonstrates how OSHA fails workers, especially those in dangerous, low-wage jobs often filled by immigrant workers.¹⁵⁶ Textbook economic principles tell us employers are likely to prevent health and safety risks only to the extent that it is cheaper than compensating the injured or ill worker.¹⁵⁷ This is even more true when the employee sees no upside to reporting the violation. After all, without the ability to enforce OSHA standards through a private right of action or due to a fear of employer retaliation,¹⁵⁸ immigrant workers aware of workplace violations may nonetheless be hesitant to bring them to OSHA's attention. This reduces employers' costs because they need not worry about the OSH Act's civil and criminal penalties if they do not expect OSH Act violations to be enforced.¹⁵⁹

Encouraging low-wage immigrant workers to interact with OSHA may combat some of the externalities in improving working conditions while at the same time foster trust in the immigrant community.¹⁶⁰ If OSHA officials certified Supplement B forms and directed eligible immigrant workers to-

¹⁵³ See McClusky et al., *PROGRESSIVE REFORMS*, *supra* note 73, at 4–5 (stating that workers are limited in their ability to enforce their rights without a private right of action).

¹⁵⁴ ALL ABOUT OSHA, *supra* note 71, at 6 (stating that 22 states or territories have OSHA-approved state programs).

¹⁵⁵ This is a stark contrast from some other workplace rights, which have both agency enforcement and a private right of action. For example, a worker who believes he is not being paid minimum wage or overtime under the Fair Labor Standards Act ("FLSA") can generally choose to report that to an administrative agency, or he can file a private lawsuit to enforce his rights. Because the OSH Act does not have a private right of action, a worker who wants his employer to be punished for a violation can only do so by reporting the violation to OSHA.

¹⁵⁶ See *supra* Part I(A) (explaining that immigrants are more likely to hold these types of jobs than native-born workers).

¹⁵⁷ See Sidney A. Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 ADMIN. L. REV. 97, 105 (2000) ("A firm will prevent health and safety risks to the point where the cost of further risk reductions exceeds the expected compensation that the firm will pay for injuries or illnesses."); see also Lee, *supra* note 42, at 1104 (explaining that certain immigration enforcement strategies can particularly dissuade workers from engaging with the agencies in general, which allows employers to violate labor rights with little concern that they will face an investigation from the agency).

¹⁵⁸ See *supra* Part I(A) (discussing the concern that immigrants may fear reporting to an agency for fear of immigration or job repercussions).

¹⁵⁹ However, OSHA's low penalties, even when being enforced, may not be enough to deter violations. See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 419 (1995) ("Paying OSHA fines and penalties is often cheaper for an employer than complying with the law.")

¹⁶⁰ Cho, *supra* note 45, at 130 ("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.")

wards U nonimmigrant status, some workers would be less fearful of reporting their employers to the agency. This result is especially important in light of *Hoffman Plastics Compounds*,¹⁶¹ which altered the nature of the workplace environment for low-wage immigrant workers. *Hoffman Plastic Compounds* suggests that OSHA whistleblowers would not be eligible for reinstatement, back pay, or other benefits even if their firing constituted unlawful retaliation.¹⁶² This lack of remedy, coupled with immigrants' fear in the workplace, gives these workers no incentive to report to or cooperate with agency officials. In fact, these workers are discouraged from interacting with the agency because they may lose their jobs and are ineligible for reinstatement.¹⁶³ By providing some protection for workers to engage with OSHA, employers would have less incentive to prefer hiring immigrant workers for riskier jobs.¹⁶⁴

There are a variety of U-Visa qualifying crimes that OSHA investigators might discover during the course of investigating health and safety violations in the workplace. It is important to note that in allowing the DOL to certify Supplement B forms, the Department of Homeland Security recognized that investigators might detect qualifying criminal activities while investigating violations of workplace laws.¹⁶⁵ However, because the DOL has only delegated the power to certify Supplement B forms to the WHD, immigrant workers who interact with the DOL through other sub-agencies like OSHA may be unable to petition for U nonimmigrant status. This is true even though they may otherwise meet all the requirements for U nonimmigrant status.¹⁶⁶

However, even if the qualifying criminal activity is not one directly related to occupational safety or health, an OSHA official might become aware of qualifying criminal activity occurring in the workplace.¹⁶⁷ For example, abusive sexual conduct, rape, sexual assault, and sexual exploitation could all occur in the workplace even though they are not specifically related to occupational safety or health.¹⁶⁸ Additionally, blackmail or extortion can

¹⁶¹ 535 U.S. 137 (2002).

