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Relief for Guestworkers: Employer Perjury as a Qualifying Crime for U Visa Petitions

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RELIEF FOR GUESTWORKERS: EMPLOYER PERJURY AS A QUALIFYING CRIME FOR U VISA PETITIONS

*Lucy Benz-Rogers**

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INTRODUCTION

Migrant workers in the federal guestworker program make up an important part of the United States workforce and economy. The Department of State granted over 115,000 H-2 guestworker visas during the 2012 fiscal year.¹ These workers often enter into debt with predatory lenders in their home countries in order to pay illegal recruitment fees and travel costs, and leave their families behind to come to work in the United States.² Guestworkers are also frequently victims of false or misleading statements about the job opportunities awaiting them and are subject to workplace threats and mistreatment upon arrival.³

The guestworker program ties a foreign worker to a single United States employer and prevents the worker from changing jobs or rejecting employer demands without losing his or her legal status in the United States. If a worker has a complaint, he or she is at risk of

1. *Multi-Year Graphs*, U.S. DEP’T OF STATE, <http://travel.state.gov/content/visas/english/law-and-policy/statistics/graphs.html>. In the 2012 fiscal year there were 65,345 visas issued for H-2A temporary agricultural workers, and 50,009 visas issued for H-2B temporary non-agricultural workers. *Id.*

2. See S. POVERTY LAW CTR., *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES* 9 (2013), available at <http://www.splcenter.org/sites/default/files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf> (“U.S. employers almost universally rely on private individuals or agencies to find and recruit guestworkers in their home countries, mostly in Mexico and Central America. These labor recruiters usually charge fees to the worker—sometimes thousands of dollars—to cover travel, visas and other costs, including profit for the recruiters. The workers, most of whom live in poverty, frequently must obtain high-interest loans to come up with the money to pay the fees. In addition, recruiters sometimes require them to leave collateral, such as the deed to their house or car, to ensure that they fulfill the terms of their individual labor contract.”).

3. See *id.* at 28 (“Job contractor involvement in guestworker programs is also problematic for foreign workers. H-2 workers, who usually speak no English and have no ability to move about on their own, are completely at the mercy of these brokers for housing, food and transportation. No matter how abusive the situation, even if workers are not paid and their movements are restricted, they typically have no recourse whatsoever.”).

being fired and having to return to his or her home country.⁴ Consequently, legal challenges against guestworker employers have been hampered by guestworkers' fears of speaking out about workplace abuses. This allows violations like unpaid wages, unsafe working conditions, inadequate housing facilities, and retaliation to occur with impunity.⁵ Filing complaints is difficult for guestworkers because most do not speak sufficient English and lack resources like transportation, time, and money to pay for legal assistance.⁶ Even if a guestworker does succeed in filing a complaint, the employer may still effectively shut her out of the guestworker program by refusing to hire her again and informally blacklisting her.⁷

One supposed safeguard against such exploitation is that employers are required to attest under penalty of perjury to various conditions in the application to the government to receive guestworkers. These conditions include promises to pay the minimum or prevailing wage as determined by the Department of Labor (DOL), uphold health and safety laws, and not retaliate against workers who make complaints.⁸ Employers must also comply with all immigration laws and must register their employees with the Department of Homeland Security (DHS). There is little to no oversight of the guestworker programs, however, which creates a culture of fear among guestworkers. While employers are legally bound by the terms of the guestworker programs and applicable labor laws, enforcement is based upon the employers agreeing under penalty of perjury to abide by these terms. This "attestation model"

4. David Bacon, *Be Our Guests*, NATION, Sept. 27, 2004, available at <http://dbacon.igc.org/Immigrants/2004guests.html> (discussing the experience of an H-2A guestworker placed on a blacklist in retaliation for legal action); see S. POVERTY LAW CTR., *supra* note 2, at 41 ("A more fundamental barrier to justice is that guestworkers risk blacklisting and other forms of retaliation against themselves or their families if they sue to protect their rights. In the midst of one lawsuit filed by the SPLC, a labor recruiter threatened to burn down a worker's village in Guatemala if he did not drop his case.").

5. See *infra* Part II.

6. S. POVERTY LAW CTR., *supra* note 2, at 40 ("Because of the lack of government enforcement, it generally falls to the workers to take action to protect themselves from abuses. Unfortunately, filing lawsuits against abusive employers is not a realistic option in most cases. Even if guestworkers know their rights—and most do not—it is rare that workers will have access to an affordable, private attorney who will take their cases. Representation of migrant workers presents unique challenges, including language barriers and the fact that most workers will have to return to their country during the litigation, that tend to dissuade many private attorneys from filing guestworker cases.").

7. See S. POVERTY LAW CTR., *supra* note 2, at 41; Bacon, *supra* note 4.

8. See *infra* Part I.A.

places the onus on the workers to report violations and enables unscrupulous employers to ignore their legal obligations. Guestworkers face a difficult power imbalance that leads many to quietly acquiesce to substandard wages and working conditions.

One potential remedy for guestworkers who are subjected to workplace violations is the U Visa. U Visas are granted to noncitizen victims of specific crimes who cooperate with United States authorities in reporting and investigating the crime.⁹ Some of the statutorily enumerated qualifying crimes for a U Visa that directly impact guestworkers are perjury, fraud in foreign labor contracting, and obstruction of justice.¹⁰ Many employers knowingly and willfully violate the terms of employment contracts and disregard the conditions placed upon them by the DOL certification they sign under penalty of perjury, which leaves them potentially liable for perjury, fraud in foreign labor contracting, or obstruction of justice.¹¹

This Note examines the legal and strategic viability of using these employer violations as qualifying crimes for U Visas, and how U Visas might be used as a tool for aiding guestworkers and putting an

9. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000); New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (to be codified at 8 C.F.R. pt. 103).

10. 8 U.S.C. § 1101(a)(15)(U)(iii) (Supp. 2013) (“The criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: 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 § 1351 of Title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.”).

11. See *infra* Part I.B; see also Elizabeth Johnston, *The United States Guestworker Program: The Need for Reform*, 43 VAND. J. TRANSNAT’L L. 1121, 1147 (2010) (“The DOL could require employers to make a full report to the DOL of workers’ hours and wages. This report could be made under penalty of perjury and serve as a starting point for hunting abusive employers.”); AM. FED’N OF LABOR-CONG. OF INDUS. ORGS., AFL-CIO’S MODEL FOR ‘FUTURE FLOW’: FOREIGN WORKERS MUST HAVE FULL RIGHTS 3, available at http://fcnl.org/assets/model_for_future_flow.pdf (last visited Oct. 30, 2014) (“Congress should require all employers to certify to the Labor Department, at the conclusion of a guest worker’s term of employment and under penalty of perjury, that they have complied with the terms of the contract and the law.”); S. POVERTY LAW CTR., *supra* note 2, at 44 (“Congress should require that all employers report to the Department of Labor, at the conclusion of a guestworker’s term of employment and under penalty of perjury, on their compliance with the terms of the law and the guestworker’s contract. There currently is no mechanism that allows the government to ensure that employers comply with guestworker contracts.”).

end to employer abuses. Part I introduces the federal guestworker program and the employer certification process required for guestworkers. After describing these obligations, Part I also introduces applicable federal perjury statutes and discusses their application in the guestworker context for those employers who violate their obligations. Part II highlights the realities of the exploitation that guestworkers face and how these abuses violate the terms of the guestworker program and federal labor laws. Part III provides background on the U Visa remedy for noncitizen victims of certain enumerated crimes, and discusses how employer perjury and fraud could be used to remedy workplace violations by employers. This Note concludes by recommending that advocates for guestworker rights pursue U Visas for employer fraud and perjury based on workplace abuses and offers suggestions for creating successful petitions.

I. THE FEDERAL GUESTWORK PROGRAM

A. The Guestworker Program

The United States has a long history of hosting foreign guestworkers, particularly in agriculture. Facing labor shortages during World War II, the United States reached a bilateral agreement with Mexico to receive temporary agricultural workers from Mexico.¹² This program, known as the Bracero program, brought millions of Mexican workers to the agricultural fields of the United States between 1942 and 1964.¹³

The current guestworker program is comprised of the H-2A program for agricultural workers, and the H-2B program for workers in other industries such as hospitality or industrial work.¹⁴ The current H-2A and H-2B visa scheme was not devised until 1986.¹⁵ The visas themselves are granted by DHS, pending certification from the DOL allowing the employer to host temporary foreign workers.¹⁶

12. See, e.g., Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1605–06 (2005).

13. See *id.*

14. 8 U.S.C. §1101(a)(15)(H)(ii)(a)–(b) (2012).

15. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3411 (codified as amended at 8 U.S.C. §1101(a)(15)(H)(ii)(a)–(b)).

16. *H-2A Temporary Agricultural Program*, U.S. DEP'T LABOR, EMP. & TRAINING ADMIN, <http://www.foreignlaborcert.doleta.gov/h-2a.cfm>; *H-2B Certification for Temporary Nonagricultural Work*, U.S. DEP'T LABOR, EMP. & TRAINING ADMIN., <http://www.foreignlaborcert.doleta.gov/h-2b.cfm>.

An H-2A worker is a noncitizen with a residence in a foreign country who comes to the United States on a temporary basis to perform agricultural labor when unemployed domestic workers cannot be found.¹⁷ There is no annual cap on the number of H-2A visas that can be issued.¹⁸ To participate in the H-2A program, the agricultural employer must first obtain certification from the DOL.¹⁹ The Secretary of Labor must certify that there are not enough domestic workers willing to do the work described in the petition, and that the temporary employment of the foreign worker will not adversely impact the wages and working conditions of American employees.²⁰ A typical H-2A worker would work on a farm helping to cultivate and harvest crops.²¹

An H-2B worker is a noncitizen with a residence in a foreign country who comes to the United States temporarily to perform non-agricultural labor.²² Just as in the H-2A program, an employer must demonstrate that qualified persons in the United States are not available and that the terms of employment “will not adversely affect the wages and working conditions of U.S. workers similarly employed.”²³ The job or employer’s need must also be one-time, seasonal, during a peak load, or intermittent and for less than one year.²⁴ Examples of some of the larger categories of H-2B employment include factory and industrial workers, and low-wage

17. 8 U.S.C.A. § 1101(a)(15)(H)(ii)(a) (2012). Employment is of a seasonal nature “where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations.” 20 C.F.R. § 655.103(d) (2014). Employment is temporary “where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.” *Id.*

18. See 8 U.S.C. § 1184(g) (2012); Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125, 135 n.77 (2009).

19. *H-2A Temporary Agricultural Program*, *supra* note 16.

20. 8 U.S.C. § 1188(a)(1)(A)–(B) (2012).

