

JOBS LOOKING FOR PEOPLE, PEOPLE LOOKING FOR THEIR RIGHTS: SEEKING RELIEF FOR EXPLOITED IMMIGRANT WORKERS IN NORTH DAKOTA

SABRINA BALGAMWALLA*

ABSTRACT

North Dakota's oil boom coincided with a visible influx of immigrant workers to the state, including temporary visa holders and undocumented immigrants. Although the local economy relies on this population to meet demands for labor, unauthorized workers face a greater possibility of exploitation in the workplace than United States citizen workers. This Article examines labor migration to North Dakota, the factors influencing workplace exploitation, and forms of immigration relief associated with labor trafficking and other abuses. It concludes with recommendations for North Dakota to make these forms of relief easier to obtain for temporary and unauthorized workers as a way of enhancing relationships between law enforcement and immigrant communities, offering greater protection to exploitation victims and witnesses, and promoting safe and fair employment practices that benefit all workers.

* Assistant Professor of Law, University of North Dakota. The author wishes to thank the staff of the NORTH DAKOTA LAW REVIEW for highlighting the social impact of the Bakken oil boom, and her colleague and co-teacher in the Clinical Education Program, Associate Professor Margaret Moore Jackson, for her valuable insight and feedback.

I. INTRODUCTION	485
II. IMMIGRANT WORKERS IN NEED OF PROTECTION	486
A. WHO ARE IMMIGRANT WORKERS IN NORTH DAKOTA?	486
B. THE VULNERABILITY OF IMMIGRANT WORKERS IN “BOOM AND BUST” ECONOMIES.....	489
III. LEGAL REMEDIES FOR IMMIGRANT VICTIMS OF WORKPLACE EXPLOITATION AND VIOLENCE	493
A. T VISA RELIEF FOR VICTIMS OF SEVERE HUMAN TRAFFICKING	493
B. U VISA RELIEF FOR VICTIMS OF CRIME.....	496
IV. VISA CERTIFICATIONS: OPPORTUNITIES AND CHALLENGES.....	499
A. WHO ARE VISA CERTIFIERS?	499
B. LACK OF UNIFORMITY IN LAW ENFORCEMENT CERTIFICATION PRACTICES	501
1. Problem 1: Certifications Granted Only Under Particular Circumstances.....	502
2. Problem 2: Refusal to Certify	504
C. LEGAL CONSEQUENCES OF CERTIFICATION DENIAL POLICIES.....	505
1. Refusal to Certify as an Abuse of Discretion.....	505
2. Certification Denials as Federal Preemption and Uniformity Concerns.....	506
3. Refusal to Certify as Equal Protection and Title VI Violations	506
IV. VISA CERTIFICATION AS AN OPPORTUNITY TO ASSIST WORKERS IN A DYNAMIC ECONOMY	508
A. PROMOTING IDENTIFICATION OF IMMIGRANT VICTIMS OF WORKPLACE EXPLOITATION	508
B. DESIGNATING CERTIFYING OFFICIALS TO IMPROVE COMMUNITY RELATIONS WITH LAW ENFORCEMENT.....	509

C. INCREASING CAPACITY TO ADDRESS WAGE THEFT AND WORKPLACE VIOLENCE.....	510
VI. CONCLUSION.....	512

“We’ve got 10,000 jobs looking for people.”

— Rep. Lee Kaldor

“We asked for workers. We got people instead.”

—Max Frisch

I. INTRODUCTION

In 2011, North Dakota’s booming economy was the subject of national news, complemented by accompanied by images of “man camps” and overcrowded motels. As prices for the limited rental housing in the Bakken region skyrocket, and a construction firm hires a contractor to build luxury apartments for oil rig workers. Before the project is complete, however, the price of oil drops. Workers begin to leave the Bakken and the demand for housing declines. The apartment complex becomes irrelevant, and it is clear that the firm will not turn a profit on the project. The construction firm not only halts the building project, but also refuses to pay the contractor and his team for their work. When the contractor persists in seeking payment, the firm threatens to call Immigration and Customs Enforcement (ICE), because they know that many of the workers on the contractor’s team are undocumented immigrants and lack work authorization. The contractor’s team disbands and leaves immediately without seeking payment, fearing that they will be will be deported.¹

North Dakota saw a number of demographic changes as a result of the 2006-2012 oil boom, including a growing foreign-born population and workforce. Immigrant workers are a key part of the state’s economic development, but temporary or undocumented immigrants are also more likely to be exploited in the workplace. This Article will explore immigration remedies for workplace abuse—specifically the T visa for survivors of trafficking and U visas for survivors of particular crimes—and the barriers that workers face when seeking visa certification. Although T and U visa certifications are not yet common in North Dakota, this Article argues that policies to facilitate their use and identify eligible individuals would enhance protection for immigrant workers. Certification practices

1. This story is based on a case referred to the Law Clinic at the University of North Dakota School of Law; personally identifying details have been omitted.

across the country demonstrate that these programs benefit relationships between law enforcement and immigrant communities, protect fundamental workplace rights, and ultimately support better conditions for all workers. Where these programs are not utilized, offices and agencies risk violating federal immigration policy and anti-discrimination law, as well as missing a key opportunity to assist and protect victims of labor trafficking and other workplace crimes.

II. IMMIGRANT WORKERS IN NEED OF PROTECTION

North Dakota's economy has historically relied on the contributions of immigrant workers, even before the oil boom. Guest workers, temporary visa holders, and undocumented immigrants have all played roles in meeting labor demands. While the state regularly benefits from their contributions, these workers are also at greater risk of exploitation than native-born workers or those with paths to citizenship, particularly in the boom-and-bust economy of the Bakken.

A. WHO ARE IMMIGRANT WORKERS IN NORTH DAKOTA?

North Dakota's immigration history is associated with Germany, Norway, and Sweden, while contemporary state immigration trends include resettlement of refugees from Bosnia, Iraq, Somalia, and Bhutan. Labor demands are also a dynamic factor for the state's immigrant population, and the Bakken region is no exception. During the most recent oil boom, the state's foreign-born population nearly doubled.² News coverage of the Bakken workforce has included profiles of workers who came to North Dakota from all over the world.³ Some of these workers may be in the United States as refugees⁴ or lawful permanent residents,⁵ residing

2. U.S. CENSUS BUREAU, *QuickFacts: North Dakota*, <https://www.census.gov/quickfacts/table/PST045215/38> (last visited July 11, 2016) (estimating that 2.9 percent of North Dakota residents are foreign-born); compare with U.S. CENSUS BUREAU, THE FOREIGN BORN POPULATION: 2000, at 3 (2003), <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf#page=3> (showing foreign-born persons comprised that 1.5 percent of the state population in 1990 and 1.9 percent of the population in 2000).

3. See, e.g., Alex Halperin, *From the wars of West Africa to the oil boom of North Dakota*, Al Jazeera Am. (Nov. 7, 2014, 5:00 AM), <http://america.aljazeera.com/multimedia/2014/11/north-dakota-s-oilboomeconomydrawsaffricanimmigrants.html>; Jack Nicas, *North Dakota City Draws Foreign Workers*, Wall St. J. (June 28, 2012, 11:35 PM), <http://www.wsj.com/articles/SB10001424052702304830704577495022206535072>.

4. Refugees are individuals outside of their home countries who have a well-founded fear of persecution if they return to that country. The category of "refugee" also includes individuals in the United States who have obtained asylum. See 8 U.S.C. § 1101(a)(42) (2016).

5. Lawful permanent residents, or "green cards" holders, are eligible to remain in the United States indefinitely, and are later eligible for naturalization to become United States citizens if they meet certain requirements. Only certain categories of individuals are eligible to apply for and

indefinitely in the United States on a long-term basis with authorization to work. Other categories of individuals may be present in the United States on temporary visas that allow them to obtain work authorization.⁶

There are also a significant number of guest workers who arrive in North Dakota each year. H-2A visa holders⁷ arrive in the United States to undertake agricultural work, and pass through North Dakota during harvest season.⁸ H-2B guest workers⁹ perform seasonal labor in sectors such as landscaping, forestry, housekeeping, recreation, and food production.¹⁰

Many North Dakota employers are familiar with guest worker programs and rely on these programs, often engaging with the same recruiters and many of the same workers over the years. The seasonal H-2B guest worker program was also compatible with some labor demands in the Bakken, but many businesses found these programs cost-prohibitive.¹¹ Instead, a number of employers in Williston turned to the J-1 cultural exchange visa program to fill service industry jobs.¹² The J visa is a two-year visa available to individuals who come to the United States for temporary work and cultural exchange.¹³ There are various types of employment suitable for J visa holders, including the summer work travel program, which places foreign students in temporary jobs around the United States.¹⁴

receive permanent resident status; this includes qualifying relatives of United States citizens and permanent residents, certain categories of employment visas, and humanitarian immigration status such as refugee, T visa, U visa, or Special Immigrant Juvenile Status. *See* 8 U.S.C. § 1255 (2016).

6. Visa classifications eligible for work authorization are enumerated at 8 C.F.R. § 274a (2016).

7. H-2A workers are foreign nationals who intend to return to their home country, but are temporarily employed in the United States in response to demand in the agricultural sector. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2016). “Agricultural work” is defined in very specific terms for visa purposes. *See* 26 U.S.C. § 3121(g) (2016); 29 U.S.C. § 29(f) (2016).

