

HEINONLINE

Citation: 29 Geo. Immigr. L.J. 1 2014-2015

Provided by:

Sponsored By: Thomas Jefferson School of Law



Content downloaded/printed from [HeinOnline](#)

Thu Dec 8 13:39:53 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

ARTICLES

A NEW UNDERSTANDING OF SUBSTANTIAL ABUSE: EVALUATING HARM IN U VISA PETITIONS FOR IMMIGRANT VICTIMS OF WORKPLACE CRIME

EUNICE HYUNHYE CHO, GISELLE A. HASS, AND LETICIA M. SAUCEDO*

ABSTRACT

This Article examines the legal concept of “substantial physical or mental abuse” suffered by immigrant victims of crime in the workplace, particularly as it relates to the ability to qualify for U non-immigrant status (commonly referred to as a “U visa”). Enacted for the dual purposes of strengthening law enforcement capacity and providing humanitarian relief to victims of crime, the U visa allows non-citizen victims of crime who are helpful in a crime’s detection, investigation, or prosecution to remain in the United States, obtain employment authorization, and attain lawful permanent residency. To qualify for the visa, victims must demonstrate that they have suffered “substantial physical or mental abuse” as a result of the criminal activity.

Although legal scholars, medical and mental health experts, and government agencies have more robustly explored the concept of “substantial physical or mental abuse” in the context of domestic violence and sexual assault against immigrant women, there has been no focused exploration of

* Eunice Hyunhye Cho, Staff Attorney, Immigrant Justice Project at the Southern Poverty Law Center; † Dr. Giselle A. Hass, Psy.D., Adjunct Professor of Law, Center for Applied Legal Studies, Georgetown University; Leticia M. Saucedo, Professor of Law, U.C. Davis School of Law. The authors wish to thank Jan Collatz, Thomas Fritzsche, and Gail Pendleton for their comments on earlier drafts, as well as the National Employment Law Project, the Southern Poverty Law Center, ASISTA, the National Immigration Project of the National Lawyers’ Guild, the Skadden Fellowship Foundation, and the participants of the Workplace U Visa Working Group for support of work underlying this article. Many thanks to Matt Trujillo, Daniel Rojas, Bryan Lopez, and Amanda Hass for their research assistance. Any positions taken in this article, errors, or omissions are the authors’ alone. † For identification only. © 2015, Eunice Hyunhye Cho, Giselle A. Hass, and Leticia M. Saucedo.

this concept in relation to abuse of immigrant workers. In recent years, labor and civil rights enforcement agencies have increasingly certified U visa petitions in cases involving victims of workplace crime, but greater clarity is needed on the concept of substantial abuse in this context.

This Article provides for the first time a comprehensive framework to evaluate abuse suffered by victims of workplace crime in the U visa context. Based on a multi-disciplinary analysis, the Article argues that adjudicators have erroneously conflated the U visa’s “substantial physical or mental abuse” standard with the standard of “extreme cruelty” developed in the context of immigration remedies for victims of domestic violence. The Article also argues that U visa adjudicators and advocates must account for the specific dynamics of abuse experienced by immigrant victims of workplace-based criminal activity, which are distinct from abuse displayed in more familiar cases of domestic violence, and examines particular forms of harm and vulnerabilities experienced by victims of workplace crime. The Article finally provides examples to assist adjudicators, policy-makers, and practitioners in the identification and assessment of workplace based U visa cases envisioned by the U visa statute and regulations.

TABLE OF CONTENTS

I. THE U VISA: AN EMERGING TOOL TO COMBAT ABUSE OF IMMIGRANT WORKERS	5
A. <i>The Immigrant Workforce: Broad Labor and Civil Rights Violations</i>	5
B. <i>The U Visa as a Tool for Improved Labor and Civil Rights Law Enforcement</i>	6
1. <i>U Visa Qualifying Crimes in the Workplace</i>	7
2. <i>Certification by Labor and Civil Rights Law Enforcement Agencies</i>	8
3. <i>USCIS’s Determination of U Visa Eligibility: Adjudicating Substantial Abuse Claims</i>	9
II. THE U VISA’S “SUBSTANTIAL PHYSICAL OR MENTAL ABUSE” STANDARD IN CASES OF WORKPLACE CRIME AS DISTINCT FROM VAWA’S “EXTREME CRUELTY” STANDARD	10
III. UNDERSTANDING WORKPLACE ABUSE: PSYCHOLOGICAL FRAMEWORKS	15
A. <i>Theories of Stress and Trauma</i>	16

2014]	A NEW UNDERSTANDING OF SUBSTANTIAL ABUSE	3
	B. <i>Stress, Trauma, Victimization, and Abuse in the Workplace</i>	18
	C. <i>Immigrant Victims of Workplace Crime: Factors Affecting Severity of Harm and Aggravation of Pre-Existing Conditions</i>	23
	1. <i>Pre-Existing Conditions and Prior Traumatic Experiences</i>	23
	2. <i>Inability to Engage in Healthy Coping Strategies in the Face of Employer Abuse</i>	24
	a. <i>Economic Dependency</i>	25
	b. <i>Lack of Work Authorization or Legal Status</i>	26
	c. <i>Power Differentials Between Employer and Employee</i>	27
	d. <i>Limited English Language Proficiency</i>	27
	e. <i>Gender, Gender Identity, or Sexual Orientation</i>	28
	f. <i>Isolation</i>	30
	g. <i>Lack of Knowledge of or Ability to Exercise Legal Rights</i>	30
IV.	U VISA QUALIFYING CRIMINAL ACTIVITY IN THE WORKPLACE	31
	A. <i>The Unique Role of Employer Threats and Retaliation in Workplace Abuse</i>	31
	B. <i>Common Qualifying Criminal Activities in the Workplace</i>	32
	1. <i>Obstruction of Justice, Witness Tampering, and Perjury</i>	32
	2. <i>Extortion and Blackmail</i>	35
	3. <i>Fraud in Foreign Labor Contracting</i>	37
	4. <i>Trafficking, Involuntary Servitude, and Peonage</i>	38
	5. <i>Felonious Assault</i>	40
	6. <i>Sex Crimes</i>	41
V.	CONCLUSION	43

INTRODUCTION

Although immigrant workers¹ in the United States, regardless of legal status, are covered by the same legal protections as native-born workers,² immigrants face higher risks of abuse and exploitation in the workplace. Immigrants work disproportionately in low-wage industries marked by poor conditions, and experience exceedingly high rates of basic labor law violations.³ In some cases, mistreatment of immigrant workers by employers rises to the level of criminal activity.⁴ However, undocumented immigrants and migrant workers whose legal status is dependent on their employers may fear retaliation by their employers when exercising their workplace rights, and thus fail to come forward to report exploitation and abuse.⁵

In recent years, law enforcement agencies have increasingly viewed U non-immigrant status (commonly referred to as a “U visa”)⁶ as a helpful tool to strengthen enforcement of labor standards and civil rights protections. The U visa allows non-citizen victims of certain qualifying crimes who are helpful in the crime’s detection, investigation, or prosecution, and have suffered substantial physical or mental abuse as a result of the crime to remain in the United States, obtain employment authorization, and adjust their status to that of a legal permanent resident.⁷ In cases where worker mistreatment rises to the level of criminal activity, law enforcement agencies, including civil enforcement agencies, may choose to certify U visa petitions for immigrant victims of workplace crime. However, as the number of U visa petitions certified by labor law enforcement agencies has grown, so too has confusion around the concept of “substantial physical or mental abuse”—a precondition for receipt of the U visa—in the context of workplace abuse.

1. Undocumented workers and guestworkers alike face high risk of workplace exploitation because of immigration status. We thus refer to both categories of workers as “immigrant workers” in this Article.

2. *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) (undocumented workers covered by FLSA’s minimum wage and overtime protections); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004), *cert. denied*, 544 U.S. 905 (2005) (coverage of undocumented workers under Title VII); *Sure-Tan v. NLRB*, 467 U.S. 883 (1984) (holding that undocumented workers are “employees” under the NLRA); *Agri-Processor Co. Inc. v. NLRB*, 514 F.3d 1, 5 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 594 (2008) (concluding that Congress did not intend to repeal NLRA’s coverage of undocumented workers).

3. *See infra*, notes 13-15.

4. *See, e.g.*, *United States v. Askarkhodjaev*, No. 09-00143-01/11-CR-W-ODS (W.D. Mo. Jan. 7, 2010) (indictment on criminal charges, including fraud in foreign labor contracting, for a scheme to recruit and exploit workers recruited outside the United States for work in the U.S.).

5. *See, e.g.*, Teresa Scherzer et al., *Work-Related Pain and Injury and Barriers to Workers’ Compensation Among Las Vegas Hotel Room Cleaners*, 95 Am. J. Pub. Health 483 (2005) (finding that only 20 percent of immigrant hotel workers who had experienced work-related pain filed claims for fear of “getting in trouble” or being fired).

6. Practitioners commonly use the term “U visa” and “U non-immigrant status” interchangeably, despite technical differences. A “U visa” corresponds with the actual visa granted individuals at the time of admission to the United States; “U non-immigrant status” corresponds with legal status granted to individuals allowed admission and presence under 8 U.S.C. § 1101(a)(15)(U). For the purposes of this article, we use the term “U visa” to refer to both.

7. *See* 8 U.S.C. § 1101(a)(15)(U) (2012).

Legal scholars and policymakers have discussed the concept of “substantial physical or mental abuse” in the context of domestic violence against immigrant women in greater depth.⁸ This concept, however, requires greater clarity in the context of workplace-related crimes. This Article provides for the first time a comprehensive framework to evaluate abuse against immigrant workers in the context of the U visa’s “substantial physical or mental abuse” standard. Drawing on theoretical models of stress and trauma in psychological literature, and empirical research describing physical and mental health outcomes for victims of workplace bullying, harassment, violence, and trafficking, the Article also provides useful examples that may assist adjudicators, policy-makers and practitioners in the identification and assessment of abuse experienced by immigrant victims of workplace crime.

To begin this analysis, Part I provides a brief overview. It briefly describes poor conditions faced by low-wage immigrant workers and explores the emergence of the U visa as an important tool in the enforcement of labor standards and anti-discrimination protections for immigrant workers. Part II examines the legislative and regulatory origins for the “substantial abuse” standard, and its application in the context of the U visa. In particular, this Part urges adjudicators to apply standards for substantial abuse that are rooted in social science research findings, and prevent the erroneous conflation of the U visa’s “substantial physical or mental abuse” standard with the standard of “extreme cruelty” developed in the limited context of immigration remedies for victims of domestic violence. Part III explores frameworks for evaluating and understanding psychological harm experienced by victims of abuse in the workplace, including additional factors that aggravate the severity of harm. Part IV examines U visa qualifying criminal activities that most often occur in the workplace. Part V provides a conclusion.

I. THE U VISA: AN EMERGING TOOL TO COMBAT ABUSE OF IMMIGRANT WORKERS

A. *The Immigrant Workforce: Broad Labor and Civil Rights Violations*

Immigrant workers’ vulnerability to poor labor conditions is well documented.⁹ Although all workers, regardless of legal status, are entitled to the

8. LESLYE ORLOFF & PAIGE FELDMAN, LEGAL MOMENTUM, NATIONAL SURVEY ON TYPES OF CRIMINAL ACTIVITIES EXPERIENCED BY U VISA RECIPIENTS (2011), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/U-visa-recipients-criminal-activity-survey.pdf/view>; see also, Nawal H. Ammar, et al., *Calls to Police and Police Response: A Case Study from Latina Immigrant Women in the U.S.*, 7 J. OF INT’L POLICE SCI. AND MGMT 230 (2005); Mangai Natarajan, *Domestic Violence among Immigrants from India: What We Need to Know—and What We Should Do*, 26 INT’L J. COMP. & APPL. CRIM. JUSTICE 301 (2003); Leslye Orloff, et al., *Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 UCLA WOMEN’S L.J. 43 (2003); Anita Raj, et al., *Immigration Policies Increase South Asian Immigrant Women’s Vulnerability to Intimate Partner Violence*, 60 J. AM. MED. WOMEN’S ASS’N 26 (2005).

9. See *infra* note 11.

same protections as their native-born counterparts,¹⁰ immigrant workers experience exceedingly high rates of basic labor law violations. Sexual violence against immigrant women workers in industries such as agriculture, domestic work, and food manufacturing and processing remains widespread.¹¹ A recent national study found that 37.1 percent of low-wage undocumented workers were paid less than the minimum wage, in comparison to 15.6 percent of native-born low-wage workers.¹² Seventy-six percent of undocumented workers had worked off-the-clock without *any* pay; 84.9 percent had not received overtime pay.¹³ Immigrant workers are also more susceptible to dangerous work conditions, and experience higher rates of occupational injury and death than U.S. citizen workers.¹⁴

B. *The U Visa as a Tool for Improved Labor and Civil Rights Law Enforcement*

In recent years, federal and state labor rights enforcement agencies have begun in earnest to certify U visa applications for immigrant victims of workplace-based criminal activity.¹⁵ Recognizing the challenges in gaining the trust of the immigrant workforce, these agencies have used U visas to enhance cooperation in key enforcement investigations. Although official statistics are unavailable, advocates report hundreds of known certifications by labor agencies since 2010 alone.¹⁶

Congress created the U visa as part of the Victims of Trafficking and Violence Prevention Act of 2000 (TVPA)¹⁷ in order to strengthen the ability of law enforcement agencies to investigate and prosecute certain criminal activities against immigrants, and to offer protection to victims who fear cooperating with law enforcement due to their immigration status. This

10. See *supra* note 2.

11. HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE U.S. TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT, 3 (2012), available at http://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf; MONICA RAMIREZ & MARY BAUER, INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY, 45-48 (2010); Amanda Clark, *A Hometown Dilemma: Addressing the Sexual Harassment of Undocumented Women in Meatpacking Plants in Iowa and Nebraska*, 16 HASTINGS WOMEN'S L.J. 139 (2004); Maria Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 MAINE L. REV. 157 (2003); Diana Velloso, *Immigrant Latina Domestic Workers and Sexual Harassment*, 43 J. GENDER & L. 407 (1997).

12. ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 42-48 (2009), available at <http://bit.ly/JjXs8D>.

13. *Id.*

14. Immigrant workers suffer workplace injury at thirty-one injuries per 10,000, a rate higher than all workers. Pia Orrenius et al., *Do Immigrants Work in Riskier Jobs?*, 46 DEMOGRAPHY 535 (2009).

15. See *infra* note 31.

16. Although no official statistics exist, author Eunice Cho, as a staff attorney at the National Employment Law Project, which established a national working group on workplace-based U visas, reviewed and provided technical assistance on hundreds of U visa applications certified for workplace-based crime since 2010.

17. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a), 114 Stat. 1464, 1533 (2000).

immigration relief provides some protection for workers against employer retaliation when workers are willing to call attention to workplace abuse, and strengthens the ability of labor and civil rights law enforcement agencies to gain workers' trust and cooperation.¹⁸ The employment authorization that a U visa confers may also facilitate workers' access to employment remedies that might otherwise be foreclosed, such as reinstatement or back wages.¹⁹

U visa recipients receive lawful status for up to four years, are eligible to adjust status to lawful permanent residence after three years, and receive work authorization for the time of the visa.²⁰ U visa holders may also receive derivative visas for dependents, including spouses, children and in some cases, parents and siblings.²¹

In order to qualify for a U visa, an immigrant worker must have been a victim of a qualifying criminal activity, and have information concerning the qualifying criminal activity; been helpful, be helpful, or be likely to be helpful in the detection, investigation, or prosecution of the qualifying criminal activity; show that the qualifying criminal activity violated a local, state, or federal law, or have occurred in the United States or violated a law with extraterritorial reach; and have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity.²²

1. *U Visa Qualifying Crimes in the Workplace*

Twenty-eight qualifying criminal activities trigger eligibility under U visa statutory provisions. Among these qualifying criminal activities are the more commonly recognized categories of domestic violence and sexual assault. A robust literature exists on the psychological effects of these criminal activities,²³ however, the statute lists several other criminal activities that may take place in low-wage workplaces. These qualifying criminal activities include abusive sexual contact, sexual assault, and rape; blackmail and extortion; felonious assault; fraud in foreign labor contracting, involuntary servitude, peonage and trafficking; and obstruction of justice, witness tampering, and

18. See, e.g., *Garcia v. Audobon Communities Mgmt.*, No. 08-1291, 2008 WL 1774584 (E.D. La. Apr. 15, 2008).

19. 8 C.F.R. § 214.14(c)(7) (providing employment authorization documents to U visa recipients).

20. 8 U.S.C. § 1184(p) (2012).

21. 8 C.F.R. § 214.14(a)(10); see also DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, POLICY MEMORANDUM: AGE-OUT PROTECTION FOR DERIVATIVE U NONIMMIGRANT STATUS HOLDERS: PENDING PETITIONS, INITIAL APPROVALS, AND EXTENSIONS OF STATUS, PM-602-0077 (Oct. 24, 2012), available at http://www.asistahelp.org/documents/resources/Age_Out_Memo_C54AAA0DE9911.pdf. Spouses must be legally married *prior* to the filing of the U visa petition with USCIS in order to qualify as a derivative.

22. 8 U.S.C. § 1101(a)(15)(U) (2012); 8 C.F.R. § 214.14(b). Importantly, 8 C.F.R. § 214.14(a)(5) defines "investigation or prosecution" to include the "detection or investigation of a qualifying crime or criminal activity."

23. See *supra* note 8. See also NANCY LOMBARD, VIOLENCE AGAINST WOMEN: CURRENT THEORY AND PRACTICE IN DOMESTIC ABUSE, SEXUAL VIOLENCE AND EXPLOITATION (2013) for a summary of research on domestic violence/intimate partner violence and sexual assault.

perjury.²⁴ In addition to the qualifying acts themselves, the attempt, conspiracy, or solicitation of these qualifying acts may serve as the basis for U visa eligibility.²⁵

2. *Certification by Labor and Civil Rights Law Enforcement Agencies*

A U visa petitioner must obtain certification from a law enforcement agency, prosecutor, judge, or other government official authorized by the U visa regulations to sign a certification confirming that the petitioner is a victim of a qualifying criminal activity and has been helpful in detecting, investigating, or prosecuting that crime.²⁶ In order to certify a U visa petition, a judge or a governmental official who is in a supervisory role at a certifying law enforcement agency must complete and sign a U-Nonimmigrant Status Certification, Form I-918 Supplement B (Form I-918B).²⁷

Certifying agencies have broad discretion to certify U visa applications. For example, a certifying agency may complete a Form I-918B while an investigation is open or after a case is closed. Regulatory commentary explains that the helpfulness requirement “was written with several verb tenses, recognizing that an alien may apply for U-Nonimmigrant status at different stages of the investigation or prosecution.”²⁸ Moreover, a conviction is not required for a law enforcement agency to certify a U visa petition, and certification is valid even if the initial criminal activity detected or investigated is different than the crime that is prosecuted.²⁹

Since 2008, federal labor and civil rights agencies, including the U.S. Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, and state agencies including the California Division of Labor Standards Enforcement, California Department of Fair Employment and Housing, Illinois Department of Labor, and the New York Department of Labor have released protocols to certify U visa petitions.³⁰

24. 8 U.S.C. § 1101(a)(15)(U)(iii) (2012).

25. *Id.*

26. 8 C.F.R. § 214.14(b)(2) (2011) defines “[i]nvestigation or prosecution” of a qualifying crime or criminal activity as referring to “the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.” See also 72 Fed. Reg. 53,019.

27. *Id.* See also, 8 C.F.R. § 214.14(a)(3)(i).

28. 72 Fed. Reg. 53,019; U.S. DEP’T. OF HOMELAND SECURITY, U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE 10 (2011) [hereinafter “DHS U VISA RESOURCE GUIDE”], available at <http://1.usa.gov/KIEaqm> (“[L]aw enforcement can still complete the Form I-918B for an investigation or case that is closed.”).

29. U.S. DEP’T. OF HOMELAND SECURITY, U VISA RESOURCE GUIDE, *supra* note 28 at 10, 13.

30. U.S. DEP’T OF LABOR, FACT SHEET: THE DEP’T OF LABOR’S WAGE AND HOUR DIVISION WILL EXPAND ITS SUPPORT OF VICTIMS OF HUMAN TRAFFICKING AND OTHER CRIMES SEEKING IMMIGRATION RELIEF FROM DHS (2014); DEP’T. OF FAIR EMP’T AND HOUSING, STATE OF CAL., ENFORCEMENT DIV. DIRECTIVE (2014); Memorandum from Richard A. Seigel, Nat’l. Labor Relations Board, to All Reg’l Directors (June 7, 2011); Memorandum from Nancy Leppink, Acting Adm’r, Wage and Hour Div., U.S. Dep’t of Labor, to Regional Administrators and District Directors (Apr. 28, 2011); N.Y. STATE DEP’T OF LABOR, MEMORANDUM AND ORDER REGARDING CERTIFICATION OF U VISA PETITIONS (2011); Memorandum from Naomi Earp, Chair, Equal Emp’t Opportunity Comm’n, to District Directors and

Federal, state, and local courts may also issue U visa certifications. In *Garcia v. Audubon Communities Management*, a federal district court confirmed that judges presiding over civil litigation may certify U visa petitions for immigrant victims of qualifying criminal activity in the workplace. The decision clarified that a court may certify a U visa petition upon a prima facie showing that an individual is a victim of the qualifying criminal activity.³¹ Based on the U visa statute and that decision, advocates have successfully requested judicial certification of U visa petitions for victims of workplace crime in a variety of settings.³²

3. USCIS's Determination of U Visa Eligibility: Adjudicating Substantial Abuse Claims

After a law enforcement agency has provided certification of a victim's helpfulness in detecting, investigating, or prosecuting a crime, the U.S. Citizenship and Immigration Services (USCIS) has jurisdiction to approve or deny the U visa. Significantly, applicants must present evidence and the agency bears responsibility for determining whether a victim has suffered "substantial physical or mental abuse" as a result of the qualifying crime, a required element of proof for approval of a U visa.³³

U visa regulations define "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."³⁴ When determining whether a U visa applicant is a victim of substantial physical or mental abuse, USCIS adjudicators must weigh a number of factors in a fact-specific determination, including:

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.³⁵

The agency regulations also provide guidance on the cumulative effects of these factors:

Reg'l Attorneys (July 3, 2008), available at <http://www.nelp.org/page/-/Justice/2014/U-Visas-for-Victims-of-Workplace-Crime-Practice-Manual-NELP.pdf?nocdn=1>.

31. *Garcia v. Audubon Communities Management*, No. 08-1291, 2008 WL 1774584, at *2-3 (E.D. La. Apr. 15, 2008); see also Andrew Turner et al., *Case of First Impression: Federal Judge in Civil Case May Certify U Visa Applications of Undocumented Immigrant Human Trafficking Victims*, 42 CLEARINGHOUSE REV. 510 (2009).

32. See, e.g., *Zapata v. Zadeyan, Inc.*, No. D-101-CV-201103322 (N.M. 1st D.C. Sept. 9, 2013) (providing judicial certification for victim of workplace crime).

33. 8 C.F.R. §§ 214.14(b)(1).

34. 8 C.F.R. § 214.14(a)(8).

35. 8 C.F.R. § 214.14(b)(1).

No single factor is a prerequisite to establish that the abuse suffered was substantial. Also, the existence of one or more of the factors automatically does not create a presumption that the abuse suffered was substantial. 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.³⁶

Recent USCIS adjudications of U visa petitions for victims of workplace criminal activity, however, suggest significant confusion around the concept of “substantial physical or mental abuse.” As some advocates have noted, USCIS adjudicators in many cases have applied inconsistent or higher standards for a showing of substantial physical or mental abuse in cases involving victims of crime in the workplace than for victims of crime in other settings, including domestic or intimate partner violence.³⁷ In addition, recent cases suggest a lack of familiarity with U visa qualifying criminal activities that most commonly occur in the context of the workplace, the harms experienced by immigrant victims of workplace crime, and how pre-existing conditions or other contextual factors aggravate victims’ experiences of abuse.³⁸ As this article argues, frameworks for understanding power and control dynamics in intimate partner abuse cases cannot simply be transferred to employer-employee relationships. This article presents a social science-based framework that will assist adjudicators and practitioners to more accurately understand substantial abuse resulting from workplace crime.

II. THE U VISA’S “SUBSTANTIAL PHYSICAL OR MENTAL ABUSE” STANDARD IN CASES OF WORKPLACE CRIME AS DISTINCT FROM THE VAWA’S “EXTREME CRUELTY” STANDARD

Since DHS’s promulgation of U visa regulations in 2007, USCIS adjudicators have received extensive training on domestic violence, sexual assault, and human trafficking issues.³⁹ These agency adjudicators, who are also responsible for adjudication of immigration petitions under the Violence Against Women Act (VAWA), have had less specialized training and exposure to victims of workplace crime outside of the human trafficking context. According to surveys conducted by advocacy groups, domestic violence

36. 8 C.F.R. § 214.14(b)(1).

37. Letter from National Employment Law Project and ASISTA, to Alejandro Mayorkas, Deputy Secretary, Department of Homeland Security, (May 6, 2014), available at: http://www.asistahelp.org/index.cfm/21011/28881/uscis__workplace_u_visa_substantial_abuse_letter.

38. *Id.*

39. See, e.g. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, QUESTIONS AND ANSWERS: FILING T, U, AND VAWA PETITIONS WITH USCIS 3 (Jun. 30, 2009) (describing training for VAWA unit adjudicators on family violence), available at http://www.asistahelp.org/documents/filelibrary/documents/CIS_T_and_U_FAQ_630091_F6FFECE756DE9.pdf.

cases account for 49.5 percent of U visa cases.⁴⁰ As a result, adjudicators may view the “substantial physical or mental abuse” standard primarily through the lens of domestic violence, and may improperly conflate the “extreme cruelty” standard required for immigration relief under the VAWA with the U visa’s “substantial abuse” standard.⁴¹ USCIS adjudicators may thus have more experience recognizing fact patterns that appear more readily in domestic violence settings, to the exclusion of other forms of harm and abuse experienced by victims of other types of criminal activity covered by the U visa, including victims of crime in the workplace.

This Part analyzes the overlapping, yet distinct, origins of the “extreme cruelty” standard required for relief in the VAWA domestic violence context and the “substantial abuse” standard in the U visa context, and promotes the application of the “substantial abuse” standard that accounts for the statute’s broader purpose.

Congress first provided specific immigration relief for victims of domestic violence in 1990,⁴² and subsequently expanded protections for immigrant victims of domestic violence in the Violence Against Women Act of 1994.⁴³ Under VAWA’s provisions, individuals who have been “batter[ed]” or subject to “extreme cruelty” by a U.S. citizen or legal permanent resident spouse or parent, among other requirements, could file a battered spouse waiver, file a self-petition for permanent residency, or apply for cancellation of removal or suspension of deportation.⁴⁴

Underscoring Congress’s intent to provide relief to battered immigrant women, the Immigration and Naturalization Service (INS)⁴⁵ referenced patterns of abuse common to intimate partner and family violence in defining “battery or extreme cruelty” for purposes of VAWA relief. Under the VAWA

40. LESLYE ORLOFF & PAIGE FELDMAN, NATIONAL SURVEY ON TYPES OF CRIMINAL ACTIVITIES EXPERIENCED BY U VISA RECIPIENTS (Nov. 29, 2011) *available at* <http://niwapllibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/U-visa-recipients-criminal-activity-survey.pdf/view>.

41. *See supra* note 37 (describing case examples).

42. Immigration Act of 1990, Pub. L. No. 101-649, § 701(b), 104 Stat. 4978 (codified as INA § 216(c)(4)(C)); *see also* Maxine Yi Hwa Lee, *A Life Preserver for Battered Immigrant Women: The 1990 Amendments to the Immigration Marriage Fraud Amendments*, 41 BUFF. L. REV. 779, 788-790 (1993).

43. Violence Against Women Act (VAWA I), Pub. L. No. 103-322, 108 Stat. 1941, 1941-1942 (1994) (codified as amended in scattered sections of 8 and 42 U.S.C.).

44. VAWA I §§ 40, 701, 40,703. Applicants for VAWA self-petitions or cancellation of removal must also reside in the United States, have resided in the United States with the citizen or lawful permanent resident spouse, be a person of good moral character, show that deportation would result in extreme hardship, and had entered into the marriage in good faith. Moreover, immigrant children or adult parents who are the victims of abuse perpetrated by a U.S. citizen or legal permanent resident parent or child, in certain circumstances, are also eligible for this relief. 8 U.S.C. § 1154(a)(1)(A)(iii) (2012); 8 U.S.C. § 1229b(2)(A) (2012).

45. On March 1, 2003, the functions of the former Immigration and Naturalization Service (INS) were transferred from the Department of Justice to three agencies (the U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services) in the newly formed Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

regulation, an individual “battered by” or the “subject of extreme cruelty” included any “victim of any act or threatened act of violence . . . which results or threatens to result in physical or mental injury.”⁴⁶ The INS specified particular acts of violence common to intimate and family violence as illustrative examples, including psychological or sexual abuse or exploitation, rape, molestation, incest, and forced prostitution.⁴⁷ The INS also endorsed a contextual approach to understanding what constituted “violence” in intimate partner and family relationships, and cautioned against dismissing actions that, on their surface, might not appear to be violent. “Other abusive actions may also be acts of violence under certain circumstances,” the INS noted, “including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.”⁴⁸ This nuanced and fact-specific approach to understanding abuse, moreover, would prove important for future approaches to protecting immigrant victims of criminal activity.

Six years later, Congress passed the Victims of Trafficking and Violence Protection Act of 2000 (TVPA),⁴⁹ which established the U visa.⁵⁰ Although in creating the U visa, Congress emphasized the need to protect immigrant victims of domestic violence and sexual assault, it also specified a need to target a broader spectrum of criminal activity enumerated in the U visa statute.⁵¹ Unlike VAWA’s requirement that applicants for immigration relief show that they had been subject to “battery or extreme cruelty,” Congress introduced a new standard for U visa applicants, requiring that applicants must have “suffered substantial physical or mental abuse as a result of having been a victim of criminal activity” enumerated in the statute.⁵²

When Congress created U visa protections for immigrant crime victims, the term “substantial physical or mental abuse” had never been used before in the immigration context. In promulgating the U visa regulations, the Department of Homeland Security (DHS) faced the task of interpreting the term’s meaning for the first time.

As it interpreted the meaning of “substantial physical or mental abuse” in the U visa context, DHS first looked to provisions involving victims in the VAWA statute. In its analysis, DHS noted that in the context of VAWA, the term “abuse” was used nearly interchangeably with the concepts of “battery,”

46. 8 C.F.R. 204.2(c)(1)(vi).

