Immigration and Employment

Acknowledgments

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An introductory note: The Employment Justice Center does not provide legal advice regarding immigration issues. That said, many of our clients have employment-related legal issues that impact, or are impacted by, their legal status in the United States. This chapter is intended to provide an introduction to the cross-section of these areas of law and to facilitate the identification of immigration-related issues that need to be considered in developing an effective strategy for resolving a client's employment case. Immigration issues that arise may necessitate an appropriate referral.

Undocumented Employees

Introduction

Although undocumented workers are covered by many employment laws and are legally entitled to certain remedies, it's important for clients and their legal advisors or representatives to understand the very real risks involved in pursuing their legal rights (whether seeking employment claims or immigration relief). Additionally, it is extremely important for employment law attorneys representing undocumented workers to seek supplemental legal counseling from an immigration attorney, and to work closely with their client's immigration counsel. There are unique case strategy issues that come into play – including important implications in terms of discovery and rules of evidence – when an individual pursues his or her civil claims and immigration relief (either separately or simultaneously), thus it's very helpful to have a clear roadmap of your client's whole case before filing anything or contacting law enforcement. On this note, please consider following this suggested checklist when interviewing an undocumented worker for the first time:

Case Screening Checklist

What is the client's immigration status (and status of immediate family members)? If they originally entered the United States on a visa, what kind of visa was it? Who was their visa sponsor? When did this visa expire?

1) What are the client's employment issue(s)? – assess the facts of the case under employment laws (e.g., W&H, UI, Title VII, NLRA, workers' compensation, etc.)
2) Get relevant dates to assess statute of limitations for employment claim(s) stated above.
3) Has the client experienced any of the U-visa Qualifying Criminal Activities ("QCA")?
4) What is the timeframe when the QCA took place?
5) What is the willingness of the client to speak with law enforcement about his or her immigration status?
6) What are the overall goals of the client?

As you complete the intake interview and think about the client's potential claims or forms of relief, here is a brief list of case strategy matters to keep in mind:

Case Strategy

Which portion of the client's claims do you address first – immigration or employment matters? Is it possible to address them simultaneously?

- Where do you file the claim?
- What are the evidentiary issues?
- Is it helpful or necessary to partner with an immigration attorney?

Coverage

Undocumented employees are generally covered by employment laws, although as you will see in the next section, their remedies are sometimes limited by their undocumented status.

While many employment laws contain retaliation provisions, which are designed to protect workers who report and file claims, these provisions may not adequately protect undocumented workers. For example, an undocumented worker who is fired cannot force his or her employer to reinstate him or her if doing so would be illegal under the Immigration Reform and Control Act (IRCA). Similarly, if an employer threatens to report a worker to immigration authorities, the worker may decide that the risk of deportation is not worth the reward of vindicating the claim. Clients should be counseled about the possibility of retaliation from their employers, including firing them and/or reporting them to immigration authorities.

Unemployment Compensation

The one major exception is unemployment compensation. Undocumented workers are not eligible for unemployment compensation and should not apply. DC Code §51-101(2), Va. Code §60.2-617.

Workers' Compensation

Undocumented workers are eligible to receive workers' compensation in D.C. and Maryland. *See* DC Code §32-1501(12); *Design Kitchen & Baths v. Lagos*, 882 A.2d 817 (Md. 2005). Injured workers in VA who are undocumented are covered by workers' compensation for medical benefits, temporary or permanent total disability, and permanent impairments. However, Va. Code 65.2-502 states that workers **"not eligible for lawful employment" are not eligible for temporary partial disability.** If an undocumented worker is released to do any kind of work or has an injury classified as a "temporary partial disability," s/he cannot receive any wage loss compensation; however, s/he is still entitled to medical treatment. The rationale of the law is that the worker cannot work legally in Virginia, so s/he can only be compensated if s/he is completely unable to work or for a specific loss of an extremity, etc.

Discrimination

Undocumented workers are generally covered by anti-discrimination laws; however, they are not protected from discrimination by employers on the basis of their status as undocumented

workers. Practically, it may be difficult for an undocumented worker to assert these rights. For example, the D.C. Office of Human Rights requires a Social Security number on all claims because its database requires it, so anyone who does not provide a Social Security number will not have claims processed.

Occupational Safety and Health (OSHA)

Undocumented workers may make OSHA complaints. OSHA allows the identity of the complainant to remain confidential, and undocumented workers may wish to use this feature.

Remedies

In the landmark case *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Supreme Court held that undocumented immigrants were not entitled to back pay from employers who fired them in retaliation for trying to organize a union under the National Labor Relations Act. Since 2002, courts have grappled with how the ruling in Hoffman affects the remedies available to undocumented workers under other employment statutes.

Fair Labor Standards Act

After *Hoffman*, the Department of Labor (DOL) has continued to enforce the Fair Labor Standards Act (FLSA) regardless of an employee's immigration status. The DOL has noted that the decision in *Hoffman* applies only to the National Labor Relations Act (NLRA), which is a separate statute enforced by a separate agency. The DOL also noted the critical difference that "[i]n *Hoffman Plastics*, the NLRB sought back pay for time an employee *would* have worked if he had not been illegally discharged, under a law that permitted but did not require back pay as a remedy. Under the FLSA, the Department…seeks back pay for hours an employee has *actually worked*, under laws that require payment for such work."[139] *See Zirintusa v. Whitaker*, 2007 WL 30603at *5 (D.D.C. 2007) (holding that employees' immigration status was irrelevant to their ability to bring claims under the FLSA and would actually "provide perverse incentives to employers" if undocumented workers were prevented from bringing such claims); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 322 (D.N.J. 2005) (noting that the FLSA makes no mention of citizenship and upholding plaintiffs' claim for unpaid wages for work already performed).

