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## Immigration Enforcement versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace

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# **IMMIGRATION ENFORCEMENT VERSUS EMPLOYMENT LAW ENFORCEMENT: THE CASE FOR INTEGRATED PROTECTIONS IN THE IMMIGRANT WORKPLACE**

*Leticia M. Saucedo*\*

## **ABSTRACT**

In considering specific provisions of the Immigration and Nationality Act that can be “fixed” in the absence of comprehensive immigration reform, we must seek to ameliorate the unintended consequences of existing provisions. One important and potentially devastating consequence has been the exploitation of noncitizen workers arising out of the implementation of the employer sanctions provisions of the Act. The employer sanctions provisions were implemented to punish employers who knowingly hired undocumented workers. Since its enactment, however, it has been workers themselves who have borne the consequences of employer sanctions enforcement efforts. Employer sanctions investigations have yielded vastly more deportation orders than employer violations. Today, moreover, prosecutors charge workers with fraud and similar criminal violations, even though Congress did not intend criminal sanctions for workers who worked in the United States without authorization. These actions are taken in the name of immigration enforcement, which I believe is overemphasized. A more nuanced reading of the Act reveals a congressional intent to admit and protect several categories of noncitizens, including victims of workplace criminal activity. Specifically, the Act contains a potentially powerful provision that can undo many of the unintended consequences of employer sanctions provisions, and at the same time refocus enforcement efforts on the originally-intended employers who knowingly hire undocumented workers. The U visa provision of the INA—intended to protect victims of crimes, including workplace crimes—can and should provide leverage to workers who seek to uphold or enforce labor and employment rights in the most egregious settings (i.e., those in which the employer is both circumventing the immigration employer sanctions provisions and exploiting noncitizen workers who fear deportation). In this essay, I recommend ways to strengthen the U visa provision so that it can mitigate the unintended consequences of employer sanctions provisions for workers.

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## INTRODUCTION

In many ways, immigration regulation today emphasizes enforcement over other aspects of the immigration scheme, such as admissions. The enforcement goals of immigration law tend to compete with enforcement goals in other areas of law, such as employment law, producing mixed results.<sup>1</sup> The Immigration and Nationality Act's ("INA" or "Act") employer sanctions provision can be seen as an example of Congress reaching into the employment arena to fulfill the enforcement aspect of immigration regulation. The enforcement principles of immigration law, however, are overemphasized. A more nuanced reading of the statute would reveal a congressional intent to admit and protect several categories of noncitizens. Among the protected categories are noncitizens who have been the victims of, among other things, workplace criminal activity. Specifically, the Act contains a potentially powerful provision that can undo many of the unintended consequences of employer sanctions provisions, and at the same time refocus enforcement efforts on the originally-intended employers who knowingly hire undocumented workers. The U visa provision of the INA—intended to protect victims of crimes, including workplace crimes—can and should provide leverage to workers who seek to uphold or enforce labor and employment rights in the most egregious settings (i.e., those in which the employer is both circumventing the immigration employer sanctions provisions and also exploiting noncitizen workers who fear deportation).<sup>2</sup> In this essay, I will focus on the issues that have arisen in the implementation of the U visa program and its application to workplace crimes. I will also provide some recommendations for future implementation of workplace protections for noncitizens in the immigration statute. In addition to providing suggestions for strengthening the protection mechanisms of U nonimmigrant status in the Act, I critique my own approach, in-

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1. In one particularly striking example, the Supreme Court interpreted immigration enforcement policy goals as essentially trumping the enforcement goals against unfair labor practices in labor cases. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002). Sometimes, however, immigration enforcement goals take a back seat to humanitarian or other principles within immigration law, or to enforcement goals in other areas of law, or to constitutional limitations. *See, e.g., Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (holding that immigrants have a right to Sixth Amendment effective assistance of counsel regarding the immigration consequences of a criminal conviction); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that withholding K-12 public education based on immigration status violated the Equal Protection Clause).

