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RE: Substantial Abuse Determinations for U-Visa Victims of Workplace Crimes

Dear Ms. Dawkins:

We write to you to raise concern with the Department of Homeland Security's Bureau of U.S. Citizenship and Immigration Service's (USCIS) treatment of petitions for U Nonimmigrant Status (U visa) in cases involving workplace-based crime. Specifically, we raise concern with its substantial abuse determinations in cases where crimes have taken place in the workplace, and adjudication of cases involving the qualifying criminal activities of witness tampering and obstruction of justice.

As federal regulations have established, law enforcement agencies that conduct their enforcement largely in the workplace, including the Equal Employment Opportunity Commission (EEOC), the Department of Labor (DOL), and equivalent state and local agencies may certify U visa petitions. 8 C.F.R. § 214.14(a)(2). In recent years, these agencies have released U visa certification protocol, and have appointed personnel to coordinate U visa

certification.¹ As a result, USCIS has adjudicated, and will likely adjudicate an increasing number of U visa applications based on qualifying criminal activity in the workplace.

Although USCIS has handled many of these workplace-based U visa petitions without issue, USCIS has issued Requests for Evidence (RFE) or denied several U visa applications of victims of workplace-based crime, concluding that applicants have not shown that they have suffered “substantial physical or mental abuse” as a result of qualifying criminal activity. We believe some of these denials reflect lack of education about the context and experience of workplace crime victims, not failure to meet the requirements of the statute. Although USCIS staff are familiar with determining the degree of physical and mental abuse in cases involving domestic violence and sexual assault-related crimes, additional training on the specific dynamics of vulnerability and abuse experienced by victims of workplace-based crime would improve access to U visas. This issue is particularly significant for victims of obstruction of justice and witness tampering by their employers.

We ask that you provide further internal guidance and training to USCIS staff to ensure that victims of workplace-based crime are adequately protected and to strengthen the ability of labor and civil rights law enforcement agencies to detect, investigate, and prosecute criminal activities. We provide some suggestions below on issues and content for such training and request an opportunity to meet with you in the near future to further discuss these concerns. We appreciate your commitment to making these aspects of the law work and look forward to deepening our collaboration with you and to hearing your responses to our concerns.

A. “Substantial Physical or Mental Abuse” for Victims of Workplace Crime

When determining whether an applicant has suffered substantial physical or mental abuse, USCIS considers 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.” 8 C.F.R. § 214.14(b)(1). USCIS has concluded that it is reasonable to consider both “the severity of the injury suffered by the victim” and “the severity of abuse inflicted by the perpetrator.” 72 Fed. Reg. 53014, 53018 (Sept. 17, 2007). “No single factor is a prerequisite to establish that the abuse 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.” 8 C.F.R. § 214.14(b)(1).

¹ Memorandum from Richard A. Seigel, National Labor Relations Board, to All Regional Directors, Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings (June 7, 2011); Memorandum from Nancy Leppink, Acting Administrator, Wage and Hour Division, U.S. Department of Labor, to Regional Administrators and District Directors, Certification of Supplement B Forms of U Nonimmigrant Visa Applications (Apr. 28, 2011); Memorandum from New York State Department of Labor, Memorandum and Order Regarding Certification of U Visa Petitions (2011); Memorandum from Phyllis W. Cheng, Director, California Department of Fair Employment and Housing, Enforcement Division Directive: Obtaining U Visas in Investigated Cases (May 6, 2010); Memorandum from Naomi Earp, Chair, Equal Employment Opportunity Commission, to District Directors and Regional Attorneys, EEOC Procedures for U Nonimmigrant Classification Certification (July 3, 2008).

Undocumented workers and guestworkers are particularly vulnerable to victimization in the workplace. Economic dependency, power differentials between the employer and employee, and employee isolation because of limited access to culturally and linguistically-appropriate support systems heighten workers' vulnerability. An abusive employer or supervisor may feel safe in the knowledge that an undocumented worker or guestworker may not bring charges or report abuse due to fear of retaliation, or would not call the police or other law enforcement agencies to report crime out of fear of deportation.² Employers may also prey upon unique vulnerabilities such as a worker's gender, or ethnic or cultural background.

