

## The U Visa and How It Can Protect Workers

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Unions and other worker rights advocates often bear witness to employer exploitation and abuse of immigrant workers. These abusive practices may violate labor and employment laws such as wage and hour protections, equal employment protections, health and safety regulations, or the right of workers to engage in protected concerted activity. Sometimes, however, employer abuse of workers rises to the level of criminal activity. In those situations, depending on the crime and other factors, workers may be eligible for a [U nonimmigrant visa](#) (“U visa”). By protecting workers from deportation and providing a path to permanent legal status, the U visa empowers workers who experience criminal activity in the workplace to come forward and cooperate with labor agency and/or law enforcement investigations. In turn, law enforcement agencies—including labor agencies—are authorized to “certify” the worker’s cooperation, making them eligible to apply for the U visa.

This explainer will provide a general overview of the purpose, benefits, eligibility, and requirements for the U visa and related immigration benefits, specifically as they apply to labor-based crimes.<sup>1</sup> Although the backlog of U visa cases has led to extremely long processing delays—often over ten years—recent guidance and updated policies such as Bona Fide Determinations and Labor-Based Deferred Action can provide U-eligible immigrant workers quicker access to immigration protections and work authorization. All of these protections serve to empower immigrant workers to hold abusive employers accountable and improve working conditions for all.

### What Is the U Visa’s Purpose?

Congress created the [U visa](#) as part of the Victims of Trafficking and Violence

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<sup>1</sup> For additional guidance on labor-based U visas, see Eunice Hyunhye Cho, U Visas for Victims of Crime in the Workplace: A Practice Manual, May 2014, <https://www.nelp.org/app/uploads/2015/03/U-Visas-for-Victims-of-Workplace-Crime-Practice-Manual-NELP.pdf>.

Protection Act of 2000 (TVPA).<sup>2</sup> Its purpose was to encourage immigrants to report crimes to law enforcement and to afford protection for those willing to cooperate.<sup>3</sup> Congress intended that the law would protect victims of domestic violence and other violent crimes, but it also explicitly expressed its intent that the visa protect against qualifying workplace-related crimes. Indeed, the U visa’s [list of “Qualifying Criminal Activity”](#) includes several work-related crimes, though it is worth noting that many other crimes can occur in the workplace. Further, the U visas can be obtained for “substantially similar” crimes to those enumerated in the list.

### **What Are the Benefits of the U Visa?**

Benefits of U nonimmigrant status include:

- ▶ Lawful nonimmigrant status for up to four years;
- ▶ Four years of work authorization;
- ▶ Derivative benefits for spouses and children under 21;
- ▶ Eligibility to adjust status to lawful permanent resident after three years.

### **How does a Worker become Eligible for a U Visa?**

To be eligible for a U visa, a worker must meet the following criteria:<sup>4</sup>

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

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<sup>2</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 1513(a), 114 Stat. 1464, 1533 (2000).

<sup>3</sup> *Id.*; see also, 3 USCIS Policy Manual C. 1 Purpose and Background, (<https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-1>).

<sup>4</sup> 8 U.S.C. 1101(a)(15)(U).

USCIS will not consider a U visa petition without a completed law enforcement certification.

### **Which Government Entities Have Certifying Authority?**

A number of government entities have the authority to certify U visas, including federal, state, and local law enforcement agencies, prosecutors, judges, and other authorities with responsibility for the investigation or prosecution of qualifying criminal activities.<sup>5</sup> Also included in that list are federal, state, and local agencies that enforce employment and labor laws, such as the U.S. Department of Labor, the Equal Employment Opportunity Commission, and the National Labor Relations Board.<sup>6</sup>

Since the inception of the U visa program, there has been considerable confusion among government agencies regarding certifying authority and the identification of qualifying criminal activity. It is important to note that, when working with an agency, agency rules permit U visa certification based on a crime that is detected even if the certifying agency has no authority to prosecute that crime.<sup>7</sup> Agencies are given this broad certifying authority partly to further Congress's intent to "[s]trengthen the ability of law enforcement agencies to investigate and prosecute cases...."<sup>8</sup>

### **Qualifying Criminal Activity in the Labor Context**

Despite having certifying authority, some labor agencies will only certify certain QCA's that typically arise in the labor context, while others will certify any QCAs that are detected in the course of the agency's enforcement of labor laws. The

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<sup>5</sup> 8 C.F.R. § 214.14(a)(2) (2011).

<sup>6</sup> New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,019 (Sept. 17, 2007).