21. Crops with increasing utilization of H-2A guestworkers include Arizona’s lettuce (125.7% increase between 2011 to 2012), South Carolina’s peaches (106.4%), Arkansas’ tomatoes (99.0%), Virginia’s tobacco (98.7%), Florida’s oranges (66.2%), Washington’s cherries (57.3%), and Georgia’s onions (52.8%). EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR, H-2A TEMPORARY AGRICULTURAL VISA PROGRAM FY 2012—QUARTER 3: SELECT STATISTICS, *available at* http://www.foreignlaborcert.doleta.gov/pdf/h_2a_selected_statistics.pdf.

22. *H-2B Certification for Temporary Nonagricultural Work*, *supra* note 16.

23. 20 C.F.R. § 655.1(a)(2) (2014).

24. See *H-2B Certification for Temporary Nonagricultural Work*, *supra* note 16.

service industry employees such as hotel workers and amusement park or restaurant employees.²⁵

One key feature of both the H-2A and H-2B visas is that the employees are bound to the employer that received the certification to host them.²⁶ A guestworker is required to leave the United States almost immediately if his or her employment is terminated or he or she does not show up to work.²⁷ The DOL regulations do allow for the extension of a guestworker visa in certain instances, but this requires finding a new sponsoring employer quickly, and in practice this is rarely a possibility for guestworkers.²⁸ On the one hand, strictly limiting employment to a single employer in this way is what distinguishes a guestworker program from the general employment-based immigration pool. Nevertheless, it also makes it highly unlikely that the workers will feel empowered and willing to denounce workplace abuses for fear of being shut out of the program completely. This reticence is compounded by the practice of informal blacklisting among employers, blocking workers who speak out against employers from future participation in the program.²⁹

1. *Employer Attestations Under Penalty of Perjury*

In terms of enforcement and oversight of the guestworker program, the DOL uses various forms and documentation as part of an “attestation model” that relies on the threat of audits or, even more tenuously, on reports of violations by the workers that might spark an inquiry.³⁰ The DOL does not engage in a direct analysis of recruitment documents or recruitment procedures.³¹ Instead, an employer’s application for temporary labor certification is usually

25. See EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR, Office of Foreign Labor Certification: H-2B TEMPORARY NON-AGRICULTURAL VISA PROGRAM—SELECTED STATISTICS, FY 2012 YTD, *available at* http://www.foreignlaborcert.doleta.gov/pdf/h_2b_select_statis_oct2011_may_2012.pdf.

26. 8 C.F.R. § 214.2(h)(2)(i)(d) (2013).

27. *See id.*; *see also* 8 C.F.R. § 214.2(h)(5)(viii)(B)–(C), (h)(13)(i)(A).

28. *See id.*

29. *See* S. POVERTY LAW CTR., *supra* note 2, at 41; Bacon, *supra* note 4.

30. *See* Labor Certification for the Permanent Employment of Aliens in the U.S.; Implementation of New System, 69 Fed. Reg. 77,326, 77,396 (Dec. 27, 2004) (to be codified at 20 C.F.R. pt. 656.20); *see also* Geoffrey Forney, *Material Misrepresentation—Labor Certification, Actual Minimum Requirements and Employer Sanctions*, 23 GEO. IMMIGR. L.J. 463, 466 (2009).

31. *See* Labor Certification for the Permanent Employment of Aliens in the U.S.; Implementation of New System, 69 Fed. Reg. at 77,396; Forney, *supra* note 30, at 466.

quickly and cursorily approved, subject to the attenuated threat of potential audits and penalties to deter fraud and noncompliance.³²

The recruitment and hiring process for H-2A and H-2B guestworkers requires the employer to make numerous statements under penalty of perjury about factors such as their hiring process, and the pay and conditions of the work to be performed.³³ As part of the DOL labor certification process and the subsequent visa application process, employers agree under penalty of perjury to be bound by federal law and federal regulations that control the guestworker program.³⁴ Employers have extensive obligations under these laws and regulations, some of which are enumerated in the forms that the employers must submit to the DOL and the DHS. Other obligations are enumerated as regulations in the Code of Federal Regulations.³⁵ Federal statutes governing employment and labor, such as the Fair Labor Standards Act (FLSA), also apply to guestworkers, and employers are still bound by these laws when they apply for temporary labor certification.³⁶

To understand the attestation model, the first step is to examine precisely what statements that employers attest to on their temporary labor certification applications and the obligations they undertake, as detailed in the following forms and regulations.

a. ETA Form 9142

ETA Form 9142 is the general application for Temporary Employment Certification.³⁷ Identical versions are used for both H-2A and H-2B guestworkers.³⁸ ETA 9142 asks for general information about the employer, the prospective employees, and the type of work

32. See Forney, *supra* note 30, at 466 (citing Lorna Rogers Burges, *How the PERM Labor Certification Process Evolved*, in THE DAVID STANTON MANUAL ON LABOR CERTIFICATION 5 (Josie Gonzalez ed., 3d ed. 2005)).

33. See generally U.S. DEP'T OF LABOR, H-2A APPLICATION FOR TEMPORARY EMPLOYMENT, ETA FORM 9142A [hereinafter ETA FORM 9142A], available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142A.pdf; U.S. DEP'T OF LABOR, H-2B APPLICATION FOR TEMPORARY EMPLOYMENT, ETA FORM 9142B [hereinafter ETA FORM 9142B], available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142B.pdf.

34. See ETA FORM 9142A, *supra* note 33; ETA FORM 9142B, *supra* note 33.

35. See ETA FORM 9142A, *supra* note 33; ETA FORM 9142B, *supra* note 33.

36. See generally Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2012).

37. See U.S. DEP'T OF LABOR, APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION: ETA FORM 9142 [hereinafter ETA FORM 9142], available at <http://www.foreignlaborcert.doleta.gov/pdf/OMBETAForm9142.pdf>.

38. See generally ETA FORM 9142A, *supra* note 33; ETA FORM 9142B, *supra* note 33.

to be performed.³⁹ In signing this form, the employer attests to the information provided and certifies under penalty of perjury that there are not sufficient U.S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the United States who are similarly employed.⁴⁰

b. ETA Form 9142: Appendices A and B

Appendices A and B to ETA Form 9142 provide additional information to the DOL about the employer and prospective employees.⁴¹ Guestworker employers are required to submit these forms to receive certification to hire guestworkers. Appendix A is for H-2A employers, and Appendix B is for H-2B employers.⁴² Both appendices require numerous attestations from the employer about the conditions of the work under the federal false statement statute, 18 U.S.C. § 1001.⁴³

Appendix A requires the employer to agree to wage requirements, and to certify that the job opportunity is open to domestic workers and that it will offer the same wage, benefits, and terms to domestic workers.⁴⁴ Statutory and regulatory requirements provide for numerous worker protections and employer requirements with respect to wages and working conditions that do not apply to nonagricultural programs.⁴⁵ Appendix A includes a list of sixteen statements to which the employer must swear.⁴⁶ The employer must certify to the DOL, under penalty of perjury, that the job opportunity is a full-time, temporary position that is otherwise open to any qualified U.S. worker and that the employer has made bona fide

39. See generally ETA FORM 9142A, *supra* note 33; ETA FORM 9142B, *supra* note 33.

40. See ETA FORM 9142A, *supra* note 33, at 6 (requiring employer to attach APPENDIX A, *infra* note 37); ETA FORM 9142B, *supra* note 33, at 6 (requiring employer to attach APPENDIX B, *infra* note 42).

41. See generally U.S. DEP'T OF LABOR, H-2A APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION: ETA FORM 9142A—APPENDIX A [hereinafter APPENDIX A], available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142A_APPENDIX.pdf; U.S. DEP'T OF LABOR, H-2B APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION: ETA FORM 9142B—APPENDIX B [hereinafter APPENDIX B], available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142B_APPENDIX.pdf.

42. See APPENDIX A, *supra* note 41, at A.1; APPENDIX B, *supra* note 41, at B.1.

43. See APPENDIX A, *supra* note 41, at A.3; APPENDIX B, *supra* note 41, at B.2; see also *infra* Part I.B (discussing 18 U.S.C. § 1001 in more detail).

44. See APPENDIX A, *supra* note 41, at A.1.

45. See *id.* at A.1–A.2; see generally APPENDIX B, *supra* note 41 (not including the same provisions as Appendix A).

46. See APPENDIX A, *supra* note 41.

efforts to recruit qualified U.S. workers.⁴⁷ The job opportunity must offer domestic workers the same benefits, wages, and working conditions as the H-2A workers.⁴⁸ The DOL can set wage requirements to ensure fair pay to the H-2A workers as well as to make sure there are no adverse effects on comparable U.S. workers.⁴⁹

Appendix B includes a lengthy employer declaration under penalty of perjury to the DOL.⁵⁰ Particularly relevant is that the employer must declare on this form that the terms of employment and working conditions are “normal to workers similarly employed;” that “the offered wage equals or exceeds the highest of the prevailing wage” as determined by the DOL; and that “the employer will comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety law.”⁵¹ 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, and during the same period of employment.⁵² Certification is issued to the employer, not the worker, and is not transferable from one employer to another.⁵³

In total, Appendix B includes a list of fourteen statements to which the employer must swear.⁵⁴ During the period of employment, the employer must comply with applicable Federal, State, and local employment-related laws and regulations, including employment-related health and safety laws.⁵⁵ As with the H-2A program, the employer must certify to the DOL under penalty of perjury that the job opportunity is a bona fide full-time, temporary position, the qualifications for which are consistent with the normal and accepted qualifications required by non-H-2B employers, and that the job opportunity is open to any qualified U.S. worker, but no such worker has been recruited.⁵⁶ Any U.S. workers who applied or will apply for the job were or will be rejected only for lawful, job-related reasons, and the employer must retain records of all rejections.⁵⁷ The offered

47. *See id.* at A.1.

48. *See id.*

49. *See id.*

50. *See* APPENDIX B, *supra* note 41, at B.2.

51. *Id.* at B.1.

52. *See id.*

53. *See id.* at B.2.

54. *See id.*

55. *See id.* at B.1.

56. *See id.*

57. *See id.*

wage must equal or exceed a prevailing wage as established by the DOL, or the applicable minimum wage laws.⁵⁸ The employer may not seek or receive payment of any kind from the employee for any activity related to obtaining labor certification, including payment of the employer's attorney fees, application fees, or recruitment costs.⁵⁹ Furthermore, the employer must attest that the dates of temporary need, reason for temporary need, and number of worker positions being requested for certification have been truly and accurately stated on the application.⁶⁰

c. I-9 and I-129, Petitions for a Non-Immigrant Worker

Once the DOL grants the employer certification for hiring, the employer must individually petition the United States Citizenship and Immigration Services (USCIS) for each potential hire with Form I-129.⁶¹ This form requires numerous employer signatures, depending on the type of employer or work, verifying the information included under penalty of perjury.⁶² This information includes basic facts regarding the employer and employee but does not address the specifics of obligations as to wages, work conditions, or employer conduct.⁶³

In conjunction with completing Form I-129, an employer must examine documents that evidence the identity and employment authorization of the potential employee. The employer, recruiter or referrer, and the potential employee must each complete an attestation on Form I-9 under penalty of perjury.⁶⁴ Similar to the I-129, the sworn information on the I-9 includes basic information on the employer and employee—specifically that the employer has reviewed the employee's information and documents and believes the

58. *See id.*

59. *See id.* at B.2.