¹⁶² See *id.* at 140 (holding that the National Labor Relations Board could not award backpay to an undocumented worker who was terminated for his union organizing activities in violation of the National Labor Relations Act).

¹⁶³ *Id.*

¹⁶⁴ Saucedo, *The Browning*, *supra* note 63, at 320. Generally, immigrant workers are less likely to speak out regarding workplace exploitation when there is no protection for them doing so. See Saucedo, *Employer Preference*, *supra* note 31, at 968–71 (discussing the chilling effect of immigration consequences for immigrant workers).

¹⁶⁵ See *Fact Sheet*, *supra* note 125 (explaining that the DHS Regulations explicitly list the DOL as an agency that can certify Supplement B forms, which demonstrates the understanding that investigators of workplace legal violations might encounter qualifying criminal activity in the course of their investigations).

¹⁶⁶ See *supra* notes 100–112 and accompanying text (articulating the requirements, including law enforcement certification, for a U-Visa).

¹⁶⁷ Because the regulations include the detection of qualifying crimes, OSHA's ability to certify Supplement B forms would not need to be limited to only those crimes which OSHA itself is investigating or prosecuting. See 8 C.F.R. § 214.14(a)(5) (2013).

¹⁶⁸ See Cho, *supra* note 45, at 129 (explaining possible workplace crimes).

be workplace crimes, especially if workers are being blackmailed for their organizing efforts.¹⁶⁹ Furthermore, workers might experience a felonious assault in the workplace; be subject to involuntary servitude, peonage or trafficking; or be forced to participate in the obstruction of justice, perjury, or witness tampering.¹⁷⁰

Certain qualifying crimes seem particularly relevant to the occupational safety and health context for low-wage immigrant workers. Low-wage immigrant workers may be subject to blackmail for organizing,¹⁷¹ which might include organizing to make a demand for improved occupational health and safety. Additionally, employers could instruct workers to lie to law enforcement officials.¹⁷² This might qualify the worker for a U-Visa under the qualifying crimes of obstruction of justice, perjury, or witness tampering.¹⁷³

In addition to OSHA possibly detecting criminal activity outside of its direct investigatory and prosecutorial authority, there are certain criminal provisions of the OSH Act that might be a qualifying criminal activity for U nonimmigrant status under the statute's "substantially similar"¹⁷⁴ prong. For example, a willful violation of an OSHA standard that leads to the death of an employee can be punished criminally.¹⁷⁵ Under certain circumstances, this might be substantially similar to a felonious assault.¹⁷⁶ Under the DOL's current protocol, however, OSHA is unable to certify a Supplement B form, regardless of how helpful an immigrant is in the detection, investigation, or prosecution of criminal activity under the OSH Act.

Congress contemplated that workers would need to interact with OSHA by including provisions for workers to report health and safety issues and to protect workers from retaliation.¹⁷⁷ However, even though undocumented

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* at 129–130 (suggesting that examples of these crimes in the workplace include visa fraud, employers instructing employees to lie to law enforcement, and intimidating workers to discourage them from complying with law enforcement or from making affirmative complaints).

¹⁷¹ *See id.* at 128 (explaining that threats to call Immigration or blacklist employees could constitute blackmail); *see also* Johnston, *supra* note 32, at 1140 (explaining that the North Carolina Growers Association maintains a "blacklist" of "undesirable" guestworkers).

¹⁷² *See Cho, supra* note 45, at 130 (articulating that an employer's instructions to lie to law enforcement investigators or intimidating workers from making complaints or cooperating with law enforcement could be qualifying criminal activity as obstruction of justice, perjury, or witness tampering).

¹⁷³ Victims are eligible under the crimes of witness tampering, obstruction of justice, or perjury if the victim has been "directly and proximately harmed" by the perpetrator of the offense and there are "reasonable grounds to conclude" that the perpetrator committed the offense to avoid investigation or prosecution for the offense or to further the exploitation of the petitioner by "manipulation of the legal system." INSTRUCTIONS, *supra* note 122.