47. *Id.*

48. *Id.*

49. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. B, 114 Stat. 1464, (2000) (codified as amended in scattered sections of 8 and 42 U.S.C.).

50. *Id.* § 1513.

51. *Id.* § 1513(a)(2)(A).

52. 8 U.S.C. § 1101(a)(15)(u)(i)(I) (2012).

and “extreme cruelty” in the context of domestic violence.⁵³ As it explained in its regulatory commentary:

This rule defines physical or mental abuse to mean injury or harm to the victim’s physical person, or harm to or impairment of the emotional or psychological soundness of the victim. New 8 CFR 214.14(a)(8). In considering how to define the term physical or mental abuse, USCIS examined existing regulations that use similar terms. In particular, USCIS looked to regulations promulgated following the enactment of VAWA 1994 that allow battered spouses and children of U.S. citizens and lawful permanent residents to seek immigration status. See 8 CFR 204.2(c), 216.5(e)(3). These regulations use the terms “battery” and “extreme cruelty” to refer to any act or threatened act of violence that results in physical or mental injury. See 8 CFR 204.2(c)(2)(vi); 8 CFR 216.5(e)(3)(i). Battery and extreme cruelty are terms that the regulations use interchangeably with the term “abuse.” See 8 CFR 204.2(c)(1)(vi); (2)(iv); 216.5(e)(3)(i); and 216.5(e)(3)(iii).⁵⁴

Although the VAWA “extreme cruelty” standard and treatment of victims of abuse informed the INS’s understanding of the U visa “substantial abuse” standard, it did so only as a starting point, as discussed below. As DHS further specified when drafting the regulations, a number of additional factors would determine whether physical or mental abuse qualified as “substantial.”⁵⁵

The U visa regulations make clear that the U visa “substantial abuse” standard incorporates, but is not limited by, VAWA’s approach to “extreme cruelty.” The term “extreme cruelty” is limited in that it is a legal concept uniquely and historically based in family law and domestic violence, and is a concept too limited to be readily transferable to other areas of law. DHS recognized this limitation and devoted an extended discussion in the preamble to the U visa regulation to provide a more detailed guidance and direction to applicants and adjudicators.

Historically, family law determinations that assign fault in divorce proceedings have uniquely shaped the contours of what constitutes “extreme cruelty,” often requiring an analysis of a wide array of psychological and emotional abuse in marital or family settings. As illustrations, family courts have identified stalking,⁵⁶ deception through false promises or lies,⁵⁷ social

53. 8 U.S.C. §§ 204(a)(1)(A)(iii), (B)(ii) (2012). The provisions state that a victim of battery or extreme cruelty perpetrated by a citizen or lawful permanent resident can self-petition for immigrant status.

54. 72 Fed. Reg. 53018 (Sept. 17, 2007).

55. 72 Fed. Reg. 53018 (Sept. 17, 2007).

56. *Rakestraw v. Rakestraw*, 717 So. 2d 1284, 1286 (Miss. Ct. App. 1998) (stalking behavior contributing to a finding of “extreme cruelty” may run from loitering outside or driving past the victim’s home); *Fuchs v. Fuchs*, 216 A.D.2d 628, 628 (N.Y. App. Div. 1995) (following the victim and

isolation,⁵⁸ possessive, harassing, and controlling behavior,⁵⁹ threats to person or property,⁶⁰ economic abuse⁶¹ and humiliation or degradation as constituting extreme cruelty in divorce proceedings.⁶²

Adjudications that conflate the standards of substantial abuse and extreme cruelty and look for fact patterns that fit the family law definitions of “extreme cruelty” may impose standards never meant to apply in U visa cases. Acts viewed as battery or extremely cruel in the family law context might have analogous treatment in other law enforcement settings. To the extent that these acts do not have analogues in criminal law, the “extreme cruelty” definition derived from family law cases is either over-inclusive or under-inclusive for purposes of U visa adjudication, particularly in cases of worker abuse. The concept is under-inclusive because it fails to capture the

engaging in a high-speed car chase); *Christenson v. Christenson*, 472 N.W.2d 279, 280 (Iowa 1991) (high speed car chase is “domestic abuse”).

57. For example, where a spouse “induced by fraud the resumption of marital relations” by insincerely promising to end certain behavior, a marriage was properly dissolved due to extreme cruelty even if no new blatant misconduct followed the lies. *See, Keenan v. Keenan*, 105 N.W.2d 54, 57 (Mich. 1960) (affirming divorce on extreme cruelty grounds and denying claim where “the brief reconciliation rested on the bases of promises and assurances given by defendant to plaintiff which were not kept, and which inferentially were not made in good faith”).

58. *See, e.g., Giselle Aguilar Hass et al., Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications, in DOMESTIC VIOLENCE: GLOBAL RESPONSES* 93-113 (2000) (“Immigration-related abuse is a critical way in which batterers of immigrant women exert power and control; it is a key element of extreme cruelty, dominance and isolation.”); *see also, Robinson v. Robinson*, 722 So. 2d 601, 603 (Miss. 1998) (finding cruel and inhuman treatment where a husband “restrict[ed] her social life to the point of telling her who she could be friends with, what social functions she could attend, and where and under what circumstances she could go anywhere”); *Gazzillo v. Gazzillo*, 379 A.2d 288, 291 (N.J. Super. Ct. Ch. Div. 1977) (refusal to permit wife to invite relatives to visit them supports extreme cruelty finding); *McFall v. McFall*, 136 P.2d 580, 582 (Cal. Ct. App. 1943) (“forbid[ing] defendant to keep company with her friends or to bring her friends to their home” contributed to extreme cruelty finding).

59. *See Keller v. Keller*, 763 So. 2d 902, 904, 909 (Miss. Ct. App. 2000) (finding that husband demanding his wife to give up custody of her son or else he would leave her contributed to cruel and unusual punishment by the husband); *Richardson v. Richardson*, 589 N.Y.S.2d 624, 625-26 (N.Y. App. Div. 1992) (finding that daily multi-hour arguments between husband and wife and the husband’s not allowing wife to sleep until she conceded to the husband’s position contributed to finding of cruel and inhuman treatment by husband); *Veach v. Veach*, 392 P.2d 425, 429 (In. 1964) (finding that a “continuing course of unrelenting domination” to a wife contributed to extreme cruelty by the husband); *Muhammad v. Muhammad*, 622 So.2d 1239, 1241-42, 1248-49 (Miss. 1993) (finding of cruel and inhuman treatment by a husband where the husband’s religion forced his wife to surrender control over her privacy, finances, phone calls, mail, diet, child care decisions, and ability to leave the community); *Hybertson v. Hybertson*, 582 N.W.2d 402, 405 (S.D. 1998) (finding extreme cruelty where a husband’s religion made his wife feel “like she and the children were living in a ‘Gestapo’ environment”); *Gascon v. Gascon*, 187 A.D.2d 955, 955 (N.Y. App. Div. 1992) (finding that installation of surveillance equipment to monitor spouse contributed to extreme cruelty); *H.E.S. v. J.C.S.*, 793 A.2d 780, 783-84, 792 (N.J. Super. Ct. App. Div. 2002) (repeated phone calls and letters constituted harassment and stalking), *aff’d in part, rev’d in part*, 815 A.2d 405 (2003) (finding the husband’s phone calls and letters also constituted harassment).

60. *See, e.g., JANET CARTER, FAMILY VIOLENCE PREVENTION FUND: A NATIONAL MODEL FOR JUDICIAL EDUCATION* 23-24 (Jaqueline Agtuca et al. eds., 1992) (finding that abusers use gestures such as standing very close, clenching fists, sending warning looks, and displaying weapons to intimidate their victims).

61. *Id.* at 23.

62. *See, e.g., Gazzillo v. Gazzillo*, 379 A.2d 288 (N.J. Super. Ct. Ch. Div. 1977) (finding that a husband insults, criticism, and blaming towards his wife, and forcing the victim to engage in illegal activities, drug abuse, and prostitution all constituted to acts of extreme cruelty by the husband).

type of employer control that includes an intimidating atmosphere alongside an economic wage relationship. It is over-inclusive to the extent that adjudicators seek specific forms of extreme cruelty that come from the family law cases to substitute for substantial abuse. A wholesale importation of the “extreme cruelty” standard, therefore, is inadequate for the workplace-based criminal activity.

Instead, a proper approach to U visa adjudication takes into consideration the full range of factors and the broad spectrum of evidence contemplated by the U visa regulations as relevant to a substantial abuse determination. First, as the USCIS noted in its regulatory commentary, when considering whether abuse suffered by a victim of crime was “substantial,” the regulation contemplated both “the severity of the injury suffered by the victim,” as well as the “severity of the abuse inflicted by the perpetrator.”⁶³ This guidance indicates that the conduct of the perpetrator in some instances might be so severe as to result in substantial abuse. Second, U visa regulations clearly require consideration of several factors, none of which, by themselves, are determinative.⁶⁴ This directive indicates that even if the perpetrator’s conduct, viewed by itself, is not sufficiently severe, other factors may contribute to the conclusion that the abuse is substantial.

Finally, in issuing the U visa regulations, DHS instructed that adjudicators take a fact-specific and nuanced approach to acts that might constitute abuse. As the regulation notes, “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.”⁶⁵ In some cases, victims of criminal activity in the workplace experience abuse closely analogous to fact patterns observed in domestic violence settings, including abusive sexual contact, sexual assault, rape and felonious assault by employers. These fact patterns easily parallel examples of violence that would meet VAWA’s “extreme cruelty” standard. However, the U visa statute provides that victims of a broader array of crimes also qualify for relief. Thus, a more nuanced understanding of how abuse manifests in settings other than familial relationships is informative for both adjudicators and applicants.

III. UNDERSTANDING WORKPLACE ABUSE: PSYCHOLOGICAL FRAMEWORKS

Workplace aggression includes an extensive number of behaviors that occur in the workplace and that fall on a continuum ranging from glares, verbal threats, deception, manipulation, coercion, sexual contact, and physical assaults.⁶⁶ Experts define workplace violence to include “behavior by an

63. 72 Fed. Reg. 53018 (Sept. 17, 2007).

64. 8 C.F.R. § 214.14(b)(1) (2013).

65. *Id.*

66. Aaron C. H. Schat, Michael Frone, & E. Kevin Kelloway, *Prevalence of Workplace Aggression in the U.S. Workforce*, in HANDBOOK OF WORKPLACE VIOLENCE 46, 48 (E. Kevin Kelloway, et al., eds. 2006).

individual or individuals within or outside an organization that is intended to physically or psychologically harm a worker or workers and occurs in a work-related context.”⁶⁷

Although aggression in different contexts has been the subject of study in the psychological literature, workplace aggression, whether physical or mental, has not been as widely addressed.⁶⁸ Empirical research confirms negative psychological and physical consequences for victims who suffer different forms of violence in the workplace, including bullying, harassment, psychological aggression, and other forms of victimization.

Workplace aggression causes particularly negative consequences for victims’ mental health and psychological and psycho-social functioning that harm and impair the emotional and psychological soundness of the victim.⁶⁹ Indeed, victims of workplace abuse, like victims of other forms of abuse, often suffer from diagnosable disorders, such as depression, post-traumatic stress disorder, panic disorder, and other emotional harm including symptoms such as negative mood and high levels of anxiety.⁷⁰ Victims of workplace abuse who experience direct physical injuries usually also suffer from secondary somatic concerns such as persistent pain, and psychological harm caused by the abuse itself.⁷¹ Research on workplace abuse has concluded that it is also associated with negative psycho-social functioning, ranging from negative self-views, impaired social interactions, and substance abuse.⁷²

A. *Theories of Stress and Trauma*

Understanding the role of stress and trauma experienced by victims of criminal activity is central to any evaluation of abuse. Stress is an essential ingredient of life that propels human beings to grow and adapt to change.⁷³ Excessively toxic, persistent, or intense stress, however, inhibits an individual’s ability to return to a normal level of both physical and emotional equilibrium. A stress-inducing event may tax a substantial portion of an individual’s mental and physical resources, and decrease his or her ability to

67. Aaron C.H. Schat & E. Kevin Kelloway, *Workplace Aggression*, in HANDBOOK OF WORK STRESS 189, 191 (Julian Barling, et al., eds., 2005).

68. See, Schat, Frone, & Kelloway, *supra* note 67, at 3. One exception is the field of personal injury, including workers’ compensation and damages in tort. Psychological injury, including emotional distress caused by an employment has become recognized as distinct and separate from physical injuries in the workplace in both the U.S. and Canada. William J. Koch, et al., *PSYCHOLOGICAL INJURIES: FORENSIC ASSESSMENT, TREATMENT, AND LAW* 26 (Ronald Roesch ed., 2006).

69. See 72 Fed. Reg. 53,018 (Sept. 17, 2007).

70. Ase Marie Hansen et al., *Bullying at Work, Health Outcomes, and Physiological Stress Response*, 60 J. OF PSYCHOSOMATIC RES. 63, 63-71 (2006).

71. *Id.*; Michelle K. Duffy, et al., *Social Undermining in the Workplace*, 45 ACAD. MGMT. J. 331, 336-342 (2002); Michael P. Leiter, *Perception of Risk: An Organizational Model of Occupational Risk, Burnout, and Physical Symptoms*, 18 ANXIETY, STRESS & COPING 131, 132-133 (2005).

72. See Schat, Frone, & Kelloway, *supra* note 67 at 99 (describing describes results of numerous research studies regarding effects of emotionally abusive behaviors in the workplace).

73. Virginia Hill Rice, *Theories of Stress and Its Relationship to Health*, in HANDBOOK OF STRESS, COPING, AND HEALTH: IMPLICATIONS FOR NURSING RESEARCH, THEORY, AND PRACTICE, 22, 23 (2012).

cope with challenges.⁷⁴ In such cases, regaining equilibrium after a significant stressful episode can take a significant emotional and physical toll on the victim.

The determination of an individual's stress and trauma levels takes into consideration the relationship between the person's resources and the situation that provoked the stress response. Furthermore, a specific event itself does not determine whether it is considered "traumatic;" rather, such a determination depends on many factors, the most important of which is the individual's own experience of the event.⁷⁵ Seemingly minor insults and abuses combine in such a manner that the psychological impact to the victim is magnified due to contextual and background factors.

While returning to normalcy may be feasible for those with sufficient internal and external resources, individuals whose resources are insufficient, usually due to pre-existing vulnerabilities or collateral stresses, can become overburdened.⁷⁶ Insufficient resources in the face of a stressor, along with inadequate coping, lead to negative functioning, poor health, and mental health illness. Moreover, when an individual is unable to replace or substitute resources spent coping with intense stress, he or she may succumb to a 'loss spiral,'⁷⁷ where the depletion of resources caused by one stressful experience leads to additional stresses and further loss of coping ability. An excess of defensive or submissive bodily reactions in response to stress leads to inflammatory and immunological diseases,⁷⁸ and nervous and mental health disorders.⁷⁹

Certain experiences are highly likely to produce traumatic stress, including physical assault, rape and sexual assault, natural disasters, mass violence, interpersonal violence, partner battery, child abuse, and torture among others. However, less serious crimes such as bullying and harassment may also lead

74. Stevan E. Hobfoll, *Conservation of Resources: A New Attempt of Conceptualizing Stress*, 44 AM. PSYCHOLOGIST 513, 516 (1989).