<sup>7</sup> The U visa regulations define the phrase "investigation or prosecution of a qualifying crime or criminal activity" broadly, declaring that "[i]nvestigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity." 8 C.F.R. § 214.14(a)(5) (2011). Thus, an agency that "detects" qualifying criminal activity (such as, for example, involuntary servitude or witness tampering) in the course of the exercise of its standard investigatory authority (into matters such as, for example, wage payment) is authorized to issue a U visa certification pursuant to DHS regulations—even when that agency has no authority to *prosecute* that criminal activity.

<sup>8</sup> See *supra* n. 2.

table below sets forth the qualifying crimes for which labor and employment law agencies will certify an applicant’s petition for U nonimmigrant status.<sup>9</sup>

**Table: Labor Agencies Certifying U Visas**

<b>LABOR AGENCY</b>	<b>U Certifying AUTHORITY?</b>	<b>CRIMES AGENCY WILL CERTIFY</b>
<a href="#">U.S. DOL WHD</a>	Yes	Trafficking, Involuntary Servitude, Forced Labor, Peonage, Witness Tampering, Obstruction of Justice, Extortion, Fraud in Foreign Labor Contracting
<a href="#">U.S. DOL OSHA</a>	Yes	Trafficking, Involuntary Servitude, Forced Labor, Peonage, Witness Tampering, Obstruction of Justice, Extortion, Fraud in Foreign Labor Contracting, Murder, Manslaughter, Felonious Assault; will consider other QCA’s or substantially similar crimes.
<a href="#">EEOC</a>	Yes	Trafficking, any qualifying crime related to its enforcement of discrimination laws
<a href="#">NLRB</a>	Yes	Trafficking, any qualifying crime related to its enforcement of labor laws
<a href="#">State Agencies</a>	Varies by state	Varies by state

### **What is the Process to Apply for a U Visa?**

If a worker experiences a qualifying crime and obtains a certification from labor agency, they must apply for a U visa with the United States Citizenship and Immigration Service (“USCIS”). The worker, or someone on the worker’s behalf, must submit the [Form I-918, Petition for U Nonimmigrant Status](#), along with Supplement A if they are including family members in their request, and Supplement B, which contains the requisite certification from a law enforcement agency (which can be a labor or employment agency) citing a specific Qualifying

<sup>9</sup> This table was adapted from the following resource: Mary Yanik, Jessica Bansal, Ann Garcia & Lynn Damiano Pearson, Practice Manual: Labor-Based Deferred Action, Table 7 (Mar. 24, 2023), [https://www.nilc.org/wp-content/uploads/2023/03/2023\\_24March-labor-deferred-action-advisory.pdf](https://www.nilc.org/wp-content/uploads/2023/03/2023_24March-labor-deferred-action-advisory.pdf).

Criminal Activity. The worker must also include supplemental evidence such as a personal statement that provides a narrative of the crimes, and evidence that demonstrates that the worker suffered “substantial abuse” as a result of the criminal activity. Lastly, the U visa offers a generous waiver, that allows applicants to waive grounds of inadmissibility that could otherwise be a barrier to adjusting their status and obtaining a green card.

### **What Is the U Visa Bona Fide Determination Process?**

For many years, USCIS has faced a significant and growing backlog of U visa applications, with processing times for those who file now expected to exceed fifteen years. In June of 2021, in an effort to mitigate the hardship of these delays on meritorious applicants, USCIS announced a new system granting deferred action and employment authorization to petitioners with “bona fide” applications who do not pose a threat to national security. Through this bona fide determination process (“BFD”), USCIS will grant the applicant deferred action for a period of 4 years. Additionally, the applicant may receive a 4-year employment authorization card pursuant to the grant of deferred action. Both grants of deferred action and employment authorization may be renewed if the underlying petition has not yet been adjudicated by the time the 4-year validity period of the initial grant expires. Unfortunately, delays persist in the BFD process, which processing times taking approximately five years from the date of initial filing at the time of writing.

### **How Does A U Visa Petitioner Obtain Bona Fide Determination Benefits?**

No separate form is required for BFD consideration. Upon receipt of an applicant’s petition for U nonimmigrant status, the USCIS will conduct an initial review to determine whether the application is meritorious on its face. If so, USCIS will then issue a letter stating the applicant has received deferred action for a period of 4 years. If a worker wants to receive a work permit through the BFD process, the applicant must submit Form I-765 under eligibility category (c)(14), Form I-765 Worksheet, as well as the associated filing fee. To avoid further delays, such applicants should file their application for employment authorization concurrently with the initial U visa petition.