Discrimination Laws (Title VII, ADA, ADEA)

The Equal Employment Opportunity Commission (EEOC) is the agency responsible for enforcing Title VII, the Americans with Disabilities Act (ADA), The Pregnancy Discrimination Act, and the Age Discrimination in Employment Act (ADEA). The EEOC has been very clear that *Hoffman* "in no way calls into question the settled principle that undocumented workers are

[139] Department of Labor Wage and Hour Division, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division, revised July 2008, available at www.dol.gov.

covered by the federal employment discrimination statutes."[140] The EEOC has stated that it will not, on its own initiative, ask about a person's immigration status or consider a person's immigration status when determining whether a claim has merit. However, in some courts, *Hoffman* may affect the remedies available to undocumented workers. Most courts have held that *Hoffman* should be interpreted narrowly, but this case law is still developing. *See Iweala v. Operational Technologies Services, Inc.*, 634 F. Supp. 2d 73, 80 (D.D.C. 2009) (holding that "[plaintiff's] visa status and eligibility for employment…should not preclude her from protection under Title VII though her visa status and eligibility for employment may limit her remedies.").

The Fourth Circuit, which governs VA federal courts, had already held prior to *Hoffman* that to be eligible for protection from discrimination, a plaintiff must show that he was qualified for employment and that undocumented workers are thus not eligible to bring anti-discrimination claims. *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187 (4th Cir. 1998) (holding that undocumented workers aren't protected by Title VII); *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502, 504 (4th Cir. 1999) (holding that undocumented workers are not protected by the ADA or Title VII); *Reyes-Gaona v. N. Carolina Growers Assn.*, 250 F.3d 861 (4th Cir. 2001) (holding that undocumented workers aren't protected from age discrimination by the ADEA).

Collecting on a Favorable Judgment

After winning a favorable judgment, some undocumented clients worry about the tax ramifications if they do not have a valid Social Security number. In a settlement or court order for unpaid wages, both employees and employers have tax-reporting requirements. Employers have been known to use these tax-reporting obligations to delay or avoid paying workers, by claiming that the workers must provide a genuine Social Security number. However, to receive an award or settlement as part of a winning claim, an employee does not need a Social Security number; he or she only needs an Individual Taxpayer Identification Number (ITIN), issued by the IRS. *See* "Fact Sheet for Workers: What is an ITIN?" National Employment Law Project, (November 2004).

An ITIN is a number issued by the IRS to process taxes. It was created for people who are not eligible for a Social Security number (SSN). The ITIN is a nine-digit number that looks like a SSN but it always begins with a 9 (SSNs do not) and the fourth digit is always a 7 or 8. It looks like this: 9XX-7X-XXXX or 9XX-8X-XXXX.[141] The ITIN does not provide work authorization, Social Security benefits, or an Earned Income Tax Credit. However, the ITIN will allow the worker to get a refund if too many taxes were withheld from his or her paycheck and may entitle them to a Child Tax Credit and to exemptions for dependents. Filing taxes also helps establish good character for future immigration applications. Most importantly for purposes of

[140] "Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws," EEOC Directive, (June 27, 2002), available at: www.eeoc.gov.

[141] "Individual Taxpayer Identification Number (ITIN)" IRS website, available at www.irs.gov.

the EJC, the ITIN will allow taxes to be withheld from any judgments or settlements in court, allowing the employee to collect successfully.[142]

In simple cases where an employer has reached a settlement or been ordered by the court to pay an employee, the employer issues a check to the worker, along with two IRS forms (a 1099 and a W-2.) These forms request the employee's Social Security number so an employer may try to use the lack of a valid SSN as an excuse not to move forward. The National Employment Law Project advises that if a worker filled out an I-9 form when he or she was hired, he or she should simply tell his or her employer to use the number provided on that form for tax-reporting purposes. If the employer refuses, the worker should apply for an ITIN.

To apply for an ITIN, you must fill out a Form W-7, "Application for IRS Individual Taxpayer Identification Number," and attach a valid federal income tax return, and your original, notarized, or certified proof of identity and foreign status. More detailed instructions are available here: "Instructions for Form W-7" (revised January 2012), Department of the Treasury, Internal Revenue Service; available at http://www.irs.gov/ and http://wrmanual.dcejc.org/40.

Options Available to Undocumented Immigrants Filing in Civil Court

Protective Orders to Prevent Discovery of Immigration Status

Although undocumented workers face some barriers to enforcing their rights that other workers do not, there are certain measures that can help mitigate these risks. For example, many courts have approved protective orders that prevent discovery regarding plaintiffs' immigration status. *See Montoya v. S.C.C.P. Painting Contractors, Inc.* 530 F.Supp.2d 746 (D.Md. 2008) (holding that "immigration status of a class representative is irrelevant in wage and hour cases, in light of FLSA's coverage of all workers – undocumented or not" where the employer had sought Social Security numbers and driver's license numbers during discovery); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463-64 (E.D.N.Y. 2002) (holding that in situations where undocumented immigrants sought wages under the FLSA for work already performed, they were entitled to a protective order precluding discovery of their immigration status); *Liu v. Donna Karan Int'l, Inc.*, 207 F.Supp.2d 191, 192-3 (S.D.N.Y. 2002) (holding that a confidentiality agreement would be unsatisfactory in protecting plaintiffs and no discovery of immigration status would be allowed at the current stage of litigation because of the potential for intimidation); *Flores v. Albertsons, Inc.*, 2002 WL 1163623 at *5 (C.D. Cal. 2002) (holding that Defendant employer failed to meet its burden of showing that the need for information regarding immigration status of employees in an FLSA action outweighed the potential harm posed to plaintiffs.)

Filing Anonymously

In some rare cases, plaintiffs may be able to file anonymously if they can prove that the potential for retaliation is extraordinary in nature. In *Does I thru XXIII v. Advanced Textile*

[142] "Immigrant & Nonstandard Worker Project: Fact Sheet for Advocates," National Employment Law Project, (July 2005), available at http://nelp.org and http://wrmanual.dcejc.org/39.