60. *See id.*

61. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., FORM I-129: PETITION FOR A NONIMMIGRANT WORKER [hereinafter I-129], *available at* <http://www.uscis.gov/sites/default/files/files/form/i-129.pdf> (last visited Oct. 30, 2014).

62. *See id.* at 6, 10, 12.

63. *See id.* at 1, 3, 4.

64. U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., Form I-9: INSTRUCTIONS FOR EMPLOYMENT ELIGIBILITY VERIFICATION 8 [hereinafter I-9], *available at* <http://www.uscis.gov/sites/default/files/files/form/i-9.pdf> (last visited Oct. 30, 2014).

employee is authorized to work—but does not address specific employer obligations.⁶⁵

2. Further Regulatory Requirements

In addition to these written attestations, there are significant regulations by which H-2A and H-2B employers are bound and with which they must comply.⁶⁶ An agreement to comply with these regulations is arguably part of the labor certification process under penalty of perjury as described above. The DOL regulations that aim to ensure compliance in the H-2B program state that “information, statements, and data submitted in compliance with [immigration laws governing the H-2B program] or the regulations in this part are subject to [the federal false statement statute] 18 U.S.C. § 1001.”⁶⁷ Similar DOL regulations regarding the assurances and obligations of H-2A employers require compliance with “all applicable Federal, State and local laws and regulations, including health and safety laws . . . including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008,” adding that “an employer seeking to employ H-2A workers must agree as part of the Application for Temporary Employment Certification [Appendix A] and job offer that it will abide by the requirements of this subpart and make each of the following additional assurances.”⁶⁸

These regulations go beyond compliance with mere formalities of the guestworker program and seek to protect the rights of guestworkers, and offenses could be considered violations of the terms of labor certification agreed to under federal law. These regulations contain detailed and often fairly technical requirements, from reporting and notice guidelines to recruitment procedures and wage standards. For example, an employer of H-2B workers must inform USCIS if the worker fails to report to work within five work days of the start date; the worker leaves without notice and fails to report for work for five consecutive workdays without the consent of the employer; the worker is terminated prior to the completion of the H-2B labor or services for which he or she was hired; or the worker finishes the labor or services for which he or she was hired more than thirty days earlier than the date specified in the H-2B petition.⁶⁹

65. *See id.*

66. *See* 8 C.F.R. § 214.2(h)(5)–(6) (2013).

67. 29 C.F.R. § 503.8 (2014).

68. 20 C.F.R. § 655.135 (2014).

69. *See* 8 C.F.R. § 214.2(h)(6)(i)(F)(1) .

H-2B employers must also post posters in a conspicuous location at the place of employment, which set out the rights and protections for H-2B workers.⁷⁰ Employers must provide H-2B guestworkers with a copy of the job notice, as well as detailed earnings statements.⁷¹ H-2A employers are subject to similar, though generally much sparser, requirements.⁷² For example, H-2A employers are also required to post posters in a conspicuous location at the place of employment, which set out an employee's rights and protections, but there is not the same requirement for detailed earnings statements or job notices, and H-2A employers do not have the same DOL reporting requirements.⁷³ H-2B employers must provide or reimburse the worker for transportation costs to and from his or her home country to the worksite, with certain exceptions.⁷⁴ The employer may not pass on fees to the worker for costs "related to obtaining H-2B labor certification or employment, including payment of the employer's attorney or agent fees, application and H-2B Petition fees, recruitment costs, or any fees attributed to obtaining the approved Application for Temporary Employment Certification."⁷⁵

Getting directly at the issue of guestworker intimidation and retaliation, H-2A regulations require that "the employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against" an H-2A worker who has filed a complaint, instituted any proceeding, testified or is about to testify in any proceeding, consulted with an employee of a legal assistance program or an attorney, or exercised or asserted any right or protection afforded them.⁷⁶ In compliance with immigration and labor laws, including the Trafficking Victims Protection Reauthorization Act of 2008, the employer also may not hold or confiscate workers' passports, visas, or other immigration documents.⁷⁷ Further, H-2A employers are explicitly subject to the

70. 20 C.F.R. § 655.20(m).

71. *Id.* § 655.20(i), (l).

72. *See* 20 C.F.R. § 655.135.

73. *See id.* § 655.135(l).

74. 20 C.F.R. § 655.20(j)(1)(i).

75. *Id.* § 655.20(o).

76. 20 C.F.R. § 655.135(h).

77. *Id.* § 655.135(e).

FLSA, which has specific requirements that address payment of wages, including deductions from wages, and payment of overtime.⁷⁸

B. Applicable Federal Perjury and Fraud Law

The temporary labor certification process comes with a host of obligations and regulations to which employers are subject. The current model of enforcement is based on attestations under the law. To make the attestation model effective, however, there must be consequences for fraud, misrepresentations, and obstruction of justice for guestworker employers.

The risk of fraud and misrepresentation in the attestation model has been recognized by government officials and has been raised repeatedly by advocates of guestworker rights. In establishing the current application system, the final regulations stated:

Many commenters were concerned about the potential for fraud, misrepresentation, and non-meritorious applications in an attestation-based system. Some, but not all, of the measures we have taken to minimize these problems, include: a review of applications, upon receipt, to verify the existence of the employer and to verify the employer has employees on its payroll, and the use of auditing techniques that can be adjusted as necessary to maintain program integrity.⁷⁹

This concern was echoed in 2012 regulations that attempted to move away from an attestation model to a certification model for the H-2B program, under which H-2B recruitment would take place after the filing of the employer's application with the DOL. The regulations pointed to the concerns of advocates regarding fraud in the H-2B program.⁸⁰ Of particular significance behind this change

78. *Id.* (“The FLSA operates independently of the H-2A program and has specific requirements that address payment of wages, including deductions from wages, the payment of Federal minimum wage and payment of overtime.”).

79. Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77326-01, 77328 (Dec. 27, 2004) (to be codified at 20 C.F.R. pts. 655, 656).

80. Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10038-01, 10041 (Feb. 21, 2012) (to be codified at 20 C.F.R. pt. 655, 29 C.F.R. pt. 503) (“One commenter specifically pointed out that changes in the 2008 Final Rule made it easier for unscrupulous employers and their agents to use H-2B visas for the illicit purpose of suppressing wages. This same commenter suggested that a return to a compliance-based model brings us back to the proper focus of administering the H-2B program in a manner that fairly balances the protection of workers with the desires of employers Similarly, an advocacy group stated that many aspects of the attestation-based model deprive domestic workers of employment opportunities, adversely affect their wages and working conditions, and encourage, rather than curb, the well-documented fraud in the H-2B program.”).

was the Office of the Inspector General's report from 2011, finding that the DOL did not consider debarment actions against employers found by the Department to have violated the Foreign Labor Certification guidelines, and did not report debarred or disqualified employers for future exclusion from the system.⁸¹ A related report, although not cited in the regulatory findings, is a 2010 Government Accountability Office (GAO) report regarding abuses in the H-2B program. The report found evidence of wage violations and overtime violations in the H-2B program, and reviewed cases where H-2B employers were found to have submitted fraudulent information in their certification applications.⁸² Despite these official acknowledgements of employer fraud under the attestation model and the promulgation of the 2012 DOL regulations to address these concerns, these regulations have been prevented from being enforced due to litigation challenging the DOL's authority to regulate the H-2B program.⁸³

This section gives an overview of federal perjury statutes that could apply in the guestworker context. Notably, state or local laws related to the enumerated criminal activities may also serve as qualifying crimes; therefore, in addition to the overview of federal laws presented here, parallel state and local statutes may also be applicable to guestworker employer fraud.⁸⁴

81. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF LABOR, DEBARMENT AUTHORITY SHOULD BE USED MORE EXTENSIVELY IN FOREIGN LABOR CERTIFICATION PROGRAMS 4 (2010), *available at* www.oig.dol.gov/public/reports/oa/2010/05-10-002-03-321.pdf ("The Department was not required to use suspension and was not properly using debarment in administering the foreign labor certification programs. Specifically, it did not (a) consider debarring 178 FLC applicants based on the results of OIG investigations, and (b) report debarred or otherwise disqualified parties for inclusion on the governmentwide exclusion system.").

82. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1053, H-2B VISA PROGRAM: CLOSED CIVIL & CRIMINAL CASES ILLUSTRATE INSTANCES OF H-2B WORKERS BEING TARGETS OF FRAUD & ABUSE 4-10 (2010), *available at* <http://www.gao.gov/assets/320/310640.pdf>.

83. *See* *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1084-85 (11th Cir. 2013) (interpreting narrowly the DOL's ability to regulate the H-2B program); *see also* *Bayou Lawn & Landscape Servs., et al. v. Solis*, No. 3:11cv183 (N.D. Fla. Filed Apr. 26, 2012) (enjoining DOL from implementing the 2012 H-2B regulations); *Bayou Lawn & Landscape Servs., et al. v. Solis*, No. 3:11cv445 (N.D. Fla. Filed Sept. 11, 2011). *Compare with* *Louisiana Forestry Ass'n, Inc. v. Solis*, 889 F.Supp.2d 711 (E.D. Pa. 2012).

84. *See* 8 U.S.C. § 1101(a)(15)(U)(iii) (2012) ("The criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law . . .").

The general federal perjury law is laid out in 18 U.S.C. § 1621.⁸⁵ Section 1621(2) states in relevant part that whoever,

[I]n any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.⁸⁶

Section 1621 requires compliance with “the two witness rule” to establish that a statement is false. Under this rule, “the uncorroborated oath of one witness is not sufficient to establish the falsity of the testimony of the accused as set forth in the indictment as perjury.”⁸⁷ Thus, conviction under § 1621 requires that the government “establish the falsity of the statement . . . by the testimony of two independent witnesses or one witness and corroborating circumstances.”⁸⁸ If the rule is to be satisfied with corroborative evidence, the evidence must be trustworthy and support the account of the single witness upon which the perjury prosecution is based.⁸⁹

Section 1621 is most appropriately and commonly used in the context of official administrative proceedings under oath or court pleadings and proceedings, because there is a separate federal false statement statute that applies even without an oath administered and is not restricted by the two witness rule.⁹⁰ Therefore the general federal perjury statute may be more difficult to use as a qualifying crime, particularly regarding the forms submitted to DOL and DHS as part of a guestworker application. The Supreme Court has held

85. See 18 U.S.C. § 1621 (2012).

86. See *id.* § 1621(2).

87. *Hammer v. United States*, 271 U.S. 620, 626 (1926).