2. For a discussion of the power of the U visa to protect immigrant workers, see Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008).

asmuch as it follows in the tradition of piecemeal legislation to “fix” the problem of immigration in this country. Ultimately, I believe Congress should examine the consequences of its entry into the immigration-employment nexus and continue to build upon protections that alleviate the unintended exploitation caused by its implementation of employer sanctions.

### I. HISTORICAL BACKGROUND: EMPLOYER SANCTIONS, UNINTENDED CONSEQUENCES, AND THE EMPLOYMENT STRUCTURE IN IMMIGRANT WORKPLACES

Before the passage of the Immigration Control and Reform Act of 1986 (IRCA), it was not a violation of the Immigration and Nationality Act to work in the United States without authorization or to hire undocumented workers.<sup>3</sup> With the passage of the IRCA, Congress determined that employers would become both targets and allies in border control and enforcement activities. Congress introduced sanctions for employers who knowingly hire undocumented workers.<sup>4</sup> Employers face fines and possible imprisonment for violating the employer sanctions provisions of the Act.<sup>5</sup> The provision was meant to prevent and deter employers from seeking, recruiting or pulling undocumented immigrant workers into the U.S. labor market. The Act also imposes civil penalties in the form of immigration-related sanctions for those who work without authorization. For example, INA § 245 prohibits adjustment of status to anyone (except immediate relatives of a citizen) who has worked in the United States without authorization.<sup>6</sup> Notably, however, Congress has refused to impose criminal sanctions against workers for unauthorized work.

In the employment arena, most notably after the Act’s amendment in 1986, the workplace became a site and focus of immigration regulation and enforcement. When Congress included the employer sanctions provisions into the Immigration Reform and Control Act of 1986,<sup>7</sup> it bound the fates of employers and workers who entered employment arrangements in violation of Congressional intent to curb unlawful immigration. The provisions were meant to discourage the entry of undocumented workers by sanction-

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3. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a)(1) (codified as amended at 8 U.S.C. § 1324a (2006)).

4. Immigration and Nationality Act § 274a(a)(1), (e)(4), 8 U.S.C. § 1324a(a)(1), (e)(4) (2006).

5. 8 U.S.C. § 1324a(e)(4), (f)(1).

6. Immigration and Nationality Act § 245(c), 8 U.S.C. § 1255(c) (2006).

7. Immigration and Nationality Act § 274A(a)(1)(A), 8 U.S.C. § 1324a(a)(1)(A).

ing employers and thereby cutting off the demand for such labor.<sup>8</sup> In fact, as predicted by several immigrant advocacy organizations, including the Mexican American Legal Defense and Educational Fund (MALDEF), which warned of the consequences of employer sanctions provisions, the amendments did not curb immigration.<sup>9</sup> Instead, the provisions resulted in more workplace exploitation, as employers took advantage of workers' undocumented status, and at the same time, employers began to build protections from regulatory enforcement.<sup>10</sup> The unintended consequence of the employer sanctions provision was the development of a more vulnerable, still undocumented, labor force.<sup>11</sup>

Today, worksite enforcement, ostensibly targeting employers who knowingly hire undocumented workers, has become a regular part of immigration enforcement activity of Immigration and Customs Enforcement (ICE), the agency responsible for immigration enforcement efforts.<sup>12</sup> ICE's enforcement strategy has yielded woefully low numbers of employer sanctions, penalties, or prosecutions. Since the enactment of the provision, only relatively few employers have faced prosecution for knowingly hiring undocumented workers. In 2009, for example, ICE arrested over 1100 individuals in worksite enforcement efforts.<sup>13</sup> Only 135 of those were employers or their agents.<sup>14</sup> ICE also made over 5,100 administrative arrests or detentions during those enforcement efforts.<sup>15</sup> In April 2009, the Department of Homeland Security issued a policy memorandum and fact sheet addressing the Obama administration's approach to worksite enforce-

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8. MEXICAN AM. LEGAL DEF. & EDUC. FUND & AM. CIV. LIBERTIES UNION, THE HUMAN COSTS OF EMPLOYER SANCTIONS: RECOMMENDATIONS FOR GAO'S THIRD REPORT TO CONGRESS UNDER THE IMMIGRATION REFORM AND CONTROL ACT OF 1986, at 4 (1989).