Corp., 214 F.3d 1058, 1068-69 (9th Cir. 2000) a group of Chinese workers attempted to bring an FLSA collective action and were threatened by their employer with "various reprisals, including termination, blacklisting, deportation, and closing the factory." *Id.* at 1065. In that case the Ninth Circuit considered three factors – "(1) the severity of the threatened harm, (2) the reasonableness of the anonymous party's fears, and (3) the anonymous party's vulnerability to retaliation" – and concluded that the plaintiffs in the case were entitled to anonymity. The court also noted that fear of physical harm was not necessary where the retaliation was "extraordinary" and noted that "deportation, arrest, and imprisonment" all constituted extraordinary retaliation. *Id.* at 1071.

No D.C. court has held that threats of deportation justify filing anonymously; however, the D.C. Circuit has cited *Advanced Textile* for the proposition that plaintiffs may proceed anonymously (1) when identification creates a risk of retaliation, (2) when anonymity is necessary to preserve privacy in a sensitive personal matter, or (3) when the party seeking anonymity may be compelled to admit their intent to act illegally. *W. Coast Productions, Inc. v. Does 1-5829*, 275 F.R.D. 9, 13 (D.D.C. 2011). Although in that case the D.C. Circuit was dealing with the second issue of sensitive personal information rather than the issue of intimidation and retaliation, the case demonstrates that D.C. courts consider the risk of retaliation to be a possible ground for anonymity. *See also Guifu Li v. A Perfect Day Franchise, Inc.*, 270 F.R.D. 509, 517 (N.D. Cal. 2010) (holding that in FLSA suit by Chinese workers who spoke little English, the threat of termination and of reducing hours did not constitute "extraordinary" retaliation to justify anonymity because such actions were "typical" forms of retaliation in the FLSA context); *4 Exotic Dancers v. Spearmint Rhino*, 2009 WL 250054 at *2 (C.D.Cal., Jan. 29, 2009) (distinguishing threats of termination and blacklisting from threats of deportation and imprisonment because the former only affect economic interests and are therefore not "extraordinary" so as to justify anonymity); *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008) (holding that additional factors relevant to anonymity include whether possible prejudice to the defendant caused by allowing anonymity differs at any particular stage in the litigation and whether it can be mitigated by the court; whether the plaintiff's identity has thus far been kept confidential; whether the public interest in the case is furthered or compromised by requiring the plaintiff to disclose their identity; and whether there are alternative ways to protect the plaintiff's confidentiality).

Immigration Relief Available to Some Undocumented Workers

Immigration Relief for Severely Exploited Immigrant Workers

1) T-visa: Victims of Human Trafficking
2) U-visa: Victims of Crime
3) Continued Presence

In some special circumstances, workers may be eligible to have their undocumented status adjusted to grant them lawful residency in the United States. T-visas and U-visas were designed to aid undocumented victims of crimes who assist law enforcement to stay in the country legally.

T-Visas

What constitutes "human trafficking"?

The Trafficking Victims Protection Act ("TVPA")[143] – the federal anti-trafficking statute – defines "severe forms of human trafficking" as:
"The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery;"

or

"The *recruitment*[144], harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act where such act is induced by force, fraud, or coercion, or where the person induced to perform such act has not attained 18 years of age.[145]"

What are the eligibility requirements for a T-visa?

To establish eligibility for the T-visa, the individual must show that he or she:

- Is or has been a victim of a severe form of human trafficking as defined above;
- Is physically present in the United States due to human trafficking;
- Has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking in persons (if he or she is older than 18; those younger than 18 do not need to meet this requirement); and
- Would suffer extreme hardship involving unusual and severe harm if removed from the United States.[146]

Note: It is recommended that a T-visa petitioner get law enforcement certification before applying for a T-visa, but such certification is *not* required, only a showing of cooperation with law enforcement is required. Likewise, actual prosecution by law enforcement is not required in order for a victim to succeed in his or her petition for a T-visa.

Communicating with Law Enforcement

Generally, an officer, agent, and/or prosecutor will want to interview your client. In most cases, when local law enforcement interviews a victim, the officer will write a report and issue an incident card. However, this is generally *not* the case with federal law enforcement agents (FBI and ICE).

After the interview, it may be requested that the officer or agent sign an affidavit or certification, and seeking Continued Presence may be requested as well. The officer or agent will

[143] 22 USC § 7102
[144] New language regarding labor recruiters was added to the TVPA when it was reauthorized in March, 2013, as of this writing we are still waiting for the implementing regs.
[145] 22 USC § 7102.
[146] TVPA 107(c), 8 CFR § 214.11(b).

rarely agree to sign an affidavit or certification at that time, and will often want to investigate the case further before deciding whether to sign.

Note: Anything shared with law enforcement (including memos considered to be privileged attorney work product) has to be turned over to a criminal defendant if the client's claim results in criminal prosecution. Think carefully before sending anything in writing.

> **Practice Tip:** Keep correspondence with the law enforcement officer or agent general enough that it does not matter that the defendant's attorney receives copies, but specific enough that you can use the correspondence as secondary evidence of cooperation. Sometimes, prior to this first interview, if law enforcement is amenable, it may be helpful if the legal advocate can proffer some facts and information. Sometimes just identifying names, players, and a short outline of the facts in a chronological order will give law enforcement a roadmap and allow them to interview your client in an effective and expeditious manner.

What benefits do T-visa recipients receive?

- T-visa recipients get an Employment Authorization Document (*e.g.,* work permit).
- T-visa recipients can petition for their spouses and minor children to join them in the United States on derivative T-visas.
- T-visas are good for up to four years, and after three years one can petition to adjust status to a green card.
- Low-income T-visa recipients may also be eligible for housing, cash, and food assistance for a limited time, as well as Medicaid.