¹⁷⁴ 8 U.S.C. § 1101(a)(15)(U)(iii) (2015).

¹⁷⁵ 29 U.S.C. § 666(e) (2015).

¹⁷⁶ *See McClusky et al., PROGRESSIVE REFORMS, supra* note 73 (arguing that willful violations of OSHA standards that result in a worker's death are equivalent to homicide and should be treated that way).

¹⁷⁷ *Protecting America's Workers Act (PAWA): Testimony Before the Subcomm. on Workforce Protections of the H. Comm. on Education and Labor*, 111th Cong. (2010) (testimony of Jordan Barab, Deputy Assistant Secretary for Occupational Safety and Health) available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&

workers may receive these protections, the decision in *Hoffman Plastic Compounds* demonstrates some remedies are unavailable to certain immigrant workers whose rights were violated on the job.¹⁷⁸ Although OSHA's certification of Supplement B forms does not rectify this situation, it would begin providing protections for certain workers who are willing to engage with the agency.¹⁷⁹

Of note, the decision to certify a Supplement B form is discretionary.¹⁸⁰ There is consequently no guarantee OSHA would certify the form for immigrant workers who meet the qualifications for U nonimmigrant status.¹⁸¹ If OSHA begins to certify Supplement B forms, the agency should develop a procedure similar to that implemented by the WHD.¹⁸² This procedure would make the process uniform and clear for eligible non-citizens, ensuring that all applicants for U nonimmigrant status are treated similarly by the agency.

B. Qualifying Criminal Activity Should be Expanded to Include Severe Occupational Safety and Health Violations and Indirect Victims of Those Violations

While allowing OSHA officials to certify Supplement B forms is a cogent first step towards improving occupational safety and health for immigrant workers, most workers who are injured at work or who witness occupational safety hazards are unlikely to qualify for U nonimmigrant status because the nature of their injury does not fall into one of the enumerated categories.¹⁸³ The success of U-Visa program, however, suggests that a similar program for workplace violations would help achieve the OSH Act's goal of a safe and healthful workplace while simultaneously benefiting immigrant workers. While Congress could create a new, separate visa for workplace

p_id=1125, archived at <http://perma.cc/45J4-L2DZ> (stating that "Congress realized that OSHA inspectors would never be able to visit more than a small fraction of the nation's workplaces" and thus the OSH Act "relies heavily on workers to help identify hazards at their workplaces").

¹⁷⁸ See *supra* notes 40–42 and accompanying text.

¹⁷⁹ See *supra* notes 141–142 and accompanying text.

¹⁸⁰ *Ordonez Orozco v. Chertoff*, No. CIV.A. B–07–153, 2008 WL 5155728, at *4 (S.D. Tex. Dec. 8, 2008).

¹⁸¹ See, e.g., McCormick, *supra* note 46, at 592 (discussing how some law enforcement agencies have not wanted to get involved in U-Visa certifications because they believe it rewards immigrants who have come to the United States unlawfully). But see Nessel, *The Fallacy*, *supra* note 47, at 390–92 (critiquing the narrative that undocumented workers are "rewarded" by enforcing workplace rights).

¹⁸² For an explanation of the WHD current protocol see *Field Assistance Bulletin*, *supra* note 25. The procedure includes the agency's detection of qualifying criminal activity during the course of an investigation, the investigator working with the appropriate U-Visa coordinator, and the U-Visa coordinator working with an agency attorney who will make the determination as to whether or not to certify the Supplement B form. *Id.* This Article further discusses this procedure *infra* at Part III.C.