75. RICHARD S. LAZARUS, STRESS AND EMOTION: A NEW SYNTHESIS 129-165 (1999); Richard S. Lazarus, *Relational Meaning and Discrete Emotions*, in APPRAISAL PROCESSES IN EMOTION: THEORY, METHODS, AND RESEARCH 37, 37-67 (Klaus R. Scherer, Angela Schorr, & Tom Johnstone, eds., 2001).

76. Hobfoll, *supra* note 74, at 517-519.

77. Stevan E. Hobfoll, *The Influence of Culture, Community, and the Nested-Self in the Stress Process: Advancing Conservation of Resources Theory*, 50 APPLIED PSYCHOL. 337, 337-338 (2001).

78. Nancy Leidy, *A Physiological Analysis of Stress and Chronic Illness*, 14 J. ADVANCED NURSING 868, 871 (1989); J. Jean Tache & Hans Selye, *On Stress and Coping Mechanisms*, 7 ISSUES IN MENTAL HEALTH NURSING 3 (1985).

79. Tache & Selye, *supra* note 78. Psychological stress, which involves fear and anxiety, may evoke psychosomatic reactions such as gastric ulcers and disorders of immunosuppression. Marvin Stein & Andrew H. Miller, *Stress, the Immune System and Health and Illness*, in HANDBOOK OF STRESS: THEORETICAL AND CLINICAL ASPECTS at 171-177.(2010); Bruce S. McEwen, *Protective and Damaging Effects of Stress Mediators*, 338 NEW ENGLAND J. OF MED. 175 (1998); Bruce S. McEwen, *Allostasis and Allostatic Load: Implications for Neuropsychopharmacology*, 22 NEUROPSYCHOPHARMACOLOGY 108, 116 (2000). At higher levels of stress others conditions may develop, such as diseases of the heart and blood vessels, inflammatory and immunological diseases, nervous and mental disorders, diseases of the skin and eyes, allergies and hypersensitivities, metabolic diseases, nutritional imbalances including obesity and diabetes mellitus, and breast cancer. Marvin Stein & Andre H. Miller at 171-177.

to traumatic stress, especially when combined with pre-existing vulnerabilities and aggravating factors. The key in a substantial abuse determination should be the relationship between the employer's action and the effects of the employer's action on the employee. Specifically, "an event is traumatic if it is extremely upsetting and at least temporarily overwhelms the individual's internal resources."⁸⁰ Major threats to psychological integrity produce as much suffering and psychological disturbance as a physical injury or threats to a person's life.⁸¹ A person can suffer from traumatic stress, even where the traumatic event is not catastrophic and/or the individual may not receive a typical trauma-related diagnosis.

The effects of different types of traumas and their consequences on an individual given his or her history are complex. A single event trauma, such as an accident or a disaster, is qualitatively different than interpersonal traumas or persistent traumatic experiences, the cumulative effects of which are often more substantial. Chronic trauma consists of multiple events that accumulate over time and that combine with a prolonged toxic environment that multiplies the psychological harm. In chronically traumatic situations, the anticipation of a traumatic experience in itself becomes highly stressful and affects a victim's future psychosocial adaptation. In particular, when specific traumatic experiences are added to the cumulative effect of repeated emotional and psychological abuse and deprivation, significant personality changes occur.⁸² When a person's identity is organized around internal distress, fear, and a sense of fragility, personal and emotional growth are likely to be significantly harmed.⁸³

B. *Stress, Trauma, Victimization, and Abuse in the Workplace*

High levels of work-related stress lead to what is commonly referred to as burnout.⁸⁴ Burnout in the workplace leads to negative behavioral coping

80. John N. Briere & Catherine Scott, *PRINCIPLES OF TRAUMA THERAPY: A GUIDE TO SYMPTOMS, EVALUATION, AND TREATMENT* 4 (2006). This broader definition does not always fit the specific criteria set forth by the Diagnostic and Statistical Manual of Mental Disorders, but recognizes that major threats to psychological integrity produce as much suffering and psychological disturbances as a physical injury or life threat. *Id.*

81. *Id.* Clinicians can make the determination that a person has been traumatized, even when the traumatic event is not catastrophic and/or the individual has not met a typical trauma-related diagnosis. *Id.*

82. John P. Wilson & Thomas A. Moran, *Forensic/Clinical Assessment of Psychological Trauma and PTSD in Legal Settings*, in *ASSESSING PSYCHOLOGICAL TRAUMA AND PTSD* 603, 606-607 (John P. Wilson & Terence M. Keane eds., 2004).

83. Bessel van der Kolk, *Developmental Trauma Disorder: Towards A Rational Diagnosis For Children With Complex Trauma Histories*, at 6-7, available at http://www.traumacenter.org/products/pdf_files/preprint_dev_trauma_disorder.pdf. See also Wilson & Moran, *supra* note 82.

84. The experience of work-related burnout occurs when there is a loss of valued resources, or where personal resources are inadequate to meet demands or do not yield the anticipated rewards. Raymond T. Lee & Blake E. Ashforth, *A Meta-analytic Examination of the Correlates of the Three Dimensions of Burnout*, 81 *J. OF APPLIED PSYCHOL.* 123, 123 (1996). In the workplace, major demands include role ambiguity, role conflict, stressful events, heavy workload, and pressure. *Id.* at 123. Personal resources in the workplace include social support, opportunity, participation in decision-

responses, employee turnover, and erosion of organizational commitment, job involvement, and job satisfaction.⁸⁵ Negative working conditions, pressure to perform, task repetition, lack of opportunities to advance at work, and an inability to enjoy free time in a normal manner can contribute to depression. For the purposes of the U visa, substantial mental abuse likely exceeds the level of typical worker burnout. However, conditions that lead to burnout are often present in workplaces that tolerate other serious forms of worker mistreatment, further exacerbating a worker's negative mental health consequences that result from abuse.

How individuals cope with intense workplace stress, particularly stress caused by workplace violence and abuse, can vary as a result of a victim's appraisal of the source of the abuse.⁸⁶ According to appraisal models of harm, victims of abuse cope more effectively if they perceive the manager or the organization as the source of abuse.⁸⁷ Victims who believe that the responsibility for the abuse lies with the manager or organization and who either confront the abuser directly or take action against the organization are more likely to cope appropriately with the abuse. Victims who view themselves as deserving of the abuse or powerless against it, however, are likely to experience more negative psychological and physical effects. Moreover, victims who are unable to take action against the abuser or organization or those who suffer retribution for taking action are also likely to experience greater negative psychological consequences.⁸⁸

Workplace bullying, on the other hand, is "a gradual process wherein an individual is subjected to indirect and subtle forms of psychological violence in a systematic way and over a prolonged period of time."⁸⁹ Bullying includes work-related behaviors such as unreasonable deadlines, unmanageable workload, excessive monitoring, withholding of crucial information, sabotage, work devaluation, as well as interpersonal behaviors such as gossip, insulting remarks, scolding, threats, excessive teasing, social exclusion, and persistent criticism.⁹⁰ A key component is the imbalance of power

making, autonomy, and positive reinforcement. *Id.* at 123; Ronald J. Burke, R.J. & Astrid M. Richardsen, *Psychological Burnout in Organizations*, in HANDBOOK OF ORGANIZATIONAL BEHAVIOR 263 (Robert T. Golembiewski, ed. 1993); Cynthia L. Cordes & Thomas W. Dougherty, *A Review and an Integration of Research on Job Burnout*, 18 ACAD. OF MGMT. REV. 621, 648 (1993).

85. Burke & Richardsen, *supra* note 84, at 283.

86. Nathan A. Bowling & Terry A. Beehr, *Workplace Harassment From the Victim's Perspective: A Theoretical Model and Meta-analysis*, 91 J. OF APPLIED PSYCHOL. 998, 998 (2006).

87. Nathan A. Bowling & Jesse S. Michel, *Why Do You Treat Me Badly? The Role of Attributions Regarding the Cause of Abuse in Subordinates' Responses to Abusive Supervision*, 25 WORK & STRESS 309, 310-312 (2011).

88. *Id.* at 314-317.

89. Gabriele Giorgi, Mikado Ando, Alicia Arenas, Mindy Krisher Shoss and Jose Maria Leon-Perez, *Exploring Personal and Organizational Determinants of Workplace Bullying and its Prevalence in a Japanese Sample*, 3 PSYCHOLOGY OF VIOLENCE 185 (2013).

90. *Id.* at 186.

in the relationship and the victim's limitations to defend him or herself.⁹¹

Empirical research on workplace bullying, violence, and abuse confirms the high likelihood of negative physical and psychological consequences for victims. Research on the physical consequences of workplace abuse indicates that victims also experience secondary somatic symptoms often associated with experiences of extreme distress including headaches, neck, back, and stomach pain, sleep disturbances, heart-related health issues, miscarriage, nerve damage, and unhealthy weight loss or gain.⁹²

Workplace abuse also has negative consequences on victims' psychological and psychosocial functioning. Victimization in the workplace can lead to acute or sudden clinical mental health symptoms, as well as diagnosable disorders. Surveys of victims of workplace victimization have found that victims report higher scores on measures of depression⁹³ and post-traumatic stress disorder.⁹⁴ Mental health problems such as depression, anxiety, mood disorders, dissociation, substance abuse, suicide attempts, acting out, and post-traumatic symptoms have been extensively documented in victims of abuse and maltreatment in the workplace.⁹⁵ The behaviors that constitute workplace bullying can cause trauma similar to trauma of other abuse such as domestic violence and even mild forms of torture.⁹⁶ In sexual harassment cases, a victim's physical and emotional reaction is likely related to the severity of the harassment. Indeed, a clear relationship exists between sexual

91. Charlotte Rayner & Cary L. Cooper, *Workplace Bullying*, in Schat, Frone, & Kelloway, *supra* note 67, at 129.

92. Duffy, et al., *supra* note 71; Hansen, et al, *supra* note 70, at 64; Leiter, *supra* note 71, at 132.

93. Bowling, et al, *supra* note 88; Jordi Escartín, Alvaro Rodríguez-Carballeira, Juana Gómez-Benito & Dieter Zapf, *Development and Validation of the Workplace Bullying Scale EAPA-T*, 10 INT'L J. OF CLINICAL AND HEALTH PSYCHOL. 519, 530 (2010); Hansen, et al., *supra* note 70; GARY NAME, WORKPLACE BULLYING INST., 2003 REPORT ON ABUSIVE WORKPLACES (2003), available at <http://www.workplacebullying.org/multi/pdf/N-N-2003C.pdf>; Bennett J. Tepper, *Consequences of Abusive Supervision*, 43 ACAD. OF MGMT. J. 178, 185 (2000).

94. Escartín, et al., *supra* note 94; Heinz Leymann & Annelie Gustafsson, *Mobbing at Work and the Development of Post-Traumatic Stress Disorders*, 5 EURO. J. OF WORK AND ORGANIZATIONAL PSYCHOL. 251, 252 (1996).

95. Duffy, et al., *supra* note 71, at 331; Annie Hogh et al., *Individual Consequences of Workplace Bullying/Mobbing*, in BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENTS IN THEORY, RESEARCH, AND PRACTICE (Stale Einarsen et al., eds., 2d ed. 2011); Ronald Glaser & Janice Keicolt-Glaser, *Stress-Induced Immune Dysfunction: Implications for Health*, 5 NATURE REVIEWS IMMUNOLOGY 243 (2005); Janice K. Kiecolt-Glaser & Ronald Glaser, *Depression and Immune Function: Central Pathways to Morbidity and Mortality*, 53 J. OF PSYCHOSOMATIC RES. 873 (2002). These symptoms are widely documented in victims of sexual harassment. See Judith A. Richman, et al., *Sexual Harassment and Generalized Workplace Abuse Among University Employees: Prevalence and Mental Health Correlates*, 89 AM. J. OF PUB. HEALTH 358, 359 (1999); Judith A. Richman, et al., *Workplace Harassment: Active Coping, and Alcohol-Related Outcomes*, 13 J. OF SUBSTANCE ABUSE 347 (2001) (hereinafter, *Workplace Harassment*); Kathleen M. Rospenda, Judith A. Richman, Joseph S. Wislar, & Joseph A. Flaherty, *Chronicity of Sexual Harassment and Generalized Work-Place Abuse: Effects on Drinking Outcomes*, 95 ADDICTION 1805, 1811-1815 (2000).

96. Stale Einarsen, *The Nature and Causes of Bullying at Work*, 20 INT'L J. OF MANPOWER 16 (1999); *Mental Health Harm*, WORKPLACE BULLYING INST. (2014), <http://www.workplacebullying.org/individuals/impact/mental-health-harm>.

harassment and post-traumatic stress disorder.⁹⁷

Victims of workplace abuse have also reported higher levels of general stress⁹⁸ and lower levels of general psychological health.⁹⁹ Victims of workplace abuse and exploitation report lower satisfaction in life due to high levels of negative emotions and mood,¹⁰⁰ anger,¹⁰¹ and high levels of anxiety.¹⁰² Workers suffering from resulting depressive thoughts and feelings express that they have felt like crying because of a hostile environment, felt desperation because of poor working conditions, felt that going to work took great effort, and felt sad and confused as to why supervisors would treat employees in such a negative manner.¹⁰³ The overall quality of life and psychological soundness is negatively impacted for victims of workplace abuse.

While most studies on the relationship between workplace abuse and psychological disorders rely on self-report measures, which often include validity scales, some physiological studies have confirmed that victims of workplace abuse exhibit high levels of cortisol, a stress hormone, similar to those who suffer from post-traumatic stress disorder and chronic fatigue.¹⁰⁴ Moreover, multiple studies suggest that workplace abuse can significantly impact victims' sense of self, which in turn may permanently damage mental well-being. In these studies, victims of workplace abuse reported low levels of self-esteem,¹⁰⁵ self-efficacy,¹⁰⁶ and self-confidence.¹⁰⁷

97. See Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. OF VOCATIONAL BEHAV. 28, 33 (1993); Louise F. Fitzgerald, *Sexual Harassment: Violence Against Women in the Workplace*, 48 AM. PSYCHOLOGIST 1070, 1072 (1993).

98. Pamela Lutgen-Sandvik, Sarah J. Tracy & Jess K. Alberts, *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree and Impact*, 44 J. OF MGMT. STUD. 837 (2007); Bennett J. Tepper, *Consequences of Abusive Supervision*, 43 ACAD. OF MGMT. J. 178 (2000).

99. Bowling et al., *supra* note 87, at 316.

100. Bowling et al., *supra* note 86; Celeste M. Brotheridge & Raymond T. Lee, *Restless and Confused: Emotional Responses to Workplace Bullying in Men and Women*, 15 CAREER DEV. INT'L 687, 694-698 (2010); Paolo Girardi et al., *Personality and Psychopathological Profiles in Individuals Exposed to Mobbing*, 22 VIOLENCE AND VICTIMS 172, 178-182 (2007); Dana Yagil, *The Relationship of Abusive and Supportive Workplace Supervision to Employee Burnout and Upward Influence Tactics*, 6 J. OF EMOTIONAL ABUSE 49 (2006).

101. Blake E. Ashforth, *Petty Tyranny in Organizations: A Preliminary Examination of Antecedents and Consequences*, 14 CAN. J. OF ADMIN. SCI. 126 (1997); Richman et al., *Workplace Harassment*, *supra* note 95.

102. Bowling et al., *supra* note 86; Hansen et al., *supra* note 70; Kenneth J. Harris, K. Michele Kacmar, & Ranida Boonthanom, Address at Annual Meeting of the Society for Industrial-Organizational Psychology April 16, 2005: The Interrelationship Between Abusive Supervision, Leader-Member Exchange, and Various Outcomes (2005).