88. *Weiler v. United States*, 323 U.S. 606, 610 (1945); see also *United States v. Stewart*, 433 F.3d 273, 315 (2d Cir. 2006); *United States v. Chaplin*, 25 F.3d 1373, 1377 (7th Cir. 1994).

89. See *Weiler v. United States*, 323 U.S. 606, 610 (1945); *United States v. Stewart*, 433 F.3d 273, 315 (2d Cir. 2006) (quoting other sources) (“The rule is satisfied by the direct testimony of a second witness or by other evidence of independent probative value, circumstantial or direct, which is of a quality to assure that a guilty verdict is solidly founded. The independent evidence must, by itself, be inconsistent with the innocence of the defendant. However, the corroborative evidence need not, itself, be sufficient, if believed to support a conviction.”).

90. 18 U.S.C. § 1001 (2012).

that an oath for the purposes of Section 1621 cannot encompass statements made in “contexts less formal than a deposition.”⁹¹

The federal statute prohibiting false statements can be found at 18 U.S.C. § 1001.⁹² It prohibits the knowing or willful falsification or concealing of a material fact, or making a false or fraudulent statement in a document or application.⁹³ The ETA 9142, Appendix A, and Appendix Ball explicitly state that any false statements made on these forms and submitted to the DOL are punishable under § 1001.⁹⁴

There are also specific provisions regarding perjury and false statements within federal immigration law. Immigration fraud and perjury is prohibited by 8 U.S.C. § 1546.⁹⁵ Similar to § 1621, this statute contains a provision prohibiting false statements regarding a material fact in any form or document required by immigration laws.⁹⁶ The statute, in relevant part, punishes:

[W]hoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact.⁹⁷

Section 1546 is traditionally applied to immigrant petitioners who submit fraudulent information.⁹⁸ In terms of guestworker certification, it is important to note that the Tenth Circuit in *United States v. Phillips* held that falsified or forged materials submitted to

91. *Dunn v. United States*, 442 U.S. 100, 113 (1979).

92. *See* 18 U.S.C. § 1001.

93. *Id.* (“Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact; makes any false, fictitious or fraudulent statement or representation; or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in § 2331), imprisoned not more than 8 years, or both.”).

94. APPENDIX A, *supra* note 41; APPENDIX B, *supra* note 41.

95. *See* 8 U.S.C. § 1546 (2012).

96. *Id.* § 1546(a).

97. *Id.*

98. *See id.* The other provisions of this section prohibit the creation and possession of the falsification of documents such as visas and passports, but it is the provision regarding sworn statements in Subsection A that is most likely to apply to guestworker employers.

the DOL for employer and guestworker certification (which could include the ETA 9142 and Appendices A and B) do not fall within the purview of § 1546 because they are merely prerequisites for entry and do not actually grant entry.⁹⁹ This holding is based on the specific statutory language of § 1546 regarding the use of false materials “for entry into or as evidence of authorized stay or employment in the United States.”¹⁰⁰ However, regarding false statements made in otherwise bona fide and original materials like DOL certification forms—as opposed to materials that are themselves forged or falsified, such as a forged passport or birth certificate—the statutory language is seemingly broader and covers any materials “required by the immigration laws or regulations.”¹⁰¹

There is authority from the Fourth Circuit supporting this proposition, holding that a certification application required for a guestworker visa is covered under § 1546.¹⁰² In examining the plain language of § 1546, the Fourth Circuit held that because DHS cannot issue a guestworker visa without first receiving a determination from DOL regarding Temporary Labor Certification Applications, such an application is therefore a document prescribed by both statute and regulation for entry into the United States.¹⁰³

1. *Common Elements of Perjury*

a. *Materiality*

Courts have interpreted the requirement of materiality broadly. This element applies across the three statutes discussed herein, given that it is derived from common law principles. Courts have considered a sworn statement to constitute a material false testimony if the misrepresentation is capable of influencing the relevant decision makers or authorities.¹⁰⁴ This rule applies as well to false material statements made to any federal agency or department, including those made to immigration officials.¹⁰⁵ The Circuits are virtually

99. *United States v. Phillips*, 543 F.3d 1197, 1205–08 (10th Cir. 2008).

100. 8 U.S.C. § 1546(a).

101. *Id.*

102. *United States v. Ryan-Webster*, 353 F.3d 353, 361 (4th Cir. 2003).

103. *Id.*

104. *See United States v. Corsino*, 812 F.2d 26, 30–31 (1st Cir. 1987); *United States v. Molinares*, 700 F.2d 647, 653 (11th Cir. 1983); *United States v. Ostertag*, 671 F.2d 262, 264 (8th Cir. 1982); *United States v. Kelly*, 540 F.2d 990, 993 (9th Cir. 1976).

105. *See, e.g., United States v. Wallace*, 597 F.3d 794, 801 (6th Cir. 2010) (quoting *United States v. Swift*, 809 F.2d 320, 324 (6th Cir. 1987)) (“A false declaration satisfies the materiality requirement if a truthful statement might have assisted or

unanimous in holding that the government need not prove that a falsehood actually would have altered the outcome of a tribunal's or official's decision.¹⁰⁶ The government is not required to prove that the decision-maker was actually deceived by the false statement.¹⁰⁷ It is sufficient to show that a misstatement merely had the potential to influence or interfere with the decision-maker.¹⁰⁸ The false testimony is material if it has the potential to affect or hinder any relevant line of inquiry.¹⁰⁹

Most case law on materiality in the immigration context seems to focus on fraud or misrepresentation as a barrier to meeting the "good moral character" requirement for naturalization.¹¹⁰ While this is not directly on point relating to certification of guestworker employers, it may serve as a useful analogy. In naturalization cases, the obstruction of an investigation is the hallmark of materiality. The Third Circuit in *United States v. Montalbano* takes a particularly broad view of materiality and suggests in a footnote that a prevaricating response to essentially any question the government is entitled to ask is material, regardless of whether the truth would have led to a denial of citizenship.¹¹¹ An expansive interpretation of the materiality element could suggest that a prospective employer who submits temporary foreign labor certifications with no intent to actually comply with the requirements would be liable under perjury law.

influenced the jury in its investigation."); *United States v. Peterson*, 538 F.3d 1064, 1067 (9th Cir. 2008); *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003); *United States v. Roberts*, 308 F.3d 1147, 1155 (11th Cir. 2002); *United States v. Matsumaru*, 244 F.3d 1092, 1101 (9th Cir. 2001); *United States v. Allen*, 892 F.2d 66, 67 (10th Cir. 1989); *United States v. Morales*, 815 F.2d 725, 747 (1st Cir. 1987); *United States v. Lopez*, 728 F.2d 1359, 1362 (11th Cir. 1984) (upholding the conviction of an attorney under 18 U.S.C. § 1001 for providing false information in documents filed on behalf of clients with Immigration and Naturalization Service ("INS")); *Tzantarmas v. United States*, 402 F.2d 163, 166–68 (9th Cir. 1968) (upholding a conviction under 18 U.S.C. § 1001 for misrepresentations to officials of INS); *Robles v. United States*, 279 F.2d 401, 404 (9th Cir. 1960) (upholding a conviction under 18 U.S.C. § 1001 for submitting false documents to State Department officials responsible for determining eligibility for entry).

106. See, for example, *Corsino*, 812 F.2d 26, 30–31 and cases cited therein.

107. *See id.*

108. *See United States v. Berardi*, 629 F.2d 723, 728 (2d Cir. 1980); *United States v. Markham*, 537 F.2d 187, 196 (5th Cir. 1976); *United States v. Jones*, 464 F.2d 1118, 1122 (8th Cir. 1972).

109. *See, e.g., United States v. Abrams*, 568 F.2d 411, 420 (5th Cir. 1978).

110. *See, e.g., Corrado v. United States*, 227 F.2d 780, 784 (6th Cir. 1955) (discussing the government's ability to investigate good moral character.).

111. *United States v. Montalbano*, 236 F.2d 757, 760 n. 3 (3d Cir. 1956).

b. State of Mind Requirement

Conviction under § 1621 requires not only that the defendant knows his statement was false (“which he does not believe to be true”), but that his false statement is “willfully” presented.¹¹² There is little authority on precisely what “willful” means in this context, as most of the precedent is surrounding court testimony under the distinct but related statute 18 U.S.C. § 1623. The Supreme Court, in dicta, has indicated that willful perjury consists of “[d]eliberate material falsification under oath.”¹¹³ Other courts have referred to it as acting with an “intent to provide false testimony” or as acting “intentionally.”¹¹⁴

Under § 1001 the offense must be committed “knowingly and willfully.”¹¹⁵ The prosecution must show that the defendant knew or elected not to know that the statement, omission, or documentation was false and that the defendant presented it with the intent to deceive.¹¹⁶ The phrase “knowingly and willfully” refers to the circumstances under which the defendant made his statement, omitted a fact he was obliged to disclose, or included with his false documentation, i.e., “that the defendant knew that his statement was false when he made it or—which amounts in law to the same thing—consciously disregarded or averted his eyes from the likely falsity.”¹¹⁷

112. 18 U.S.C. § 1621 (2012).

113. *See* United States v. Norris, 300 U.S. 564, 574 (1937).

114. *See* United States v. Mounts, 35 F.3d 1208, 1219 (7th Cir. 1994); United States v. Friedman, 854 F.2d 535, 560 (2d Cir. 1988).

115. 18 U.S.C. § 1001.

116. *See* United States v. Boffil-Rivera, 607 F.3d 736, 740–41 (11th Cir. 2010) (“For purposes of the statute, the word ‘false’ requires an intent to deceive or mislead.”); *see also* United States v. Starnes, 583 F.3d 196, 210 (3d Cir. 2009) (citation omitted) (“In general, ‘knowingly’ requires the government to prove that a criminal defendant had ‘knowledge of the facts that constitute the offense’ . . . willfully . . . usually requires the government to prove that the defendant acted not merely voluntarily, but with a bad purpose, that is, with knowledge that his conduct was, in some general sense, unlawful.”).