¹⁸³ Lori A. Nessel, *Disposable Workers – Applying a Human Rights Framework to Analyze Duties Owed to Seriously Injured or Ill Migrants*, 19 IND. J. GLOBAL LEGAL STUD. 61, 94 (2012).

health and safety violations that is modeled on the T¹⁸⁴ and U¹⁸⁵ Visa programs, an expansion of the U-Visa itself makes sense due to the serious nature of certain occupational safety and health violations and their similarities to the U-Visa program's qualifying crimes.¹⁸⁶ Such an expansion aligns with the purposes of U nonimmigrant status, while also remaining true to both the law enforcement and humanitarian goals steeped in OSHA's mission.¹⁸⁷

Senate Bill 744 was a good start to this goal when it proposed expanding the definition of qualifying criminal activity to also include "covered violations."¹⁸⁸ Expanding the U-Visa to "covered violations" would allow immigrant workers who are victims of such violations to receive protection if they cooperate in the investigation or prosecution of workplace violations that may not fall into one of the current categories for U nonimmigrant status. This is particularly important because OSHA has limited criminal investigative jurisdiction and rarely proceeds with a criminal prosecution.¹⁸⁹

Still, the bill failed to outline what types of violations should be included under this definition. The expansion of qualifying criminal activities for U nonimmigrant status should include any violation that could be punished criminally under the OSH Act¹⁹⁰ as well as all "serious violations," which contain a substantial probability that death or serious bodily harm would result from the employer's violation of OSHA standards.¹⁹¹ This expansion aligns with OSHA's enforcement priorities, and offers a humanitarian immigration remedy to those workers facing the most serious risk of injury. For the same humanitarian purposes that caused Congress to create the U-Visa for victims of serious crimes, it should expand the visa to victims of serious workplace health and safety violations.

In order to be most effective in preventing occupational safety and health violations and improving outcomes, "victims" for purposes of the visa must include those who take the risk in reporting their employers before they have suffered harm. Although such a provision would be somewhat outside the scope of the traditional U-Visa, which is targeted towards individuals who have been direct victims of crime,¹⁹² it aligns with victims of

¹⁸⁴ "T" visas are for victims of human trafficking. 8 U.S.C. § 1101(a)(15)(T) (2015).

¹⁸⁵ Before regulations for the U-Visa were promulgated, Lori Nessel suggested creating a new visa category based on the "S" and "T" visa categories, noting that "T" visa was the result of an expansion on the "S" visa. See Nessel, *The Fallacy*, *supra* note 47, at 393.

¹⁸⁶ See *supra* note 91 for the list of qualifying criminal activities.

¹⁸⁷ See Saucedo, *A New "U"*, *supra* note 44, at 114 (articulating that granting U-Visas for labor violations could be a "counteracting force" against these violations).

¹⁸⁸ S. 744, 113th Cong. § 3201 (2013).

¹⁸⁹ See *supra* note 16 (discussing how few OSHA criminal prosecutions have occurred in the past forty years).

¹⁹⁰ See *supra* notes 79-81 and accompanying text (outlining what qualifies as a criminal offense under the OSH Act).

¹⁹¹ 29 U.S.C. § 666(k) (2015).

¹⁹² See 8 C.F.R. § 214.14(a)(14) (2013) (explaining that victims must have "suffered direct and proximate harm" as a result of the qualifying criminal activity).

attempted crimes under the current U-Visa statute.¹⁹³ It is critical that those immigrants who report, and not just suffer, serious OSH Act violations are eligible for protection because not doing so would fail to utilize the benefits of U visas for preventative purposes. The expansion should hence include individuals who have prevented serious injury or death by proactively reporting workplace health and safety hazards. Furthermore, such an expansion of the U-Visa certification program would be more effective if Congress increases the yearly allotment of U-Visas since they regularly fill to capacity.¹⁹⁴

C. Structuring U Nonimmigrant Status Certification for OSHA Violations

OSHA could use a structure similar to the WHD Division for certification of Supplement B forms. This structure would mean each region would have a U-Visa coordinator and a supervising attorney tasked with dealing with U-Visa issues.¹⁹⁵ This setup allows individuals with expertise to handle the certification of the Supplement B forms.¹⁹⁶ All requests for Supplement B certification would be forwarded to the U-Visa coordinator, who then makes a preliminary determination about whether to certify the form.¹⁹⁷ In order to provide uniformity and consistency in the decision to certify Supplement B forms, OSHA should enumerate the factors upon which this determination will be made.¹⁹⁸ Structuring the certification in the same manner as the WHD also provides consistency within the DOL, making the process more straightforward for the immigrants, advocates, and attorneys who are likely to interact with the system. However, because there is no statutory mandate to limit the types of crimes for which OSHA can certify, and in order to ensure as many eligible workers as possible obtain the visa, OSHA would not need to limit its certification of Supplement B Forms to particular crimes.