103. *Id.*

104. Hansen, et al., *supra* note 70, at 71-72.

105. Ashforth, *supra* note 101; Bowling & Beehr, *supra* note 86; James Burton, & Jenny M. Hoobler, *Subordinate Self-Esteem and Abusive Supervision*, 18 J. OF MANAGERIAL ISSUES 340, 341-343 (2006); Michael R. Frone, *Interpersonal Conflict at Work and Psychological Outcomes: Testing a Model Among Young Workers*, 5 J. OF OCCUPATIONAL HEALTH PSYCHOL. 246, 248 (2000).

106. Duffy et al., *supra* note 71, at 335; Eva G. Mikkelsen & Stale Einarsen, *Relationship Between Exposure to Bullying at Work and Psychological and Psychosomatic Health Complaints: The Role of State Negative Affectivity and Generalized Self-Efficacy*, 43 SCANDINAVIAN J. OF PSYCHOL. 397 (2002).

Victimization and exploitation at work not only affect direct victims, but also co-workers who witness the victimization of their peers and thus fear for their own safety and well-being. This secondary trauma (also called vicarious or bystander traumatization) is well-established.¹⁰⁸ The emotional consequences of exposure to victimization of others are similar to those suffered by direct victims. Workers often report extreme distress after witnessing traumatic events to the same degree as if they had been the direct victim.¹⁰⁹ The U visa regulations contemplate bystander or indirect victimization and have incorporated these types of emotional consequences into the definition of victimhood.¹¹⁰

Traumatic stress resulting from interpersonal abuse in the workplace constitutes a significant psychological injury. Immigrant victims may respond to a traumatic situation with culturally specific patterns of distress and symptoms.¹¹¹ For instance, somatic symptoms have been documented to be idioms of distress in some ethnic groups.¹¹² Panic disorder¹¹³ and a high prevalence of alcohol use have also been found to correlate with trauma in certain ethnic groups.¹¹⁴ Immigrants may present forms of traumatic stress that do not correspond to a known mental health disorder diagnosis. The American Psychological Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5) includes methods to address difficulties that arise when applying diagnostic criteria to foreign-born individuals that have been

107. Maarit Vartia-Vaananen, *Workplace Bullying—A Study on the Work Environment, Well-Being and Health* (Feb. 15, 2003) (unpublished dissertation, University of Helsinki), available at <https://helda.helsinki.fi/bitstream/handle/10138/19884/workplac.pdf?sequence=3>.

108. Sharon Jenkins & Stephanie Baird, *Secondary Traumatic Stress and Vicarious Trauma: A Validation Study*, 15 J. OF TRAUMATIC STRESS 423 (2002).

109. This type of injury is similar to sex-based harassment discrimination cases, where a plaintiff may bring a hostile work environment claim when a harasser severely alters the conditions of a female worker's environment, even if that worker is not directly harassed. See, e.g., Christopher M. O'Connor, *Stop Harassing Her or We'll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE W. RES. L. REV. 501 (1999).

110. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014, 53016 (Sept. 17, 2007) ("USCIS does not anticipate approving a significant number of applications from bystanders, but will exercise its discretion on a case-by-case basis to treat bystanders as victims where that bystander suffers an unusually direct injury as a result of a qualifying crime.")

111. AM. PSYCHIATRIC ASS'N., *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (5th ed. 2013).

112. Karl Peltzer, *Ethnocultural Construction of Posttraumatic Stress Symptoms in African Contexts*, 1 J. OF PSYCHOL. IN AFR., SOUTH OF THE SAHARA, THE CARIBBEAN AND AFRO-LATIN AM. 17 (1998); Haroutune K. Armenian, Arthur K. Malkonian, & Ashot P. Hovanesian, *Long-term Mortality and Morbidity Related to Degree of Damage Following the 1988 Earthquake in Armenia*, 148 AM. J. OF EPIDEMIOLOGY 1077, 1080-1084 (1998); Kathryn A. Conrad et al., *Examination of General Health Following Typhoon Xangsane: A Pre-Postanalysis*, 2 PSYCHOL. TRAUMA: THEORY, RESEARCH, PRACTICE, AND POL'Y 109 (2010).

113. Conrad et al., *supra* note 113.

114. Julian D. Ford, Mary L. Adams, & Wayne F. Dailey, *Psychological and Health Problems in a Geographically Proximate Population Time-Sampled Continuously for Three Months After the September 11th, 2001 Terrorist Incidents*, 20 ANXIETY, STRESS, AND COPING 129, 134-138 (2007).

labeled “culture-bound syndromes.”¹¹⁵

C. *Immigrant Victims of Workplace Crime: Factors Affecting Severity of Harm and Aggravation of Pre-Existing Conditions*

U visa regulations require a fact-specific analysis of the severity of harm experienced by a victim of crime, including consideration of the victim’s pre-existing conditions.¹¹⁶ Relevant pre-existing conditions include a prior history of abuse, mental health disorders such as depression, and intellectual deficits. However, some of these vulnerabilities may not be evident, as many psychological injuries can lay dormant until subsequent trauma.¹¹⁷ Significant mental health consequences can also result from indirect exposure to a traumatic event. Several factors affect the severity of psychological injury suffered by victims of criminal activity. In many cases, the severity of the injury suffered by the victim of workplace criminal activity will be related to the victim’s individual emotional makeup, including prior experiences of trauma. Situational and environmental factors also impact the way victimization is experienced and managed. Workers working under abusive working conditions often lack the ability to engage in the otherwise healthy coping strategies needed to combat the abuse, thus resorting to unhealthy coping strategies that exacerbate the harm the worker experiences.

Immigrant workers face significant barriers to successfully confronting workplace abuse, including greater economic dependency and limited English ability. Limited English proficiency prevents workers from accessing social services and other resources. In many cases, fear of deportation is a significant obstacle to coping with workplace abuse, as deportation would generate significant shame and hardship to a worker and his or her family, invoking a stigma of failure, and making it more difficult to seek employment and rebuild a life back in the worker’s home country.¹¹⁸ The longer an employee stays in a job with abusive conditions, and the more an employer exploits barriers to departure, the greater the harm and psychological injury the immigrant worker will experience, although even short-term exposure can lead to substantial harm.

1. *Pre-Existing Conditions and Prior Traumatic Experiences*

Immigrant workers are likely to have histories of previous traumatic

115. Manuel Trujillo, *Multicultural Aspects of Mental Health*, 15 PRIMARY PSYCHIATRY 65 (2008); Gregory Juckett & Lisa Rudolph-Watson, *Recognizing Mental Illness in Culture-Bound Syndromes*, 15 AM. FAM. PHYSICIAN 206 (2010); AM. PSYCHIATRIC ASS’N, *supra* note 112.

116. 8 C.F.R § 214.14(b)(1).

117. Koch, *supra* note 69, at 39.

118. See Leticia M. Saucedo and M. Cristina Morales, *Voices Without Law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 CORNELL J. LAW & PUB. POL. 641, 653 (2012) (describing how economic dislocation affects immigrant workers seeking to retain masculine identities).

experiences. Immigrants who come from nations that are war-torn, poverty-stricken, have high crime rates, or have been devastated by natural disasters are likely to have experienced, directly or indirectly, traumatic events in their past such as assault or death of family members, child abuse, parental abandonment or other significant losses.¹¹⁹ In addition, the migration process involves traumatic experiences, including physical and sexual assault, theft, kidnapping, exploitation at the hands of smugglers, forcible drug use, injuries or death of peers and partners, and loss of family and social support.¹²⁰ Upon arrival to the United States, immigrant workers may experience a number of other potential hardships, such as unemployment, inadequate living conditions, limited social support, discrimination, and difficulties settling in the new environment. These hardships and traumatic experiences lead to psychological fragility that can exacerbate the psychological harm from workplace abuse.

Cumulative traumas may lead a victim to be more vulnerable to future traumatization.¹²¹ Prior traumatic experiences set in motion maladaptive adjustments in which a person acquiesces to abuse because he or she is unable to imagine or expect better treatment, and does not believe that leaving a job would improve his or her working conditions. Individuals with preexisting vulnerabilities may be at greater risk of suffering from greater mental health consequences resulting from an abusive episode or chronic abuse than persons without such histories.¹²²

2. *Inability to Engage in Healthy Coping Strategies in the Face of Employer Abuse*

A natural initial reaction to abuse and victimization is to fight back with active coping strategies, unless victims perceive themselves to be very vulnerable, or if they learn that fighting back is ineffective. Research on the effectiveness of the different coping strategies suggests that the use of direct coping strategies, reduces the relationship between workplace abuse and resulting psychological harm, while the use of indirect coping strategies,

119. AMERICAN PSYCHOLOGICAL ASSOCIATION, PRESIDENTIAL TASK FORCE ON IMMIGRATION, CROSSROADS: THE PSYCHOLOGY OF IMMIGRATION IN THE NEW CENTURY: REPORT OF THE PRESIDENTIAL TASK FORCE ON IMMIGRATION 74-75 (2012).

120. See Lawrence A. De Luca, Marylyn M. McEwen & Samuel M. Keim, *United States-Mexico Border Crossing: Experiences and Risk Perceptions of Undocumented Male Immigrants*, 12 J. OF IMMIGRATION HEALTH 113,118-119 (2010); RoseMarie P. FOSTER, *When Immigration is Trauma: Guidelines for the Individual and Family Clinician*, 71 AM. J. OF ORTHOPSYCHIATRY 153,156-158 (2001).

121. See Victoria Follette & Aditi Vijay, *Retraumatization*, in ENCYCLOPEDIA OF PSYCHOLOGICAL TRAUMA 586, 586-589 (Gilbert Reyes, John D. Elhai & Julian D. Ford, eds. 2008); Marylene Cloitre, Bradley C. Stolbach, Judith L.Herman, Bessel Van Der Kolk, Robert Pynoos & Jing Wang, *A Developmental Approach to Complex PTSD: Childhood and Adult Cumulative Trauma as Predictors of Symptom Complexity*, 22 J. OF TRAUMATIC STRESS 399, 405-406 (2009).

122. Eric Drogin, Frank M. Dattilio, Robert L. Sadoff & Thomas G. Gutheil, HANDBOOK OF FORENSIC ASSESSMENT: PSYCHOLOGICAL AND PSYCHIATRIC PERSPECTIVES 293 (2011).

such as failing to show up on time at work, increases the relationship between workplace abuse and harm.¹²³ Furthermore, indirect strategies are ineffective in improving the emotional consequences and reactions that result from the abuse.¹²⁴ Often, the immigrant worker needs to contain anger and resentment about injustice and maltreatment when an abuser is in the best position to retaliate,¹²⁵ leading to a greater sense of victimization and subsequent emotional distress.

Many immigrant victims of workplace abuse are unable to leave their jobs, resulting in significant and cumulative negative psychological consequences. Immigrant victims of workplace criminal activity may, by necessity, choose to engage in passive coping strategies out of fear that engaging in active strategies may lead to loss of a job, exposure to law enforcement, hardship to their family members in the United States or in their country of origin, or detention and deportation. This inability to leave a job results in prolonged and repeated exposure to abuse, associated with more severe psychological harm.¹²⁶ Victims of abuse in the workplace who are economically dependent on abusive employers and lack job mobility often suffer greater psychological harm than those who can more easily leave a job.¹²⁷

Individuals who are chronically abused often learn to submit and comply in order to survive.¹²⁸ In turn, victims can become depressed, helpless, and emotionally numb. These individuals use strategies to prevent or minimize intense negative emotions such as fear, grief, sadness, and anxiety in order to function in a hostile environment.

Several factors increase the likelihood that an immigrant worker will need to rely on unhealthy coping strategies. These factors include a) economic dependency; b) lack of work authorization or legal immigration status; c) power differentials between employer and employee; d) a worker's limited English language proficiency; e) gender, gender identity, or sexual orientation; f) isolation; and g) knowledge of/ability to exercise legal rights.

a. *Economic Dependency*

Many immigrant workers who come to the United States migrate because

123. Bennett J. Tepper & Daniel Lockhart, *Abused Subordinates' Upward Maintenance Communication: A Coping Perspective*, in PROCEEDINGS OF THE ANNUAL MEETING OF THE SOUTHERN MANAGEMENT ASSOCIATION (2005).

124. Dana Yagil, Hasida Ben-Zur & Inbal Tamir, *Do Employees Cope Effectively with Abusive Supervision at Work? An Exploratory Study*, 18 INT'L J. OF STRESS MANAGEMENT 5 (2011).

125. Karl Aquino, Thomas M. Tripp & Robert J. Bies, *Getting Even or Moving On? Power, Procedural Justice, and Types of Offense as Predictors of Revenge, Forgiveness, Reconciliation, and Avoidance in Organizations*, 91 JOURNAL OF APPLIED PSYCHOLOGY 653 (2006).

126. Pamela Lutgen-Sandvik, et al., *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree, and Impact*, 44 J. OF MANAGEMENT STUDIES 835 (2007).

127. Bennett Tepper, *Abusive Supervision in Work Organizations: Review, Synthesis, and Research Agenda*, 33 J. OF MGMT. 261 (2007).

128. See, e.g., Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Reconceptualization*, 52 SEX ROLES 743 (2005).

they believe that they will have better opportunities for economic advancement than they find in their homelands. Low-wage immigrant workers, therefore, are particularly vulnerable to workplace abuse because of the high level of economic dependence on an employer. In addition, immigrant workers with limited education or vocational training may have incurred significant debt to travel to the U.S., and may bear the added responsibility of earning income to send to dependent families in their country of origin.¹²⁹ Immigrants whose work visas are specifically tied to a particular employer face additional vulnerabilities. Examples include guest workers and household workers for diplomats, whose immigration status, and in some cases, housing, depends on their employment. Immigrant workers who live in housing provided by employers usually lack further resources to live independently or feel greater dependence on employers.

Economic pressures can lead workers to acquiesce to extremely long overtime hours, or to work when sick or injured.¹³⁰ Victims who are more economically dependent on their jobs suffer greater harm than those with greater job mobility.¹³¹ For these workers, avoiding workplace abuse is an impossible choice in the face of homelessness, hunger, and failure to meet family responsibilities. Inability to leave an abusive employment also results in prolonged and frequent exposure to abuse associated with an increased severity of psychological harm.¹³²

b. Lack of Work Authorization or Legal Immigration Status

Immigrants who lack work authorization, legal immigration status, or whose legal status is wholly dependent on their relationship with their employers, face particular vulnerability to abuse. Without authorization to work, undocumented workers perceive that other opportunities for employment are scarce, increasing their dependence on an abusive employer. Employers may use a worker's legal status as a means of control by threatening to terminate employment—which implicates more dire consequences for undocumented workers who cannot easily replace employment—or contact immigration authorities if a worker reports abuse.¹³³ An abusive employer or supervisor may feel safe in the knowledge that an undocumented

129. The World Bank estimates remittance flows to developing countries to have totaled \$401 billion in 2012, an increase of 5.3 percent over the previous year. The World Bank, *MIGRATION, REMITTANCES, AND DIASPORA* (2014), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/0,,contentMDK:21924020pagePK:5105988piPK:360975theSitePK:214971,00.html>.

130. Sara A. Quandt, Joseph G. Grzywacz, Antonio Marin, Lourdes Carrillo, Michael L. Coates, Bless Burke & Thomas A. Arcury, *Illnesses and Injuries Reported by Latino Poultry Workers in Western North Carolina*, 49 AM. J. OF INDUST. MEDICINE 343, 343-344 (2006).