Many immigrant victims of workplace crime may thus be unable to leave their jobs to escape abuse and crime at the hands of their employers, with significant psychological consequences. Many immigrant victims of workplace crime may 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, harm to their family members in the country of origin, or detention and deportation. The inability to leave a job may result in prolonged and frequent exposure to abuse, associated with more severe psychological harm.³ Moreover, victims of abuse in the workplace who are economically dependent on abusive employers due to lack of job mobility suffer often greater psychological harm than those who may be able to leave a job.⁴

1. Forms of Abuse in the Workplace

In general, abuse in the workplace may take several forms, including physical, sexual, psychological, immigration, and economic abuse. In the case of minors, USCIS adjudicators should also consider negligence as a form of psychological abuse. The injury suffered by victims of such abuse may manifest as physical or mental injury. Such forms of employer abuse may manifest itself in the following ways. We also attach a table with concrete examples of such abuse in the workplace as Exhibit A.

- **Physical abuse:** Physical abuse includes the intentional use of physical force with the potential for causing death, disability, injury, or harm. It may include, but is not limited to physical assault and attempted assault.⁵ In the workplace, physical abuse is unique 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 abuse may range from behaviors such as shoving or hitting a worker to full-scale attacks. In most cases, a perpetrator may feel safe in the knowledge that an undocumented worker or guestworker will not bring charges or report the abuse to superiors for fear of retaliation or other repercussions. Physical abuse may also include the employer's maintenance of a dangerous workplace environment that leads to injury or potential

² 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?nocdn=1>.

³ Pamela Lutgen-Sandvik, et al., *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree, and Impact*, 44 J. OF MANAGEMENT STUD. 835-860 (2007).

⁴ Bennett Tepper, *Abusive Supervision in Work Organizations: Review, Synthesis, and Research Agenda*, 33 J. OF MGMT 261 (2007).

⁵ J.E. Saltzman, et al., INTIMATE PARTNER VIOLENCE SURVEILLANCE: UNIFORM DEFINITIONS AND RECOMMENDED DATA ELEMENTS, Centers for Disease Control and Prevention (2002).

harm, or preventing workers from attending to basic bodily needs, such as using the bathroom or taking care of medical needs. It may also include assigning dangerous jobs or arduous jobs as punishment, as well as forcing an employee to stay after his or her shift for longer hours than agreed or required, leading to physical exhaustion and other injuries.

- **Sexual abuse:** The continuum of activities that constitute sexual abuse include acts ranging from unwelcome propositions or comments, disguised fondling, and unwelcome touching, to rape in the workplace by a supervisor, co-workers, or customers. In some situations, an employer may send a message that working conditions will not improve or that wages will be withheld unless an employee submits to a sexual encounter or unwelcome touching. Other examples of activities include spreading rumors or making offensive comments about a worker's sexual life or sexual orientation, or making insults of a sexual nature. Sexual abuse also includes an employer's failure to discipline or enforce rules against sexual harassment or assault by supervisors, co-workers or clients, as well as the creation of an unsafe environment where employees are hyper-vigilant and on the defense against sexual assault at any time.
- **Psychological abuse:** Psychological abuse in the workplace can include verbal abuse, emotional abuse, intimidation, and manipulation that diminish a worker's self-worth and independence. Verbal abuse includes yelling, screaming, name-calling, insulting, using racial or other derogatory epithets, and belittling by an employer. Emotional abuse may include unwarranted blaming, shaming, isolation, threats, demands of obedience to whims, anger when tasks are not completed perfectly, and indifference to a worker's pressing needs. Intimidation may include intense surveillance, making fun of a worker, making a worker perform humiliating or demeaning tasks, monitoring a worker's personal time, or making threats. Manipulation may include statements or actions designed to turn other people against a worker, using others to pressure a worker into an action, shifting from a nurturing to a punishing stance without provocation, threatening a worker with punishment, and forcing participation in a criminal activity. Employers can psychologically terrorize immigrant employees by utilizing strategies of abuse by using issues that are culturally meaningful to the employee.
- **Immigration abuse:** Immigration abuse occurs when an abuser of an undocumented immigrant victim threatens deportation and/or actively uses their power over a victim's immigration status to exploit the victim's fear of deportation. The aim of this abusive strategy is to prevent a worker from seeking help or contacting law enforcement.⁶ In the workplace, immigration abuse takes place when a worker's immigration status is used to exploit, keep a worker trapped in harmful working conditions, or prevent a worker from cooperating with law enforcement officials. It also includes instances where the employer