117. United States v. Gonsalves, 435 F.3d 64, 72 (1st Cir. 2006) (finding defendant guilty of falsely certifying to the INS that patients had been tested for various diseases when no such tests had been performed, “demonstrating reckless disregard for the truth with a conscious purpose to avoid learning the truth”); *see also* United States v. Duclos, 214 F.3d 27, 33 (1st Cir. 2000) (holding that defendant was aware of his actions and their consequences and acted with intent when he submitted a fraudulent change of address form to the Postal Service); United States v. Hoover, 175 F.3d 564, 571 (7th Cir. 1999) (finding defendant guilty of submitting false tax returns, despite defendant’s claim that he did not intend to defraud the government and only wanted to protect his assets from his ex-wife); United States v. Hsia, 176 F.3d 517, 522 (D.C. Cir. 1999) (holding that, in prosecution for causing false

The state of mind requirement may ultimately prove to be somewhat complex in the context of guestworker employers. It may be difficult to prove that the promises that an employer attests to and the information he or she provides is false at the time of the application, as opposed to a failure six months in the future to provide the promised wage, for example. However, under common law contract fraud principles, misrepresentation does include instances where it is proven that the party never had any intention of performance or compliance.¹¹⁸ A pattern and history of violations by an employer could be used to show that he or she never intended to be bound by the requirements of the guestworker program. This would be a particularly strong argument if an employer had been sanctioned before by the DOL or a similar government authority, or if the abuses are so egregious that it is unconscionable for the employer to claim he or she did not intend to exploit and harm the guestworker.

An unreported case from the Eleventh Circuit, *Ojeda-Sanchez v. Bland Farms*, addresses the question of what constitutes a “willful” violation of the FLSA against H-2A workers.¹¹⁹ The case’s analysis of “willful” in this context could be useful and analogous to a perjury context as well.¹²⁰ The court entered into a discussion of past violations as being potentially illustrative of willfulness, which would be a useful line of reasoning in guestworker cases where there is repeated flouting of the law.¹²¹ Ultimately, however, the court found no violation based on the facts.¹²² The court held that even though the farmworkers had been denied pay for thirty minutes of time where they were made to wait for bus transportation, in violation of the Act, and although the employer had been sued for FLSA violations on six prior occasions by seasonal workers, there had never been a conviction for these FLSA violations.¹²³ Furthermore, the employer’s accounting procedures were handled by a qualified accountant who recorded the employee’s work hours on a daily basis,

statements to be made to the Federal Election Commission, the government was not required to show that the defendant knew her acts to be unlawful).

118. *See, e.g.*, *Polusky v. Allstate Petroleum, Inc.*, 180 So. 2d 815, 817 (La. Ct. App. 1965); *Thieman v. Thieman*, 218 S.W.2d 580, 584 (Mo. 1949); *City of Houston v. Howe & Wise*, 373 S.W.2d 781, 790 (Tex. Civ. App. 1963); *Weir v. Sch. Dist. No. 201*, 93 P.2d 308, 311 (Wash. 1939).

119. 499 F. App’x 897, 902–03 (11th Cir. 2012).

120. *See id.*

121. *Id.* at 903.

122. *Id.*

123. *Id.*

reviewed tally sheets and used computer software to record them, and consulted with farmworkers to check whether recorded hours were proper, indicating a degree of conscientiousness in this particular instance that tends to disprove willfulness.¹²⁴ Despite the outcome of this case, the holding still leaves some potential room for guestworker advocates to prove willful violations by employers by distinguishing their particular cases based on factual circumstances; for example, a lack of professional record-keeping, or if there had in fact been prior convictions (not just allegations) of violations of labor law and foreign labor certification procedures.

C. Fraud in Foreign Labor Contracting

In addition to perjury, fraud in foreign labor contracting is codified in a federal criminal statute specifically designed to target employers who fraudulently hire foreign workers.¹²⁵ This is a relatively new statute that has not generated much case law or other guidance yet,¹²⁶ but that could potentially make it an ideal blank slate for impact litigation. As an explicitly enumerated qualifying crime for U Visa petitions, and given the high frequency of recruiting and contract fraud in the guestworker program, it could be utilized for securing immigration benefits for guestworkers. Guestworkers often pay money to recruiters to be brought to the United States and are promised certain terms regarding salaries, working conditions, living conditions, room and board, fees, and transportation costs that simply end up not being true.¹²⁷

D. Obstruction of Justice

In cases where a guestworker is able to initiate a complaint with the DOL or file a lawsuit or other similar claim, the federal law prohibiting obstruction of justice may apply if an employer:

[K]nowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any

124. *Id.*

125. 18 U.S.C. § 1351 (2012).

126. *See, e.g.,* United States v. Askarkhodjaev, 444 F. App'x 105 (8th Cir. 2011). In *Askarkhodjaev* the defendant pled guilty to fraud in foreign labor contracting for making false promises to H-2B workers of free housing, transportation, and food and for charging exorbitant recruitment, visa application, and transport fees. *Id.* at 105. However, the case did not discuss the statute on the merits. *See id.*

127. *See infra* Part II.

department or agency of the United States or any case filed under title 11¹²⁸

This could apply in cases of intimidation or threats to delay official proceedings, any alteration, destruction, or falsification of records, or in general preventing an employee from communicating with authorities. This last point is especially crucial given that H-2A employers are required to provide housing, and therefore workers commonly live on the worksite under employer supervision.¹²⁹ The government is not required to show the accused knew his actions were likely to affect a federal matter in order to prove knowing falsification of a document in connection with a government investigation, making this a potentially easier knowledge standard to meet than that of the perjury statutes discussed above.¹³⁰

While perjury and fraud in labor contracting have not yet been commonly exercised for the protection of guestworkers, there are numerous arguable criminal statutes and regulatory bases on which to make claims against employers who violate their rights.

II. THE REALITY OF GUESTWORKER ABUSES

Generally speaking, immigration relief based on labor violations is relatively new and can be challenging to obtain. Traditionally sympathy, and therefore the access to benefits under immigration law, has aligned with groups like domestic violence victims, or even children.¹³¹ Consider the Violence Against Women Act of 1994 (VAWA), the T Visa for trafficking victims, or even the original Victims of Trafficking and Violence Protection Act of 2000, also more commonly known as the Trafficking Victims Protection Act (TVPA);

128. 18 U.S.C. § 1519 (2012).

129. See S. POVERTY LAW CTR., *supra* note 2, at 35–37. A 2007 lawsuit by Thai guestworkers alleged that the workers were watched by guards. *Asanok v. Million Express Manpower, Inc.*, No. 5:07cv00048 (E.D.N.C. Aug. 24, 2007).

130. See *United States v. Moyer*, 674 F.3d 192, 208–09 (3d Cir. 2012); *United States v. Yielding*, 657 F.3d 688, 712 (8th Cir. 2011).

131. See Joey Hipolito, *Illegal Aliens or Deserving Victims?: The Ambivalent Implementation of the U Visa Program*, 17 ASIAN AM. L.J. 153, 156–57 (2010) (“Within this framework, the government has developed policies that enshrine archetypes of undocumented immigrants it believes deserve status, while effectively excluding petitioners who do not fall into these narrow categories The U visa statute is unusually broad in its potential application, applying to victims of a variety of crimes beyond domestic abuse and sex trafficking and permitting a multitude of law enforcement agencies to certify the applicant’s helpfulness. Such broad statutory language threatens the closely guarded distinction between illegal and legal aliens, because the U visa statute could potentially grant legal status to many undocumented immigrants who possess ‘undeserving’ qualities.”).

all are focused on the needs of women and children, in particular trafficking or domestic violence victims.¹³² Consider also Special Immigrant Juvenile Status for children who cannot be reunited with one or both parents or guardians,¹³³ or Deferred Action for Childhood Arrivals for noncitizens brought here as children.¹³⁴ Immigration policy is about prioritizing, and comparatively the needs of a temporary guestworker may seem less urgent. However, room must be made within society and immigration law to recognize workplace abuses to the extent that other kinds of abuses are already protected. Further effort must be made to use existing legal tools and remedies to the fullest to exercise justice for these workers.

Another issue is a sense that perjury and fraud may seem like somewhat victimless crimes. Traditionally, the U Visa process has favored those who have suffered some sort of demonstrable physical distress.¹³⁵ The effects of assault or rape are easier to document through evidence such as medical charts and police reports, and that is a distinct advantage in the U Visa process. To that end, there may be resistance from DHS adjudicators or from certifying investigative authorities to legitimize claims of workplace abuse and allow them to be used as the basis for immigration relief.

Nevertheless, there can be no doubt that the guestworker program as it currently exists lends itself to a wide array of abuses. There are emotional, financial, and physical tolls involved. The next step is to force them to fit within the categories of existing criminal law in order to demand relief for guestworkers. To that end, the DOL has clarified through regulation that in order to be considered a victim of perjury for a U Visa petition, one must have been directly and

132. *Id.* at 157 (“Unlike the U visa, the government released T visa regulations shortly after the passage of the VTVPA. These regulations effectively narrowed the applicability of the T visa to an iconic figure—a victim of sex trafficking whom the federal government rescues and who is willing to testify on behalf of the federal government. This iconic figure guides government and law enforcement agencies in maintaining the boundary between illegal and legal aliens by providing legal status only to immigrants deemed worthy. The visa programs that correspond to the iconic figure receive acceptance and endorsement only because they narrowly define the categories of immigrants considered deserving, thereby preserving the government’s binary framework.”).

133. *See* 8 C.F.R. § 204.11 (2014).

134. *See Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process>, (last updated Sept. 9, 2014). An applicant must have arrived in the United States before her sixteenth birthday, and she must have obtained a high school diploma or equivalent in the United States or be an honorably discharged veteran. *Id.*

135. *See* Hipolito, *supra* note 131, at 156–57.

proximately harmed by the perpetrator.¹³⁶ There must also be reasonable grounds to conclude that the perpetrator principally committed the offense as a means to avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise hold them responsible for criminal activity; or to further his or her abuse of, or undue control over, the worker through manipulation of the legal system.¹³⁷ Using this guidance in conjunction with creative applications of perjury and fraud statutes and federal regulations could help get guestworkers the justice they deserve. While there are significant promises and obligations taken on by guestworker employers under penalty of perjury and federal laws and regulations, these obligations are not adequately enforced, and violations could serve as the basis for a U Visa application.

Despite the numerous statements made under penalty of perjury by employers of H-2B guestworkers, there is very little oversight and enforcement. There is a need for actual consequences and accountability for employer fraud and perjury. Guestworkers report a wide array of abuses. Wage theft is rampant. Long hours with extremely low—and sometimes illegally low—pay is the norm. Agricultural guestworkers almost always reside on-site where they work, and poor living conditions are all too common.¹³⁸ Health and safety is frequently compromised as guestworkers take what Professor Leticia Saucedo has labeled “brown collar jobs”¹³⁹ in places like factories with heavy, dangerous machinery, or produce fields where workers ingest pesticides. Part II examines these realities of the guestworker programs to better understand how perjury, fraud in foreign labor contracting, and obstruction of justice might be applied to guestworkers in order to successfully meet the requirements for a U Visa.

136. 8 C.F.R. § 214(a)(14)(ii) (2014).

137. *Id.*

138. S. POVERTY LAW CTR., *supra* note 2, at 35–37.

139. Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 964–65 (2006) (“A ‘brown collar’ worker is a newly arrived Latino who works in jobs or occupations in which Latinos are overrepresented. Generally, brown collar workers experience wage penalties, occupational segregation, and pay degradation because of their status in the workplace. They are increasingly concentrated in low-wage occupations within industries such as construction, hospitality, and service. The term ‘brown collar worker’ describes an increasingly large sector of the American labor pool. It is the fastest-growing segment of the labor force today.”)