131. Tepper, *supra* note 128, at 269-274.

132. Pamela Lutgen-Sandvick, *et al.*, *supra* note 127; see also *Garcia v. Audobon Communities Mgmt.*, No. 08-1291, 2008 WL 1774584, at *3 (E.D. La. Apr. 15, 2008).

133. See, e.g., *Chellen et al. and EEOC v. John Pickle Company, Inc.*, 344 F. Supp.2d 1278 (N.D. OK 2004).

worker, a worker without legal work authorization, or a guest worker will not bring charges or report abuse or criminal activity out of fear of loss of status, deportation, or unemployment.¹³⁴ Even where abuse has been reported and is being investigated, an employer or supervisor could threaten deportation for cooperation with authorities, exploiting the worst fears of the immigrant worker.

c. Power Differentials Between Employer and Employee

Undocumented immigrants and guest workers are likely to be in employment relationships with heightened power differential between workers and management. Although power disparities underscore most employer-employee relationships, immigrant workers face additional status differences based on legal status, race or ethnicity, mastery of English language, and acculturation. Immigrant workers may also adhere to employment structures and cultural values that require greater deference to superiors and elders. For example, immigrant women workers may feel required to defer to men.¹³⁵ These cultural values can be exploited by abusive supervisors and employers: some will use power dynamics to further overt abuse, while others engage in overly friendly and paternalistic behavior to advance their own exploitative agendas.¹³⁶

Immigrant workers in the U.S. often feel forced to accept jobs of lower status than in their native countries. In such situations, a worker may suffer from loss of identity and status, leading to a diminished sense of personal value, an additional obstacle to constructively responding to workplace abuse. These power differentials lead immigrant workers to conclude that they lack sufficient status and leverage to remedy abusive conditions. Indeed, research has found that workers with less perceived power in the workplace or who conclude that their actions would not result in change may experience more significant psychological harm.¹³⁷

d. Limited English Language Proficiency

Limited proficiency in the English language or literacy negatively impacts a worker's ability to cope with abuse.¹³⁸ Lack of language proficiency or

134. See, e.g., REBECCA SMITH AND EUNICE CHO, WORKERS' RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS (2013), available at <http://www.nelp.org/page/-/Justice/2013/Workers-Rights-on-ICE-Retaliatio-Report.pdf>.

135. See ROGER WALDINGER AND MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR 156-57 (2003).

136. *Id.*

137. Alicia A., Grandey, Julie H. Kern & Michael R. Frone, *Verbal Abuse from Outsiders vs. Insiders: Comparing Frequency, Impact on Emotional Exhaustion, and the Role of Emotional Labor*, 12 J. OF OCCUPATIONAL HEALTH PSYCHOL. 63, 74-77 (2007).

138. Many low-wage workers lack English fluency or literacy, affecting working conditions. See, e.g., William Kandel & Emilio A. Parrado, *Restructuring of the U.S. Meat Processing Industry and New Hispanic Migrant Destinations*, 31 POPULATION DEV. AND REV., 447, 465-467 (2005); Sara A.

illiteracy interferes with the ability to understand critical documents related to workplace conditions such as contracts, rights, guidelines, pay, and benefits. Workers may require assistance to complete job applications, often sign documents without understanding their contents, are given a job orientation that they do not understand, and often lack the ability to communicate directly with their employers. In some cases, workers are forbidden to speak in their native language with co-workers, limiting the ability to seek help, orientation and guidance regarding tasks and rights in the workplace or to learn from co-workers. Moreover, language isolation creates a barrier to a worker's ability to voice complaints or report abuse. Limited language fluency or literacy, as well as limitations on speaking native languages in the workplace, lead to increased isolation, which can perpetuate a sense of depression and hopelessness for victims of abuse who cannot turn to others for help or support.¹³⁹

e. Gender, Gender Identity, or Sexual Orientation

Workers' gender, gender identity, or sexual orientation increase vulnerability to workplace abuse, and negatively affect the ability to engage in direct and active coping strategies. Experiences of workplace abuse differ by gender, but a sexualized or gender-biased working environment harms everyone. In male-dominated work environments, women are often subject to overt discrimination, including lesser-valued job assignments, lack of opportunities for advancement, receiving lower pay, and subjection to sexual harassment, sexual assault, and rape.¹⁴⁰ Victims of sexual harassment or sexual assault, moreover, are often deterred from taking active steps to remedy the situation due to fear of losing social status, damage to reputation, and personal retribution.¹⁴¹ Unscrupulous employers or superiors may require sexual favors and submission to sexual behaviors as a condition of employment or job related opportunities.¹⁴² In many cases, employers target

Quandt, Joseph G. Grzywacs, Antonio Marin, Lourdes Carrillo, Michael L. Coates, Bless Burke & Thomas A. Arcury, *Illnesses and Injuries Reported by Latino Poultry Workers in Western North Carolina*, 49 AM. J. OF INDUST. MEDICINE 343, 343-344 (2006).

139. CHRONIC ILLNESS: IMPACT AND INTERVENTION 85-116 (Diana Luskin Biordi, et al. eds., 2011).

140. See, e.g., Mary Bauer & Monica Ramirez, INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOODS INDUSTRY (2011); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 819-21, 823 (1993).

141. See Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. OF SOCIAL ISSUES 117, 122 (1995).

142. Louise Fitzgerald et al., *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 Journal of Applied Psychology 578 (1997) (analyzing sexual harassment in private U.S. companies using the Sexual Experiences Questionnaire (SEQ)). The SEQ measures harassment in "the behavioral categories of gender harassment, unwanted sexual attention and sexual coercion" expressed through "crude words, acts and gestures conveying hostile, misogynist attitudes." Unwanted sexual attention is analogous to the legal concept of "hostile work environment harassment" and sexual coercion is analogous to the legal concept of "quid pro quo sexual harassment." See also Irma Morales Waugh, *Examining the Sexual Harassment Experiences of*

pregnant women or mothers, especially in some fields in which male workers are traditionally employed.¹⁴³ For a female immigrant worker, sexual slurs or innuendos carry additional consequences of subordination because, by virtue of her status and the possibility of deportation or threats to her citizenship status, she cannot complain as forcefully as a native-born worker.¹⁴⁴

Lesbian, gay, bisexual and transgender (LGBT) workers are particularly vulnerable to jokes, slurs, ridicule, discrimination, and other more abusive or assaultive behavior in the workplace. Workers who wish to keep their sexual orientation or gender identity a private matter, especially if their cultural values makes this issue taboo, will tolerate abuse or force themselves to play out traditional gender roles in order to protect themselves. Individuals who are persistently harassed and mistreated and whose behavioral freedom is restricted may engage in cognitive adjustment and minimize or deny the impact of the abuse, and may even contribute to it, in an attempt to regain a sense of personal control.¹⁴⁵

Although manifested differently, immigrant men suffer from gendered forms of workplace abuse in addition to sexual harassment. Immigrant men are forced into subservient, complacent and deferential roles—identities stereotypically gendered as female—when employers take advantage of their relatively weak citizenship status.¹⁴⁶ Moreover, by virtue of their immigration status, immigrant men in a department where women are being harassed will not perceive that they have the ability to speak out against such harassment to assume the role of protector, which is a role that is culturally valued in most ethnic groups.¹⁴⁷ The risks and consequences are much more severe than simply retaliation, as these men remain quiet due to veiled or explicit threats of deportation.¹⁴⁸ Not only do immigrant male workers view themselves as emasculated in their inability to rectify sexual harassment against their female co-workers, this disempowerment also occurs by reference to their immigration status.¹⁴⁹

Mexican Immigrant Farmworking Women, 16 VIOLENCE AGAINST WOMEN 237, 241 (2010) (surveying 150 Mexican women and women of Mexican descent working in the fields and finding that 80% reported sexual harassment).

143. National Women's Law Center, UNDERPAID AND OVERLOADED: WOMEN IN LOW-WAGE JOBS 32-33 (2014).

144. Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 819-21, 823 (1993).

145. See, e.g., Belle Rose Ragins & John M. Cornwell, *Pink Triangles: Antecedents and Consequences of Perceived Workplace Discrimination Against Gay and Lesbian Employees*, 86 J. APPLIED PSYCHOL. 1244 (2001).

146. See Leticia Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 970, 976 (2006).

147. See William Tamayo, *The EEOC and Immigrant Workers*, 44 U.S.F.L. REV. 253, 260-69 (2009).

148. *Id.*

149. See Saucedo, *supra* note 147, at 967-68.

f. Isolation

Isolation, whether social, geographic, linguistic, and/or social, correlates with the presence of abuse, as well as heightened mental health consequences for the victim of abuse. Research findings underscore the importance of social support in recovery from trauma,¹⁵⁰ including a social network that supports a victim in holding the offender accountable for abuse.¹⁵¹ Given that social support provides a healthy way of coping, isolation is a common tactic used by abusers to establish psychological control over their victims.¹⁵²

Immigrant workers in geographically isolated areas lack access to support systems, including other more acculturated immigrant communities that could provide support and advice.¹⁵³ Industries that hire undocumented immigrants may be geographically isolated from metropolitan centers with greater access to social and legal services dedicated to the particular needs of immigrants. Even in areas that have limited services, such as medical and children's services, available near a community, immigrant families are often unaware of their existence or are reluctant to access services because of language barriers and fear of deportation.¹⁵⁴

Often, immigrant family bonds are disrupted in the process of migration, adding to diminished social support. Emotional alienation prevents a worker from turning to others for support and protection. Immigrant workers with histories of prior trauma and maltreatment lack the support necessary to heal and adapt to a new life in the U.S., which increases vulnerability and the traumatic impact of workplace abuse.

g. Lack of Knowledge of or Ability to Exercise Legal Rights

Many immigrant workers lack knowledge regarding their rights as employees.¹⁵⁵ Immigrant workers often have limited experience in the labor market, even in their own countries, and lack awareness of U.S. employment rights or labor unions.¹⁵⁶ In some cases, immigrant workers from countries where

150. See Dean Ajdukovic, *Social Contexts of Trauma and Healing*, 20 MED., CONFLICT, AND SURVIVAL 120, 125-127 (2004).

151. See James A. Forte, David D. Franks & Janett A. Forte, *Asymmetrical Role-Taking: Comparing Battered and Non-Battered Women*, 41 SOC. WORK 59 (1996).

152. Elizabeth Hopper and Jose Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 INTERCULTURAL HUMAN RIGHTS L. REV. 185, 190-91 (2006).

153. William Kandel & Emilio A. Parrado, *Restructuring the Meat Processing Industry and New Hispanic Migrant Destinations*, 31 POP. AND DEV. REV. 447 (2005).

154. Gretchen Livingston, Susan Minushkin & D'Vera Cohn, *Hispanics and Health Care in the United States: Access, Information and Knowledge*, PEW HISPANIC CENTER REPORT 7 (2008) (foreign-born and less assimilated Latinos are less likely than other Hispanics to have a usual health care provider, 30% of Latinos born outside of the 50 states lack a usual place for health care, compared with 22% of U.S.-born Latinos, 32% of Latinos who mainly speak Spanish lack a regular health care provider, compared with 22% of Latinos who mainly speak English).

155. Bridget Anderson, *Migrants and Work-Related Rights*, 22 ETHICS & INT'L. AFFAIRS 199 (2008).

156. *Id.*

human rights are routinely violated may believe that abusive working conditions are the “normal state” of affairs. Even where workers are aware that abusive working conditions violate the law, they do not seek to enforce such rights out of fear of retaliation or because of lack of effective advocacy measures.¹⁵⁷

IV. U VISA QUALIFYING CRIMINAL ACTIVITY IN THE WORKPLACE

Since 2008, labor and civil rights law enforcement agencies most likely to encounter crime in the workplace have implemented comprehensive U visa certification policies. This Section explores examples of U visa qualifying criminal activity in the workplace, and discusses how physical and mental harm manifests for victims of these criminal activities.

A. *The Unique Role of Employer Threats and Retaliation in Workplace Abuse*

An employer’s threats to a worker may meet an element of several U visa-qualifying crimes, including witness tampering, obstruction of justice, blackmail, extortion, involuntary servitude, and trafficking. For example, an employer’s threats to deport, fire, evict, report to law enforcement, or physically harm a worker or a worker’s family member to induce a worker to refrain from participation in a law enforcement investigation or bringing charges may constitute witness tampering or obstruction of justice.¹⁵⁸ Likewise, such threats made by an employer to obtain property of value or services from a worker constitute extortion or blackmail.¹⁵⁹ Threats, implicit or explicit, of force, physical restraint, serious harm, abuse of legal process, constitute involuntary servitude or trafficking.¹⁶⁰

Immigrant workers are uniquely susceptible to employer threats and retaliation. Employers may hire immigrant workers in part because they consider them to be complacent and subservient, and therefore, more willing to accept employer control. This employer stereotype is widely perpetuated in immigrant workplaces.¹⁶¹ As one study found, employers explicitly referred to their preference for undocumented immigrants because of workers’ lack of work authorization.¹⁶² This preference can surface, often subtly, in how an employer signals to an employee that he seeks compliance and

157. See Fitzgerald et.al., *supra* note 142; REBECCA SMITH & EUNICE CHO, WORKERS’ RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS (2013).

158. See discussion, *infra* Section IV.B.1.

159. See discussion, *infra* Section IV.B.2.

160. See discussion, *infra* Section IV.B.4.

161. Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECONOMIC POLICY INSTITUTE BRIEFING PAPER 12 (2009).

162. As one study noted, employers explicitly referred to their preference for undocumented immigrants who were afraid to resist coercion because of their status. See ROGER WALDINGER AND MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR, 156-57 (2003).

submissiveness.¹⁶³ Employers, moreover, are highly likely to retaliate against immigrant workers who seek to exercise their labor rights. For example, an analysis of more than 1,000 NLRB certification elections found that “[i]n 7% of all campaigns—but 50% of campaigns with a majority of undocumented workers and 41% with a majority of recent immigrants—employers make threats of referral to Immigration.”¹⁶⁴

Threats or retaliatory actions by an employer must be viewed in a larger context of employer mistreatment in substantial abuse determinations. As the U visa statute instructs, “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.”¹⁶⁵

DHS regulations provide that U visa adjudicators evaluate both the severity of the perpetrator’s conduct, as well as the effect of the criminal activity on the victim when making substantial abuse determinations.¹⁶⁶ Workers threatened by employers may experience significant mental distress. An employer’s threats function as an explicit mechanism to exert improper control over a worker by highlighting the employer’s power and the worker’s weaknesses. Workers targeted by threats are particularly vulnerable to aggravation of underlying chronic stress or trauma caused by long-term abuse. For example, workers who are chronically subject to workplace violations may simply submit and comply in order to survive in such a hostile environment. An employer’s interference in a worker’s attempt to report workplace violations and cooperate with law enforcement officials may thus provoke heightened fear and even greater psychological harm.

B. *Common Qualifying Criminal Activities in the Workplace*

1. *Obstruction of Justice, Witness Tampering, and Perjury*

The U visa provisions include obstruction of justice, witness tampering, and perjury as enumerated qualifying criminal activities. These crimes, however, differ from most other U visa qualifying criminal activities. As USCIS has noted in regulatory commentary, obstruction of justice, witness tampering, and perjury have posed an “interpretive challenge” for the agency, because the U visa statute requires that victims be directly and proximately harmed as a result of the crime. Because “these criminal activities are not targeted against a person,” USCIS specified that individuals may demonstrate that they have been directly or proximately harmed by a perpetrator’s obstruction of justice, witness tampering, or perjury “if the perpetrator principally committed the offense as a means:

163. *Id.* at 156-57.

