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# OSHA Expands Its Investigative Authority Under the Whistleblower Protection Program through U and T Visa Certifications

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OSHA has unveiled another tool that will enhance its ability to investigate potential workplace safety violations affecting vulnerable workers who are victims of criminal activity, including sex and labor trafficking. Effective March 30, 2023, OSHA can now issue an important certification used to support two nonimmigrant visas, the U and T visas, that grant individuals immigration status when working with officials during criminal investigations and proceedings. Both the U visa and T visa were created in 2000 as part of the Victims of Trafficking and Violence Protection Act and are intended to provide undocumented workers or workers whose immigration status depends on their employer with the opportunity to report qualifying criminal activity (QCA) without jeopardizing their immigration status and/or risking retaliation by their employer. Now, OSHA can provide support to the visa applications of workers who bring forward credible allegations of a violation of a law that OSHA enforces, in situations where OSHA has detected specific QCA.

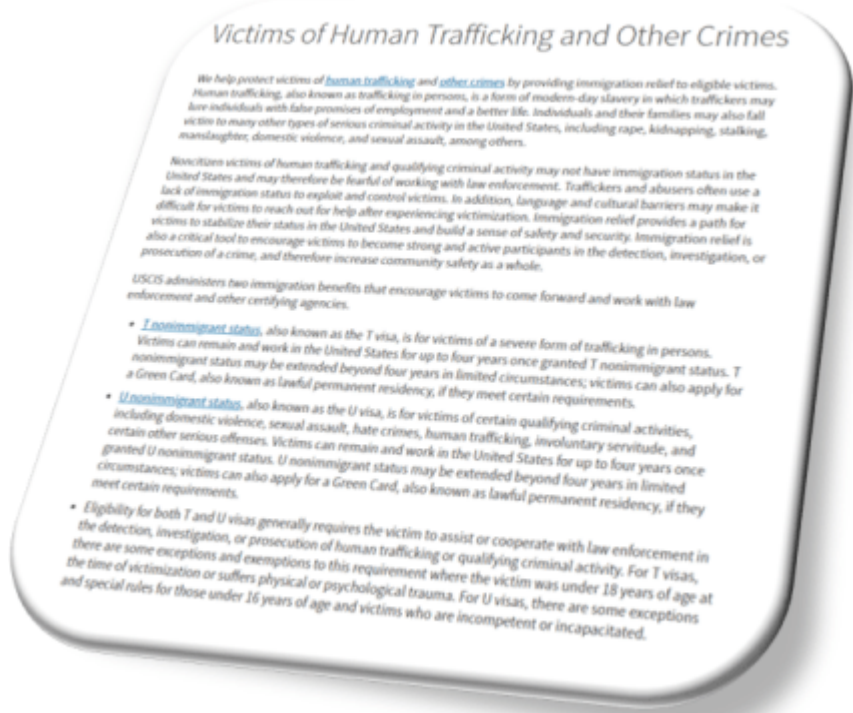


OSHA does not have the authority to issue U and T visas themselves. Rather, these visas are issued by the U.S. Citizenship and Immigration Services (USCIS), which is a separate agency within the Department of Homeland Security (DHS). However, DHS regulations (8 C.F.R. § 214.14(a)(2)) permit certain federal law enforcement agencies (such as the Department of Labor) to certify applications. Previously this authority was limited to DOL's Wage and Hour Division, but Secretary Walsh signed a memorandum on February 13, 2023, that gave OSHA the authority to issue the certifications as well.

These certifications are vital parts of nonimmigrant visa applications which require applicants to provide: a petition, I-918 Supplement B certification *signed by an authorized official of a law enforcement agency (such as the DOL/ OSHA)* confirming that the individual is being helpful or will likely be helpful in the investigation or prosecution of the case, and a personal statement describing the QCA to USCIS. The specific certification authority has been delegated to the regional administrators in each of OSHA's offices, as well as to the Deputy Assistant Secretaries and the Director of the Directorate of Whistleblower Protection Programs in OSHA's national office. They will be assisted by a regional coordinator, who will ensure that requests for certification are handled appropriately and consistent with the program's intentions.

By permitting OSHA to issue I-918 Supplement B certifications, the DOL has expanded the network of individuals whom victims might interact with that can provide them with necessary protection if they are victims of QCA. In the program's kickoff meeting, Deputy Assistant Secretary of Labor for Occupational Safety and Health Jim Frederick highlighted his hope that the ability to offer these certifications would allow OSHA to reach out to more workers and produce more trusting relationships with workers. This program is intended to provide workers protection from employer retaliation that might put their immigration status at risk, and also enable them to feel free to provide OSHA, as well as other law enforcement agencies, critical information relating to QCAs and worker safety violations. In a statement, OSHA Asst. Secretary Doug Parker said: "Workers in the U.S. need to feel empowered and able to trust OSHA and the US Department of Labor enough to voice their concerns about workplace safety regardless of their immigration status and fears of retaliation."

**What are U visas and T visas?**



- **U nonimmigrant visas** provide legal status to victims of an enumerated list of QCAs who have suffered substantial physical or mental abuse, possess information concerning that crime, and who have been, are

being, or are likely to be helpful to law enforcement or government officials.