A. Fraudulent and Coercive Recruitment

International recruitment is an inherent part of the guestworker program, but given its extraterritorial nature it is particularly fraught with a lack of oversight and the potential for violations of the rights of guestworkers.¹⁴⁰ U.S. employers rely heavily on private recruiters or agencies to recruit guestworkers in their home countries.¹⁴¹ Recruiters frequently demand payment from workers to cover costs such as travel or visa fees as well as a profit for the recruiter,¹⁴² despite the fact that H-2A regulations obligate employers to reimburse travel expenses to an employee who “completes 50 percent of the work contract period.”¹⁴³ To cover these costs, guestworkers often turn to high-interest loans, which traps them in a cycle of debt as they work to pay off the loans.¹⁴⁴ This effectively turns the guestworker program into a system disturbingly reminiscent of indentured servitude.¹⁴⁵ The recruiters sometimes force the workers to leave behind collateral, such as the deed to a house or car, to ensure the debt and coerce them to fulfill the labor contract.¹⁴⁶ A study of the H-2A program conducted by the Southern Poverty Law Center, in partnership with other advocacy organizations, found that seventy-nine percent of the agricultural workers interviewed were never given a written contract or did not understand the contract because it was in English.¹⁴⁷ Furthermore, sixty-two percent of the interviewees had to pay for either all or part of their transportation costs, which are supposed to be covered or reimbursed by the employer.¹⁴⁸

Such actions clearly violate the DOL regulations against the charging of fees, and the requirement to pay for travel and provide adequate living and working conditions, and they are patent violations of the federal perjury laws and the fraud in foreign labor contracting statute. Depending on the ultimate harm suffered, this could provide a clear basis for a U Visa qualifying crime for those guestworkers who are recruited in this way.

140. See S. POVERTY LAW CTR., *supra* note 2, at 43.

141. See *id.* at 9.

142. See *id.*

143. 20 C.F.R. § 655.122(h)(1) (2014).

144. See S. POVERTY LAW CTR., *supra* note 2, at 9.

145. See *id.* at 2.

146. See *id.* at 9.

147. See JORNALEROS SAFE, MEXICAN H2A FARMWORKERS IN THE U.S.: THE INVISIBLE WORKFORCE 10–11, *available at* http://www.splcenter.org/sites/default/files/downloads/resource/executive_summary_jornaleros_safe.pdf.

148. See *id.* at 11.

B. Wage and Hour Violations

Wage theft is probably the most ubiquitous form of abuse against guestworkers. This can be viewed as the proverbial “broken window”¹⁴⁹ of seemingly minor labor violations that, left unchecked with impunity, creates a culture of exploitation that can lead to further violations of guestworkers’ rights. The Southern Poverty Law Center reports rampant wage theft in fields that rely on guestworker labor,¹⁵⁰ such as the agricultural, forestry, hospitality, seafood processing, landscaping, and carnival industries, as evidenced by lawsuits and administrative complaints filed by advocates throughout the country.¹⁵¹ A 2010 GAO report regarding abuses in the H-2B program found evidence of wage violations and overtime violations.¹⁵²

Wage theft of guestworkers in low-wage occupations can take various forms. Employers may fail to pay the minimum wage as established by federal or local law, or may fail to pay the required wage as established by the DOL during the temporary labor

149. See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1, 1982, at 29, available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>; see also Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 302–03 (1998) (“The Broken Windows essay is premised on the idea that ‘disorder and crime are usually inextricably linked, in a kind of developmental sequence.’ According to Wilson and Kelling, minor disorders (like littering, loitering, public drinking, panhandling, and prostitution) if tolerated, produce an environment that is likely to attract crime. They signal to potential criminals that delinquent behavior will not be reported or controlled—that no one is in charge. One broken window, left unrepaired, invites other broken windows. These progressively break down community standards, leaving the community vulnerable to crime.”).

150. S. POVERTY LAW CTR., *supra* note 2, at 18.

151. *Id.* See, e.g., *Hernandez-Luna v. W.K. Events, Inc.*, No. 6:12-cv-575-Orl-28TBS, 2012 WL 4017469 at *1 (M.D. Fla. Aug. 22, 2012); *Diaz v. Quality Crab Co.*, No. 2:10-CV-15-H, 2011 WL 4498939, at *1 (E.D.N.C. Sept. 27, 2011); *Covarrubias v. Capt. Charlie’s Seafood, Inc.*, No. 2:10-CV-10-F, 2011 WL 2690531 at *2 (E.D.N.C. July 6, 2011); *Gaxiola v. Williams Seafood of Arapahoe, Inc.*, 776 F. Supp. 2d 117, 125 (E.D.N.C. 2011); *Teoba v. Trugreen Landcare, LLC*, 769 F. Supp. 2d 175, 177 (W.D.N.Y. 2011); *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 703 (E.D.N.C. 2009); *Cuomo v. Dreamland Amusements, Inc.*, Nos. 08 Civ. 7100(JGK), 2008 WL 4369270 at *1 (S.D.N.Y. Sept. 22, 2008); *Rivera v. Brickman Group, Ltd.*, Civ. No. 05-1518, 2008 WL 81570 at *1 (E.D. Pa. Jan. 7, 2008); *Villanueva-Bazaldua v. TruGreen Ltd. Partners*, 479 F. Supp. 2d 411, 413-14 (D. Del. 2007); *Marnie Eisenstadt, State Fair Vendor Abused Workers from Mexico*, SYRACUSE.COM (Apr. 17, 2011), www.syracuse.com/news/index.ssf/2011/04/vendor_abused_mexican_workers.html.

152. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 82, at 4.

certification process.¹⁵³ The FLSA requires employers to cover the cost of items that principally benefit the employer, such as work tools and safety equipment,¹⁵⁴ but employers frequently make illegal deductions for these and other items, which results in the employee being underpaid.¹⁵⁵ The GAO report on the H-2A program found numerous incidences of excessive and illegal fees employers charged to their H-2B workers, bringing wages below the hourly federal minimum wage.¹⁵⁶ Particularly common among agricultural and industrial manufacturing employers is the practice of complicated piece-rate pay schemes, where an employee is paid according to the number of items harvested or fabricated, for example.¹⁵⁷ A piece-rate is supposed to be calculated based on the reasonable production pace of a non-disabled worker, allowing for fatigue and delay, and personal time or breaks, and is still subject to minimum wage.¹⁵⁸ However, in practice piece-rate work among guestworkers often leads to long hours at an unreasonable pace of work, as well as underpayment of wages since piece-rate pay is more difficult to calculate and monitor than a fixed wage.¹⁵⁹ Record-keeping of work hours is almost always controlled by employers, who may either keep no records or often underreport hours, thus costing the guestworker part of his or her earned wages.¹⁶⁰

Wages are highly regulated in detail under the FLSA as well as local minimum wage laws across the country, not to mention the DOL Temporary Labor Certification procedures that establish the required wage and the regulatory guidelines regarding H-2A and H-2B hour and wage guidelines. This is an area that should not remain unchecked and must be monitored.

C. Safety Conditions

There is no doubt that guestworkers work in extremely dangerous conditions. Many guestworkers are employed in industries with the leading number of fatalities, not to mention the frequency of non-

153. See S. POVERTY LAW CTR., *supra* note 2, at 18.

154. 29 U.S.C. § 206(a)(2) (2012); 29 C.F.R. §§ 531.3(c)–(d), 531.32(c), 531.35 (2014).

155. See S. POVERTY LAW CTR., *supra* note 2, at 18–20.

156. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 82, at 4.

157. See S. POVERTY LAW CTR., *supra* note 2, at 18–20.

158. 29 C.F.R. § 525.12(h)(2) (2014).

159. See S. POVERTY LAW CTR., *supra* note 2, at 18–20.

160. See *id.*

fatal injuries.¹⁶¹ Guestworkers may be required to operate dangerous heavy machinery as part of warehouse or manufacturing work.¹⁶² Agricultural workers may also work with heavy machinery, and they frequently report exposure to toxic pesticides.¹⁶³ Pesticide exposure can cause serious health issues, such as green tobacco sickness, skin disease, and diseases of the eye.¹⁶⁴ Employers must be made to ensure the health and well-being of guestworkers by adhering to all applicable safety standards under the law, and should provide guestworkers with safe working conditions and appropriate training and protective gear.

D. Living Conditions

Employers hiring H-2A workers must provide them with free housing that must be inspected and certified to meet applicable safety and health regulations.¹⁶⁵ In practice, the quality of housing provided to H-2A workers can often be very poor, with cramped, unsanitary, and unsafe conditions.¹⁶⁶ H-2B workers have even less protection, as there are no general federal regulations governing the conditions of labor camps or housing for H-2B workers.¹⁶⁷ H-2A employers have

161. *See id.* at 25 (“Guestworkers toil in some of the most dangerous occupations in the United States. Fatality rates for the agriculture and forestry industries, both of which employ large numbers of guestworkers, are seven times the national average.”); *see also* U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES 14 (2013), *available at* <http://www.bls.gov/iif/oshwc/foi/cfch0010.pdf>. The occupations with the highest fatalities include transportation and warehousing, construction, agriculture, and manufacturing, all of which frequently employ guestworkers. *Id.*

162. *See* Justin Pritchard, *Mexican Worker Deaths Rise Sharply as U.S. Safety Improves*, CASPER STAR TRIB., Mar. 14, 2004, http://trib.com/news/state-and-regional/mexican-deaths-rise-sharply-as-u-s-safety-improves/article_9c89347e-5c71-59b3-9151-6da2c4b792c8.html; *see also* U.S. BUREAU OF LABOR STATISTICS, *supra* note 161, at 17.

163. *See* Victoria Bouloubasis, *Be Our Guest Worker*, AM. PROSPECT (Nov. 7, 2013), <http://prospect.org/article/be-our-guest-worker>; Erin Robinson, et al., *Wages, Wage Violations, and Pesticide Safety Experienced by Migrant Farmworkers in North Carolina*, 21 NEW SOLUTIONS 251 (2011), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3291018> (“These farmworkers are repeatedly exposed to these pesticides across the agricultural season. Many of these farmworkers are not provided with the training and field sanitation resources required by regulation to protect them from pesticide exposure.”).

164. *See* Robinson, *supra* note 163, at 5.

165. *See* 20 C.F.R. § 655.122(d) (2014).

166. *See* S. POVERTY LAW CTR., *supra* note 2, at 35–37.