164. Bronfenbrenner, *supra* note 161, at 1.

165. 8 C.F.R. 214.14(b)(1).

166. 8 C.F.R. § 214.14(a)(14)(ii).

- (1) To avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring him or her to justice for other criminal activity; or
- (2) to further his or her abuse or exploitation of or undue control over the alien through manipulation of the legal system.”¹⁶⁷

These regulations underscore that the underlying context of workplace abuse is relevant in cases involving obstruction of justice, witness tampering, and perjury. Moreover, these requirements explicitly acknowledge and tether both victim eligibility and evaluation of harm to the broader context of employer abuse, exploitation, or control.

In the workplace setting, witness tampering, obstruction of justice, and perjury often involve employers’ attempts to thwart investigation by labor or civil rights law enforcement agencies for violations of workplace standards, including cases where workers have filed a complaint.¹⁶⁸ Employers may threaten to fire, deport, and evict workers, or engage in physical, economic, and verbal abuse if workers do not withdraw claims, cooperate or collaborate with the employer, or lie to investigators.¹⁶⁹ Employers may also confiscate workers’ personal identification documents, or prevent workers from meeting basic human needs.¹⁷⁰ Employers may also attempt to further ongoing exploitation or abuse by threatening workers with deportation, blacklisting, and refusal to re-hire as a way to maintain undue control over their workforce.¹⁷¹

Obstruction of justice, witness tampering, and perjury in the context of immigrant workers often manifest in the context of employer retaliation. The federal criminal code itself includes several examples of obstruction of justice, witness tampering and perjury that encompass retaliatory activity by employers.¹⁷² For example, 18 U.S.C. § 1505 prohibits any individual from “corruptly, or by threats or force, or by any threatening letter or communica-

167. 72 Fed. Reg. 53,017; 8 C.F.R. § 214.14(a)(14)(ii).

168. *See, e.g.*, Garcia v. Audobon Communities Mgmt., No. 08-1291, 2008 WL 1774584, at *3 (E.D. La. Apr. 15, 2008).

169. *See* SMITH AND CHO, *supra* note 134 (detailing examples of retaliation).

170. *Id.*

171. *Id.*; *see also* National Labor Relations Board, Office of the General Counsel, Memorandum OM 11-62, Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings 4 (Jun. 7, 2011).

172. The full list of crimes enumerated in Chapter 73 of the federal criminal code includes: § 1501, Assault on process server; § 1502, Resistance to extradition agent; § 1503, Influencing or injuring officer or juror generally; § 1504, Influencing juror by writing; § 1505, Obstruction of proceedings before departments, agencies, and committees; § 1506, Theft or alteration of record or process; false bail; § 1507, Picketing or parading; § 1508, Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting; § 1509, Obstruction of court orders; § 1510, Obstruction of criminal investigations; § 1511, Obstruction of State or local law enforcement; § 1512, Tampering with a witness, victim, or an informant; § 1513, Retaliating against a witness, victim, or an informant; § 1514, Civil Action To Restrain Harassment Of A Victim Or Witness; § 1514(a), Civil Action To Protect Against Retaliation In Fraud Cases; § 1515, Definitions For Certain Provisions: General Provision; § 1516, Obstruction of Federal audit; § 1517, Obstructing examination of financial institution; § 1518, Obstruction of criminal investigations of health care offenses; § 1519, Destruction, alteration, or falsification of records in Federal investigations and bankruptcy;

tion” influencing, obstructing, or impeding “the due and proper administration of the law under which any pending proceeding is being had by either House, or any committee of either House or any joint committee of the Congress.”¹⁷³ A proceeding is “defined broadly,” and includes preliminary inquiries by a law enforcement agency.¹⁷⁴ 18 U.S.C. § 1512 prohibits intimidation, threats, corrupt persuasion, or misleading conduct with the intent to cause a person to withhold testimony or records, evade legal process, be absent from a legal proceeding, or dissuade testimony.¹⁷⁵ 18 U.S.C. § 1513 prohibits intentional retaliation, including interference with lawful employment or livelihood, for providing truthful information to law enforcement about the commission of a federal offense.¹⁷⁶ 18 U.S.C. § 1519 prohibits the falsification or destruction of records during the course of a federal investigation.¹⁷⁷

Moreover, an employer’s obstruction of justice, witness tampering, or perjury often encompasses prohibitions against workplace retaliation in the Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act, and the National Labor Relations Act (NLRA).¹⁷⁸ For example, federal district courts have repeatedly concluded that employers violate the FLSA’s prohibitions against retaliation by reporting the immigration status of workers who had exercised workplace rights to local law enforcement agencies or immigration authorities.¹⁷⁹ Likewise, the National Labor Relations Board has repeatedly concluded that an employer’s threats to investigate immigration status in retaliation for a worker’s exercise of labor rights constitute an unfair labor practice in violation of Section 8(a)(1) of the NLRA.¹⁸⁰ Federal courts have

§ 1520, Destruction of corporate audit records; § 1521, Retaliating against a Federal judge or Federal law enforcement officer by false claim or slander of title.

173. 18 U.S.C. § 1505 (2012).

174. *United States v. Dessange*, No. 00-1486, 2001 WL 138290, at *63 (2d. Cir. Feb. 16, 2001) (citing *United States v. Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994)).

175. 18 U.S.C. § 1512 (2012).

176. 18 U.S.C. § 1513 (2012).

177. 18 U.S.C. § 1519 (2012).

178. *Compare* 8 U.S.C. § 1101(a)(15)(U)(iii) (2000) (encompassing criminal activity that involves witness tampering; obstruction of justice; perjury), *with* 29 U.S.C. § 215(a)(3) (2000) (defining prohibited acts under the FLSA).

179. *See* *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 103 F. Supp. 2d 1180, 1185 (N.D. Cal. 2000); *see also* *Singh v. Jutla & C.D. & R’s Oil, Inc.*, 214 F. Supp. 2d 1056, 1057 (N.D. Cal. 2002) (finding sufficient pleading of a FLSA retaliation claim where employer threatened to report to immigration authorities unless worker dropped unpaid wage claim); *Centeno-Bernuy v. Perry*, No. 03-CV-457, 2009 WL 2424380, at *9 (W.D.N.Y. Aug. 5, 2009) (finding retaliation where employer reported H2A workers to DHS who had filed a FLSA claim, accusing workers of being terrorists); *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894, 901-02 (M.D. Tenn. 2009) (concluding that employers retaliated against workers who requested unpaid wages by firing and evicting them, and calling the police).

180. *AM Property Holding, et al.*, 350 N.L.R.B. 998, 1010 (2007) (recognizing long-held prohibition against the practice of employers seeking investigations into the immigration status of employees in retaliation for their protected activity); *E. Buffet & Rest., Inc. & 318 Rest. Workers’ Union*, No. S. 29-CA-27114, 2007 WL 1035161 (Apr. 3, 2007) (threats to examine immigration documentation if workers joined a union constituted unfair labor practice); *NLRB v. North Hills Office Svcs.*, 344 N.L.R.B. 1083, 1090-100 (2005) (concluding that demands to show work

also concluded that inquiries into immigration status, including completion of I-9 forms, in the midst of Title VII discrimination litigation, constitute retaliation. As the district court in *EEOC v. City of Joliet* noted, “the main purpose behind [the employer’s] alleged new found desire to abide by the law is to effect a not so subtle intimidation of the intervenor plaintiffs and all the potential class members.”¹⁸¹

To the extent that employers utilize forms of intimidation such as abuse of legal process, fraud, threats of violence, or corrupt persuasion to prevent workers from enforcing workplace rights, they engage in witness tampering, obstruction of justice and perjury, and can inflict substantial harm on workers. As described above, relationships with power imbalances are particularly vulnerable to the use of coercive power and psychological abuse.¹⁸² An employer’s threats, coercion, manipulation, and verbal abuse can diminish a person’s sense of self-worth, autonomy, and free will, and result in anxiety, depression, and post-traumatic disorders.¹⁸³ Even mild forms of such actions can isolate victims from external support and prevent them from protecting their rights and themselves. Long-term consequences of the resulting emotional distress include difficulty maintaining trust, difficulty asserting rights, lack of confidence, shame, a diminished sense of self-worth, and prolonged psychological distress manifested in chronic states of anxiety.¹⁸⁴

2. *Extortion and Blackmail*

Federal law defines extortion as the “wrongful use of threatened or actual force, violence or fear” to obtain “property [from] another, with his [coerced] consent.”¹⁸⁵ Several states explicitly include the threat to expose an individual’s immigration status to obtain property or services of value as extortion.¹⁸⁶ Blackmail generally refers to a threat to reveal information (regardless of

authorization after worker became union organizer constituted unfair labor practice in violation of NLRA Section 8(a)(1)).

181. *EEOC v. City of Joliet*, 239 F.R.D. 490, 493 (N.D. Ill. 2006).

182. Loreleigh Keashly & Karen Jagatic, *By Any Other Name: American Perspectives on Workplace Bullying* 31, in *BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE* 31, 52-57 (Stale Einarsen, et al., eds. 2003).

183. Gary Namie, U.S. HOSTILE WORKPLACE SURVEY 2000 (2000), available at <http://www.workplacebullying.org/multi/pdf/N-N-2000.pdf>.

184. Stale Einarsen & Morten Birkeland Nielsen, *Workplace Bullying as an Antecedent of Mental Health Problems: A Five-Year Prospective and Representative Study*, 88 Int’l Archives of Occupational & Env. Health 131 (2015).

185. 18 U.S.C. § 1951 (2012). Federal law also outlaws forms of extortion under 18 U.S.C. § 872 (2012) (criminalizing “extortion by officers or employees of the United States”), 18 U.S.C. § 880 (2012) (criminalizing knowing receipt of the proceeds of extortion), and 29 U.S.C. § 186 (2012) (criminalizing extortion, bribery and exchange of anything of value between unions and employers).

186. See, e.g., COLO. REV. STAT. ANN. § 18-3-207 (West 2006) (including as extortion the threat “to report to law enforcement officials the immigration status of the threatened person or another person”); VA CODE ANN. § 18.2-59 (West 2010) (including the “threat to report [another] as being illegally present in the United States” or withholding passport or immigration documents in order to extort money, property, or pecuniary benefit); CAL. PENAL CODE. § 519 (West 2015) (“[f]ear, such as

veracity) unless a demand is met, while extortion generally consists of a threat to take violent action or make use of another's fear to obtain something of value.¹⁸⁷ The NLRB has specified in its U visa certification protocol that "blackmail may include interfering with protected activity through illegal threats of retaliation such as threats to call immigration authorities or threats to 'blacklist' employees."¹⁸⁸

Employers commit extortion or blackmail of their workers when threatening violence or other action—including reporting immigration status to law enforcement officials—in order to obtain a worker's property, including unpaid wages, or other items of value to which the employer is not entitled. As the California state legislature noted when defining extortion to include immigration-related threats, "Given undocumented immigrants' reluctance to interact with police due to fear of deportation, this group is particularly vulnerable to extortion."¹⁸⁹ Although employers may use threats or force to extort money or property from a worker, the harm suffered by victims of extortion and blackmail is not merely financial.

Immigrant victims of extortion or blackmail in the workplace may suffer significant distress and fear as a result of an employer's threats, including threats to fire or report their immigration status to law enforcement officials, and threats to fire employees who do not work unpaid hours, particularly in the context of broader labor violations in the workplace. The psychological consequences of extortion and blackmail are also considered in the literature of psychological abuse and coercive power described earlier.¹⁹⁰ However, perpetrators of blackmail and extortion often use private information to maintain control over a victim in specifically humiliating and stressful ways. An employer may threaten to report to immigration authorities, use knowledge about the worker's past to ruin his or her reputation, or use other intimate knowledge to shape threats to ensure compliance. Such threats raise the cost of resistance beyond that of self-capitulation, leading to anxiety, depression, mental confusion, self-doubts, guilt, and shame.¹⁹¹ These emotions can lead to long-term consequences that shape the victim's approach to interpersonal, social, and workplace interactions. Behavioral disturbances, including substance abuse, isolation and withdrawal, eating and sleeping

will constitute extortion, may be induced by a threat . . . to report his, her, or their immigration status or suspected immigration status.").

187. See, e.g., 18 U.S.C. § 873 (2012).

188. National Labor Relations Board, Office of the General Counsel, Memorandum OM 11-62, Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings 4 (Jun. 7, 2011).

189. *Bill Analysis, AB 524, Immigration: Extortion, Hearing Before Senate Comm. on Public Safety*, 2013-2014 Reg. Sess. 7-8 (Cal. 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0501-0550/ab_524_cfa_20130625_120134_sen_comm.html.

190. See *supra* Section II.C.; see also Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Reconceptualization*, 52 *SEX ROLES* 743 (2005).

191. SUSAN FORWARD & DONNA FRAZIER, *EMOTIONAL BLACKMAIL: WHEN THE PEOPLE IN YOUR LIFE USE FEAR, OBLIGATION AND GUILT TO MANIPULATE YOU* 28, 82, 145, 169 (1997).

disorders as described earlier, can also appear as a result of the victim's efforts to diminish the emotional discomfort and suffering.

3. *Fraud in Foreign Labor Contracting*

In 2013, Congress added fraud in foreign labor contracting, as defined in 18 U.S.C. § 1351, to the list of U visa qualifying crimes. Under 18 U.S.C. § 1351, fraud in foreign labor contracting occurs when a contractor “knowingly” and “with intent to defraud” recruits, solicits, or hires a person outside the United States, or causes another person to do so “by means of materially false or fraudulent pretenses, representations, or promises regarding that employment.”¹⁹²

Employers may commit fraud in foreign labor contracting by providing false representations on terms and conditions of employment, housing, fees to labor brokers, food and transportation, ability to work at other places of employment, and other material aspects of the work arrangement when bringing workers to the United States. For example, in *United States v. Askarjodjaev*,¹⁹³ the first case prosecuted under 18 U.S.C. § 1351, a foreign labor contractor and his associates recruited hundreds of workers to the United States with false promises concerning the terms, conditions, and nature of their employment. Once in the United States, the contractors placed the workers in overcrowded apartments and compelled them to work in service positions in luxury hotels, resorts, and casinos. Contractors withheld much of the workers' earnings, and threatened workers with deportation and financial penalties if they refused to comply.¹⁹⁴

Immigrant workers who have been manipulated into migrating to the United States for work opportunities that do not materialize, or lead to abuse and exploitation, often suffer from significant distress. Victims of fraud in foreign labor contracting endure sub-minimum wages, decrepit housing conditions, and other workplace violations, and may also suffer from intense shame, self-recrimination and guilt. Victims who internalize the responsibility for falling prey to fraud blame themselves for their own ambition and their failure to resist or recognize lies, fraud, and manipulation by an employer, supervisor or contractor. Victims of fraud in foreign labor contracting may develop a belief that their own instincts cannot be trusted anymore and that their decision-making is irreparably flawed, leading to further destructive decisions and behaviors. Victims of fraud in foreign labor contracting typically suffer from devastation to their identity, sense of self-efficacy, and sense of self-worth.

192. 18 U.S.C. § 1351 (2012).

193. *United States v. Askarkhodjaev*, No. 09-00143-01-CV-W-ODS, 2010 WL 4038783, at *3 (W.D. Mo. Sept. 23, 2010).