U-Visas

The TVPA also created the "U-visa," a temporary non-immigrant status available to non-citizen victims of certain crimes (referred to as "Qualifying Criminal Activity" or "QCA"). Congress created the U-visa originally with victims of domestic violence in mind, but increasingly the U-visa is being leveraged by advocates of undocumented workers who are victims of workplace crimes.

What constitutes a Qualifying Criminal Activity?

U-visa regulations identify 28 categories of qualifying criminal activity (QCAs) and any other substantially similar criminal activity as eligible for certification. Advocates should identify violations of local, state, or federal statutes that may correspond to the qualifying criminal activity when seeking certification. Law enforcement agencies may also certify U-visa petitions for attempt, conspiracy, or solicitation of the qualifying criminal activity.

Qualifying crimes that constitute criminal activity include the following:

Abduction	Abusive sexual contact	Being held hostage
Blackmail	Domestic violence	Extortion
False imprisonment	Felonious assault	Female genital mutilation
Incest	Involuntary servitude	Kidnapping
Manslaughter	Murder	Obstruction of justice
Peonage	Perjury	Prostitution
Rape	Sexual assault	Sexual exploitation
Slave trade	Torture	Trafficking
Witness tampering	Unlawful criminal restraint	*Fraudulent labor contracting
*Stalking[147]		

What are the eligibility requirements for a U-visa?

In order to be eligible for a U-visa, an immigrant worker must:

- Have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity;
- Possess information concerning the qualifying criminal activity;
- Have been helpful, be helpful, or be likely to be helpful in the detection, investigation, or prosecution of the qualifying criminal activity;
- Show that the qualifying criminal activity violated a local, state, or federal law, or have occurred in the United States.
- Receive certification from law enforcement or a certifying agency such as the EEOC or DOL.

This is the key difference between the T and the U-visa – for a U-visa, law enforcement certification is required; for a T-visa, it is only strongly encouraged.

IMPORTANT: Please see section above regarding communicating with law enforcement!

What benefits do U-visa recipients receive?

- U-visa recipients get an Employment Authorization Document (*e.g.*, work permit).
- U-visa recipients can petition for their spouses and minor children to join them in the United States on derivative U-visas.
- U-visas are good for up to four years, and after three years one can petition to adjust status to a green card.
- Unlike recipients of the T-visa, U-visa recipients are not eligible for public benefits.

[147] Fraudulent labor contracting and stalking were added to the TVPA when it was reauthorized in March 2013; as of this writing, we are still waiting for the implementing regulations.

Examples of Employment-Based Eligible Crimes

Only some crimes are eligible for U-visas, but many of the eligible crimes occur in an employment context. For example, the crimes of involuntary servitude, peonage, or trafficking, can all qualify for U-visa protection where there are threats of physical, psychological, or financial harm (including threats to call immigration authorities), which are used by an employer to make an employee continue to work. Confiscation or withholding of passports, restricted contact with others, and fraudulent labor contracting or recruiting may also support these claims. Sexual crimes perpetrated by an employer or a co-worker may qualify. Also, obstruction of justice, perjury, and witness tampering can be employment-related where the employer commits visa fraud or forges wage and hour records; tells their employees to lie to law enforcement; and/or intimidates workers with illegal retaliation. [148]

Certifying Agencies

The Victims of Trafficking and Violence Prevention Act specifies certain agencies that can fill out the Supplement B form and certify U-visa applications. In addition to local law enforcement, agencies such as the Equal Employment Opportunity Commission, the NLRB, and Department of Labor (Wage and Hour Division), which have criminal investigative jurisdiction in their respective areas of expertise, can offer certifications. A federal judge may also certify a U-visa petition in the context of labor abuse. 8 C.F.R. § 214.14(a)(2); *See e.g.*, *Garcia v. Audubon Cmty. Mgmt.*, 2008 WL 1774584 (E.D. La. Apr. 15, 2008). These agencies will determine whether you meet the criteria before they will certify an application.

- **The Department of Labor** has determined that it will only certify applications for the following five crimes: (1) involuntary servitude, (2) peonage, (3) trafficking, (4) obstruction of justice, and (5) witness tampering. The DOL has also stated that it will only certify U-visa applications in instances where these crimes were detected or reported as part of an investigation into crimes that the DOL actually enforces (such as minimum wage and overtime violations). Requests can be submitted to one of five regional U-visa coordinators. [149]
- **The NLRB** has noted in its "Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings" that "a number of crimes that may arise in the workplace, and which also constitute unfair labor practices in some cases, including 'peonage; involuntary servitude; . . . unlawful criminal restraint; false imprisonment; blackmail; extortion; . . . felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes' " may be eligible for Supplement B certification by the agency.[150]

[148] Cho, Eunice and Rebecca Smith, The U-Visa: A Potential Immigration Remedy for Immigrant Workers Facing Labor Abuse, National Employment Law Project (November 2011), available at www.nelp.org.

[149] "Field Assistance Bulletin No. 2011-1: Certification of Supplement B Forms of U Nonimmigrant Visa Applications." Department of Labor, Wage & Hour Division (Apr. 28, 2011), available at www.dol.gov.

[150] "Memorandum OM 11-62: Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings" Office of the General Counsel: (Jun. 7, 2011) available at: http://pages.pomona.edu.

- **The EEOC** has determined that it will certify for any of the qualifying crimes listed in the statute so long as the crime is related to unlawful employment discrimination alleged in the charge or otherwise properly under investigation by the EEOC. The EEOC requires that all requests for Supplement B certification be submitted to the appointed Regional Attorney (RA), who will conduct an initial investigation into the merits. The certification process at the EEOC requires an in-person interview of the visa applicant. If the requirements for certification do not appear to be met, the RA can decline the request.
- **Diplomatic Security Service** of the U.S. Department of State – see the section below regarding A-3 and G-5 workers.