⁶ N.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); M. Natarajan, *Domestic Violence among Immigrants from India: What We Need to Know—and What We Should Do*, 26 INT'L J. OF COMP. AND APPL. CRIM. JUSTICE 301 (2003); L. Orloff, et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S LAW J. 43 (2003); A. Raj, et al., *Immigration Policies Increase South Asian Immigrant Women's Vulnerability to Intimate Partner Violence*, 60 J. OF THE AM. MED. WOMEN'S ASS'N 26 (2005).

or supervisor tells workers that they have paid ICE to refrain from enforcing immigration laws in their workplace.

- **Economic abuse.** Economic need is one of the most important barriers that impede immigrant workers from leaving an abusive workplace. Lack of money to support the worker and the worker's family, often in the home country, is a significant factor for undocumented workers or guestworkers who have come to the United States in search of better conditions. Workers may fear not being able to find other employment due to their lack of authorization, particularly those who live paycheck to paycheck. Employers may also fail to pay the correct amount of money for hours worked, withhold leave, provide economic punishment for minor infractions, or charge workers for items that should be provided by the employer, such as uniforms and safety equipment. Employers may also threaten workers that they will not renew contracts, mislead workers about their rights as employees, and withhold information about relevant procedures and protections.

2. Effects of Abuse on Victims of Crime in the Workplace

A large body of research has established that workplace abuse produces a wide range of physical and psychological problems in victims.⁷ Abuse and exploitation at work not only affects direct victims, but also impacts co-workers who witness the abuse of their peers and thus fear for themselves. These effects may include psychological harm, physical harm, and social harm.

- **Psychological harm.** Victims of workplace abuse often report experiencing higher levels of general stress and anxiety. Victims may exhibit symptoms including insomnia, constant worry, daily sadness, irritability, extreme fatigue, lack of interest in things that interested them in the past, lack of motivation, poor appetite, crying spells, nightmares, feelings of hopelessness and worthlessness, and somatic symptoms such as migraines and digestive problems.⁸

Abuse in the workplace may also be associated with acute clinical mental health symptoms and diagnosable disorders. Mental health problems such as depression, anxiety, mood disorders, dissociation, substance abuse, suicide attempts, acting out, and post traumatic symptoms are often found in victims of abuse and maltreatment.⁹ Workers may develop symptoms compatible with the diagnosis of post-traumatic stress disorder, somatization, and depression.¹⁰ Working in stressful conditions may produce chronic

⁷ See D. Ajdukovic, *Social Contexts of Trauma and Healing*, 20 MEDICINE, CONFLICT, AND SURVIVAL 120 (2004).

⁸ See, e.g. Lutgen-Sandvick, et al., *supra* note 3; N.A. Bowling, et al., *Why Do You Treat Me Badly? The Role of Attributions Regarding the Cause of Abuse in Relation to Subordinates' Responses to Abusive Supervision*, 25 Work and Stress 343 (2011); C. Brotheridge & R. Lee, *Restless and Confused: Emotional Responses to Workplace Bullying*, 15 Career Dev. Int'l 687 (2010); N.A. Bowling & T.A. Beehr, *Workplace Harassment from the Victim's Perspective: A Theoretical Model and Meta-Analysis*, 91 J. of Applied Psychology 998 (2006).