9. *Id.* at 5.

10. *Id.* at 13-51.

11. See, e.g., Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1134 (2009) (arguing that the employer sanctions provision encouraged the development of a compliance structure in which the Department of Homeland Security and employers cooperate to identify undocumented workers without penalties to the employers who cooperate); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 969 (2006).

12. *The Fiscal Year 2010 Budget for Immigration and Customs Enforcement, Customs and Border Protection, and The U.S. Coast Guard: Hearing Before the Subcomm. on Border, Maritime and Global Counterterrorism of the H. Comm. on Homeland Sec.*, 111th Cong. 3 (2009) (statement of John T. Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, Department of Homeland Security) [hereinafter Morton Statement], available at [http://www.ice.gov/doclib/pi/news/testimonies/morton\\_06\\_11\\_09.doc](http://www.ice.gov/doclib/pi/news/testimonies/morton_06_11_09.doc).

13. *Worksite Enforcement Overview*, ICE OFFICE OF INVESTIGATIONS, <http://www.ice.gov/news/library/factsheets/worksite.htm> (last visited Nov. 3, 2010).

14. *Id.*

15. *Id.*

ment.<sup>16</sup> The policy notes that ICE's focus in worksite enforcement is on employer rather than employee violations.<sup>17</sup> At the same time, the strategy provides employers safe harbors from prosecution.<sup>18</sup>

ICE acknowledges it will continue to enforce removals of workers caught up in their investigations of employer violations.<sup>19</sup> Even though the current administration portrays deportations as incidental consequences of its focus on employers, thousands of workers have been affected. The same is not true of employers. While the government claims it has targeted exploitative employers, few, if any, of the worksite audits the administration has conducted have resulted in the protection of workers against exploitative employers.<sup>20</sup> Instead, workers are being fired in employers' attempts to comply with the audit processing in negotiations with ICE.<sup>21</sup> The employers, meanwhile, are not facing the dire consequences of the audits, as was intended with employer sanctions in the first place.<sup>22</sup>

The employer sanctions provisions have, in fact, created an employment structure in which employers set up mechanisms to protect themselves from the sanctions and enforcement, and at the same time make employees vulnerable to both immigration and non-immigration consequences of working without authorization.

Simultaneously, while immigration enforcement goals force the round-up and removal of thousands of workers, enforcement of employment and labor laws becomes increasingly difficult in the immigrant workplace. Employees are afraid to advocate for themselves because they risk removal. The fear is real and the stakes continue to escalate. Criminal sanctions for immigration-related offenses now give government prosecutors added leverage to seek convictions in cases arising out of worksite raids.<sup>23</sup> We now

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16. Memorandum from Marcy Forman, Dir., Office of Investigations, U.S. Immigration & Customs Enforcement, to Assistant Dir., Deputy Assistant & Dir.'s & Special Agents in Charge (Apr. 20, 2009) [hereinafter ICE, Worksite Enforcement Strategy, Apr. 30, 2009] (on file with author).

17. *Id.*

18. *Id.*

19. *Id.*

20. Instead, the audits have produced massive firings or layoffs of employees suspected of unauthorized or irregular immigration status, leaving the government one step removed from the process of removing undocumented workers from the workplace. Neil A. Lewis, *Immigration Officials to Audit 1,000 More Companies*, N.Y. TIMES, Nov. 19, 2009, <http://www.nytimes.com/2009/11/20/us/20immig.html>.