167. *See id.* at 35.

spoken out against the housing requirement in the past and have encouraged the government to get rid of it.¹⁶⁸

E. Intimidation and Retaliation

It is clear that guestworkers need assistance if they are going to be able to successfully challenge their employers and receive any recompense and remuneration for violations. Given the lack of direct government oversight, the burden falls on workers to protect themselves and initiate complaints against their employers.¹⁶⁹ Yet there are significant obstacles, from language barriers to logistics, such as transportation for workers who live on their worksite. Furthermore, once a guestworker initiates a complaint the worker will usually be fired and required to return to his or her home country, even if there is an ongoing investigation.¹⁷⁰ Filing a complaint would of course be easier for those who have assistance or legal representation, but very few workers have access to an affordable, private attorney who will take their cases, and pro bono opportunities may be extremely limited.¹⁷¹ Guestworkers face a lack of government assistance and monitoring, plus seemingly insurmountable challenges in locating affordable legal assistance and actually following through on filing a suit.¹⁷² Couple these barriers with the threat of blacklisting and being tied to a single employer, it is little wonder that employers feel free to intimidate workers and retaliate against those who try to assert their rights. This is patently illegal under DOL regulations, and goes against the fair treatment and compliance with federal labor law like the FLSA that also prohibits such conduct.

III. THE U VISA SOLUTION

Despite the obligations of employers and the numerous legal rights of employees, clearly workplace abuses against guestworkers continue. Simply requiring attestations and relying on government administrators to identify and sanction the realities of exploitation in the guestworker program is not enough. An ideal solution would empower guestworkers while holding unscrupulous employers

168. See Griselda Nevarez, *Jones: Change Farmworker Housing Rules*, YUMASUN, Mar. 10, 2011, available at http://smfws.com/articles2011/articles_march_2011/art03102011b.html.

169. See S. POVERTY LAW CTR., *supra* note 2, at 38–41.

170. See *id.* at 40–41.

171. See *id.* at 40.

172. See *id.* at 41.

accountable. While the U Visa in and of itself cannot fix the system and does not impose any direct penalties or sanctions on the employer, it could provide an important tool for numerous reasons outlined in this final Part of this Note. By offering the benefits of a U Visa to the workers while imposing criminal liability for fraud and perjury on employers, hopefully United States workplaces will improve for both citizen and noncitizen workers.

A. U Visas

1. *Qualifying for a U Visa*

For noncitizens who are victims of crime within the United States, the U Visa encourages them to cooperate with any investigation. More specifically, a U Visa grants a path to legal immigration status for those who qualify, as well as potential benefits such as work authorization and public assistance.¹⁷³ Congress established the U Visa category in 2000 as part of the TVPA.¹⁷⁴ This expanded immigration benefits previously provided to domestic violence victims under the VAWA.¹⁷⁵ However, despite Congress' desire to extend immigration benefits to victims of crimes,¹⁷⁶ it took seven years for

173. Access to public assistance for U Visa recipients may depend on state laws regulating benefits eligibility. For example, California gives U Visa recipients access to medical insurance, job development benefits, cash aid, and food stamps. See TANYA BRODER & SHEILA NEVILE, CAL. IMMIGRANT POLICY CTR., BENEFITS FOR IMMIGRANT VICTIMS OF TRAFFICKING, DOMESTIC VIOLENCE & OTHER SERIOUS CRIMES IN CALIFORNIA 1, 2 available at <http://www.f2f.ca.gov/res/pdf/BenefitsForImmigrant.pdf>.

174. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8 U.S.C. and 22 U.S.C.).

175. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40701, 108 Stat. 1796, 1953-55 (1994) (codified as amended at 8 U.S.C. § 1151 (2012)); see also Victims of Trafficking and Violence Protection Act § 1502(a)(2) (“[P]roviding battered immigrant women and children who were experiencing domestic violence at home with protection against deportation allows them to obtain protection orders against their abusers and frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers and the abusers of their children . . .”).

176. See Violent Crime Control and Law Enforcement Act, §40701; see also Victims of Trafficking and Violence Protection Act § 1502(a)(3) (“[T]here are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994.”); New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,015 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, 299) (“Alien victims may not have legal status and, therefore may be reluctant to help in the investigation or prosecution of criminal activity for fear of removal from the United States. In passing this legislation, Congress intended

DHS to issue regulations for implementation to begin in 2008.¹⁷⁷ Additionally, there is a cap of 10,000 U Visas per year,¹⁷⁸ and as of December 2013 the DHS reported that it has reached this cap for the fifth consecutive fiscal year.¹⁷⁹

The U Visa allows recipients to bypass the usual family and employment visa channels that most immigrants utilize. To qualify for a U Visa, petitioners must meet four statutory requirements: (1) they must have suffered substantial physical or mental abuse as a result of a statutorily enumerated criminal activity; (2) they must have credible information about the criminal activity of which they have been a victim; (3) they must be helpful and cooperative with an investigating law enforcement official or a prosecutor, a judge, DHS or other Federal State or local authority; and (4) the criminal activity must have occurred in the United States or violated a United States law that can be applied extraterritorially.¹⁸⁰ Certain factors that would otherwise make a noncitizen inadmissible, such as criminal history or accrued unlawful presence in the United States, may be waived for U Visa petitioners¹⁸¹ if they submit the I-192 waiver form along with their petition and are found eligible.¹⁸²

to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes while offering protection to victims of such crimes.”).

177. See *New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status*, 72 Fed. Reg. at 53,015.

178. See 8 U.S.C. § 1184(p)(2)(A) (2012).

179. See *USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 11, 2013), <http://www.uscis.gov/news/alerts/uscis-approves-10000-u-visas-5th-straight-fiscal-year>.

180. 8 U.S.C. § 1101(a)(15)(U) (2012). A U Visa may be granted if: “(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii); (II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii); (III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and (IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States.” *Id.*

181. *Id.* § 1182(d)(14).

182. See DEP’T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVS., I-192, APPLICATION FOR ADVANCE PERMISSION TO ENTER AS NONIMMIGRANT [PURSUANT TO SECTION 212(D)(3)(A)(II) OF THE INA], *available at* <http://www.uscis.gov/sites/default/files/files/form/i-192.pdf>.

a. Substantial Physical or Mental Harm

DHS regulations define substantial physical or mental abuse as “injury or harm to the victim’s physical person, or harm to or impairment of the emotional or psychological soundness of the victim.”¹⁸³ In judging the extent of the harm, DHS may consider,

The nature of the injury inflicted or suffered; the severity of the perpetrator’s conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.¹⁸⁴

No factor alone is a prerequisite to show substantial physical or mental abuse.¹⁸⁵ The presence of any factor may qualify, or several factors may be combined to reach an overall threshold.¹⁸⁶ The harm must also be derived from one of the statutorily enumerated crimes,¹⁸⁷ which include perjury and fraud in foreign labor contracting.¹⁸⁸ Qualifying crimes are enumerated, but not tied to or limited by specific criminal code provisions,¹⁸⁹ with the exception of fraud in foreign labor contracting as defined in 18 U.S.C. § 1351.¹⁹⁰

183. 8 C.F.R. § 214.14(a)(8) (2013).

184. *Id.* § 214.14(b)(1).

185. *Id.* (“No single factor is a prerequisite to establish that the abuse suffered was substantial.”).

186. *Id.* (“A series of acts taken together may be considered to constitute substantial physical or mental abuse even where no single act alone rises to that level.”).

187. 8 U.S.C. § 1101(a)(15)(U)(iii) (2012) (“[T]he criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; 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; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.”).

188. *See id.*; *see also* 18 U.S.C. § 1351 (2012).

189. 8 U.S.C. § 1101(a)(15)(U)(iii) (“[T]he criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law.”).

190. 18 U.S.C. § 1351(a) (“Whoever knowingly and with intent to defraud recruits, solicits, or hires a person outside the United States or causes another person to recruit, solicit, or hire a person outside the United States, or attempts to do so, for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment shall be fined under this title or imprisoned for not more than 5 years, or both.”).

Any federal, state, or local laws related to the enumerated criminal activities may serve as qualifying crimes.¹⁹¹

As stated in Part II of this Note, a large part of the difficulty of remedying workplace abuses under existing immigration and labor law is that labor violations are generally viewed as less egregious and have fewer remedies available than violent crimes or sex crimes, for example. The substantial harm element of a U Visa petition is likely to be the most difficult element for a guestworker to meet. For example, wage theft is extremely common and illegal, but this type of economic loss is unlikely to rise to the level of required harm on its own. Workplace safety and medical issues are more likely to prevail, assuming proof of the physical harm as a result of the employment. Employer intimidation and retaliation, especially if coupled with egregious wage and overtime violations, could arguably cause emotional distress. Conduct such as withholding passports or threatening deportation or physical harm could fit within the U Visa qualifying framework. Advocates for guestworkers who wish to petition for U Visas should be aware of some of these limitations. Ultimately, however, U Visa petitions are granted at the discretion of DHS officials, so advocates should encourage aggrieved workers to petition and to tell as compelling a story as possible regarding the harm they have suffered with accompanying documentation.

b. Providing Credible Information

A U Visa petitioner must present credible and reliable information that may help in the investigation or prosecution of the qualifying crime on which his or her petition is based, and must offer this information to the relevant authorities.¹⁹² To make the information more credible, guestworkers may want to offer statements to relevant authorities regarding their employment, or documentation such as pay stubs or labor contracts.

c. Certifying the Victim's Helpfulness

A certifying official is defined as “the head of the certifying agency, or any person(s) in a supervisory role who has been specifically

191. 8 U.S.C. § 1101(a)(15)(U)(iii) (“[T]he criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law.”).

192. 8 C.F.R. § 214.14(b)(2) (2014) (“The alien must possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity.”).

designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency; or a Federal, State, or local judge.”¹⁹³ A certifying official must find that the petitioner “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of the crime.¹⁹⁴ A petitioner will not qualify if he or she has refused or failed to provide information and assistance reasonably requested after the cooperation begins.¹⁹⁵ Given the obstacles a guestworker faces, from language and cultural barriers to fear of retaliation, receiving support from advocates early on can help encourage them to speak out regarding workplace abuses and will leave them better situated to make a U Visa petition.

In the guestworker context, it is important to note that a certifying agency includes DOL officials.¹⁹⁶ The DOL issued regulations outlining the certification process in 2011.¹⁹⁷ DHS delegated enforcement responsibility to the Wage and Hour Division (WHD) of the DOL, effective January 18, 2009, to ensure that guestworkers are employed in compliance with labor certification requirements.¹⁹⁸ The WHD investigates issues such as wage and overtime violations and

193. *Id.* § 214.14(a)(3)(i)–(ii).

194. *Id.* § 214.14(b)(3).

195. *See id.*

196. *See id.* § 214.14(a)(2).