## U Visa & Labor-Based Deferred Action

In 2023, the Department of Homeland Security [announced](#) a centralized process for workers to request deferred action and work authorization for four years if their employers are subject to a labor dispute with a local, state or federal agency. The purpose of this policy is to support the labor agencies' enforcement interests while protecting workers from immigration-based retaliation and empowering them to report labor violations. Guidance and FAQs on this process is available on the [DHS website](#).

A key requirement of the labor-based deferred action process is that the labor agency issue a letter—referred to as a Statement of Interest (“SOI”)—supporting deferred action for a specific group of workers. Since cases involving labor violations that give rise to an SOI may also involve qualifying crimes for U visa purposes, it is possible for workers to be eligible for both types of immigration benefit. Each federal labor agency and many state labor agencies have issued guidance on requesting SOIs.<sup>10</sup>

A key advantage of labor-based deferred action is the processing times. These requests are typically adjudicated in a few months, offering workers a far quicker path to immigration protections and work authorization. Meanwhile, a worker may pursue a U visa, which could lead to a bona determination and separate grant of deferred action, when labor-based deferred action expires.

## Case Examples

**Scenario 1:** During a union organizing campaign, workers file a charge with the National Labor Relations Board (NLRB) alleging the employer has retaliated against them. While the NLRB was investigating the merits of the charge, the Board agent discovered that the employer has threatened workers with calling U.S. Immigration and Customs Enforcement (ICE) if they cooperate with the Board's investigation.

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<sup>10</sup> See *supra* n. 3. The Labor-Based Deferred Action Practice Manual provides comprehensive guidance on requesting SOIs and filing requests.

### **Are workers eligible for a U visa?**

Potentially, yes. The workers who were threatened by the employer may be eligible for a U visa based on the crimes of witness tampering and obstruction of justice even though the NLRB itself has no enforcement authority over those crimes. The NLRB would have to issue individual certifications for each worker who was threatened, and each worker would need to demonstrate in their U visa petition that they incurred substantial mental or physical harm as a result of the crime.

### **Are the workers eligible for a Bona Fide Determination?**

Any worker who applies for a U visa will be automatically considered for a BFD. USCIS adjudicators will decide whether to grant a BFD based on the likelihood that the U visa will ultimately be approved.

### **Are the workers eligible for Labor-Based Deferred Action?**

Likely, yes. Upon the request of a worker or advocates, the NLRB would likely issue a Statement of Interest to protect all the workers at the worksite seeking to unionize for the duration of their investigation and enforcement action. Thus, both the workers who may qualify for a U visa and other workers who are potential witnesses or victims who have yet to cooperate in the investigation could request a 4-year grant of labor-based deferred action and work authorization.

**Scenario 2:** Alia, a factory worker, files a complaint for sexual harassment at work with the EEOC. During its investigation, the EEOC learns that the employer would routinely rub up against the worker while she stood at the assembly line. Once he groped her as she was coming out of the bathroom, though he pretended to just bump into her. The woman has become anxious and fearful whenever she goes to work and has trouble sleeping

### **Is this Worker Eligible for U Visa?**

Alia may be eligible for a U visa based on abusive sexual contact. The EEOC could certify this QCA based on its enforcement of laws prohibiting sexual harassment. She could submit evidence of her mental anguish as a result of the employer's sexual contact as evidence of substantial harm.



**Is this eligible for a Bona Fide Determination?**

Yes, she would be considered for a BFD if she files a U visa application.

**Are Workers at this Worksite eligible for Labor-Based Deferred Action?**

Yes. To investigate these allegations of sexual harassment, the EEOC is likely to issue a Statement of Interest supporting deferred action for workers at this worksite.

**Looking Forward**

**Legislative Advocacy to Expand the Rights of Immigrant Workers**

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

In March 2023, Reps. Judy Chu (CA-28) and Robert C. “Bobby” Scott (VA-03) re-introduced the Protect Our Workers from Exploitation and Retaliation (POWER) Act (H.R. 1828), which is designed to provide important labor protections for immigrants and contains vital safeguards against retaliation by employers. In addition to other changes, the POWER Act would expand the U visa’s reach by allowing workers to receive a U visa if they are involved in a civil workplace claim and reasonably fear or have actually been threatened with force, physical restraint, serious harm, or other abuses. Further, it would create statutory temporary protections for workers who have filed a workplace claim or are materials witnesses in any pending or anticipated workplace claim.