Continued Presence

Another form of immigration relief established by the Trafficking Victims Protection Act (TVPA and TVPRA) is a remedy called "continued presence."[151] Continued presence is *not* a visa and does not convey any immigration status or benefit apart from legalizing the individual's continued physical presence in the United States during an ongoing or potential criminal investigation of the underlying trafficking crime. It can take the form of deferred action, parole, stay of a final removal order, or others. In practical terms, continued presence, or CP as it is commonly referred to, is issued for up to one year at a time and can be renewed at the discretion of law enforcement.

Once CP has been granted, the grant triggers the issuance of a "certification letter" from the federal Office for Refugee Resettlement (ORR). The certification letter certifies that the individual has been recognized to be a victim of a severe form of human trafficking and entitles the individual to apply for public benefits or a Match-Grant program.[152] In most instances, the grant of CP also makes the individual eligible for an employment authorization document (EAD, commonly referred to as a "work permit").[153]

Who Can File Requests for CP?

Only law enforcement can submit a request for an individual's continued presence and adjudication of these requests is performed by the U.S. Citizenship and Immigration Services (USCIS), Vermont Service Center, T Visa Unit. Federal law enforcement officials who encounter alien victims of severe forms of trafficking in persons who are potential witnesses to that trafficking may request that the Department of Homeland Security (DHS) grant the continued presence of such aliens in the United States. All law enforcement requests for continued presence must be submitted to the Field Operations Directorate of USCIS (formerly

[151] TVPA 107(C)(3) "Federal law enforcement officials may permit an alien individual's continued presence in the United States, if, after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking in order to effectuate prosecution of those responsible.…" See also 28 CFR § 1100.35.

[152] The second route to obtaining a certification letter is by filing a successful T-visa application. If the T-visa application is approved by CIS, the approval triggers the issuance of the certification letter with its attendant benefits.

[153] 28 CFR § 1100.35 (b).

known as the "INS, Headquarters Office of Field Operations"), in accordance with DHS procedures. Each federal law enforcement agency will designate a headquarters office to administer submissions and coordinate with the DHS on all requests for continued presence. The designated headquarters office will be responsible for meeting all reporting requirements contained in INS procedures for the processing and administering of the requests for continued presence in the United States of eligible aliens.[154]

Upon receiving a request, the DHS will determine the victim's immigration status. When applicable and appropriate, the INS may then use a variety of statutory and administrative mechanisms to ensure the alien's continued presence in the United States. The specific mechanism used will depend on the alien's current status under the immigration laws and other relevant facts. These mechanisms may include parole, voluntary departure, stay of final order, section 107(c)(3)-based deferred action, or any other authorized form of continued presence, including applicable nonimmigrant visas.[155]

Although DHS and the requesting law enforcement agency will make every effort to reach a satisfactory agreement for the granting of continued presence, the DHS may deny a request for continued presence in the following instances:

> (i) Failure on the part of the requesting agency to provide necessary documentation or to adhere to established DHS procedures;
>
> (ii) Refusal to agree or comply with conditions or requirements instituted in accordance with paragraph (c)(1) of section § 1100.35;
>
> (iii) Failure on the part of the requesting agency to comply with past supervision or reporting requirements established as a condition of continued presence; or
>
> (iv) DHS determines that granting CP for the particular alien would create a significant risk to national security or public safety and that the risk cannot be eliminated or acceptably minimized by the establishment of agreeable conditions.[156]

In the case of a denial, the DHS shall promptly notify the designated office within the requesting agency. The DHS and the requesting agency will take all available steps to reach an acceptable resolution. In the event such resolution is not possible, DHS shall promptly forward the matter to the Deputy Attorney General, or his or her designee, for resolution.

In addition to meeting any conditions placed upon the granting of continued presence, the responsible official at the law enforcement agency requesting the victim's continued presence in the United States shall arrange for reasonable protection to any alien allowed to remain in the United States by the DHS. This protection shall be in accordance with 42 U.S.C. 10606 and shall include taking measures to protect trafficked persons and their family members from intimidation, threats of reprisals, and reprisals from traffickers and their associates in accordance

[154] 28 CFR § 1100.35 (a).
[155] 28 CFR § 1100.35 (1)
[156] 28 CFR § 1100.35 (2)

with section 107(c)(3). Such protection shall take into account their status as victims of severe forms of trafficking in persons.

Steps Attorneys Can Take to Request "CP" for Clients from Law Enforcement

As discuss above, attorneys are not able to petition for CP on behalf of their clients; rather law enforcement requests CP for their "witnesses" in a present or ongoing criminal investigation. Typically the address on record for the CP request will be that of the law enforcement agency that is investigating the trafficking crime.[157] As such, there is no form to fill out in advance of your client's first meeting with law enforcement. However, there are a few pieces of information that can be gathered or discussed with clients in advance of the meeting with law enforcement, to expedite the eventual CP request:

1) Two passport-sized photographs of the person(s) requesting CP.

2) Fingerprints of the person(s) requesting CP.

   Note: *Electronic* fingerprints are required. The Diplomatic Security Service office in Rosslyn, Va., has a fingerprinting place onsite; thus if the client is interviewed at their office the fingerprints can be completed at the same time.

3) A completed and signed form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative,* in the event that law enforcement allows your office to be the address on record for the CP request. *See supra* note 5.

Other Immigration Applications Connected with CP

Once CP has been granted, law enforcement will typically forward the attorneys representing the trafficking victims a copy of the "certification letter" from ORR. If this is not received within approximately 2 weeks from the day of the request, it is good idea to contact law enforcement to inquire about the status of the CP request. Once the attorney has a copy of the CP certification letter, they can immediately proceed with filing for a replacement I-94 and work permit on behalf of their client(s). It is generally best and easier to apply for the replacement I-94 card first, then the work permit.