8. *See* Andrew Haffner, *North Dakota farmers hiring more help from abroad to meet labor shortages*, GRAND FORKS HERALD (July 3, 2015, 7:00 PM) <http://www.grandforksherald.com/news/agriculture/3779258-north-dakota-farmers-hiring-more-help-abroad-meet-labor-shortages>.

9. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

10. DEP’T OF LABOR, H-2B TEMPORARY NON-AGRICULTURAL LABOR CERTIFICATION—SELECTED STATISTICS, FY14 (2014), https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Selected_Statistics_FY2014_Q4.pdf.

11. In February 2016, United States Citizenship and Immigration Services (“USCIS”) application fees were \$325, and an additional \$150 fraud fee for H-2B workers. DEP’T OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES *H and L Filing Fees for Form I-129, Petition for a Nonimmigrant Worker*, <https://www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker> (last updated Feb. 3, 2016). However, this does not include recruitment or legal fees, the total cost of which has deterred prospective employers. *See* Haffner, *supra* note 8.

12. *See*, e.g. Editorial, *J-1 visa workers do the job*, BISMARCK TRIBUNE (Apr. 18, 2012), http://bismarcktribune.com/news/opinion/editorial/j—visa-workers-do-the-job/article_03adf80e-889b-11e1-b4ed-001a4bcf887a.html.

13. *See* 8 U.S.C. § 1101(a)(15)(J) (2016).

14. *See* U.S. DEP’T OF STATE, *Summer Work Travel Program*, <http://j1visa.state.gov/programs/summer-work-travel#participants> (last visited July 11, 2016).

While experiences of J visa holders vary, the program has been subject to considerable scrutiny in recent years. Critics argue that young workers often pay high fees for placements that underpay and overwork employees.¹⁵ The United States Department of State, which oversees the J visa program, does not regulate how much J-1 visa holders pay to participate in a placement program, nor does it typically investigate employers that underpay J-1 workers or renege on terms of employment.¹⁶ J-1 visa holders often work alongside H-2 visa holders in the same jobs, but J-1 employers are not subject to Department of Labor regulation.¹⁷ The Department of State has expressed concerns about the program,¹⁸ even recognizing the possibility that the structure of the program could be exploited by traffickers.¹⁹ A number of agencies that facilitate J-1 matches have revisited their programs as the result of these concerns, including placements in North Dakota. The designated North Dakota sponsor agency suspended the J-1 program in 2012, stating that the employment opportunities in the Bakken were not compatible with the nature of the J visa.²⁰

There are also many workers in North Dakota who are undocumented.²¹ Employers are prohibited from hiring individuals who do not have work authorization or cannot work incident to their status, but undocumented workers are still a critical part of the United States workforce.²² They also represent the most vulnerable class of workers

15. See, e.g., Angelo Young, *J-1 Visa Abuse: Employers Exploit Foreign Students Under US Government Program Meant for Cultural Exchange*, INT'L BUS. TIMES (Dec. 9, 2015, 8:09 AM), <http://www.ibtimes.com/j-1-visa-abuse-employers-exploit-foreign-students-under-us-government-program-meant-2216874>.

16. See *id.*; see generally Culture Shock: The Exploitation of J-1 Cultural Exchange Workers, S. POVERTY LAW CTR. (Feb. 1, 2014), <https://www.splcenter.org/20140202/culture-shock-exploitation-j-1-cultural-exchange-workers>.

17. See, e.g., Young, *supra* note 15; see generally The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse, INT'L LABOR RECRUITMENT WORKING GRP., Feb. 2013, at 15, <https://fairlaborrecruitment.files.wordpress.com/2013/01/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse1.pdf>.

18. See U.S. DEP'T OF STATE OFFICE OF THE INSPECTOR GEN., *Inspection of the Bureau of Educational & Cultural Affairs*, Feb. 2012, at 25, <https://oig.state.gov/system/files/217892.pdf>.

19. U.S. DEP'T OF STATE, *2013 Trafficking in Persons Report*, at 385-86, www.state.gov/documents/organization/210742.pdf (last visited July 11, 2016).

20. See Diane Richard, *Oil Patch Businesses to Lose Foreign Help*, BLACK GOLD BOOM: HOW OIL CHANGED N.D. (Sept. 19, 2012), <http://blackgoldboom.com/foreign-students/>.

21. The Pew Research Center estimated that there were fewer than 5000 undocumented immigrants residing in North Dakota in 2012. *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14*, PEW RESEARCH CTR. 26 (Nov. 18, 2014), http://www.pewhispanic.org/files/2014/11/2014-11-18_unauthorized-immigration.pdf. This number represents 0.3 percent of the state population but 0.5 percent of its labor force. *Id.* at 30.

22. See Pew Research Center, *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14*, at 8 (Nov. 18, 2014), http://www.pewhispanic.org/files/2014/11/2014-11-18_unauthorized-immigration.pdf (detailing findings that unauthorized immigrants have consistently made up

when it comes to labor rights. All workers face the possibility of exploitation, particularly in dynamic “boom and bust” economies, but undocumented and temporary workers are particularly at risk for exploitation and abuse by employers on account of their immigration status and the conditions of their employment.

B. THE VULNERABILITY OF IMMIGRANT WORKERS IN “BOOM AND BUST” ECONOMIES

Like many workers in the Bakken oil fields, immigrant workers have found themselves vulnerable in the midst of a fluctuating economy.²³ Federal law protects workers from abuse and discrimination in the workplace.²⁴ However, temporary and unauthorized workers are less likely to seek legal recourse for their rights, and thus are more vulnerable to exploitation or discrimination in the workplace.²⁵ Language barriers, lack of familiarity with employment law, and power differentials between employers and employees may all contribute to the marginalization of foreign-born workers.

around five percent of the labor force in the United States); *see also* Pew Research Center, *Share of Unauthorized Immigrant Workers in Production, Construction Jobs Since 2007*, at 5 (Mar. 16, 2015), http://www.pewhispanic.org/files/2015/03/2015-03-26_unauthorized-immigrants-passel-testimony_REPORT.pdf (detailing findings that undocumented immigrants make up the majority of workers in farming, cleaning and maintenance, and construction work).

23. *See, e.g.*, Evelyn Nieves, *Fracking Town's Desperate Laid-off Workers: "They Don't Tell You It's All a Lie,"* AlterNet (Mar. 28, 2015), <http://www.alternet.org/fracking/fracking-towns-desperate-laid-workers-they-dont-tell-you-its-all-lie>; Wilson Dizard, *Optimism running on empty for African immigrants lured by oil dreams*, Al Jazeera Am. (Apr. 28, 2015, 5:00 AM) <http://america.aljazeera.com/multimedia/2015/4/optimism-running-on-empty-for-african-immigrants-lured-by-oil-dreams.html>; Wilson Dizard, *Slowdown and out in Williston, ND*, Al Jazeera Am. (Apr. 27, 2015, 8:00 AM), <http://america.aljazeera.com/multimedia/2015/4/north-dakota-hard-times.html>.

24. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (prohibiting employers from discriminating against employees on the basis of sex, race, color, national origin, and religion); 8 U.S.C. § 1324b (2006) (prohibiting employment discrimination based on national origin or citizenship status).

25. Although these barriers are common knowledge to those who work with immigrant populations, the very working conditions and fear experienced by immigrant workers, particularly undocumented workers, is difficult to study quantitatively. That said, there is abundant anecdotal evidence and many agencies openly acknowledge the challenges faced by these workers. *See, e.g.*, Michael Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 679 (2003) (“[T]here is little empirical data but widespread consensus among law enforcement officials, lawyers, lay advocates, and immigrants themselves that noncitizens tend to underreport illegal activity, due in part to deportation.”). *Id.* The Department of Justice and Department of Labor are among the agencies that acknowledge that unauthorized workers are particularly vulnerable to these threats. *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, NO. 915.002, ENFORCEMENT GUIDE OF REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (Oct. 26, 1999); *Statement of John L. Henshaw, Assistant Sec’y of Labor for Occupational Safety and Health Before the S. Subcomm. on Emp’t, Safety and Training, S. Comm. on Health, Educ., Labor and Pensions*, 107th Cong. (2002).

A worker's immigration status has extensive implications for that person's legal and *de facto* rights in the workplace. Individuals with paths to permanent residence and citizenship in the United States enjoy the highest protections, while workers with temporary status have much less security.²⁶ Workers on J and H visas, for example, are tied to their sponsoring employers; the limited transferability of their visas makes it difficult to leave an exploitative work situation.²⁷ These individuals may also incur significant debt as payment for their recruitment and transportation to the United States, which may discourage them from seeking redress or alternative employment options even when the terms of their visas permit them to do so.²⁸ Some employment terms, particularly for guest workers, may include housing and transportation, meaning that employers control the living arrangements and mobility of employees.²⁹ Where workers are not familiar with their surroundings and lack social support or other ways of providing for their needs, employees may be more dependent on their employers and hence more fearful to speak out. Other forms of employer control can include confiscation of passports and other important documents, withholding of wages, limiting access to food and medical care, and threats to revoke legal status or have an offending worker deported.³⁰ Guest workers also rely on employers to renew their seasonal contracts and may fear blacklisting if they protest working conditions.³¹

26. Guest worker programs have been the subject of numerous cases involving trafficking in persons and other forms of employee exploitation. *See, e.g.*, *David v. Signal Int'l, LLC*, 588 F. Supp. 2d 718 (E.D. La. 2008). The National Human Trafficking Resource Center estimated in FY14 that thirty-eight percent of the calls to its hotline involved workers on these temporary visas. *See* POLARIS PROJECT, *Labor Trafficking in the U.S.: A Closer Look at Temporary Work Visas*, at 1 (Oct. 2015), http://polarisproject.org/sites/default/files/Temp%20Visa_v5%20%281%29.pdf (hereinafter *Polaris Report*).