⁹ J.G. Allen, et al., *Complexities in Complex Post-Traumatic Stress Disorder in Inpatient Women: Evidence from Cluster Analysis of MCMI-III Personality Disorder Scales*, 73 J. PERSONALITY ASSESSMENT 73 (1999).

¹⁰ See, e.g. J. Escartin, et al., *Development and Validation of the Workplace Bullying Scale "EAPA-T"*, 10 INT'L J. CLINICAL AND HEALTH PSYCHOLOGY 519 (2010); Heinz Leymann & Annelie Gustafsson, *Mobbing at Work and the Development of Post-traumatic Stress Disorders*, 5 EUROPEAN J. OF WORK AND ORG. PSYCHOLOGY 251 (1996).

trauma—which consists of single stressful events that accumulate over time and combine with a toxic environment—multiplies the maladaptive effects of a traumatic event. Where specific traumatic experiences are added to the cumulative effect of repeated psychological abuse and deprivation, significant personality changes may occur. When a person’s identity is organized around internal distress, fear, and a sense of fragility, personal and emotional growth are likely to be stunted.

- **Physical harm.** Workplace abuse is associated with negative physical health consequences. In addition to the direct physical injuries caused by the abuse itself or dangerous working conditions, victims of workplace abuse report a wide range of secondary somatic symptoms, including, but not limited to headaches and sleep disturbances, heart-related health issues, sexually-transmitted diseases and unhealthy weight loss or gain. Victims of abuse may also engage in unhealthy behaviors as a coping mechanism to deal with high levels of psychological stress.¹¹
- **Social harm.** The experience of abuse in the workplace can adversely impact victims’ interpersonal relationships. Victims of workplace abuse may deplete their cognitive and physical resources coping with the stress of the abuse, leaving little resources available for use when interacting outside the workplace environment. This may lead to a decreased quality of social relationships and conflict in their intimate relationships. A survey of employees has reported that workplace abuse is associated with high levels of family conflict.¹²

Because USCIS is likely to encounter greater numbers of U visa applications from victims of crime in the workplace, we recommend that the agency provide additional training to U visa adjudicators on the specific forms and effects of abuse in the workplace. As advocates and clinicians with experience in this field, we would be happy to support additional training in any way.

B. Substantial Abuse Determinations for the Qualifying Criminal Activities of Obstruction of Justice, Witness Tampering, and Perjury

In many cases, victims of workplace crime may receive certification by law enforcement agencies for the qualifying criminal activity of obstruction of justice, witness tampering, and perjury. Under U visa standards, a person is considered a victim of witness tampering, obstruction of justice, or perjury, including any attempt, solicitation, or conspiracy to commit one or more of those offenses, if: (A) The petitioner has been directly and proximately harmed by the perpetrator of the witness tampering, obstruction of justice, or perjury; and (B) there are reasonable grounds to conclude that the perpetrator committed the witness tampering, obstruction of justice, or perjury offense, at least in principal part, as a means (1) to avoid or

¹¹ M.K. Duffy, et al., *Social Undermining in the Workplace*, 45 ACAD. OF MGMT. J. 31 (2002); Annie Hogh et al., *Individual Consequences of Workplace Bullying/Mobbing*, in BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENTS IN THEORY, RESEARCH, AND PRACTICE (2011); R. Glaser, et al., *Stressed-Induced Immune Dysfunction: Implications for Health*, 5 NATURE REVIEWS IMMUNOLOGY 243 (2005); J.K. Kiecolt-Glaser, et al., *Depression and Immune Function: Central Pathways to Morbidity and Morality*, 53 J. PSYCHOSOMATIC RESEARCH 873 (2002).

¹² Tepper, *supra* note 4.

frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity; or (2) to further the perpetrator's abuse or exploitation of or undue control over the petitioner through manipulation of the legal system. 8 C.F.R. § 214.14(14)(ii).