21. *Id.*

22. *Id.*

23. For a description of the criminal charges and convictions of hundreds of workers caught up in a worksite raid targeting Agriprocessors, Inc., a meatpacking plant in Postville, Iowa, see Erik Camayd-Freixas, *Raids, Rights and Reform: The Postville Case and the Immigration Crisis*, 2 DEPAUL J. SOC. JUST. 1 (2008).

see undocumented workers charged with offenses such as identity theft, document fraud, or similar fraud offenses for presenting false documents for work.

A recent case from the Eastern District of Tennessee, *United States v. Moreno-Lopez*, illustrates the immigration-related risks of employment law enforcement.<sup>24</sup> This criminal case grew out of what initially started as a civil complaint filed by a group of workers against their employer, alleging violations of the Fair Labor Standards Act, Title VII and various state law claims.<sup>25</sup> However, the immigrant-workers who were the plaintiffs in the underlying civil case, were immediately arrested and detained for both civil immigration violations and criminal charges.<sup>26</sup> The federal prosecutor tried to make examples of the ten or so plaintiffs arrested in the case, charging them with aggravated identity theft, social security fraud, and false use of documents, where appropriate.<sup>27</sup> The federal government pursued the charges even though the workers were victims of serious exploitation and probably human trafficking victims.<sup>28</sup> Several other law enforcement agencies, including the Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL), investigated the workplace violations and the potential criminal activity of the company.<sup>29</sup> Ultimately, the plaintiffs/victims were granted U visa nonimmigrant status based on the investigations of criminal activity.<sup>30</sup> The plaintiffs pled guilty to some of the identity theft charges and appeared before a federal judge for sentencing.<sup>31</sup> The judge's questions regarding the defendants' immigration status demonstrated his lack of knowledge of specific provisions of the INA and

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24. *United States v. Moreno-Lopez*, No. 4:09-CR-21, 2010 U.S. Dist. LEXIS 2597, at \*1 (E.D. Tenn. Jan. 13, 2010). I recently wrote and participated in the filing of an amici curiae brief in the case in support of the defendants, who faced prison sentences for crimes ostensibly related to working without authorization, including false use of a social security number. See Brief for Moreno-Lopez et al. as Amici Curiae for Respondents, *United States v. Moreno-Lopez*, No. 4:09-CR-21, 2010 U.S. Dist. LEXIS 2597 (E.D. Tenn. Jan. 13, 2010) [hereinafter Amici Brief] (on file with author).

25. *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894, 899 (M.D. Tenn. 2009). The plaintiff-workers in *Montano-Perez* were noncitizens from Mexico. *Id.* at 897. The court found that the employer either postponed pay day or simply refused to pay the plaintiffs for work they had performed in violation of the Fair Labor Standards Act. *Id.*

26. Amici Brief, *supra* note 24, at 11.

27. *Id.* at 12.

28. Juana Moreno-Lopez is one such worker, who was charged with various crimes subsequent to having participated in the employment action in *Montano-Perez*. *Montano-Perez*, 666 F. Supp. 2d 894; see also *Moreno-Lopez*, 2010 U.S. Dist. LEXIS 2597, at \*1.

29. Dennis Norwood, 8 *Sentenced in Federal Court on Immigration*, CHATTANOOGAN, June 9, 2010, [http://www.chattanooga.com/articles/article\\_177523.asp](http://www.chattanooga.com/articles/article_177523.asp).

30. *Id.*

31. See, e.g., Transcript of Sentencing Hearing at 3, 2010 U.S. Dist. LEXIS 2597 (E.D. Tenn. Jan. 13, 2010) (No. 4:09-CR-21) [hereinafter Transcript of Sentencing Hearing].



how they operate on the ground.<sup>32</sup> Specifically, the judge noted that he was reluctant to reward a workplace victim who had entered the United States illegally.<sup>33</sup>

The prosecution of this case, just like general worksite enforcement strategy, sends a message to noncitizen workers that immigration enforcement efforts take precedence over the enforcement of employment regulations. Workers fear calling attention to themselves because they risk employer retaliation or ICE detection. They will not want to make affirmative complaints regarding their labor and employment conditions. Nor will they be willing to exercise their rights as workers to enforce labor protections. Moreover, in this political climate, employment law enforcement agencies are loathe to advocate on behalf of immigrant workers as immigrants (especially low-wage, undocumented workers).<sup>34</sup>