27. *See* 22 C.F.R. § 62.42 (2016) (governing the transfer of J visas); 8 C.F.R. § 214.2 (h)(2)(i)(D) (2016) (governing porting for employers of H visa holders).

28. *See* *Polaris Report*, *supra* note 26, at 3 (finding that recruitment fees in labor trafficking cases reported to the National Trafficking Resource Center hotline in FY14 were as much as \$5000, with deductions taken out of paychecks "covering expenses related to recruitment."). *See also id.* at 4 ("[L]eaving these jobs may mean the economic ruin of the worker or his or her family. Exploiters often take advantage of this lack of visa portability by using it as a constant tactic to gain and maintain control and remind potential victims of this imbalanced power dynamic."). More than half of the individuals in the *Polaris* study reported that these threats made them hesitant to file complaints or leave their places of employment. *See id.*

29. *See id.* at 5 (describing living conditions for H-2A and J-1 workers in the *Polaris* Study as frequently being "inadequate or squalid," including "no running water, heat or air conditioning, inadequate plumbing, pest infestation, a lack of proper food storage or cooking sources, and overcrowding" so severe that individuals "reported not having their own bed, forcing them to sleep on floors, with others, or even outside.").

30. *See id.* The *Polaris* study revealed that different types of employer control and abuse occur more frequently with respect to certain visa categories, and that workers on A-3, G-5, and B-1 visas would engage in "extreme methods of isolation and monitoring," including restricted access to medical care, a personal cell phone, food or other basic needs. H2-A and H2-B workers

Unsurprisingly, this potential for employer control creates fear of reporting among workers who experience abusive, dangerous or unfair work conditions. For example, in a study by the Center for Urban Economic Development at the University of Chicago, thirty percent of immigrant workers feared they would be deported if they reported Occupational Safety and Health Administration (OSHA) violations.³² The survey also found that workplace safety violations, as well as wage and hour violations, were underreported among immigrant workers.³³ In addition, immigrant workers suffer from violence and assaults in the workplace; an AFL-CIO study found that these incidents account for nearly twenty-five percent of workplace fatalities amongst foreign-born workers.³⁴ Fear of reprisal—which may include loss of immigration status, or being taken into ICE custody and placed in removal proceedings³⁵—has a chilling effect on employees’ reporting of workplace misconduct.

Unfortunately, in the current political landscape, immigrant workers have reason to fear that their employers may enlist law enforcement to trigger removal proceedings. Although the penalties for working without authorization target employers rather than employees,³⁶ undocumented immigrants fear arrested at the worksite for immigration violations, document fraud, or other offenses.³⁷ Employers regularly exploit these

also frequently reported being denied food as a means of punishment. Practices of “[v]erbal abuse, degradation, and emotional manipulation” existed across visa categories, at times “coincid[ing] with employment discrimination based on nationality or gender.” *Id.* at 5.

31. FARMWORKER JUSTICE, *No Way to Treat a Guest: Why the H2-A Agricultural Visa Program Fails U.S. and Foreign Workers*, at 31 (2011), <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf>.

32. Chirag Mehta, et al., *Chicago’s Undocumented Immigrants: An Analysis of Wages, Working Conditions, and Economic Contributions*, CTR. FOR URBAN ECON. DEV., at 28 (Feb. 2002), https://cued.uic.edu/wp-content/uploads/undoc_wages_working_64.pdf.

33. *Id.* at 27-29.

34. AFL-CIO, *Immigrant Workers at Risk: The Urgent Need for Improved Worker Safety and Health Programs*, at 3 (2005), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1021&context=laborunions>.

35. Prior to April 1, 1997, individuals were placed in “deportation” or “exclusion” proceedings; under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRAIRA”), these two forms of proceedings were unified through the common designation as “removal proceedings.” Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009.

36. 8 U.S.C. §1324a (2016).

37. See, e.g. Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1119-23 (2009) (describing incentives for collaboration between employers and immigration enforcement officials); Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1092 (2011) (detailing instances of worksite arrests of undocumented workers initiated by employers); Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 307-08 (2010) (detailing patterns of ICE arrests at worksites).

workers' fear of law enforcement, and unfortunately sometimes involve law enforcement in retaliation against undocumented workers. For example, the case of *Garcia v. Audubon Communities Management* involves approximately fifty laborers who suffered retaliation from their employers.³⁸ These workers, who were reconstructing apartment buildings in New Orleans after Hurricane Katrina, filed a Fair Labor Standards Act (FLSA) claim for wage and hour violations against their employer.³⁹ Five days after sending a demand letter for underpayment and non-payment of wages, the workers came to work one morning and found ICE officials at the job site waiting to arrest them.⁴⁰ Under cooperative initiatives between local and federal law enforcement, individuals taken into police custody can expect to have their fingerprints taken and transferred to ICE custody if they are not in lawful status, potentially resulting in the initiation of removal proceedings.⁴¹ Workers' wariness of law enforcement is reinforced by the reality that immigration violations make up about half of all federal offense charges.⁴² Undocumented or temporary workers have legitimate reasons to fear being taken into law enforcement custody, and widespread arrest practices only add credibility to employers' threats.

While immigration reform is a subject of intense debate, the reliance of the United States economy on immigrant workers is undeniable, and North Dakota is no exception to this rule. The state began to consider immigration as a tool for developing and sustaining infrastructure in North

38. No. 08-1291 2008 WL 1774584 (E.D. La. Apr. 15, 2008).

39. *Id.* at *1.

40. *Id.*

41. The Secure Communities program, which began in 2008, facilitated the sharing of biometric information between local law enforcement and immigration enforcement agencies. Under the program, individuals who were arrested and booked would be fingerprinted while in law enforcement custody and the information shared with ICE. If the individual was found to not be in lawful status, he or she could be taken into ICE custody and placed in removal proceedings. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: GET THE FACTS, <https://www.ice.gov/secure-communities#a3> (last visited July 11, 2016). Secure Communities was phased out and replaced by the Priority Enforcement Program (PEP) in July 2015. PEP maintains the sharing arrangement for biometric information, but provides that ICE should only seek a transfer of custody in "high priority" situations. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *Priority Enforcement Program*, <https://www.ice.gov/pep> (last visited July 11, 2016). Although these priorities are intended to narrow ICE's authority, immigrant rights advocates still remain concerned about the scope of the program and its effect on relationships between law enforcement and immigrant communities. See, e.g. Nat'l Immigration Law Ctr., *Priority Enforcement Program: Why 'PEP' Doesn't Fix S-Comm's Failings*, June 2015, <https://www.nilc.org/wp-content/uploads/2015/11/PEP-does-not-fix-SComm-2015-06.pdf>.

42. According to the Bureau of Justice Statistics, at one point, immigration violations represented fifty percent of federal prosecutions nationwide. U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2011–2012, NCJ 248493 (2015). That number decreased at the end of 2015. See TRAC IMMIGRATION, *Immigration Prosecutions for November 2015*, Jan. 2016, <http://trac.syr.edu/tracreports/bulletins/immigration/monthlynov15/fil/>.

Dakota boomtowns as the labor shortage threatened to undercut economic growth.⁴³ Foreign-born workers continue to play an important role in the state's economy and the need to enforce their rights is ongoing. Immigration enforcement strategies that foster workers' fear and distrust of police only reinforce employers' threats of immigration detention and removal and contribute to the decline of workplace conditions for all workers.

III. LEGAL REMEDIES FOR IMMIGRANT VICTIMS OF WORKPLACE EXPLOITATION AND VIOLENCE

Immigration policy reflects growing awareness of labor abuses against workers who are undocumented or without permanent legal status in the United States. Through reauthorization of the Violence Against Women Act, Congress created the T and U visa programs, which allow victims of human trafficking and other crimes to remain in the United States. These provisions are also intended to help strengthen relationships between law enforcement and immigrant communities to combat violence, abuse and exploitation.

A. T VISA RELIEF FOR VICTIMS OF SEVERE HUMAN TRAFFICKING

The T visa was created as part of the Trafficking and Violence Protection Act (TVPA) as a means of relief for immigrant survivors of human trafficking.⁴⁴ The T visa is available to victims of sex trafficking, but also for individuals obtained for labor or services who are subject to involuntary servitude, peonage, debt bondage, or slavery through the use of force, fraud, or coercion.⁴⁵ To be eligible for a T visa, an applicant must comply with reasonable requests by law enforcement to assist in the investigation or prosecution of the trafficking.⁴⁶ The individual may qualify for an exception to this requirement if he or she is under the age of eighteen,⁴⁷ or is too traumatized to provide assistance.⁴⁸ Applicants must

43. See, e.g., *Targeted immigration seen by some as solution to ND's worker shortage*, PRAIRIE BUS. MAG., July 14, 2014, <http://www.prairiebizmag.com/event/article/id/19958/> (discussing the Valley Prosperity Partnership Action Agenda 2014-2019 report, in which "consultants recommend businesses, legislators and others consider exploring, among other options, the creation of a targeted immigration program.").

44. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464.

45. 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2016); 8 C.F.R. § 214.11(a) (2016)

46. 8 U.S.C. § 1101(a)(15)(T)(i)(III) (2016); 8 C.F.R. § 214.11(b)(3) (2016).

47. 8 U.S.C. § 1101(a)(15)(T)(i)(III)(ccc) (2016).

48. 8 U.S.C. § 1101(a)(15)(T)(III)(bb) (2016).

also prove that they are in the United States on account of trafficking,⁴⁹ and that they would suffer severe or unusual hardship if forced to return to their home countries.⁵⁰ T visas are valid for four years; after three years, a T visa holder may apply for adjustment of status if he or she meets certain requirements.⁵¹

Human trafficking is frequently associated with forced prostitution, but worldwide most trafficking cases involve other kinds of labor.⁵² Although there are high-profile T visa cases involving individuals who have been abused by their employers, including domestic workers⁵³ and manual laborers,⁵⁴ female sex trafficking victims are much more likely to be identified by law enforcement.⁵⁵ Gendered portrayals of trafficking may also make it more unlikely for labor exploitation survivors—particularly men—to identify as victims.⁵⁶ Law enforcement identification can significantly affect an individual's T visa case. If the individual is identified as a survivor of human trafficking, that person is more likely to be connected to assistance and services. If the individual is not questioned and identified as a survivor, he or she may face criminal prosecution for illegal reentry or other offenses related to the trafficking crime, or be referred to Immigration Court for removal proceedings.

There are other barriers to obtaining a T visa, even where survivors of workplace abuse are successfully identified. Although T visa relief should be considered as an immigration remedy for workplace violations, framing and corroborating these claims can be challenging. The first major obstacle is proving that the applicant is in fact a victim of trafficking. In the context of labor trafficking, the applicant must show that he or she was subject to force, fraud or coercion.⁵⁷ If a T visa application does not contain

49. 22 U.S.C. § 7102(9)(B) (2016); 8 U.S.C. § 1101(a)(15)(T)(i)(II) (2016); 8 C.F.R. § 214.11(b)(1) (2016).

50. 8 U.S.C. § 1101(a)(15)(T)(i)(IV) (2016).

51. *See* 8 U.S.C. § 1255(l) (2016). Notably, the individual must demonstrate good moral character and show that he or she would suffer extreme hardship involving “unusual and severe harm” if forced to return to his or her home country. 8 C.F.R. § 245.23(g) (2016); 8 C.F.R. § 214.11(i) (2016). Extreme hardship cannot be economic in nature. *Id.*

52. *See, e.g., Forced labour, human trafficking and slavery*, INT’L LABOR ORG., <http://www.ilo.org/global/topics/forced-labour/lang—en/index.htm> (last visited July 11, 2016).

53. *See, e.g., Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 127 (D. D.C. 2009).

54. *See, e.g., David v. Signal Int’l., L.L.C.*, 2012 WL 5455650 (E.D. La. 2012).

55. *See, e.g., Jayashri Srikantiah, Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B. U. L. REV. 157, 170 (2007); Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 347 (2007).

56. *See, e.g., Srikantiah, supra* note 55, at 204.

57. 22 U.S.C. § 7102(9)(B) (2016); 8 C.F.R. § 214.11(f) (2016); 8 C.F.R. § 214.11(h)(2) (2016).

certification from a law enforcement official, the applicant must explain why there is no certification and provide independent evidence that the trafficking occurred.⁵⁸ T visa regulations require, at a minimum, a detailed statement from the applicant detailing circumstances of the trafficking, reporting of the crime to law enforcement, and cooperation with law enforcement as required.⁵⁹ To prove victimization, the applicant may also need to provide additional evidence, including other records or the incident and affidavits from other witnesses.⁶⁰ Given the covert nature of trafficking and labor exploitation, this evidence may be scarce or extremely difficult to obtain. Applicants are likely to be reluctant to discuss their experiences of victimization, trauma, and humiliation. Many labor exploitation cases are not covered in the news or even subject to investigation, as workers are likely to fear retaliation for exposing their employers. Witnesses also may be difficult to locate and interview, either because they still work for the employer or because they have left the area and cannot be contacted. In cases without law enforcement certification, the success of a case will almost certainly require the assistance of a lawyer or advocate to develop evidence and present the strongest possible argument in an applicant's favor.

Second, the applicant must establish a connection between a crime of trafficking and their presence in the United States. This can be straightforward in some situations, and considerably less so in others. If an individual leaves an employment situation and does not return to the home country, the individual must provide a sufficient explanation as to why he or she has not returned.⁶¹ In this sense, T visa requirements contemplate a situation where a trafficked worker has been rescued by law enforcement, but places additional requirements on individuals who have managed to leave trafficking situations on their own.⁶² Once again, meeting this evidentiary requirement involves documenting important facts in the case, this time related to the applicant's trauma or injury, access to resources, and other relevant factors.⁶³ This can be difficult to prove in cases where individuals are not connected to services or benefits for trafficking survivors, particularly in the absence of an advocate or attorney. Where an individual entered the United States under circumstances unrelated to trafficking, that individual must also that his or her continuing presence in

58. 8 C.F.R. § 214.11(f)(3) (2016).

59. *Id.*

60. *Id.*

61. 8 C.F.R. § 214.11(g)(2) (2016).

62. *Id.*

63. *Id.*

the United States is “directly related” to the original act of trafficking,⁶⁴ requiring the applicant to furnish additional relevant details and evidence to establish the connection.

Finally, the individual must make a compelling showing of “severe and unusual hardship” in the event he or she is removed from the United States.⁶⁵ This is a relatively high hardship standard compared to other forms of immigration relief that require a showing of hardship.⁶⁶ Applicants are required to provide documentation and evidence of relevant hardship factors, including age, need for treatment or services in the United States, injury or trauma, use of the United States court system for criminal prosecution or civil restitution, danger of alienation or victimization in the applicant’s home country.⁶⁷ Developing this evidence may include enlisting experts, such as medical and mental health professionals or country conditions experts. It could also include proof of a pending case for civil restitution (another matter that is likely to require legal representation).

Overall, negotiating the application process also depends on a worker’s knowledge of his or her rights, and the requirements are difficult to meet without the assistance of an advocate or attorney. In the absence of a T visa certification, the applicant is required to present a considerable amount of additional evidence to establish his or her eligibility. For the reasons set forth above, the T visa is considered a relatively rare form of relief. Although Congress designated an annual limit of 5000 T visas, the number approved each year has never come close to that threshold.⁶⁸

B. U VISA RELIEF FOR VICTIMS OF CRIME

Congress created the U visa program as part of the Trafficking and Violence Prevention Act of 2000.⁶⁹ The visa has a dual intent—to strengthen law enforcement efforts to investigate and prosecute serious crimes, and to protect crime victims and witnesses.⁷⁰ The U visa allows

64. 8 C.F.R. § 214.11(g) (2016).

65. 8 C.F.R. § 214.11(i) (2016).

66. *See, e.g.* 8 C.F.R. § 1240A(b) (2016) (standard for Cancellation of Removal for Certain Nonpermanent Residents).

67. *See* 8 C.F.R. § 214.11(i)(I) (2016).

68. 8 C.F.R. § 1214(o)(2) (2015). In FY2015, 1062 T visas were approved, the highest number issued in the visa’s history. *See* DEP’T OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Number of I-914 Applications for T Nonimmigrant Status (Victims of Severe Forms of Trafficking and Family Members) by Fiscal Year, Quarter, and Case Status 2008-2015* (Sept. 2015), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/1914t_visastatistics_fy2015_qtr4.pdf.

69. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464-1548.

70. Victims of Trafficking and Violence Protection Act, §§ 1513, 1533.

immigrant victims of certain crimes to remain in the United States insofar as they are willing to assist law enforcement in the investigation or prosecution of these crimes.⁷¹ This form of immigration relief speaks to the significant barriers faced by individuals who need help from law enforcement, but may be fearful of seeking out that assistance on account of their tenuous immigration status. Advocates have long argued that many immigrant victims of crime also face a lack a support system in the United States, many have a limited understanding of the laws and legal system of the United States, and not all of them are able to communicate easily in the English language.⁷² In addition, many undocumented individuals may fear the possibility of deportation should they contact law enforcement—a fear exploited in crimes involving power and control, such as domestic violence or workplace exploitation.⁷³

To be eligible for a U visa, the applicant must be a victim of a qualifying crime, possess information about the crime, be helpful in the process of the investigation, and suffer severe emotional or physical abuse as the result of the underlying crime.⁷⁴ In addition, the individual is subject to a review of criminal history, immigration violations, and other factors; the individual must seek a waiver for any of these grounds of inadmissibility.⁷⁵ The visa is valid for four years, at which point an individual may apply for adjustment of status and obtain a green card if the individual can establish that there are humanitarian grounds for remaining in the United States.⁷⁶ The U visa is most commonly associated domestic violence and other forms of interpersonal physical violence such as assault and rape, but the remedy is also available to victims of numerous crimes, including workplace crimes of fraud in foreign labor contracting, involuntary servitude, peonage, and trafficking.⁷⁷ Although U visas are available for trafficking victims, the visa is also an option for individuals who may not be subject to force, fraud, or coercion, but have otherwise been exploited, suffering other violations such as low or unpaid wages, poor

71. *Id.* § 1513.