Employers who seek to obstruct justice or prevent witnesses from participating in official proceedings or investigations often use abusive methods and/or build upon prior patterns of abuse in order to achieve their ends. Victims of such crimes have typically suffered abuse at the hands of their employers, whose obstructive activity, witness tampering, and perjury to avoid detection and prosecution are symptomatic of a larger pattern of harm and exploitation. Indeed, employers' actions to obstruct justice, tamper with witnesses, and commit perjury may often manifest as substantial abuse for employees who have endured multiple violations in the workplace.

Based on experience with these cases, we believe that USCIS adjudicators would benefit from additional training on this issue. USCIS has issued Requests for Evidence (RFE) or denied several U visa applications of victims of obstruction of justice and witness tampering in the workplace, concluding that applicants have not shown that they have suffered "substantial physical or mental abuse." We believe that many of these determinations are based on a misunderstanding of the unique nature of abuse in the workplace. We attach one such example to this letter as Exhibit B.

Typical cases involving obstruction of justice, witness tampering, and perjury in the workplace may involve employers' attempts to avoid detection and investigation for violations of workplace standards, including wage and hour violations, false record-keeping, underage labor, and health and safety violations. Often, employers may issue threats, retaliate against workers who may ask for unpaid wages or assert their workplace rights, or engage in physical, economic, and verbal abuse to further their control over workers. For example, employers who are under threat of investigation may engage in the following activities:

- Direct or indirect threats of firing, physical harm to the employee or family members, or of potential reports of worker or worker's friends/family to immigration enforcement or local law enforcement if workers do not withdraw claims, cooperate/collaborate with employer, or lie to investigators;
- Confiscation of workers' personal identification documents, passports, or work permits, limiting mobility of the worker or ability to leave;
- Retaliation, harassment, stalking, intimidation, isolation, demotion, transfer to inferior position, insulting remarks, derogatory comments, and denial of privileges, wages, payment, or further work;
- Denial of access to food, water, housing, or basic needs if workers do not withdraw claims, cooperate/collaborate with employer, or lie to investigators.¹³

¹³ Significantly, these activities mirror the dynamics of power and control inherent in a situation of domestic violence involving an immigrant victim. See, e.g. Nat'l Center on Domestic and Sexual Violence, *Immigrant Power and Control Wheel*, available at: http://www.ncdsv.org/images/Immigrant%20P&C%20wheel%20NO%20SHADING%20-%20NCDSV-ICE_updated2009.pdf (last accessed Mar. 21, 2013).

Victims of these crimes in workplace settings often suffer serious consequences as a result of the employer's criminal activity. In many cases, victims of witness tampering, obstruction of justice, or perjury are particularly vulnerable to aggravation of underlying chronic stress or trauma caused by long-term abuse. For example, workers who are chronically abused may learn to submit and comply with abusive conditions in order to survive. An employer's interference in a worker's attempt to break the cycle of abuse by cooperating with law enforcement officials may thus provoke heightened fear and even more severe psychological harm as described above.

As awareness of the U visa on the part of victims and agencies that enforce laws protecting immigrant workers increases, we predict that USCIS will encounter more U visa applications from victims of obstruction of justice, witness tampering, and perjury in the workplace. We suggest that now is the time for USCIS to provide additional trainings to U visa adjudicators on the particular abuse suffered by victims of obstruction of justice, witness tampering, and perjury by their employers. We would like the opportunity to discuss with you the experts and materials that USCIS could use to train its staff.

USCIS's commitment to protecting victims of crime provides key protections for the most vulnerable in our society, as well as our communities as a whole. We appreciate your efforts, and hope that this letter provides an opportunity for further discussion of the particular challenges faced by victims of workplace-based crime. We look forward to continued collaboration and to your response. Please contact Eunice Cho at echo@nelp.org or at 510-663-5707 with any questions.