Practice Tip: Sometimes law enforcement will file the request for a replacement I-94 and/or the work permit at the same time that they request CP. To be prepared for this possibility, it is a good idea to bring client-signed, partially completed (*i.e.*, do not complete the mailing address portion) Form I-102 and Form I-765 with you when you meet with law enforcement. It is particularly helpful to get these forms signed by your client early in the process if you think that it may be awhile before you will meet with the client again.

[157] Attorneys can request that their office address be used instead – and should bring a signed form G-28 to support this request – but, most of the time, law enforcement will insist on using their address.

Employees with Unique Forms of Immigration Status

Domestic Employees on A-3 & G-5 Visas

The U.S. government allows employees of foreign embassies and international organizations to bring household and childcare workers into the United States on special A-3 and G-5 visas. Each year, more than 3,000 A-3 and G-5 visas are issued. A-3 visas correspond to domestic workers who work for diplomats and G-5 visas correspond to domestic workers who are employed by people who work for international organizations.[158] These visas provide work authorization only for employment by the original sponsor or someone else with the same or equivalent status as the sponsor.

Workers who enter the US on a G-5 or A-3 visa have certain rights:

- ✓ Sponsor must guarantee the employee will be compensated at the state or federal minimum or prevailing wage, whichever is greater. For contracts signed before March, 2011, any money deducted for food or lodging is limited to that which is considered "reasonable." For contracts signed as of March 2011, no deductions are allowed for lodging, medical care, medical insurance, or travel and for contracts signed as of April 2012, deductions taken for meals are also no longer allowed. See State Department regulation: 9 FAM 41.21 N6.4(b)(3) at http://www.state.gov/documents/organization/87174.pdf, p. 9.
- ✓ The worker should also have a written contract with a copy both in English and the a language the worker can read.
- ✓ The contract should include an agreement by the employer to abide by all U.S. laws, an agreement not to keep the worker's passport, contract, or other property, a description of the worker's duties and hours, and an explanation of how the worker will be compensated including vacation and sick time.[159]
- ✓ Also, pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Public Law 110-457) (reauthorized in 2013 as part of the Violence Against Women Act), all applicants for these visas should have received a pamphlet explaining these rights.

Protections

Administrative Remedies

As noted above, the Diplomatic Security Services (DSS) of DOS is responsible for providing oversight of the A-3 and G-5 program. If you encounter an A-3 or G-5 employee with an employment matter (particularly if you suspect she is a victim of labor trafficking), one of the first agencies to consider contacting is DSS. However, contacting DSS is akin to contacting law

[158] Frederickson, Caroline and Vania Leveille, Eradicating Slavery: Preventing the Abuse, Exploitation and Trafficking of Domestic Workers by Foreign Diplomats and Ensuring Diplomat Accountability at 3, Statement for the Record at House Foreign Affairs Committee Hearing (Oct. 18, 2007), available at www.aclu.org.

[159] Bureau of Consular Affairs, U.S. State Dept. "Rights and Protections for Temporary Workers" pamphlet, available at www.travel.state.gov.

enforcement, thus it is best to consult with an immigration attorney before doing so. DSS can grant continued presence for your client and they can certify your client for a T or U-visa. For cases arising in the Washington metro area, the best person to contact at DSS is:

Andrew S. Parker
Branch Chief / Supervisory Special Agent
U.S. Department of State
Diplomatic Security Service Headquarters
Criminal Fraud Investigations Branch
ParkerAS@state.gov
Desk: (571) 345-2934

Many of the international organizations whose employees are allowed to sponsor G-5 workers also have their own internal grievance procedures and codes of conduct with regards to the treatment of G-5 workers. Please see the International Employees chapter for further of discussion of this topic.

Civil Remedies

Section 203(c) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 provides A-3 and G-5 visa holders some protection against deportation while they pursue civil legal claims against former employers. If an A-3 or G-5 visa holder files a civil action alleging a violation of any term of their employment contract, or a violation of any federal, state, or local law governing the terms and conditions of their employment, the Attorney General and Secretary of Homeland Security *must* defer action on deportation and permit that person to remain and work legally in the United States so that they can participate in the legal proceedings.

There are two major exceptions to this rule: (1) if the person is inadmissible or otherwise deportable under the Immigration and Nationality Act they can still be deported, and (2) if the Attorney General or Secretary of Homeland Security finds that the person has failed to exercise due diligence in pursuing their civil case or has needlessly dragged on the proceedings, they can still be deported.

Diplomatic Immunity

A further complication is that if an employer has diplomatic status, the employee's claims may be stayed or dismissed due to claims of "diplomatic immunity." This possibility should not discourage the client from filing suit, as the case law on "diplomatic immunity" is constantly changing (largely in workers' favor).[160] Nonetheless, both client and attorney should understand at the outset that filing suit against a diplomat will mean many months of arguing over diplomatic status and the extent of that status, before reaching the merits of the primary case.

An employee can check with the DOS list to confirm whether the employer is a "registered" diplomat. DOS provides general information about diplomatic immunity at: www.state.gov. From this website one can find links to current and archived lists of registered

[160] See *Swarna v. Al Awadi,* 622 F. 3d 123 - Court of Appeals, 2nd Circuit 2010

diplomats, organized by country. If the employer's name does not appear on this list, the employer is likely not covered by any diplomatic immunity despite what he or she says or believes.

Even if the employer has diplomatic status, the employee may still refer to the contract of employment to attempt to make demands on the employer. If the employer's actions rise to the level of human trafficking, he or she may be entitled to protection under a T-visa or U-visa (see previous section). Any victim of abuse that rises to the level of human trafficking should call the National Hotline Human Trafficking Resource Center at 1-888-373-7888.

If the employer does not have diplomatic status or is an individual who works for an international organization (as in the case of G-5 visas) then the employer's vulnerability to legal action will need to be determined on a case-by-case basis, accounting for the laws, treaties, and other international agreements that govern that entity. Some international organizations will require employees to make use of internal tribunals to resolve conflicts, etc.