72. *See, e.g.,* Anita Khashu, et. al., *Building Strong Police-Immigrant Community Relations: Lessons from a New York City Project*, 16 VERA INST. OF JUSTICE 3 (Aug. 2005), http://www.vera.org/sites/default/files/resources/downloads/300_564.pdf (indicating cultural and language barriers identified by participants at a community forum on community policing).

73. *See id.*

74. 8 U.S.C. § 1101(a)(15)(U)(i) (2016).

75. 8 U.S.C. § 1182(d)(14).

76. 8 C.F.R. § 245.24(b).

77. 8 U.S.C. § 1101(a)(15)(U)(iii) (2016).

working conditions, and lack of redress for discrimination or mistreatment in the workplace.⁷⁸

The U visa has become a common form of immigration relief for victims of workplace mistreatment.⁷⁹ Obtaining a U visa, however, comes with its own challenges. Like the T visa, it is difficult to navigate the process and evidentiary requirements without the assistance of an advocate or attorney. The “severe emotional and physical abuse” requirement can be particularly trying in workplace exploitation U visa cases.⁸⁰ From the outset, Congress conceptualized the U visa as a form of relief for domestic violence victims; the type of abuse individuals suffer in the workplace is quite different from intimate partner violence, as is the harm that manifests as a result. Information shared among attorneys representing U visa applicants indicates that United States Citizenship and Immigration Services (USCIS) issued a number of requests for evidence to substantiate the harm suffered by applicants in workplace visa cases.⁸¹ It is now best practice among attorneys to submit mental health evaluations in workplace exploitation—an added cost and an added need for expertise—even though such evaluations are not required and may not be needed in U visa applications for other qualifying crimes.⁸²

Another matter is the backlog of U visa applications. Only 10,000 U visas are available each year; other qualified applicants must wait in line until the preceding applications are processed and approved.⁸³ Currently, there are over 120,000 U visa applications pending.⁸⁴ Even with the

78. See, e.g., Polaris Report, *supra* note 26, at 6 (noting the prevalence of individuals reporting wage and hour violations, contract violations, wrongful termination, hazardous, unsafe, or unsanitary working conditions, discrimination, and verbal abuse to the National Human Trafficking Resource Center hotline).

79. Although USCIS does not keep statistics on this point, it is a common observation among nonprofit attorneys who provide technical assistance in T and U visa cases. See, e.g., Eunice Hyunye Cho, et al., *A New Understanding of Substantial Abuse: Evaluating Harm in U-Visa Petitions of Immigrant Victims of Workplace Crime*, 29 GEO. IMMIGR. L.J. 1, fn16 (2014) (“A New Understanding of Substantial Abuse”).

80. See generally *id.*

81. See Letter from National Employment Law Project and ASISTA to Alejandro Mayorkas, Deputy Secretary, Department of Homeland Security (May 6, 2014), <http://www.wjcnj.org/wp-content/uploads/2013/03/USCIS-Workplace-U-Visa-Substantial-Abuse-Letter.pdf>; see also Letter from National Employment Law Project to Laura Dawkins, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Immigration Services, Department of Homeland Security, (Mar. 28, 2013), http://www.asistahelp.org/documents/resources/Workplace_U_visasubstantial_abuse_a_DAACF071FEA01.pdf.

82. See Eunice Cho & Gail Pendleton, *Effectively Framing a U Visa Labor-Based Application* (June 17, 2013), http://www.asistahelp.org/documents/resources/ASISTA_NELP_U_visa_webinar_June_17_7DB35A4DBBF55.pdf.

83. 8 U.S.C. § 1101(a)(15)(U) (2016).

84. DEP’T OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Number of I-918 Petitions for U Nonimmigrant Status (Victims of Certain Criminal Activities and*

overwhelming number of applications, there are a number of applicants who would otherwise qualify, but are not granted law enforcement certification for their helpfulness. The next section will discuss the issues in obtaining law enforcement certification, with a particular emphasis on U visas.

IV. VISA CERTIFICATIONS: OPPORTUNITIES AND CHALLENGES

Congress intended T and U visas as tools for law enforcement officials and agencies to encourage victims and witnesses to report certain crimes and cooperate with investigations. The T and U visa are also considered humanitarian immigration programs, developed to assist individuals in need of legal protection. Evidence indicates, however, that the U visa program is not viewed or treated uniformly among local law enforcement agencies nationwide. A close examination of disparate treatment of U visa certification requests suggests that some offices are not reviewing requests in conformity with federal laws and regulations. While officials in the state of North Dakota have certified fairly few visa applications, the review of local practices in other states illustrates the importance of uniform and fair certification policies.

A. WHO ARE VISA CERTIFIERS?

Both the T and U visa—the two forms of immigration relief for immigrant victims of workplace exploitation—have at their heart a goal of promoting cooperation with law enforcement. As previously mentioned, T visa applicants are expected to comply with reasonable requests made by a law enforcement officer or prosecutor in association with the investigation or prosecution of the trafficking case. Although certification is strong evidence of a victim's eligibility for a T visa, exceptions do exist under the law that permit individuals to file applications without this documentation of cooperation with law enforcement.⁸⁵ T visa certifiers may include the Department of Justice, the Office of the United States Attorney, the Civil Rights and Criminal Divisions, the FBI, USCIS, ICE, the United States

Family Members) by Fiscal Year, Quarter and Case Status 2009-2016, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/1918u_visastatistics_fy2016_qtr2.pdf (last visited July 11, 2016); *see also* Letter to the Hon. León Rodríguez, Director, Department of Homeland Security, U.S. Citizenship and Immigration Services (May 16, 2016), <http://lawprofessors.typepad.com/files/whitehouseltruisasmay16.pdf>.

85. 8 C.F.R. § 214.11(a) (2016) (citing nature of victimization, fear, traumatization, and youth as relevant factors for granting an exception).

Marshals Service, and the Diplomatic Security Service of the Department of State.⁸⁶

The U visa regulations provide that certifications be completed by a designated individual within a law enforcement agency.⁸⁷ Unlike with T visas, there are no exceptions to the certification requirement for U visa applicants. There is a significant overlap between law enforcement certifiers in T and U visa cases, but law enforcement agencies in the U visa regulations also include local law enforcement, judges, “or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity.”⁸⁸ The Department of Labor (DOL) began certifying U visas in 2011, and has since expanded certification authority to crimes of involuntary servitude, peonage, trafficking, obstruction of justice, witness tampering, fraud in foreign labor contracting, extortion, and forced labor, as well as certification for T visas where a trafficking situation is discovered in the course of the investigation.⁸⁹ Wage and hour violations are particularly widespread,⁹⁰ and witness tampering may apply to a number of situations where individuals have suffered retaliation for reporting workplace violations.⁹¹ The United States Equal Employment Opportunity

86. *Id.*

87. 8 C.F.R. § 214.14(a)(3)(i) (2016).

88. 8 C.F.R. § 214.14(a)(2) (2016).

89. See U.S. DEP’T OF LABOR, *Fact Sheet: The Department of Labor’s Wage and Hour Division Will Expand Its Support of Victims of Human Trafficking and Other Crimes Seeking Immigration Relief from DHS*, <http://www.dol.gov/general/immigration/u-t-visa> (last visited July 11, 2016).

90. Wage and hour violations include getting paid less than the minimum wage of agreed-upon wage, working unpaid hours, lack of overtime pay, confiscation of tips, illegal deductions from paychecks, misclassification as an “independent contractor” instead of employee, or simply not being paid. See, e.g., Steven Greenhouse, *More Workers Are Claiming ‘Wage Theft,’* N.Y. TIMES (Aug. 31, 2014), http://www.nytimes.com/2014/09/01/business/more-workers-are-claiming-wage-theft.html?_r=0. National surveys have established the prevalence of wage theft across low-wage industries. See, e.g., Annette Burnhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities* (Sept. 2009), http://www.unprotectedworkers.org/brokenlaws/BRENNAN_CTR_FOR_JUSTICE_A_Survey_of_Literature_Estimating_the_Prevalence_of_Employment_and_Labor_Law_Violations_in_the_U.S._ (Apr. 15, 2005), http://nelp.3cdn.net/1ef1df52e6d5b7cf33_s8m6br9zf.pdf (last accessed July 13, 2016); Abel Valenzuela, Jr., et al., *On the Corner: Day Labor in the United States*, (Jan. 2006), https://cued.uic.edu/wp-content/uploads/ontheCorner_daylaborinUS_39p_2006.pdf; RESTAURANT OPPORTUNITIES CTR. UNITED, *Darden’s Decision: Which Future for Olive Garden, Red Lobster, and the Capital Grille?* (2012), http://rocunited.org/wp-content/uploads/2013/04/reports_darden.pdf.

91. See, e.g., S. POVERTY LAW CTR., *Beneath the Pines: Stories of Migrant Tree Planters* (2006) at 9, https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/beneaththepines.pdf (describing the practices of an H-2B employer, who ripped up visas of individuals who complained about pay); S. POVERTY LAW CTR., *Close to Slavery: Guestworker Programs in the United States*, (2013) at 41, https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/Close_to_Slavery.pdf (describing a labor recruiter’s threaten to burn down a worker’s village in Guatemala if he did not drop the case against his employer (citing Recinos-Recinos v. Express Forestry, Inc., 122 F.R.D. 472, 475-76 (E.D. La. 2006)).