Because in the public consciousness immigrants have no rights, the government has resorted to prosecutions with high stakes for individual workers. The rationale for harsh treatment is that the undocumented immigrant should not be allowed to get away with violating immigration law by his or her unlawful presence. The charges circumvent congressional intent not to hold unauthorized workers criminally liable for unlawful presence,<sup>35</sup> or the Supreme Court's recent pronouncement that social security fraud does not encompass the act of simply using a false social security number for work.<sup>36</sup> Due to this misunderstanding of the nuances of immigration law,

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32. *See id.* The judge's concern regarding the use of the U visa as a form of amnesty and his ignorance of the difficulty of receiving such a visa demonstrates just how unattainable U visa protection can be, even though the provision itself is about protecting the most vulnerable immigrant population. The judge facilitated the government's argument that courts should not protect those who openly violate the law. The judge sought reassurance that not everyone could get a U visa because if he gave amnesty to one set of workers, he did not want to be forced to give it to the next group of workers before him. The misperception comes from an assumption that U visa grants will open the floodgates for anyone to make a claim and receive a visa in return.

33. *See id.* at 26-27.

34. The EEOC, for example, withdrew its enforcement guidance on the protection of and remedies available to undocumented workers after the Supreme Court issued its opinion in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002). The EEOC reasoned that it had to review its policies to ensure they were in compliance with the opinion, which limited the remedies available to undocumented workers for labor violations. *See* EQUAL EMP. OPP. COMM'N, EEOC DIRECTIVES TRANSMITTAL NO. 915.002, RESCISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html>.

35. Although unlawful presence may have civil immigration consequences, such as inadmissibility in some circumstances, Congress has yet to implement criminal penalties simply for unlawful presence. *See* Immigration and Nationality Act § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) (2006) (describing inadmissibility circumstances).

36. *See* *Flores-Figueora v. United States*, 129 S. Ct. 1886, 1890-94 (2009).

this attitude permeates discussions in criminal court even where an immigrant has the right to and is eligible for some sort of visa status. Consequently, the government has successfully begun to accomplish immigration enforcement through the criminal justice system.<sup>37</sup> It is these types of prosecutions that can be curbed with a strong statement from Congress that U visa recipients do not merit prosecution for their immigration-related mistakes. If the compliance regime lets an employer avoid sanctions for violating the employer sanctions provision, a parallel structure should allow a worker to avoid similar sanctions. I believe that structure can be triggered by the issuance of U visas.

## II. THE ROLE OF THE U VISA PROVISIONS

In the U visa program, Congress authorized the issuance of visas for victims willing to cooperate with law enforcement authorities to investigate and/or prosecute a given set of crimes. U nonimmigrant status is granted when the Department of Homeland Security (DHS) determines that the applicant has proven he or she: is a victim of an enumerated crime; suffers substantial mental or physical abuse from being a victim of an enumerated crime; possesses information concerning enumerated criminal activity; and, has been helpful, is being helpful, or is likely to be helpful to the DHS, or a federal, state, or local law enforcement official, prosecutor, judge, or other authorities investigating or prosecuting an enumerated crime.<sup>38</sup> Congress enumerated the types of crimes it meant to protect against, including workplace crimes, for undocumented as well as temporary nonimmigrant workers.<sup>39</sup>

Congress authorized the U visa in the Victims of Trafficking and Violence Protection Act of 2000 to protect and encourage noncitizen victims of certain crimes to cooperate with law enforcement officials in the investigation and prosecution of those crimes.<sup>40</sup> Congress had a dual purpose—targeting crime and providing humanitarian relief—when it created the U nonimmigrant status category. The U visa program grants temporary non-

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37. See Jennifer Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1835-50 (2007) (discussing the increasing criminalization of immigration status-related offenses throughout the history of immigration law).