The act also provides for the suspension of A-3 and G-5 visa privileges for any mission or international organization whose members the State Department determines have abused or exploited an A-3 or G-5 visa holder, where the organization was found to have tolerated the mistreatment. So far the EJC knows of no entities that have had their visa privileges suspended under the act at this time.

"Guest Workers" on H-1B, H-2B, H-2A, & J-1 Visas

Introduction

The term "guest worker" once almost exclusively referred to "farm workers," but now guest workers can be found in almost every industry in America. For example, in recent years, "guest worker" schoolteachers have been imported from the Philippines to teach in D.C. and Prince George's County public schools. Many guest workers toil in Maryland's crab industry and in local amusement parks, while others have worked in places as diverse as Hershey's warehouses in Pennsylvania[161] and local nursing homes in Maryland and Virginia.

Such workers are often limited in their ability to affiliate with trade unions, and often their positions result in a carve-out or watering down of a pre-existing bargaining units. Most guest workers are also tied to their specific visa-sponsoring employers; thus, if they are fired or quit, they immediately lose their lawful immigration status. The latter reason is why handling employment claims of guest workers is such a delicate matter (and also why proportionally, guest workers face more employment-based violations than U.S. citizen workers). Nonetheless, all guest workers have a legal right to work in the United States (in the job or industry that their visa applies to), and all are covered by most federal and state employment laws.

The visa categories described below (H-1B, H-2B, H-2A, & J-1) are but a few of the myriad guest worker visa categories currently available. These categories were selected because they are the most common in the Washington, D.C., area.

[161] *Huffington Post*, "Hershey Student Guest Workers Win $200,000 In Back Pay After Claims Of Abusive Conditions" (Nov. 14, 2012) available at www.huffingtonpost.com/2012/11/14/hershey-student-guest-workers_n_2131914.html.

H-1B

The H-1B is a non-immigrant visa in the United States under the Immigration and Nationality Act, section 101(a)(15)(H). It allows U.S. employers to temporarily employ foreign workers in specialty occupations. The regulations define a "specialty occupation" as requiring theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor[162] including but not limited to biotechnology, chemistry, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, law, accounting, business specialties, theology, and the arts, and requiring the attainment of a bachelor's degree or its equivalent as a minimum[163] (with the exception of fashion models, who must be "of distinguished merit and ability").[164] Likewise, the foreign worker must possess at least a bachelor's degree or its equivalent and state licensure, if required to practice in that field. H-1B work-authorization is strictly limited to employment by the sponsoring employer. In recent years, legal service organizations in the D.C. metro area have seen an increase in the number of H-1B workers in a wide range of occupations from nurses to public school teachers.[165]

If a foreign worker in H-1B status quits or is dismissed from the sponsoring employer, the worker must either apply for and be granted a change of status to another non-immigrant status, find another employer (subject to application for adjustment of status and/or change of visa), or leave the United States. In other words, this visa *is transferrable*! It's very important for workers in the country on an H-1B visa to understand that they do not have to continue working for abusive employers. This is a unique quality of the H-1B visa. Many employers would have a worker believe that s/he is bound to the employer that sponsored the visa – this is not the case for an H-1B visa holder. If an H-1B visa holder wants to leave a job, or is fired, s/he should consult with both an employment law attorney and an immigration attorney as soon as possible. Moreover, if the visa is still valid, s/he should not be compelled to return to his or her country of origin.

Furthermore, an employer can petition for a green card for an employee in the United States on an H-1B (it also does not have to be the original visa-sponsoring employer). This process can take a long time, however, so workers who are interested in this prospect should consult with an immigration attorney as soon as possible. Once the process is under way, however, the worker should not change jobs until the green card is granted (or the green card petition will be considered null and void).

H-2B

The H-2B visa nonimmigrant program permits employers to hire foreign workers to come temporarily to the United States and perform temporary nonagricultural services or labor on a one-time, seasonal, peak load, or intermittent basis.

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[162] 8 U.S.C. 1184(i)(1)(A)
[163] 8 U.S.C. 1184(i)(1)(B)
[164] 8 U.S.C. 1101(a)(15)(H)(i)
[165] See article about H-1B workers public school teachers in Prince George's County, available at www.today.com/id/44708445/ns/today-today_news/t/foreign-teachers-american-dreams-vanish-flash/#.UdrcbzuR_Ss

The H-2B visa classification requires the Secretary of Homeland Security to consult with appropriate agencies before admitting H-2B non-immigrants. Homeland Security regulations require that, except for Guam, the petitioning employer first apply for a temporary labor certification from the Secretary of Labor indicating that: (1) there are not sufficient U.S. workers who are capable of performing the temporary services or labor at the time of filing the petition for H-2B classification and at the place where the foreign worker is to perform the work; and (2) the employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. The Department of Labor will review and process all H-2B applications on a first-in, first-out basis.

Employers seeking to employ temporary H-2B workers must apply for Temporary Employment Certification to the Chicago National Processing Center (NPC). An employer may submit a request for multiple unnamed foreign workers as long as each worker is to perform the same services or labor, on the same terms and conditions, in the same occupation, in the same area of intended employment during the same period of employment. Certification is issued to the employer, not the worker, and is ***not transferable*** from one employer to another or from one worker to another.

H-2A

An H-2A visa allows a foreign national entry into the U.S. for temporary or seasonal agricultural work. There are several requirements of the employer in regards to this visa. The H-2A temporary agricultural program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature. Currently in the United States there are about 30,000 temporary agricultural workers under this visa program. All of these workers are supposed to be covered by U.S. wage laws, workers' compensation and other standards, but covert debt bondage may be present.

The wage or rate of pay must be the same for U.S. workers and H-2A workers. The hourly rate must be at least as high as the applicable Adverse Effect Wage Rate (AEWR), federal or state minimum wage, or the applicable prevailing hourly wage rate, whichever is higher. The AEWR is established every year by the Department of Labor for every state except Alaska.