Commission (EEOC) has procedures for certifying in cases of unlawful employment discrimination.⁹² State and local agencies that handle cases related to labor violations and employment discrimination may also issue certifications.⁹³

Although the DOL and EEOC may seem like the clear certifying authorities in employment cases, exploited workers may have contact with law enforcement agencies in other ways. It is possible, for example, the local police will also become involved with workplace crime such as violence, abuse, or trafficking.⁹⁴ Crimes like obstruction of justice, witness tampering, or perjury often occur in the context of workplace retaliation.⁹⁵ Threats to deport workers in order to obtain labor or property from them may also constitute extortion⁹⁶ or blackmail.⁹⁷ These crimes may be certified by individuals within local police departments. Where cases are referred for prosecution, District Attorney's offices across the country regularly certify for witnesses. Courts may also issue certifications.⁹⁸

B. LACK OF UNIFORMITY IN LAW ENFORCEMENT CERTIFICATION PRACTICES

Given the range of offices and agencies vested with certification authority, it is perhaps unsurprising that certification policies and practices vary between federal and local authorities, and from state to state. Although U visa regulations were promulgated in 2008, some jurisdictions in the United States issue U visa certifications only under particular

92. U.S. DEP'T OF LABOR, EQUAL EMP'T. OPPORTUNITY COMM., *EEOC Procedures: Requesting EEOC Certification for U Nonimmigrant Classification (U Visa) Petitions in EEOC Cases*, http://www.eeoc.gov/eeoc/foia/u_visas.cfm (last visited July 11, 2016).

93. Although many state agencies have certification procedures, most recently, the New York Human Rights Commission became the first local agency of its kind to adopt T and U certification procedures. See New York City Office of the Mayor, *Mayor de Blasio Announces NYC Commission on Human Rights First Such Agency in Major U.S. City to Issue U and T Visa Certifications*, (Feb. 9, 2016), <http://1 nyc.gov/office-of-the-mayor/news/148-16/mayor-de-blasio-nyc-commission-human-rights-first-such-agency-major-u-s-city-to>.

94. See, e.g., NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, *The Importance of the U-visa as a Crime-Fighting Tool for Law Enforcement Officials - Views from Around the Country* 6 (2012), <http://iwp.legalmomentum.org/reference/additional-materials/immigration/u-visa/tools/police-prosecutors/how-the-u-visa-helps-law-enforcement-statements-from-the-field/U-visa-Crime-Fighting-Tool-Views-12.3.12.pdf/view> (citing Deputy Sheriff Keith Bickford, Director of Oregon Human Trafficking Task Force, stating, "As for the types of cases they are bringing forward, they include trafficking and labor violations. . . We find trafficking through other criminal reports because you never know where trafficking could be hiding. . . . I think opening a U-visa case has helped with my relationship with different communities. . . . We use T- and U-visas differently depending on the case.").

95. See *A New Understanding of Substantial Abuse*, *supra* note 79 at 33.

96. See 18 U.S.C. § 1951 (2016).

97. See 18 U.S.C. § 873 (2016).

98. See *Garcia v. Audubon Cmty. Mgmt., L.L.C.*, 2008 WL 1774584 *2-3 (E.D. La. 2008).

circumstances; others do not issue them at all. Few visas have been certified in North Dakota as of the time of this Article's publication.⁹⁹

As previously mentioned, law enforcement certification is required in U visa cases; when individuals are denied certification, they are entirely precluded from filing U visa applications. The University of North Carolina (UNC) School of Law Immigration and Human Rights Policy Clinic, along with the legal nonprofit ASISTA, conducted a survey to analyze certification patterns across the country.¹⁰⁰ Their conclusion was that immigrant victims of crime face "geographic roulette," effectively only to obtain federal relief in certain jurisdictions within the United States.¹⁰¹ The lack of uniformity across jurisdictions, as well as its discriminatory effect, is legally problematic for law enforcement and for exploited workers.

1. *Problem 1: Certifications Granted Only Under Particular Circumstances*

The UNC/ ASISTA survey respondents identified eighty agencies across the country that have adopted limited U visa certification processes that are more narrow than the scope of the U visa statute, regulations, and DHS guidance.¹⁰² For example, some agencies have adopted practices of only certifying in cases involving certain crimes, or deny certification if a case is not prosecuted or if the suspect is not convicted.¹⁰³ The most benign explanation is that some agencies are not familiar with certification requirements. Some agencies' interpretations are, however, inconsistent with both the language and spirit of relevant law. For example, one office denied certification because the witness was assaulted and suffered a blow to the head, and thus was not able to identify the assailant; although the crime was reported, the witness was deemed "not helpful" to law enforcement.¹⁰⁴ Another office may find the witness "not helpful" if a complaint is not made within 24 hours of the crime's occurrence, regardless of the circumstances.¹⁰⁵

Other certification policies clearly fall outside the guidance of the law. For example, although the statute enumerates the crimes that qualify for

99. See UNC SCH. OF L. IMMIGRATION/ HUM. RTS. POL'Y CLINIC & ASISTA, *The Political Geography of the U Visa: Eligibility as a Matter of Locale* (2014), <http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf> [hereinafter I/HRP/ASISTA report].

100. See generally *id.*

101. *Id.*

102. *Id.* at 28.

103. *Id.* at 14.

104. I/HRP/ASISTA report, *supra* note 99, at 48.

105. *Id.*

certification, including crimes of indentured servitude and peonage, some law enforcement agencies have adopted certification policies for only certain crimes, such as domestic violence, trafficking, or sexual crimes.¹⁰⁶ In other instances, law enforcement will deny certification if the witness has a conviction, although the regulations specify that the certification is exclusively concerned with individual's helpfulness and whether he or she was a victim of a qualifying crime.¹⁰⁷ Some agencies have made certifications contingent upon the disposition of the case, although DHS guidance makes clear that there are no such conditions placed on certifications.¹⁰⁸ Witnesses were refused certification in some jurisdictions because their cases were closed; in other jurisdictions, witnesses were denied certification because they were pending; still others had their requests denied because their cases were not prosecuted.¹⁰⁹

One possible reason for denying certification while a case is pending is a concern that witnesses will cease to be helpful once their cases are certified. However, USCIS has practices in place to address this possibility. Should an individual refuse to continue assisting law enforcement after the application has been filed, certifying agencies are recommended to contact USCIS, and this will be taken into account when the agency reviews the application.¹¹⁰ Another possible concern is that witnesses' credibility will be questioned if they obtain certification in association with their testimony. Because the U visa is a known immigration remedy, however, it may affect a witness's credibility whether or not that individual has a visa certification or may be given one in the future. In addition, offices that have adopted best practices for certification indicates that earlier certifications result in more willing and helpful witnesses.¹¹¹

Finally, in some instances, some agency officials act *ultra vires* in their refusal to certify. The survey found that some agencies refused to certify to avoid "giving someone legal status," because it was deemed "not necessary for the victim," or because an agency deemed that being "allowed to stay in the U.S. during the prosecution of [a] crime . . . was enough benefit" without addressing a witness's long-term immigration status.¹¹² In other cases, individuals were denied certification because they worked without

106. *Id.* at 50.

107. *Id.* at 50-51.

108. *Id.* at 51-52; see also DEP'T OF HOMELAND SEC., *U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies* 4 (2015) [hereinafter DHS Law Enforcement Guide].

109. I/HRP/ASISTA report, *supra* note 99, at 51-52.

110. See DHS Law Enforcement Guide, *supra* note 108, at 12.

111. I/HRP/ASISTA report, *supra* note 99, at 3-4.

112. *Id.* at 56.

authorization, because they were minors, because did not have advocates, or because they “did not suffer enough.”¹¹³ In all of these instances, agency officials have acted outside the scope of their legal authority, in some cases exercising decision-making power reserved for USCIS in determining who is a qualifying victim.

North Dakota does not have a certifying official or established certification consideration processes. While this means that each request for certification can be reviewed at the discretion of individual officers, the lack of set policies presents its own challenges. Familiarity with certification procedures may vary from jurisdiction to jurisdiction, with each jurisdiction adopting its own policies regarding cases it will and will not certify. Some individuals may not be comfortable with certification because it may be seen as making a decision about immigration status. Other individuals might be opposed to certifying under certain circumstances. In this sense, the lack of designated officials and certifying policies in the state parallels the uneven review of certification requests across the country.

2. *Problem 2: Refusal to Certify*

The survey also demonstrates that some jurisdictions have a blanket practice of refusing to certify U visas.¹¹⁴ Again, in some instances, this may be a case of a lack of information about U visas and the certification process. It also may reflect some anxiety about weight given to certification, or the extent of liability associated with certification practices. Certifications may also be denied in cases where there is no certification policy.¹¹⁵

This survey does not include data from the state of North Dakota, although one attorney from the state did respond, indicating “the lack of available advocates . . . to provide services for potential U visa petitioners.”¹¹⁶ There are also no designated certifying officials in the state. As a result, North Dakota has a *de facto* problem of failure to certify U visas for victims of workplace abuse and other crimes.

113. *Id.* at 56-57.

114. *Id.* at 24, 27-28 (noting, in particular, that survey respondents identified 165 agencies that refuse to certify U visas). *Id.* at 27.

115. *See id.*

116. *Id.* at 26 n.47.