194. *Id.*

4. *Trafficking, Involuntary Servitude, and Peonage*

Immigrant workers are particularly vulnerable to becoming victims of trafficking, involuntary servitude, and peonage. In such cases, employers may compel workers to provide labor through the use of force, fraud, coercion, or indebtedness.

In order to combat human trafficking in the United States, Congress passed the Trafficking Victims Protection Act of 2000 (TVPA),¹⁹⁵ and reauthorized and amended the TVPA in 2003, 2005, and 2008.¹⁹⁶ The TVPA provides a comprehensive framework to address serious forms of trafficking, which include “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.”¹⁹⁷

The TVPA’s requirement that a victim of serious forms of trafficking show “force, fraud, or coercion” that compelled a worker to provide labor closely tracks the U visa’s required showing of substantial abuse. In addition to physical force and fraud, the TVPA’s definition of coercion incorporates physical force, psychological abuse, serious harm or physical restraint, serious harm, and abuse or threatened abuse of the legal process.¹⁹⁸ The TVPA further defines “serious harm” as “any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.”¹⁹⁹ Likewise, “abuse or threatened abuse of the law or legal process” includes the use or threatened use of a law or legal process . . . in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.”²⁰⁰ A finding of involuntary servitude requires consideration of a victim’s individual circumstances when determining “whether a particular type or certain degree of harm or coercion is sufficient to maintain or obtain a victim’s labor or services, including the

195. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

196. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified as amended in scattered sections of 8, 18, 22 U.S.C.); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified as amended in scattered sections of 18, 22, 42 U.S.C.); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-147, 122 Stat. 5044 (codified in scattered sections of 6, 8, 18, 22, 28, 42 U.S.C.).

197. 22 U.S.C. § 7102(9)(b) (2012).

198. 22 U.S.C. § 7102(3) (2012). *See also* Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 440 (2011) (describing TVPA’s broad coercion standard).

199. 18 U.S.C. § 1589(c)(2) (2012).

200. 18 U.S.C. § 1589(c)(1) (2012).

age and background of the victims.”²⁰¹

The U visa provisions include trafficking as a qualifying criminal activity.²⁰² The U visa does not, however, specifically require “a severe form” of trafficking, as it is defined in the TVPA, and also includes the various definitions of trafficking in state law. At least thirty-seven states, to date, have enacted trafficking statutes.²⁰³ The state-defined trafficking provisions may define trafficking differently from the federal provisions. These state trafficking statutes reflect the distinct ways that trafficking occurs at the state and local levels. These statutes provide for a more nuanced approach to identifying trafficking, and provide protections omitted in the federal trafficking definition. The Nevada state statute, for example, provides that a person shall not transport another person into the state with the intent to “violate any state or federal labor law.”²⁰⁴ Thus, even when facts surrounding trafficking victimization do not include the fraud, force, or coercion required of “severe forms of trafficking” under the TVPA, a trafficking victim can still make a claim based on a state definition of trafficking.²⁰⁵

Several court decisions have discussed fact patterns that indicate force, threats, physical restraint, harm, abuse of the legal process or other forms of victimization sufficient for a finding of trafficking, involuntary servitude and/or peonage. These include threats of deportation;²⁰⁶ eviction of workers from employer-provided housing without process;²⁰⁷ threats, curses, yelling, intimidation, including threats to call police or law enforcement agencies or to use physical force;²⁰⁸ seizure of identity documents, travel documents, passports, and/or plane tickets;²⁰⁹ underpayment of wages, with requirements to pay off debts;²¹⁰ physical assault, including hitting, punching, shaking, beating,

201. H.R. REP. NO. 106-939, at 101 (2000) (Conf. Rep.).

202. 8 U.S.C. § 1101(a)(15)(U) (2012).

203. Polaris Project, A LOOK BACK: BUILDING A HUMAN TRAFFICKING LEGAL FRAMEWORK (2014), <http://www.polarisproject.org/storage/2014SRM-capstone-report.pdf>.

204. NEV. REV. STAT. 200.468 (2007).

205. See Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. OF RICH. L. REV. 891, 940 (2008).

206. *United States v. Dann*, 652 F.3d 1160, 1165 (9th Cir. 2011); *United States v. Farrell*, 563 F.3d 364, 371 (8th Cir. 2009); *United States v. Calimlim*, 538 F.3d 706, 709 (7th Cir. 2008); *Garcia v. Audobon Communities Mgmt.*, No. 08-1291, 2008 WL 1774584, at *3 (E.D. La. Apr. 15, 2008); *United States v. Alzanki*, 54 F.3d 994, 999 (1st Cir. 1995).

207. *Garcia*, 2008 WL 1774584, at *3.

208. *United States v. Dann*, 652 F.3d 1160, 1165 (9th Cir. 2011); *United States v. Bradley*, 390 F.3d 145, 148 (1st Cir. 2004); *United States v. Veerapol*, 312 F.3d 1128, 1131 (9th Cir. 2002); *Alzanki*, 54 F.3d at 999; *United States v. Warren*, 772 F.2d 827, 830 (11th Cir. 1985); *United States v. Booker*, 655 F.2d 562, 563 (4th Cir. 1981).

209. *United States v. Sabhani*, 599 F.3d 215, 225 (2d. Cir. 2010); *Farrell*, 563 F.3d at 368; *Calimlim*, 538 F.3d at 708; *Bradley*, 390 F.3d at 148; *Alzanki*, 54 F.3d at 999; *Veerapol*, 312 F.3d at 1130.

210. *Dann*, 652 F.3d at 1165; *Farrell*, 563 F.3d at 367; *Bradley*, 390 F.3d at 148; *Warren*, 772 F.2d at 830; *Booker*, 655 F.2d at 563.

and choking;²¹¹ deprivation of medical care;²¹² restrictions on movement and isolation from family and friends;²¹³ restriction on basic necessities, including food intake, clothing, sleep, and decent living conditions;²¹⁴ threats of harm to family members;²¹⁵ and control of financial accounts and wage payments.²¹⁶

Physical and psychological harm suffered by victims of labor trafficking, involuntary servitude, and peonage are well-established. Employers sometimes subject workers to psychological assaults designed to force submission, resulting in workers' loss of sense of personal efficacy and control necessary for good mental and physical health.²¹⁷ Trafficked workers are subject to isolation, indoctrination, physical impairment and exhaustion, which decrease resistance by workers and increase vulnerability to further exploitation.²¹⁸ Loss of identity, sense of self, and treatment as a commodity lead victims to view themselves as dispensable property, contributing to depression, feelings of hopelessness, helplessness, and loss of will.²¹⁹ Victims may suffer from a deeply altered frame of reference for understanding the world, lose a sense of themselves as people, and lack the ability to trust others, leaving them "physically, emotionally, and spiritually shattered."²²⁰

5. *Felonious Assault*

Assault is generally the intentional attempt by a person, by force or violence, to injure another person; or any threatening gesture with the ability and intent to commit battery.²²¹ Generally, felonious assault, which can be defined as aggravated assault under state law, involves the use of a dangerous or deadly weapon with the intent to cause bodily injury; serious bodily injury; or assault with intent to commit another felony.²²²

Immigrant workers may become victims of felonious assault in the workplace. Common fact patterns include instances where employers, co-workers, or customers have subjected workers to violence or an attempt to

211. *Sabhani*, 599 F.3d at 225; *Bradley*, 390 F.3d at 148; *Veerapol*, 312 F.3d at 1131; *Alzanki*, 54 F.3d at 999; *Kimes v. United States*, 939 F.2d 776, 778 (9th Cir. 1991); *Warren*, 772 F.2d at 830; *Booker*, 655 F.2d at 563.

212. *Bradley*, 390 F.3d at 155; *Alzanki*, 54 F.3d at 999.

213. *Sabhani*, 599 F.3d at 226; *Farrell*, 563 F.3d at 368; *Calimlim*, 538 F.3d at 708; *Veerapol*, 312 F.3d at 1131; *Kimes*, 939 F.2d at 778.

214. *Dann*, 652 F.3d at 1165; *Sabhani*, 599 F.3d at 225, 228; *Alzanki*, 54 F.3d at 999; *Warren*, 772 F.2d at 830.

215. *Sabhani*, 599 F.3d at 227.

216. *Dann*, 652 F.3d at 116.

217. FREE THE SLAVES & THE HUMAN RIGHTS CENTER AT THE UNIVERSITY OF CALIFORNIA AT BERKELEY, *HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES* 3 (2004).

218. Elizabeth Hopper & Jose Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 INTERCULTURAL HUMAN RIGHTS L. REV. 185, 197 (2006).

219. *Id.* at 199-200.

220. *Id.* at 200.

221. 6 AM. JUR. 2D *Assault and Battery* §§ 32, 36, 62 (2014).

222. U.S. SENTENCING GUIDELINES MANUAL § 2A2.2 (2013); 6 AM. JUR. 2D *ASSAULT AND BATTERY* §§ 32, 36, 62 (2014).

commit violence, including beating with or without a weapon, or assault with the intent to commit other felonies. Physical assault in the workplace is particularly harmful due to the power differential between the perpetrator (employer) and victim (worker), and the perpetrator's use of physical abuse to further establish power over the victim.

Physical assault and physical abuse in the employment setting, even when mild, can produce or trigger traumatic stress and fear. Whether it is repetitive, intermittent, or infrequent, physical assault is a powerful tool of control and intimidation used to ensure compliance and submission.²²³ In addition to intense fear and anxiety about personal bodily integrity, victims also suffer from psychological disturbances that can rise to the level of post-traumatic stress, as well as increased expectations of continued abuse, fears that violence will increase in lethality, a perceived lack of safety and security, and a view of interpersonal relationships as dangerous. These cognitive and emotional changes may cause severe mental distress and impairment in a victim's daily social, working life and personal adjustment.

6. Sex Crimes

Undocumented immigrants, immigrant workers without authorization to work, and guestworkers are particularly vulnerable as victims of sex crimes in the workplace by employers, supervisors, co-workers, and clients.²²⁴ *U visa* qualifying activities include abusive sexual contact, rape, and sexual assault.

18 U.S.C. § 2244(b) defines "abusive sexual contact" as "knowingly engag[ing] in sexual contact with another person without that other person's permission."²²⁵ "Sexual contact" is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."²²⁶ Courts often use the terms "abusive sexual contact" and "abusive sexual conduct" interchangeably.²²⁷

Rape is generally defined as the commission of a sexual act upon another person through use of unlawful force, or through threats of death, bodily

223. MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT AND INTERVENTION 22-23 (1992).

224. Robin R. Runge, *Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women*, 20 AM. U. J. GENDER SOC. POL'Y & L. 871, 872 (2012); Dana Kabat-Farr & Lilia M. Cortina, *Sex-Based Harassment in Employment: New Insights Into Gender and Context*, 38 L. AND HUM. BEHAVIOR 58 (2014).

225. 18 U.S.C. § 2244(b) (2012).

226. 18 U.S.C. § 2246(3) (2012).

227. See e.g., *United States v. Urrabazo*, 234 F.3d 904, 905 (5th Cir. 2000); *United States v. Bahe*, 201 F.3d 1124, 1126 (9th Cir. 2000); *United States v. Downer*, 143 F.3d 819, 820 (4th Cir. 1998); *United States v. Foster*, 30 F.3d 65, 66 (7th Cir. 1994); *United States v. Lauck*, 905 F.2d 15, 16 (2nd Cir. 1990).

harm kidnapping; or sexual acts committed after rendering the other person unconscious or substantially impaired with a drug, intoxicant, or other substance.²²⁸ Sexual assault is generally considered to include the commission of a sexual act upon another person by use of threats, bodily harm, fraudulent representation, artifice, or commission of a sexual act on another person with the knowledge that the other is asleep, unconscious, unaware, or incapable of consent.²²⁹

A robust body of social science literature has documented the negative and pervasive effects of sex crimes on victims.²³⁰ Moreover, sex crimes that occur within a relationship of power and authority have greater negative impact. The most immediate reaction to instances of rape and sexual assault includes intense fear of death and dissociation. Fear reactions, however, can be quite prolonged, lasting for more than a year in many cases.²³¹ Ongoing fears can be related to reminders of the attack, and fear of contracting sexually transmitted diseases or becoming pregnant as a result of sexual assault can become a recurrent source of anxiety.²³² Fears of future attacks and other harm may follow the sexual assault, leading to restriction of social activities, including work and community involvement. For some women, particularly those from marginalized communities, sexual assault can reaffirm assumptions about themselves as devalued persons, and about the world being unsafe and dangerous.²³³ Longer-term impacts of sexual assault typically include feelings of low self-esteem, self-blame and guilt that can endure for months and years after the assault. Suicidal ideation is more common among victims/survivors of sexual assault than the general population.²³⁴

Moreover, the effects of sexual abuse can happen even when the sexual violence did not happen directly. Sexual abuse of one worker has the potential of creating a ripple effect to the rest of the workforce because it creates conditions that destroy the trust and safety workers deserve in the workplace. Sometimes sexual abuse is combined with favoritism, further confusing the victim psychologically and also his or her coworkers. A

228. See, e.g., 10 U.S.C. § 920(a) (2012).

229. See, e.g., 10 U.S.C. § 920(b) (2012).

230. See, e.g., TARA N. RICHARDS & CATHERINE D. MARCUM, *SEXUAL VICTIMIZATION: THEN AND NOW* (2014).

231. Norah C. Feeny, Laura A. Zoellner, & Edna B. Foa, *Anger, Dissociation and Post-Traumatic Stress Disorder among Female Assault Victims*, 13 J. OF TRAUMATIC STRESS 89 (2000).

232. Melissa M. Holmes, Heidi S. Resnick, Dean G. Kilpatrick & Connie L. Best, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OF OBSTETRICS & GYNECOLOGY 320 (1996); Kilpatrick, Dean G., Ron Acierno, Heidi S. Resnick, Benjamin E. Saunders & Connie L. Best, *A 2-Year Longitudinal Analysis of the Relationships Between Violent Assault and Substance Use in Women*, 65 J. OF CONSULTING & CLINICAL PSYCHOL. 834 (1997).

233. Sharon M. Wasco, *Conceptualizing the Harm Done by Rape Applications of Trauma Theory to Experiences of Sexual Assault*, 4 TRAUMA, VIOLENCE, & ABUSE 309 (2003).

234. Susan Stepakoff, *Effects of Sexual Victimization on Suicidal Ideation and Behavior in US College Women*, 28 SUICIDE & LIFE-THREATENING BEHAVIOR 107 (1998).

sexualized environment in the workplace is psychologically damaging even when not one worker was specifically sexually abused or exploited because it creates the conditions in which a person habituates to having their boundaries violated and insidiously chip away the will to resist other abuses.

V. CONCLUSION

This article has described in detail how U visa qualifying criminal activities committed in the workplace may cause substantial harm to immigrant worker victims. As the social science research discussed in this article indicates, immigrant workers who are victims of employment-related criminal activities often suffer psychological harm. This article has provided a framework to understand such harm from the perspective of the U visa's substantial abuse requirements. While some criminal activities committed in the workplace context may have close analogues to cases more commonly seen in the domestic violence context, a substantial abuse analysis for workplace crimes must consider the unique dynamics of an employer's actions on immigrant workers. A reconceptualization of the substantial abuse standard that is based in and founded upon social science research findings and considers factors that induce such trauma in the workplace will assist adjudicators and practitioners to more effectively and accurately recognize the forms, patterns and range of workplace abuse contemplated by Congress and DHS regulations.

