



**Protection for Immigrant Victims of Workplace Crimes:
United States Department of Labor Protocol for U Visa Certification.**

On April 28, 2011, DOL released its new protocol for certification of U visas for immigrant victims of certain crimes. The new protocol follows on DOL's March 2010 announcement that it would begin to use this tool to ensure that immigrant workers can safely present their claims, in the face of rampant retaliation by employers. DOL's protocol specifies that it will certify U visas for five crimes that it may detect in the course of wage and hour investigations. These are: involuntary servitude, peonage, trafficking, obstruction of justice or witness tampering.

Background: What is a U Visa?

U visas were created under the Victims of Trafficking and Violence Prevention Act (now known by the acronym TVPRA) to protect immigrant victims of crime. An individual is eligible for a U visa if the individual is a victim of a qualifying crime listed under the law, possesses information about the qualifying criminal activity; and has been, is being, or is likely to be helpful in investigating the qualifying criminal activity. US Citizenship and Immigration Service (CIS) has final authority to issue actual visas, which also come with employment authorization, but a number of other agencies may certify eligibility to USCIS. A U visa holder may be eligible to remain in the United States for up to four years. U visa holders may be able to adjust their status to that of lawful permanent resident.

Since 2007, the U.S. Department of Labor has been named in regulations under the TVPRA as an agency that may certify U visas. The EEOC, as well as other state and federal law enforcement agencies, already certify U visas for worker victims of certain crimes, and DOL announced in March of 2010 that it would do so as well.

For which crimes will DOL certify U visas?

The TVPRA lists 36 crimes for which certification is appropriate, but also allows certification for similar crimes. DOL has decided to certify U visas for the qualifying crimes of involuntary servitude, peonage, trafficking, obstruction of justice, and witness tampering. DOL has indicated that it will work with workers to identify other agencies that may be willing to certify for other crimes. DOL reasons that these crimes are those that most closely tied to its mission. Advocates had hoped to see a longer list of crimes in the protocol, including especially physical violence and perjury.

Who within DOL will make the certification?

DOL has delegated the certification authorities to Regional Administrators in its five regions. The administrators will work with a region-level U visa coordinator. DOL Solicitors within each region will be designated to handle U visa cases and will provide legal advice. DOL will train its investigators in the U visa process.

Workers and advocates will be responsible for completing the U visa application, with DOL making the certification on the form I-918 Supplement B.

How will DOL determine eligibility?

To certify a U-visa, DOL's protocol acknowledges that it need only determine: (1) whether the crime victim possesses information about a qualifying crime; (2) whether the crime victim has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying crime; and (3) that the qualifying crime violated U.S. law or occurred in the U.S. DOL intends for its regional coordinators to interview victims of crime and work with district-level investigators to make appropriate certifications.

Will DOL make certifications in the context of OSHA and other violations of the law?

DOL's regulatory authority to certify U visas extends agency-wide (including key subagencies such as OSHA), but it appears to have elected to make certifications only in the context of Wage and Hour investigations and to have excluded other DOL-administered laws. The protocol says that Wage and Hour Division (WHD) will consider certification only "in cases where the crime arises in the context of a work environment or an employment relationship and there is a related, credible allegation of a law that WHD enforces."

Will DOL make certifications outside the context of Wage and Hour investigations?

The protocol indicates that certifications will be made only in the context of an ongoing or completed WHD investigation, or where a U visa petitioner contacts WHD with an allegation of violations of a law that WHD enforces and a related crime. It is not clear what process will be available for workers who elect to exercise their private right of action against an abusive employer instead of making a WHD complaint.

How long will certifications take?

DOL's protocol assures workers and advocates that it will attempt to complete certifications within three months of a request, and will notify the petitioner and his or her representative of its decisions in writing. If DOL does not certify, it will provide petitioners with information about other law enforcement agencies that may be able to certify. Because delays in issuing U-visa certification to a cooperating worker have the potential to severely undermine the protective purposes of U visas, this should be the outer limit of delay.

How will DOL coordinate with other law enforcement authorities?

Advocates have been concerned that referrals to law enforcement must be in the control of workers who are crime victims, so that their safety is the paramount concern. DOL's protocol indicates that it understands this concern, and makes assurances that it will work with workers and their representatives in the referral process. Advocates should work closely with their regional offices to ensure that DOL does not make unauthorized referrals, in particular to the Department of Homeland Security, in light of its recently released Memorandum of Understanding with ICE.

How should advocates follow up on the release of the protocol?

Advocates should meet with their regional administrators, U visa coordinators, and regional Solicitors in order to clarify and refine the U visa process, including the key issues of confidentiality, referrals, definition of qualifying crimes and timelines for issuance of the visas. The protocol gives regional staff wide discretion in certification decisions, and advocates will need to ensure that it is exercised appropriately.