C. LEGAL CONSEQUENCES OF CERTIFICATION DENIAL POLICIES

In addition to identifying problematic trends in U visa certification denials with local agencies across the country, the UNC Immigration and Human Rights Policy Clinic identified potential legal liabilities for agencies with blanket denial policies or narrow grand policies. Specifically, they identified certification denials or refusals to certify as abuses of discretion¹¹⁷ in conflict with federal immigration law,¹¹⁸ and possibly discriminatory practices under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.¹¹⁹

1. *Refusal to Certify as an Abuse of Discretion*

The U visa regulations specify the factors designated officials should use when making certification decisions.¹²⁰ Although DHS guidance indicates that law enforcement officers “cannot be compelled to complete a certification,”¹²¹ the implication is that the agency should still conduct a fair review of the certification request. This latter interpretation is supported by the 2007 interim U visa rules, which specify that law enforcement agencies have discretion because they are “in the best position to verify certain factual information.”¹²² Accordingly, certification is intended to serve as evidence of the crime and a witness’s helpfulness rather than an adjudicatory act by the certifying agency. By way of comparison, in cases where federal courts have considered U visa certifications, judges have limited their consideration to only factors the factors in the regulations: whether the individual seeking certification was a victim of a qualifying crime, whether he or she possessed information about that crime, whether he or she assisted law enforcement, and whether there was the existence of an investigation.¹²³

Agencies that have adopted blanket non-certification policies are also abusing their discretion. In *Ordonez Orosco v. Napolitano*, the Fifth Circuit found that certification requires discretion in every instance,¹²⁴ the

117. I/HRP/ASISTA report, *supra* note 99, at 68-76.

118. *Id.* at 77-83.

119. *Id.* at 83-103.

120. See 8 C.F.R. § 214.14(c)(2)(i) (2016).

121. DHS Law Enforcement Guide, *supra* note 108, at 3.

122. New Visa Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53014, 53024 (Sept. 17, 2007) (codified at 8 C.F.R. pt. 214). This regulatory language pertains to local agencies; federal courts are bound only by the language of the statute. See *Ordonez Orosco v. Chertoff*, 2008 WL 5155728 *2 (S.D. Tex. 2008).

123. See *Garcia v. Audubon Cmty. Mgmt., L.L.C.*, 2008 WL 1774584 *2-3 (E.D. La. 2008); see also *United States v. Baio*, 2011 WL 607087 *1 (S.D. Cal. 2011).

124. 598 F.3d 222, 226-27 (5th Cir. 2010).

implication being that an agency is compelled to evaluate each request. Furthermore, in other cases involving delegation of powers to administrative agencies, courts have repeatedly emphasized that agencies must “consider[] all of the factors made relevant by the statute,”¹²⁵ and exercise their authority in a non-arbitrary fashion and in a manner that considers evidence presented.¹²⁶ Agencies that do not adhere to the statute or other policies have committed an abuse of discretion.¹²⁷ In this instance, contravening the clear language of the statute and the accompanying regulation and guidance may be seen to constitute such an abuse.

2. *Certification Denials as Federal Preemption and Uniformity Concerns*

Under the Supremacy Clause of the United States Constitution, state and local laws may not conflict with federal law, “the supreme law of the land.”¹²⁸ Certifications that are improperly denied are thus in conflict with federal law. Denying certification is, in effect, a decision by a local agency concerning an immigrant’s ability to remain in the United States, and it is well established as a matter of law that decisions concerning an individual’s immigration status may only be made by the federal government.¹²⁹

The inconsistencies that arise when these agencies exercise “discretion as adjudication” are also problematic. The Supreme Court has continuously affirmed uniformity as justification for exclusive federal jurisdiction over immigration.¹³⁰ To avoid disparate results in similar cases, agencies must adopt uniform certification policies consistent with the statute and agency regulations.

3. *Refusal to Certify as Equal Protection and Title VI Violations*

Where refusals to certify are based on discriminatory attitudes towards immigrants, undocumented individuals, or individuals of a particular race or national origin, these agency decisions may violate the Equal Protection

125. *Arent v. Shalala*, 70 F.3d 610, 620 (D.C. Cir. 1995) (Wald, J. concurring).

126. *See, e.g., In re Establishment Inspection of Kelly-Springfield Tire Co.*, 13 F.3d 1160, 1165 (7th Cir. 1994).

127. I/HRP/ASISTA report, *supra* note 99, at 75 (citing *Diaz-Resendez v. Immigration & Naturalization Serv.*, 960 F.2d 493, 495 (5th Cir. 1992)); *Henry v. Immigration & Naturalization Serv.*, 74 F.3d 1, 4 (1st Cir. 1992).

128. U.S. CONST. art. VI, § 2.

129. *See, e.g., De Canas v. Bica*, 424 U.S. 351, 354 (1976); *Chamber of Commerce v. Whiting*, 563 U.S. 582, 591-92 (2011).

130. *See, e.g., Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875); *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006); *Chamber of Commerce v. Whiting*, 563 U.S. 582, 591-92, (2011); *Arizona v. United States*, 132 S.Ct. 2492, 2498 (2012).

Clause of the United States Constitution, which “prohibits selective enforcement of the law based on consideration such as race.”¹³¹ In *Plyler v. Doe*, which struck down a Texas law that barred undocumented immigrant children from public schools as unconstitutional, the Supreme Court found that immigration status is subject to rational basis review.¹³² Agencies that deny certification may be subject to equal protection challenges based on national origin or race, immigration status, or a subclass comprised of individuals who have been denied certification that they would have been entitled to if they lived in a jurisdiction with non-discriminatory practices.¹³³

These certification policies may also violate Title VI of the Civil Rights Act, which provides that “[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance.”¹³⁴ Title VI applies to conceivably every certifying agency as federally-funded “programs or activities.”¹³⁵ In *Regents of the University of California v. Bakke*, the Supreme Court found that Title IV protections are akin to the protections guaranteed by the Fifth and Fourteenth Amendments,¹³⁶ both of which pertain to undocumented immigrants.¹³⁷ Denying certifications to “illegal immigrants” may be considered intentional discrimination under Title IV insofar as attitudes about extending benefits to immigrants are proxies for racial or national origin discrimination.¹³⁸ Individuals may also have disparate impact discrimination claims if they can show that a certification policy has a disproportionate impact on a protected group and that the practice lacks “a substantial legitimate justification.”¹³⁹ Complaints may be brought under Title VI if the policies have disproportionately affected crime victims of a particular race or national origin.¹⁴⁰

131. *Whren v. United States*, 517 U.S. 806, 813 (1996).

132. *Plyler v. Doe*, 457 U.S. 202, 215 (1982).

133. UNC SCHOOL OF LAW ET. AL., *supra* note 99, at 84-101 (analyzing survey responses that would constitute violations on these respective bases).

134. 42 U.S.C. § 2000d (1964).

135. 28 C.F.R. § 42.101.

136. 438 U.S. 265 (1978).

137. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 215 (1982).

138. *See* I/HRP/ASISTA report, *supra* note 99, at 105.

139. *Georgia State Conference v. Georgia*, 775 F.2d 1403, 1417 (Court needed 1985).

140. *See* I/HRP/ASISTA report, *supra* note 99, at 107.

IV. VISA CERTIFICATION AS AN OPPORTUNITY TO ASSIST WORKERS IN A DYNAMIC ECONOMY

Beyond adopting practices that are compliant with the law, agencies across North Dakota should consider the opportunities that accompany clear and fair certification review policies. The state has immigrant populations on whom the state economy relies, even during a lull in the oil boom. Certifications have the potential to affect not only law enforcement agencies' relationships with these communities, but also improve workplace conditions across the state generally.

A. PROMOTING IDENTIFICATION OF IMMIGRANT VICTIMS OF WORKPLACE EXPLOITATION

The North Dakota anti-trafficking statute criminalizes both sex and labor trafficking.¹⁴¹ At the same time, the media has exclusively focused on sex trafficking issues in the state.¹⁴² In these stories, survivors of trafficking tend to conform to a particular image: female, mostly minors, and all United States citizens. The existing nonprofits devoted to human trafficking in the state, while a welcome resource for survivors, focus on sex trafficking.¹⁴³

It is critical for any coalition or task force in the state to promote awareness of labor trafficking and exploitation as part of its mission. The infrastructure that exists to address human trafficking in the state can build on its successes by also promoting awareness of labor exploitation and cases involving foreign nationals, and expressly include these victims within its mandates. This includes promoting cooperation with law enforcement officials who are likely to encounter immigrant workers, screening individuals taken into immigration custody for possible T and U visa relief, facilitating referrals to victim coordinators and legal advocates who can assess eligibility for immigration relief, and ensuring that victims receive supportive assistance and benefits. This also means addressing language access issues, including providing interpretation services and

141. See N. D. CENT. CODE § 12.1-41-02 (2015).

142. See, e.g., Kayla Webley, *A Crude Awakening*, MarieClaire (Aug. 18, 2015), <http://www.marieclaire.com/culture/a15466/sex-trafficking-north-dakota/>; *Trafficked: The Exploitation of Women and Girls in the Bakken and Beyond*, Forum News Serv. (2014), <http://www.traffickedreport.com/>; Pam Louwagie, *Sex trade follows oil boom into North Dakota*, Star Trib. (Sept. 21, 2015), <http://www.startribune.com/aug-30-sex-trade-from-oil-boom-mostly-unchecked/273268991/>.