38. Immigration and Nationality Act § 101(a)(15)(U)(i)(III), 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2006).

39. See, e.g., S. POVERTY L. CTR., *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES* (2007), available at [http://www.splcenter.org/sites/default/files/downloads/Close\\_to\\_Slavery.pdf](http://www.splcenter.org/sites/default/files/downloads/Close_to_Slavery.pdf) (documenting the abuses in the H2B guestworker program).

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

immigrant status to victims who have suffered substantial physical or mental abuse and who have been, or are willing to be, helpful in the investigation or prosecution of a crime.<sup>41</sup> A U visa holder is entitled to four years of nonimmigrant legal status in the United States.<sup>42</sup> Congress considered the cooperation and protection of victims so essential that, unlike many other nonimmigrant categories, U visa holders can adjust status to that of lawful permanent resident three years after receiving the U visa provided they meet certain criteria.<sup>43</sup>

The U visa process calls for some evidence of the victim's cooperation or willingness to cooperate.<sup>44</sup> Currently, the statute requires a law enforcement certification (LEC).<sup>45</sup> An agency or official designated by the statute or its regulations signs a LEC certifying the crime victim/applicant has been, is, or is likely to be, helpful in the investigation or prosecution of one of the enumerated crimes.<sup>46</sup> The agency itself does not have to be a criminal law enforcement agency; the regulation, in its accompanying comments, lists child protective services agencies, for example, and other civil law enforcement agencies as able to sign LECs.<sup>47</sup> The crime itself does not have to result in a successful prosecution, or even in a prosecution at all.<sup>48</sup> Congress intended this expansive view of possible outcomes because it wanted to address the climate of fear existing within populations that have traditionally been afraid to trust law enforcement agencies.<sup>49</sup>

The LEC must be signed by "a federal, state or local law enforcement official, prosecutor, judge, or other federal, state, or local authority investigating" one or more of the enumerated crimes or similar criminal activity.<sup>50</sup> The regulations contemplate the head of the certifying agency or a designated official as the appropriate person to sign the LEC.<sup>51</sup> U visas are further limited pursuant to a yearly cap of 10,000 visas.<sup>52</sup> As is evident from these requirements, the U visa was created, in part, to aid certifying agen-

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41. 8 U.S.C. § 1101(a)(15)(U)(i)(III).

42. Immigration and Nationality Act § 214(p)(6), 8 U.S.C. § 1184(p)(6) (2006).

43. Immigration and Nationality Act § 245(m)(1), 8 U.S.C. § 1255(m)(1) (2006).

44. 8 U.S.C. § 1184(p)(1).

45. *Id.* (LECs shall state that the alien "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of criminal activity).

46. 8 U.S.C. § 1184(p)(1).

47. 8 C.F.R. § 214.14(a)(2) (2010).

48. *Id.*

49. See Saucedo, *supra* note 2, at 909 (noting that U visas were created, in part, to protect victims within vulnerable immigrant communities who often fear contact with law enforcement agencies).

50. 8 U.S.C. § 1184(p)(1).

51. 8 C.F.R. § 214.14(a)(3)(i).

52. 8 U.S.C. § 1184(p)(2)(A).

cies in their attempts to serve an immigrant community that has traditionally been fearful of involvement with the law enforcement community.

The purpose of the U visa provision is to effectuate congressional intent to protect certain noncitizen crime victims.<sup>53</sup> The Act's congressional purpose is demonstrated in three aspects of the enabling legislation and its history: (1) the U visa as a tool for law enforcement; (2) the U visa as humanitarian relief for those who are helpful to law enforcement; and (3) the U visa as protection for workers who suffer crimes in the workplace.

