



September 19, 2022

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**Re: Follow Up to Stakeholder Meeting Regarding Delegating the Secretary of Labor’s U and T Visa Certification Authority to the Occupational Safety and Health Administration (OSHA)**

Dear Secretary Walsh, Assistant Secretary Parker, Deputy Secretary Frederick, Dr. Tracy, and Ms. Treves,

Thank you for meeting with us on Wednesday July 27, 2022, to discuss the necessity of Secretary Walsh delegating his U and T visa certification authority to OSHA. As Professor Yanik stated during the call, “For immigrant workers, particularly in the Deep South, federal labor agencies [are] all we got.” Non-citizen workers frequently experience abhorrent safety and health violations, suffering injuries ranging from amputations to debilitating falls. Many are victims of workplace crimes, including trafficking, sexual assault, manslaughter, witness tampering, obstruction of justice, extortion and murder. While the crime-victim certification practices adopted by the Wage and Hour Division (WHD) will understandably guide OSHA, we respectfully urge OSHA not to limit itself to the parameters used by WHD, in recognition of the more expansive investigative authority held by OSHA. This letter memorializes the recommendations we previously shared with you regarding the scope of OSHA’s U and T visa certification policy.

**I. As a U and T visa certifying agency, OSHA will help ensure critical protections for all workers.**

Non-citizen workers work in the most hazardous jobs in the country, and many were deemed as essential workers during the pandemic. As the participants on our call shared, immigrant workers who raise safety and health concerns are often met with physical violence and retaliation, including termination, threats of deportation, and/or actual deportation. By way of illustration, Ruth Silver Taube, Supervising Attorney at the Katharine & George Alexander Community Law Center at Santa Clara University School of Law, shared that she had a client who, after reporting unsafe working conditions, was deported to Mexico because his employer called ICE. Another client was physically assaulted. Many workers face threats of calls to the police or ICE by their employer if they dare raise any safety or health concerns. These threats of retaliation are not just a violation of workers’ whistleblower rights – which constitutes unlawful retaliation – but they also meet the definition of witness tampering, extortion, and obstruction of justice, all of which are qualifying criminal activities (QCAs) for U visas. Workers who are assaulted after they complain about health and safety concerns may meet the definition of felonious assault, which is also a qualifying crime for a U visa.

During our call, Aimee Pacheco, a Legal Intern with Sur Legal Collaborative and a second year law student at Columbia Law School, shared her experience as the daughter of immigrant workers who have worked in the carpet industry in North Georgia for over 26 years. She shared that growing up she learned about family friends and community members who lost fingers due to lack of machine guarding or who were injured by forklifts. She had multiple family members end up in the hospital, needing wrist and knee

surgeries due to how physically demanding their jobs were. Her own father endured second degree chemical burns on his skin. To this day, the scars are still visible. Ms. Pacheco worked at one of the carpet mills one summer during college and shared that she clashed with supervisors almost every day for bringing up basic safety and health concerns. She shared that supervisors talked about OSHA coming to the worksite as something to fear, falsely and incorrectly claiming the agency would shut down factories and put people out of work. Many of the workers in Ms. Pacheco's family, as well as her own coworkers, did not trust OSHA nor did they believe or understand that OSHA's mission is to protect their health and safety, regardless of their immigration status.

Similarly, in January 2021, after a deadly nitrogen leak that took the lives of six workers, Foundation Food Group engaged in intimidation tactics to prevent workers from coming forward to OSHA and to undermine the investigation. Workers reported to advocates such as Elliot Lepe from the Southern Poverty Law Center that they were told by their employer to sign paperwork that they could not read or understand but that they believed to state that they had no knowledge about the freezer or the nitrogen leak that killed their co-workers. At least one member of the night-shift sanitation crew shared that he was asked to sign a piece of paper like this. But after sharing this information, he was too afraid to speak with worker advocates again.

As Marcy Goldstein-Gelb explained, too often workers come to the National Council for Occupational Safety and Health (National COSH) about dangers resulting in crippling disabilities from working on roofs without harness, being crushed in a trench, to suffering an amputation. Many of these workers remained silent and the employer knew the workers couldn't speak up because of their immigration status, putting all workers at grave risk and from a business standpoint, allowing the worst actors to undercut those employers who do the right thing.

While the DOL's new process for supporting workers seeking protection from the Department of Homeland Security is an important step in helping workers participate in OSHA investigations, workers who are victims of crimes in addition to being victims of workplace safety and health violations need a more durable remedy and a permanent path to status.

## **II. OSHA should not limit its certification authority to the 7 QCAs adopted by the WHD.**

The Wage and Hour Division currently only certifies for seven qualifying criminal activities (QCAs): trafficking, forced labor, involuntary servitude, peonage, fraud in foreign labor contracting, witness tampering and obstruction of justice. But we know there are other qualifying criminal activities that occur in the workplace, including felonious assault, sexual assault, and murder. OSHA should therefore certify for all of these crimes. Unlike WHD, OSHA often will be investigating the crime itself – if a worker is a victim of manslaughter, felonious assault, or murder in the workplace, OSHA can open an investigation around the worker's death and ascertain what, if any, responsibility the employer has. Often, when an employer is issued a willful or repeat citation after a workplace fatality, the case is then referred over to the Department of Justice for criminal prosecution. The victims of these crimes, including co-workers and family members, should be given the necessary protection to cooperate with these investigations and prosecutions.