Sincerely,



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EXHIBIT A: EXAMPLES OF ABUSE IN THE WORKPLACE

Table 1. Examples of Physical Abuse in the Workplace

Throw something	Burning, scalding	Restrict from taking medication
Push, grab, shove, wrestle, twist arm or bend hand	Using or threatening with a weapon	Physically restraining, locking the person in an enclosed space
Scratch, pinch, hair pulling	Use of restraints, holding down	Use car to create a dangerous situation (i.e. driving or forcing person out of the car)
Slap, spank, slam	Smother, strangle, choke, hang	Put/expose to a dangerous substances
Kick, hit, beat, drag, pull	Shaking	Fail to seek out medical treatment when the employee is ill and asked for help
Bite	Pulled hair	Force or threat to force taking drugs or alcohol
Hit with something	Force or threat to restrict from eating or drinking	Force or threat to restrict from attending to hygiene
Damage employee's property	Deprive of food and shelter	Endangerment

Table 2. Examples of sexual abuse in the workplace

Raping a person vaginally or anally by physical force, threat, or blackmail	Required to wear provocative clothes or cleavage	Unwanted advances	Double entendres
Forcing a person to perform sexual favors other than intercourse by force, threat or blackmail	Touch or pinch directly or through clothing any sexual area	Unwanted caresses, fondling	Intimate references
Showing, displaying degrading sexual images or obscene materials	Talk or make allusions to sexual activity or preferences	Indiscrete glances	Blackmail/threats to force victim to engage or accept unwanted sexual abuse
Spreading rumors of the person's sexual preference or sexual habits	Indecent proposals	Kissing	Denying benefits to a worker who did not respond to sexual advances
Force nudity or forced to undress	Obscene language or gestures	Discrimination to pregnant workers	Stalking a worker inside or outside the workplace
Threaten to out an LGBTQ victim	Sexual innuendo	Sexual stimulation	Getting too close physically while working

Table 3. Examples of psychological abuse in the workplace

<i>Verbal abuse</i>	<i>Emotional abuse</i>	<i>Intimidation</i>		<i>Manipulation</i>
		Coercion	Control	
Yelling, screaming	Blaming	Intense surveillance, monitoring or micromanaging		Crazy making
Name-calling	Shaming	Making fun of the worker		Turning other people against the worker
Insulting	Isolation	Making threatening faces or gestures		Blackmailing
Using racial or cultural derogatory terms	Threats	Making the worker do humiliating or demeaning activities		Using other people to pressure the worker into something
Putting down the worker's family, race, place of origin, or culture	Doing something to spite the worker	Monitoring the worker personal time (their phone calls, use of the bathroom, lunch breaks)		Discriminating against a worker
Belittling of the worker's ideas, feelings, perceptions, physical or personality characteristics	Demanding obedience to whims	Hitting or kicking walls, doors, furniture, or machines		Shifting from a nurturing to a punishing stance without provocation
	Sulking and refusing to talk to the worker or stumping out of the room			Playing good cap-bad cap with other superiors against workers
	Getting angry when duties were not completed perfectly			Threatening the worker with punishment
	Acting indifferently to the worker's pressing needs			Force participation in criminal activity (including obstruction of justice and witness tampering)

Table 4. Examples of immigration abuse in the workplace

Make the worker purchase illegal documents	Force the worker to use false documents	Pretend that they are filing for immigration relief for the worker or his or her family
Take the worker's passport	Threat deportation	Smuggle the worker into the US

or social security card		
Threat to report worker to immigration authorities	Pretend that they have an arrangement with immigration authorities and only working there they would be safe	Use information regarding the worker entrance to the country or use of illegal documents to blackmail the worker
Threats to report to local authorities		

Table 5. Examples of economic abuse in the workplace

Charging for things the worker has a right to (use of bathroom, a change of shift, a work uniform).	Decreasing worker's breaks	Forcing the worker to make purchases they would otherwise would not do
Taking away money with lies (payment to immigration authorities, inspectors, etc)	Punishing the worker with lack of work or payment when they displeased the supervisor	Coerced or force the worker to accept unfair working conditions (i.e. longer hours, no vacation, etc)
Not paying for hours worked or not paying overtime	Stealing or destroying the worker's personal possessions	Interfere with work performance (i.e. forcing worker to share tools with a new worker, etc)
Decreasing working hours		