#### A. The U Visa as a Tool for Law Enforcement

A major constituency supporting the creation of U nonimmigrant status was and is law enforcement at local, state and federal levels. The Act states U nonimmigrant status was created to:

strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.<sup>54</sup>

The purpose of the statute focuses on the victimization of helpful witnesses and the need to regularize their status.<sup>55</sup>

The statute lists a set of enumerated crimes for which victims who suffer substantial physical or mental abuse can seek nonimmigrant legal status. They include the following enumerated crimes, or similar criminal activity:

rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness

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

54. 8 U.S.C. § 1513(a)(2)(A) (2006).

55. *Id.* § 1513(a)(2)(B) ("Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions.").

tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.<sup>56</sup>

The enumerated crimes are all crimes in which some victim cooperation is necessary for investigation or prosecution.

### **B. The U Visa as Humanitarian Relief for Those who are Helpful to Law Enforcement**

The U visa provisions of the statute carve out a category of noncitizens for whom the statute's general immigration enforcement goals do not apply. They are by no means the only group of noncitizens in a category of people eligible for immigration relief. The category itself represents Congress's exercise of its power to determine who can seek admission to the United States, and under what terms.<sup>57</sup> The U visa provides relief for noncitizens who may have entered the country without authorization but are nonetheless protected under immigration law due to their victimization.

So expansive were the protection goals of Congress that it waived all grounds of inadmissibility for U visa recipients, including all criminal grounds, except for Nazi affiliations, genocide or terrorist activities.<sup>58</sup> The broad waiver provision for U nonimmigrant crime victims indicates the extent to which Congress sought to protect U visa crime victim recipients. Congress gave DHS discretion to determine who should receive waivers.<sup>59</sup> In the *Moreno-Lopez* case, for example, DHS used its discretion and granted U nonimmigrant status to the employees due to the extortion and labor exploitation they experienced, and the cooperation they provided to the EEOC in its investigation.<sup>60</sup> DHS granted the status despite any earlier unlawful presence, unauthorized work status, or false use of social security numbers.<sup>61</sup>

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56. Immigration and Nationality Act § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (2006).

57. Courts have historically acknowledged congressional plenary power to determine the categories of noncitizens who can seek admission. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Ekiu v. United States*, 142 U.S. 651 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

58. Immigration and Nationality Act § 212(d)(14), 8 U.S.C. § 1182(d)(14) (2006).

59. *Id.*

60. Amici Brief, *supra* note 24, at 11.

61. *Id.*

### C. The U Visa Protects Workers who Suffer Crimes in the Workplace

Several of the statute's enumerated crimes, such as indentured servitude, trafficking, and peonage, relate specifically to crimes against workers.<sup>62</sup> Others, such as those relating to sexual assault, being held against one's will, or being forced to work through extortion, often take place in the workplace, especially when the workers are undocumented.<sup>63</sup> The U visa regulations specifically mention the EEOC and the DOL among the authorized certifiers for U visas.<sup>64</sup> Both the EEOC<sup>65</sup> and DOL<sup>66</sup> have issued guidelines for assisting cooperating crime victims with law enforcement certifications based on crimes that occur in the workplace. Both agencies recognize in their guidelines that such protections are necessary to provide immigrants the assurances they need to report criminal misconduct by employers.<sup>67</sup>

The U visa regulations broadly define the parameters of an investigation or prosecution, stating that the clause "investigation or prosecution" means "the detection or investigation of a qualifying crime or criminal activity," in addition to, and separate from, "the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity."<sup>68</sup> This distinction in definition is important because it recognizes Congress's intent in the statutory language, providing help "to other Federal, State, or local authorities investigating or prosecuting criminal activity."<sup>69</sup> Congress wanted the U visa to be a tool that an agency such as the EEOC, which does not have explicit criminal prosecutorial powers, could use to investigate what would be considered a crime or criminal activity, even if no formal criminal prosecutorial power exists in the agency.

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62. *See supra* note 56 and accompanying text.

63. *See supra* note 56 and accompanying text.

64. 8 C.F.R. § 214.14(a)(2) (2010).