143. See, e.g. PROJECT FUSE, www.projectfuse.org; 4HER, www.4hernd.org (last visited July 11, 2016).

information in other languages, and refraining from using immigration officials as interpreters.¹⁴⁴

B. DESIGNATING CERTIFYING OFFICIALS TO IMPROVE COMMUNITY RELATIONS WITH LAW ENFORCEMENT

North Dakota can begin to make T and U visas more accessible options for exploited workers by designating certifying officials within local and state law enforcement agencies. Although the U visa survey does not contain data from North Dakota, the concerns reflected in the data indicate factors that certainly influence agency decisions. The North Dakota statute specifically addresses T and U visa certification, setting forth a protocol for certification and for notification of a federal law enforcement official to request continued presence.¹⁴⁵ Designating certifying officials is therefore an important part of enforcing the relevant law.

In the absence of a designated certifying official, applicants for U visas must include written designation from the head of the relevant office or agency indicating that the signer of the certification has authority to certify in this particular instance.¹⁴⁶ This can be problematic where officials are familiar with the facts of the individual case, but have limited experience with immigration regulations. Designating a certifying official removes an extra step for trafficking and exploitation survivors and their advocates by eliminating the need for additional documentation. Formalizing certifiers for each office also increases the likelihood that certification requests will be made to individuals familiar with T and U visa regulations and policies, and would likely result in more uniform assessment of certification requests. In addition, certifying officials play important roles vis-à-vis community liaison officers, victim advocates, and others who are likely to encounter crime victims. And although office leadership and the certifying official play key roles within an agency, well-administered programs involve all individuals within a program.¹⁴⁷

144. See Lisa Graybill, *Unwise Policy, Illegal Practice: Border Patrol Agents as Interpreters Along the Northern Border*, IMMIGRATION POL'Y CTR. (Sept. 2012), <http://www.immigrationpolicy.org/sites/default/files/docs/borderpatrolagentsasinterpreters.pdf>.

145. See N. D. CENT. CODE § 12.1-41-18 (2015).

146. U.S. Citizenship and Immigration Services, Form I-918, Supplement B, Instructions. 2 (Jan. 15, 2015), <https://www.uscis.gov/sites/default/files/files/form/i-918supbinstr.pdf>

147. See Nat'l Immigrant Women's Advocacy Project, *The Importance of the U-visa as a Crime-Fighting Tool for Law Enforcement Officials - Views from Around the Country*, 8 (Dec. 3, 2012), http://www.ncdsv.org/images/NIWAP_TheImportanceOfTheU-visaAsACrime-FightingToolForLE_12-3-12.pdf [hereinafter NIWAP report] (Chief Pete Helein of the Appleton Police Department, stating “[i]t is so important for the police chief or sheriff to set the policy, communicate the priority within the community, and then turn it over to the people who are actually doing the work. The chief has a strong influence in getting the program up and running,

The T and U visa are also important mechanisms to foster trust between law enforcement agencies and immigrant communities. For example, research indicates that both witnesses and victims in Latino communities are afraid to come forward out of fear that they will be asked about their immigration status and exposed to the danger of removal.¹⁴⁸ Law enforcement relations with immigrant communities stand to improve where U visa programs are adopted and administered as intended under the law.¹⁴⁹

C. INCREASING CAPACITY TO ADDRESS WAGE THEFT AND WORKPLACE VIOLENCE

The Department of State has a Know Your Rights brochure, printed in multiple languages, that consular officers give to every individual who receives a temporary employment visa.¹⁵⁰ This brochure, intended make workers aware of their rights, also includes information for the National Human Trafficking Resource Center hotline. The hotline refers workers to resources and service agencies, but relies on social and legal assistance

and continuing to endorse the concept and opportunity, but the people who are actually working on the investigations are really in the best position to certify.”)

148. See Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, DEP’T OF URBAN PLANNING AND POL’Y, May 2013, at 5-6 (finding that seventy percent of undocumented, foreign-born Latinos agreed with the statement “I am less likely to contact police officers if I have been a victim of a crime for fear they will ask me or other people I know about our immigration status,” while sixty-seven percent agreed that they would be hesitant to report a crime or volunteer information to law enforcement for the same reason).

149. See, e.g., NIWAP report, *supra* note 147, at 3, 4 (Danny Ford, Police Chief in Duncan, Oklahoma, stating “[Undocumented crime victims are] scared of being deported, so most of them won’t press charges or even talk to us. Most of the calls we’ve received have been from people who have seen the crime occur [and some who have suffered directly from the violence] . . .”); *id.* at 5 (Pete Helein, Police Chief in Appleton, Wisconsin, stating “[t]he real benefit of the U-visa . . . is the fact that law enforcement can build trust between the immigrant community and the police department. It opens up that line of communication to where people who have been victimized in the past are feeling more comfortable coming forward. Those who have historically been preyed upon now come to the police without fear of deportation.”); *id.* at 5, 6 (Maria Watkins, Retired Police Captain in Washington, DC, stating “[i]n active investigations, [the U visa] creates a bridge of trust with the police department. The idea is that police are here to help no matter what the victims’ immigration status, to protect the public, the people. We want to know what’s going in the community . . . [w]e don’t want crimes to be going on in any street, in any community, without our knowing about it. That’s why it’s important to have a tool to show immigrant victims that the police are there to help them and not to deport them.”); *id.* at 6 (Deputy Sheriff Keith Bickford, Director of Oregon Human Trafficking Task Force, stating, “[a]s for the types of cases they are bringing forward, they include trafficking and labor violations . . . [w]e find trafficking through other criminal reports because you never know where trafficking could be hiding . . . I think opening a U-visa case has helped with my relationship with different communities . . . We use T- and U-visas differently depending on the case.”)

150. See U.S. Dep’t of State, *Know Your Rights: An information pamphlet describing your rights while working in the United States*, (Apr. 2016), https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberfoce_Pamphlet_English_April2016.pdf.

organizations on the ground to help these individuals.¹⁵¹ Undocumented workers are seldom informed about their rights in this formal way, and are even more vulnerable to workplace exploitation. State agencies, unions, and community organizations can assist by providing Know Your Rights information in different languages and facilitating referrals. Even when the individual is referred to a government agency hotline for exploited workers, such as the Occupational Health and Safety Administration or the Wage and Hour hotline, these individuals are likely to be routed to a recording that is only in English or Spanish, posing a barrier for individuals who speak other languages.¹⁵² Individuals are likely to need interpreters to reach out to law enforcement and other local offices.

Ultimately, the goal behind the U and T visas is to promote cooperation with law enforcement to make agencies more effective in their public safety goals. Kevin Wiley, former Lieutenant and Commander of the Special Victims Section of the Oakland Police Department, has noted the important role of U visas in encouraging witnesses to come forward in domestic violence cases because they are “disclosure-driven crimes;”¹⁵³ in the same vein, reporting workplace exploitation is important for holding abusive employers accountable.

Addressing wage theft in North Dakota begins by addressing the most vulnerable workers. Most of the Fair Labor Standards Act cases filed in North Dakota have arisen with employers in the Bakken.¹⁵⁴ Workers with temporary status, or without status at all, are more likely to encounter exploitative employers, and it is important to bring these abusive practices to light.¹⁵⁵ Where employers rely on workers they can intimidate, underpay, and fail to protect in terms of occupational safety, workplace conditions deteriorate for all employees. Employers with unscrupulous practices are unjustly enriched as they threaten their workers to avoid paying them, as in the case that was referred to the University of North Dakota Law Clinic.¹⁵⁶ To allow employers who follow the law to remain competitive, there is an interest in bringing the claims of exploited

151. See Polaris Report, *supra* note 26, at 11.

152. *Id.*

153. Katherine Ellison, *A Special Visa Program Benefits Abused Illegal Immigrants*, N.Y. TIMES (Jan. 8, 2010), <http://www.nytimes.com/2010/01/08/us/08sfimmigrant.html>.

154. See *Fair Labor Standards Act Cases, Dockets, and Filings in the District of North Dakota*, JUSTIA, https://dockets.justia.com/browse/state-north_dakota/noscat-8/nos-710 (last visited Feb. 14, 2016) (indicating that, out of the forty-one FLSA claims currently pending in North Dakota, twenty-five are in the Bakken or related to employers in the petroleum industry).

155. See Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1, 7-8 (2013).

156. See *supra* note 1 and accompanying text.

immigrant workers to light in order to make workplace conditions safer and more equitable for everyone.

VI. CONCLUSION

The oil boom changed the demographics of North Dakota's workforce in significant ways, even as the economy continues to shift. The state will likely become increasingly dependent on the contributions of immigrant workers as the economy grows and evolves. Accordingly, now is the time to consider how law enforcement can improve relationships with immigrant communities after a history of ICE partnerships have left undocumented and temporary immigrants in fear. The T and U visas are intended to make it easier for crime victims and witnesses to come forward and cooperate with law enforcement. These visas are intended for use by local courts and agencies as a matter of federal law. Although North Dakota agencies do not yet have certification policies in place, this is an opportune time to consider developing and adopting such policies, including designation of certifying officials. The absence of routine practices exposes agencies to liability for unfair denial of requests, but it also would be a missed opportunity. The T and U visas not only benefit immigrant communities, but they also have the potential to promote safe and fair labor practices across the state.