The undersigned understand that OSHA has limited resources, time constraints, and wants to avoid having a large backlog of requests. One of several reasons for a backlog with requests at WHD is the fact that there is high turn-over of Regional Workplace Crimes Coordinators (RWCCs), in part because the position does not allow for promotions above GS-12. By allowing promotions up to at least GS-14, many qualified individuals will apply and want to remain in these positions. Additionally, under the Trump Administration,

WHD Administrator Cheryl Stanton suspended Regional Administrators' authority to do U and T visa certifications for several months, causing a massive backlog. She then put overly onerous requirements on workers as well as RWCCs and Regional Administrators including requiring simultaneous and "actionable" WHD complaints being filed, despite limited resources and capacity to actually open inspections, as well as requiring concurrence from DOJ, both of which are not requirements of providing certifications.<sup>1</sup>

### **III. OSHA should not impose certification limits based on the passage of time since the hazard or the status of agency investigations.**

Notwithstanding the requirement that OSHA must generally issue any citations within six months of the occurrence of any workplace safety and health hazard, the agency should not artificially limit its certification authority only to violations or crimes occurring within that actionable period. Instead, OSHA should be willing to provide a law enforcement agency certification where the other criteria are met, regardless of when the underlying safety and health hazards and the qualifying crime(s) occurred or whether OSHA will investigate. This policy is warranted for several reasons. First, workers often will be experiencing and making OSHA aware of crimes occurring in industries with high rates of injuries or safety and health violations. In many cases, the violations will implicate repeat offenders. As such, noncitizen workers can provide valuable assistance to OSHA even where the incidents affecting them occurred more than six months prior to their request for certification – including testifying at hearings against the same employer for hazards they experienced. The Department of Homeland Security's guidance for certifying law enforcement agencies makes clear that there is no requirement that there be a pending or completed case or that the matter still be within any applicable statute of limitations.<sup>2</sup>

Second, to the extent that other law enforcement agencies (including state and local agencies) have jurisdiction to investigate the crime even where OSHA does not, OSHA's willingness to provide the certification necessary for the U or T pathways will help incentivize noncitizen workers to report crimes even in jurisdictions where anti-immigrant policies create substantial risks in doing so. In sum, OSHA's certification policies should encourage noncitizen workers to report work-related violations and crimes regardless of the passage of time or the potential for further investigation, in order to help ensure that violators are held accountable and that the workplace is safe for all workers.

### **IV. Federal OSHA should also certify in states with State Plans**

In order to ensure consistent visa protections across the country, workers in every state should be able to seek certification with federal OSHA. Immigrant and migrant workers in states with federally approved state OSHA programs face serious health and safety hazards on the job that lead to OSHA violations, as well as trafficking and U-visa qualifying crimes, just as other workers across the country. But workers in these states also face real danger for speaking out about these hazards because of their immigration status and fear of local law enforcement.

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<sup>1</sup> Penn, Ben. "Human Trafficking Victims Blocked from Visas by Trump Wage Boss." *Bloomberg Law*, Bloomberg Law, Jun. 24, 2019, at <https://news.bloomberglaw.com/product-liability-and-toxics-law/human-trafficking-victims-blocked-from-visas-by-trump-wage-boss?context=article-related>. (last accessed on Sept. 7, 2022).

<sup>2</sup> See U Visa Law Enforcement Resource Guide, Dept. Homeland Sec'y, p.8 (May. 3, 2022) ("The key is the victim's helpfulness, not the timing of the helpfulness."), at <https://www.dhs.gov/publication/u-visa-law-enforcement-certification-resource-guide>.

Federal OSHA/DOL should consider existing joint-jurisdiction authority, procedures and practices used by the agency—such as by its whistleblower program—when creating certification for workers in state OSHA plan states. Allowing these workers to seek certification through a joint-jurisdiction mechanism with federal OSHA would be practical and encourage workers to come forward, and it would ensure a consistent and streamlined process for every worker.

#### **V. Certification for Family Members who are Indirect Victims of QCAs**

Finally, we urge you not to leave out the indirect victims of workplace qualifying crimes. These individuals may also be eligible for a U visa, if they have a direct qualifying relationship to the victim, particularly in circumstances where the primary victim is deceased due to murder or manslaughter which occurred in the workplace. Further, indirect victims with a direct relationship to the victim, may also be eligible when the primary victim is incompetent or incapacitated as a result of the crime.<sup>3</sup>

We appreciate the opportunity to share our concerns and OSHA's willingness to be open to engaging with external stakeholders to improve occupational safety and health among the nation's migrant and immigrant worker communities. Delegating Secretary Walsh's authority to OSHA would enable OSHA to improve workplace health and safety for tens of thousands of immigrant workers and their families, many of whom are essential workers and vital to the economy of this nation. We look forward to working together on this issue. You may contact the undersigned stakeholders at [shelly@surlegal.org](mailto:shelly@surlegal.org) if needed.

Sincerely,

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<sup>3</sup> [https://www.uscis.gov/sites/default/files/document/guides/U\\_Visa\\_Law\\_Enforcement\\_Resource\\_Guide.pdf](https://www.uscis.gov/sites/default/files/document/guides/U_Visa_Law_Enforcement_Resource_Guide.pdf)

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