- **T nonimmigrant visas** are available to individuals who have been subjected to severe forms of trafficking, such as sex or labor trafficking. To be eligible for a T visa, the victim must have been brought to the United States because of the trafficking and demonstrate that they would suffer extreme hardship involving unusual and severe harm if removed from the United States. The victim must also have complied with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking (unless under the age of 18 at the time at least one of the acts of trafficking occurred or unable to cooperate due to physical or psychological trauma).

The key benefit of these visas is that they allow victims to receive:

- Lawful status in the United States lawfully for up to four years;
- Automatic grant of employment authorization;
- Eligibility to adjust status to that of a lawful permanent resident after three years (and to naturalize); and
- In some cases, derivative visas for qualifying family members.

#### **What is the difference between a U visa and a T visa?**

The key difference between U visas and T visas is that they are eligible for individuals who have been victims of different types of criminal activities.

**U visas** are intended to support victims of the following crimes: Abduction, Abusive Sexual Contact, Blackmail, Domestic Violence, Extortion, False Imprisonment, Female Genital Mutilation, Felonious Assault, Fraud in Foreign Labor Contracting, Hostage, Incest, Involuntary Servitude, Kidnapping, Manslaughter, Murder, Obstruction of Justice, Peonage, Perjury, Prostitution, Rape, Sexual Assault, Sexual Exploitation, Slave Trade, Stalking, Torture, Trafficking, Witness Tampering, Unlawful Criminal Restraint, and other related crimes, to include any similar activity where the elements of the crime are substantially similar, or attempt, conspiracy, or solicitation to commit any of the above and other related crimes.

At present, OSHA has indicated that it will only consider a subset of those crimes to satisfy the QCA requisite for visa certification. Specifically, the crimes that OSHA will look at are murder, manslaughter, felonious assault, obstruction of justice, witness tampering, perjury, extortion, blackmail, involuntary servitude, peonage, or trafficking. Also, during the kickoff meeting for the program, Frederick indicated that OSHA was open to reassessing the and expanding crimes it would consider for QCA at a later date.

**T visas** are focused solely on “severe form[s] of trafficking in persons” which are identified as:

- **Sex trafficking:** When someone recruits, harbors, transports, provides, solicits, patronizes, or obtains a person for the purpose of a commercial sex act, where the commercial sex act is induced by force, fraud, or coercion, or the person being induced to perform such act is under 18 years of age; or
- **Labor trafficking:** When someone recruits, harbors, transports, provides, or obtains a person for labor or services using force, fraud, or coercion for the purpose of involuntary servitude, peonage, debt bondage, or slavery.

#### **When will OSHA consider supporting visa certification requests?**

OSHA has stated that it will consider exercising its authority to support U visa certification requests when:

1. OSHA has detected one of the following QCAs, or an attempt, conspiracy, or solicitation to commit one of the following QCAs: murder, manslaughter, felonious assault, obstruction of justice, witness tampering, perjury, extortion, blackmail, involuntary servitude, peonage, or trafficking;
2. The QCA arises in the context of a work environment or an employment relationship;
3. There is a credible allegation of a violation of a law that OSHA enforces related to the work environment or employment relationship; and
4. The victim has demonstrated that they have been, are being, or are likely to be helpful to OSHA and/or any other law enforcement officials in the detection, and any investigation or prosecution, of the QCA.

In addition, OSHA has indicated it will consider exercising its authority to support T visa certification requests when:

1. OSHA has identified a victim of trafficking;
2. The trafficking activity arises in the context of a work environment or an employment relationship;
3. There is a credible allegation of a violation of a law that OSHA enforces related to the work environment or employment relationship; and
4. The victim has complied with any reasonable requests for assistance (unless the victim qualifies for an exemption due to age or trauma suffered).

U visas and T visas would not be issued to individuals who report workplace safety violations alone. OSHA will only be able to provide the requisite certification where a workplace safety violation has some nexus to QCA.

### **How will this affect workers in state plan states?**

Regarding state plan states, Frederick indicated during the kickoff meeting that OSHA will currently only consider certification for workers in state plan states in matters where the Agency, from a federal perspective, is exercising its enforcement authority. But, OSHA would not be providing certifications in matters where state plans were exercising their enforcement authority. He also indicated that states were free and encouraged to work with DHS on their own to create certification programs. However, given that DHS's regulations currently only allow federal law enforcement to assist with certifications – it is uncertain how practical this suggestion is.

### **Employer takeaways from this new program**

Clearly, OSHA has identified worker concerns around employer retaliation and worker immigration status as hindrances to its investigations. Still, the key takeaway from OSHA's announcement regarding these visa certifications is that any decision to issue U and T visas must be underpinned by severe criminal activity. At its peak extension, this program could provide a potential lifeline for trafficked human beings who are also subjected to unsafe working conditions but are unable to speak about the conditions, because they cannot risk being deported to their home countries or because they are in debt to their traffickers. The most likely outcome of this program is that it will create greater access to justice for the most vulnerable workers whose immigration status makes them reluctant to cooperate with investigations despite being victims of QCA in the context of

potential OSHA violations.