Immigrant workers' lives and working conditions would also improve by encouraging their participation in the OSHA enforcement process. Work-

¹⁹³ See 8 U.S.C. § 1101(a)(15)(U)(iii) (2015) (including attempt, conspiracy, or solicitation to commit a qualifying crime as qualifying criminal activity). Qualifying victims, other than the direct crime victim, also include certain family members if the direct victim is deceased due to the qualifying crime, incapacitated, or under 21. 8 C.F.R. 214.14(a)(14)(i) (2013).

¹⁹⁴ *USCIS Reaches U Visas Cap for Fiscal Year 2014*, *supra* note 117.

¹⁹⁵ *Field Assistance Bulletin*, *supra* note 25. (explaining the protocol for Supplement B certification in the WHD).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* The WHD bases its decision on the following primary factors: whether the qualifying criminal activity arises out of the employment relationship and there is a related law enforced by the WHD, whether the petitioner alleges one of the five qualifying crimes that the WHD has agreed to certify, whether the petitioner has demonstrated cooperation with law enforcement or a likelihood to be cooperative, whether another law enforcement agency is investigating or prosecuting the criminal activity or would be in a better position to certify the form, and if certifying the form would assist the WHD investigation of a law that it enforces. *Id.*

ers' current role in OSHA enforcement is severely lacking. An individual worker does not have the right to file suit against his employer when there is a violation of health or safety practices at his workplace but instead must report to OSHA, which has a large amount of discretion over how to handle a complaint.¹⁹⁹ Providing immigrant workers with protection to report occupational safety concerns gives them a greater ability to combat the exploitation they face. More importantly, cooperating with OSHA officials shifts the system towards one where "[w]orkers . . . wield power that is proportionate to their huge stake in the game."²⁰⁰

CONCLUSION

Occupational safety and health is a pressing concern in the low-wage immigrant community, and immigrants often face serious risks on the job. However, immigration enforcement has led many immigrants to fear interacting with regulatory authorities. Because OSHA requires worker engagement to effectuate its mission, the agency should certify Supplement B forms for immigrant workers injured at work where OSHA detects, investigates, or prosecutes the qualifying criminal activity. To do so, the DOL should immediately expand the regulations permitting the WHD to certify Supplement B forms to include authority for OSHA to also certify Supplement B forms. Furthermore, Congress should expand U nonimmigrant status to "covered violations" that include workplace health and safety violations that put workers at substantial risk of serious bodily harm. By doing so, OSHA would have the ability to increase its reliance on immigrant workers in enforcing health and safety standards as well as provide humanitarian relief to immigrant workers exploited on the job.

¹⁹⁹ See 29 U.S.C. § 659 (2015) (articulating OSHA enforcement protocol); *Donovan v. OSHRC*, 713 F.2d 918, 927 (2d Cir. 1983) (explaining that OSHA is permitted to engage in informal settlement negotiations and settle cases without hearings, a process which employees cannot contest). Additionally, employees do not have the right to reject an OSHA settlement. See U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN SUBCOMMITTEE ON MANPOWER AND HOUSING COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES ON INFORMAL SETTLEMENT OF OSHA CITATIONS: COMMENTS ON THE LEGAL BASIS AND OTHER SELECTION ISSUES, 7 (1984) available at <http://www.gao.gov/assets/150/142289.pdf>, archived at <http://perma.cc/B95Y-2DYT>. See also Lynn Rhinehart, *Workers at Risk: The Unfulfilled Promise of the Occupational Safety and Health Act*, 111 W. VA. L. REV. 117, 128 (2008) (explaining that it is a "serious shortcoming" of the OSH Act that workers are dependent on the Secretary of Labor to choose to pursue the case). But see Nora Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1081–82 (2012) (expressing concern that S, T, and U-Visa applicants' lack of other options to remain lawfully in the United States gives authorities an opportunity to exploit these workers for information related to criminal investigations).

²⁰⁰ McCLUSKY ET AL., PROGRESSIVE REFORMS, *supra* note 73; see Lee, *supra* note 42 at 1126 ("[T]he language of the [U visa] statute does not expressly recognize the unique set of harms unauthorized migrants experience on account of their vulnerable status in the workplace.").