If a worker will be paid on a piece rate basis, the worker must be paid the prevailing piece as determined by the State Workers Agency (SWA). If the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the hourly rate, then the worker's pay must be supplemented to the equivalent hourly level. The piece rate offered must be no less than what is prevailing in the area for the same crop and/or activity.

<u>Hiring</u>

Hiring means an active effort, including newspaper and radio advertising in areas of expected labor supply. Such recruitment must be at least equivalent to that conducted by non-H-2A agricultural employers in the same or similar crops and area to secure U.S. workers. This must be an effort independent of and in addition to the efforts of the SWA for at least 15 days. In establishing worker qualifications and/or job specifications, the employer must designate only those qualifications and specifications that are essential to carrying out the job and that are normally required by other employers who do not hire foreign workers.

Housing and meals

The employer must provide free housing to all workers who are not reasonably able to return to their homes or residences the same day. Such housing must be inspected and approved according to appropriate standards. The housing provided by the employer must meet all of the Department of Labor Occupational Safety and Health Administration (OSHA) standards that were set forth at CFR 1910.142 or the full set of standards at 654.404-645.417. An alternative form of housing is rental housing, which has to meet local or state health and safety standards.

The employer must either provide three meals a day to each of the workers or furnish free and convenient cooking and kitchen for workers to prepare and cook their own meals. If the employer provides the meals, then the employer has the right to charge each worker a certain amount per day for the three meals.

Transportation and tools

There are several provisions on the transportation of workers. The amount of transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonably similar to the transportation charges for the distances involved. The employer is responsible for several forms of transportation depending on the situation. After the worker completes at least half of the work contract period, the employer must reimburse the worker for the costs of transportation and subsistence from the place of recruitment to the place of work if these expenses were charged to the worker. The employer must provide free transportation to the worker between the employer's housing and the area of work. Upon completion of the work contract, the employer must pay the costs of a worker's subsistence and transportation back to the place of recruitment. Some special conditions apply when the worker does not return to the area of recruitment because they are moving to another job. If the employer compensates foreign workers for transportation costs then they must do so for U.S. workers as well. If the employer provides transportation for foreign workers, they must provide transportation to U.S. workers as well.

The employer must cover the cost of tools and supplies necessary to carry out the work at no cost to the worker, unless this is uncommon and the occupation calls for the worker to provide certain items.

J-1

A J-1 visa is a non-immigrant visa issued by the United States to exchange visitors participating in programs that promote cultural exchange, especially to obtain medical or business training within the United States. All applicants must meet eligibility criteria and be sponsored either by a private sector or government program.

J-1 visitors may remain in the United States until the end of their exchange program, as specified on form DS-2019. Once a J-1 visitor's program ends, he or she may remain in the United States for an additional 30 days, often referred to as a "grace period," in order to prepare for departure from the country. If the visitor leaves the United States during these 30 days, the visitor may not re-enter with the J-1 visa.

The minimum and maximum duration of stay are determined by the specific J-1 category under which an exchange visitor is admitted into the United States.

As with other non-immigrant visas, a J-1 visa holder and his or her dependents are required to leave the United States at the end of the duration of stay.

Different categories exist within the J-1 program, each defining the purpose or type of exchange. While most J-1 categories are explicitly named in the federal regulations governing the J-1 program, others have been inferred from the regulatory language.

Private sector J-1 programs:

- Alien Physician
- Au pair and EduCare
- Camp Counselor (summer camp)
- Intern
- Student, secondary school
- Work/travel
- Teacher
- Trainee
- Flight training (J-1 privileges terminated effective June 1, 2010)

Referral Organizations & Resources

American Immigration Lawyers Association (AILA)

If you need to put a client in touch with an immigration attorney quickly (or, if you yourself want to consult with an immigration attorney briefly regarding a client), contact the American Immigration Lawyers Association (AILA). Use the "Find a Lawyer" search engine, available at www.ailalawyer.com. AILA is the largest, national association of more than 11,000 attorneys and law professors who practice and teach immigration law.

AILA's National Office
Suite 300, 1331 G St. NW
Washington, DC 20005-3142
Phone: 202-507-7600
Fax: 202-783-7853
www.aila.org

Resources in Washington, D.C.

Ayuda; 6925 B Willow St. NW; Washington, DC 20012. More information is available at www.ayudainc.org.
Central American Resource Center (CARECEN): 1459 Columbia Road NW; Washington, DC 20009. More information is available at: www.carecendc.org.

Washington Lawyer's Committee for Civil Rights, Immigrant and Refugee Rights Project: Assistance can be requested via online questionnaire available at www.washlaw.org.
Asian Pacific Legal Resource Center (APALRC): 1012 14th St. NW, Suite 450, Washington, DC 20005, Phone: (202) 706-7150. In Maryland, 11141 Georgia Ave., Suite 215, Silver Spring, MD 20902, Phone: (301) 942-2223. More information is available at www.apalrc.org.

Resources in Virginia

Hogar Hispano Immigration Services Project Call: 703-534-9805 for an appointment. The office is at 6201 Leesburg Pike, Suite 307, Falls Church, VA 22044. More information is available at www.hogarimmigrantservices.org.
Just Neighbors: www.justneighbors.org/clinics/
Centro Hispano de Frederick: www.centrohispanomd.com/
Tahirih Justice Center: (www.tahirih.org/) and, specifically their newly formed Human Trafficking Pro Bono Legal Center (www.tahirih.org/htprobono/)

Resources in Maryland

CASA de Maryland Legal Program: www.casademaryland.org/component/
Asian Pacific Legal Resource Center (APALRC) (see entry under Washington, DC referrals): www.apalrc.org/
Centro de los Derechos del Migrantes, Inc./Center for Migrants Rights (CDM): www.cdmigrante.org/