197. *See, e.g.*, Memorandum from Nancy J. Leppink, Acting Adm’r, Wage & Hour Div., U.S. Dep’t of Labor, to Reg’l Adm’rs & Dist. Dirs., on Certification of Supplement B Forms of U Nonimmigrant Visa Applications (Apr. 28, 2011), available at http://www.dol.gov/whd/FieldBulletins/fab2011_1.htm (“The Secretary of Labor has the authority to complete and certify Supplement B forms for U Nonimmigrant Visas (U Visas) under Section 1513(b) of the Victims of Trafficking and Violence Protection Act of 2000, as amended, 8 U.S.C. § 1101(a)(15)(U) and related Department of Homeland Security regulations, 8 C.F.R. § 214.14. The Secretary’s Order 05-2010 delegated this authority to the WHD Administrator. This authority is being further delegated to the WHD Regional Administrators.”).

198. *See also* 29 C.F.R. 503.1(c) (2014) (“DHS, effective January 18, 2009, under section 214(c)(14)(B) of the INA, 8 U.S.C. 1184(c)(14)(B), has delegated to the Secretary certain investigatory and law enforcement functions to carry out the provisions under 8 U.S.C. 1184(c). The Secretary has delegated these functions to the WHD. In general, matters concerning the rights of H-2B workers and workers in corresponding employment under this part and the employer’s obligations are enforced by the WHD, including whether employment was offered to U.S. workers as required under 20 CFR part 655, Subpart A, or whether U.S. workers were laid off or displaced in violation of program requirements. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing certifications, and to seek remedies for violations, including recovery of unpaid wages and reinstatement of improperly laid off or displaced U.S. workers.”).

may impose wage payments and civil money penalties against employers who violate certain H-2B provisions.¹⁹⁹ However, at this time the WHD will only certify the qualifying crimes of involuntary servitude, peonage, trafficking, obstruction of justice, or witness tampering.²⁰⁰ This means that perjury or fraud in foreign labor contracting will need to be certified by a different law enforcement office or government agency, or even judges.²⁰¹ On November 20, 2014 President Barack Obama announced an expansion of the DOL's role in granting certification for U Visas and T Visas for victims of trafficking.²⁰² In early 2015, the WHD will begin exercising its authority to certify applications for trafficking victims seeking T visas, and the WHD will expand its certification process to include three additional qualifying criminal activities in the course of its workplace investigations: extortion, forced labor, and fraud in foreign labor contracting.²⁰³

A key challenge is to encourage guestworkers to come forward and cooperate with the authorities. Guestworkers may assume that any contact with law enforcement could cause them to lose their legal status to remain in the United States. They may fear being fired and sent home early, losing future wages, and perhaps having past wages withheld as well. They also face the risk of being blacklisted and barred from future employment in the guestworker program. By carefully explaining the U Visa process and its attendant benefits, advocates will hopefully be able to encourage workers to cooperate.

199. See 29 C.F.R. § 503.19–23.

200. See Memorandum from Leppink to Reg'l Adm'rs & Dist. Dirs., *supra* note 197 (“The Secretary of Labor has the authority to complete and certify Supplement B forms for U Nonimmigrant Visas (U Visas) under Section 1513(b) of the Victims of Trafficking and Violence Protection Act of 2000, as amended, 8 U.S.C. § 1101(a)(15)(U) and related Department of Homeland Security regulations, 8 C.F.R. § 214.14. The Secretary's Order 05-2010 delegated this authority to the WHD Administrator. This authority is being further delegated to the WHD Regional Administrators WHD has determined that it will consider requests to certify Supplement B forms predicated on the following QCAs: involuntary servitude, peonage, trafficking, obstruction of justice, and witness tampering.”).

201. See *id.*

202. See *Fixing the System: President Obama is Taking Action on Immigration*, WHITE HOUSE, <http://www.whitehouse.gov/issues/immigration/immigration-action>.

203. See Secretary's Order 01-2014, 79 Fed. Reg. 77,527 (Dec. 24, 2014); *Fact Sheet: The Department of Labor's Wage and Hour Division Will Expand Its Support of Victims of Human Trafficking and Other Crimes Seeking Immigration Relief from DHS*, U.S. DEP'T LABOR, <http://www.dol.gov/dol/fact-sheet/immigration/u-t-visa.htm>.

d. Activity Within the United States

The final requirement for a petitioner to qualify for a U Visa is that the qualifying criminal activity must have occurred in the United States, or violate a federal law that provides for extraterritorial jurisdiction.²⁰⁴ In the guestworker context, perjury by a U.S.-based employer would not be extraterritorial assuming the relevant paperwork and subsequent work is performed within the United States.

B. The Potential Impact of U Visas: A Viable Solution

1. The U Visa Application and Benefits

The USCIS branch of DHS has sole jurisdiction over all U Visa petitions.²⁰⁵ The burden of establishing eligibility lies with the petitioner, and the USCIS conducts a de novo review of all the evidence.²⁰⁶ To apply, petitioners must submit Form I-918, “Petition for U Nonimmigrant Status,” and Supplement B signed by a certifying official.²⁰⁷ Petitioners must provide a signed statement regarding the crime and victimization they suffered and the resulting harm to their well-being, and they may include evidence supporting these statements.²⁰⁸ Petitioners must also provide biometrics information to be checked against criminal records.²⁰⁹ Factors that would normally make a visa applicant inadmissible, such as criminal history or accrued unlawful presence in the United States, may be waived for U Visa petitioners but must be declared and explained fully on Form I-192, “Application for Advance Permission to Enter as Non-Immigrant.”²¹⁰

If a petitioner is successful, then he or she is entitled to a number of benefits. U Visa recipients may apply for work authorization in the United States.²¹¹ This is significant because the employment terms are much more lenient and favorable than the guestworker program allows. They may also apply for derivative status for qualifying family members to join them in the United States. A qualifying family

204. 8 C.F.R. § 214.14(b)(4) (2014).

205. *Id.* § 214.14(c)(1).

206. *Id.* § 214.14(c)(4).

207. *Id.* § 214.14(c)(1)–(2). Supplement B is the official’s certification that the petitioner is a victim of a qualifying crime for the purposes of a U Visa. *Id.*

208. *Id.* § 214.14(c)(2)(iii).

209. *Id.* § 214.14(c)(1), (3).

210. *Id.* § 214.14(c)(2)(iv); *see also* 8 C.F.R. § 212.17 (2014).

211. 8 C.F.R. § 214.14(c)(7).

member who is in removal, deportation, or exclusion proceedings may still apply for derivative status, and the Immigration and Customs Enforcement branch of DHS may agree to file a joint motion to terminate proceedings without prejudice with the immigration judge or the Board of Immigration Appeals while the U-status is being adjudicated.²¹²

Perhaps the most significant benefit of a U Visa is that it allows the recipient the opportunity to adjust his or her status and become a lawful permanent resident (LPR), and then ultimately a citizen.²¹³ U Visa petitioners may apply for adjustment of status to obtain LPR status if: (1) they have been physically present in the United States for a continuous period of at least three years since the first date of admission as a U nonimmigrant and continue to hold that status at the time of application for adjustment of status; (2) they have not unreasonably refused to provide assistance in the criminal investigation or prosecution; (3) they have not participated in persecution, genocide, torture, or extrajudicial killing; and (4) they establish that their presence in the United States is justified on humanitarian grounds, to ensure family unity, or is in the public interest.²¹⁴ This last requirement may be established in part by showing that the petitioner is still cooperating with an ongoing investigation, or has made attempts to do so.²¹⁵

Offering public assistance and reuniting workers with their families would go a long way toward helping workers as a matter of general public policy. Perhaps an even more concrete benefit is that a U Visa removes the ties that bind a guestworker to a single abusive employer. By allowing them to remain in the United States and seek work authorization, a worker no longer needs to fear the kind of retaliation and abuses with impunity that so frequently occur in the guestworker program. This is not to say that violations of labor laws are not present outside the guestworker program. However, obtaining a U Visa and an accompanying work permit gives workers far greater latitude to seek out employment under better terms, and it takes away the fear of blacklisting and removal should they need to file a formal grievance against an employer.

212. *Id.* § 214.14(f)(2)(ii).

213. 8 C.F.R. § 245.24 (2014).

214. *Id.* § 245.24(b)(1)–(6).

215. *Id.* § 245.24(b)(5); *see also id.* § 245.24(a)(5).

CONCLUSION

It must be acknowledged that the U Visa does not impose any direct penalties or sanctions against employers. It is not a panacea and will not offer direct accountability of employers under the law. However, in addition to offering the benefits to workers described above, the fact remains that the purpose of the U Visa is to encourage noncitizens to denounce crimes and cooperate with law enforcement. This incentivizes guestworkers to speak up about violations of their rights in the workplace. By using violations such as wage theft as the basis for a U Visa, the attention of both the relevant authorities and the public should be drawn to the exploitation that guestworkers face. Filing U Visas for employer fraud and perjury would put pressure on the DOL, DHS, and law enforcement to investigate these claims and address them, and would bring these issues to light in the public record.

Advocates for guestworker rights may face an uphill battle when trying to obtain U Visas for labor violations. The first obstacle is identifying and proving the qualifying crime, such as potentially applicable perjury and fraud laws, and creativity in applying these laws or investigating similar state or local laws may be needed, as discussed in Part I. Furthermore, the DOL has limited the grounds on which it will certify to only include involuntary servitude, peonage, trafficking, obstruction of justice, or witness tampering.²¹⁶ Despite the DOL's role in administering and overseeing the guestworker program, certification for the U Visa based on federal fraud statutes will need to look for other certifying authorities, or may need to examine comparable state and local laws that can be certified by state and local law enforcement and administrative officials. There is room to push and try new strategies given the relative novelty of workplace U Visas, especially for guestworkers. Advocates for guestworkers may have to be creative in examining local and state laws that may be grounds for a U Visa certification, and should look to establish relationships with local law enforcement agencies and government administrators like state labor officials to act as certifying officials. The statutory list of qualifying criminal activities for a U Visa is explicitly non-exclusive,²¹⁷ so comparable state and local laws should be fully examined.

216. See Memorandum from Leppink to Reg'l Adm'rs & Dist. Dirs., *supra* note 197.

217. See 8 U.S.C. 1101(a)(15)(U)(iii) (2012); see also New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,018 (Sept. 17, 2007) (to be codified at 8 C.F.R. pt. 212).

As mentioned in subsection A of Part III, a second significant obstacle to a successful guestworker U Visa petition will be meeting the substantial harm requirement. Given that many labor violations may not involve an obvious physical harm, advocates will need to work to provide ample evidence of the emotional and mental effects of the exploitation of a guestworker. The determination of whether sufficient harm has occurred is ultimately at the discretion of the reviewing DHS officials, so it will behoove an applicant to use as much documentation as necessary to support a convincing argument regarding the harm they have suffered as a result of workplace abuses.

The U Visa is not a perfect remedy, but if used properly it could contribute to the movement toward much-needed reforms of the guestworker program. The attestation model of enforcement in the guestworker program is clearly broken, and the U Visa can help fill this gap.