65. Memorandum from Naomi Earp, Chair, Equal Employment Opportunity Commission (EEOC), to District Directors and Regional Attorneys, EEOC (July 3, 2008) [hereinafter EEOC Memorandum], available at [http://iwp.legalmomentum.org/immigration/u-visa/government-memoranda-and-factsheets/U%20VISA\\_EEOC%20Certification%20Memo\\_7.3.08.pdf](http://iwp.legalmomentum.org/immigration/u-visa/government-memoranda-and-factsheets/U%20VISA_EEOC%20Certification%20Memo_7.3.08.pdf).

66. Press Release, DOL News Release, U.S. Labor Department to Exercise Authority to Certify Applications for U Visas (Mar. 15, 2010) [hereinafter DOL News Release], available at <http://www.dol.gov/opa/media/press/opa/OPA20100312.html>.

67. DOL News Release, *supra* note 66; EEOC Memorandum, *supra* note 65.

68. 8 C.F.R. § 214.14(a)(5).

69. Immigration and Nationality Act § 101(a)(15)(U)(i)(III), 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2006).

The EEOC has civil investigative authority over cases that overlap with the crimes enumerated in the U visa provisions.<sup>70</sup> The EEOC's investigative jurisdiction over workplace discrimination and harassment, for example, means the EEOC has jurisdiction over workplace sexual harassment investigations that could involve the enumerated crimes of rape, sexual assault, sexual exploitation, or abusive sexual contact.<sup>71</sup> The EEOC may also investigate discrimination claims that involve involuntary servitude, peonage, trafficking, obstruction of justice, or, as in cases where the employer holds immigration status over the employee's head, extortion.<sup>72</sup> Accordingly, in *Moreno-Lopez*, the EEOC was well placed to find the defendants were victims of qualifying criminal activity, namely, extortion.<sup>73</sup> Those are the very victims Congress intended to protect.<sup>74</sup>

### III. THE FIXES: STRENGTHENING THE U VISA PROVISIONS

On the assumption that a stronger U visa provision will make for stronger protections of workers, I offer the following suggestions for improving the program and ensuring that victimized workers are allowed to remain in the United States based on their willingness to step forward to help enforce labor and employment rights. Many of these suggestions are quite specific. They are based on some of the experiences I have had in advocating on behalf of clients seeking U visa protection. They are also based on the experiences of advocates representing workers who have chosen to step forward to vindicate workplace rights in egregious conditions. The suggestions are divided into the following categories: (1) ensuring workplace victims are not punished for their willingness to vindicate their workplace rights; (2) ensuring the enforcement and judicial branches of government understand Congress's intent to protect certain workers from workplace abuses regardless of immigration status; and (3) acknowledging these are still piecemeal changes to a statute that needs a comprehensive overhaul.

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70. See Saucedo, *supra* note 2.

71. 8 U.S.C. § 1101(a)(15)(U)(i)(III); see also EEOC Memorandum, *supra* note 65, at 2.

72. 8 U.S.C. § 1101(a)(15)(U); EEOC Memorandum, *supra* note 65, at 2.

73. *United States v. Moreno-Lopez*, No. 4:09-CR-21, 2010 U.S. Dist. LEXIS 2597 (E.D. Tenn. Jan. 13, 2010).

74. See 8 U.S.C. § 1101(a)(15)(U)(iii).

### A. Ensuring That Victims are not Punished

#### 1. *Create a Parallel to T Nonimmigrant Status Protection Prohibiting Criminal Charges Against Victims for Crimes Related to Trafficking*

T nonimmigrant status is granted to victims of serious forms of human trafficking.<sup>75</sup> Just as with U nonimmigrant status, adult T victims must be willing to comply with reasonable requests for assistance in the prosecution or investigation of acts of human trafficking.<sup>76</sup> Unlike current U nonimmigrants, however, T nonimmigrants are protected from prosecution for any offenses related to their trafficked situation.<sup>77</sup> This means T nonimmigrants are immune from creative prosecutorial charging tactics for crimes such as document fraud or identity theft. The protection for trafficking victims is quite explicit:

[Criminal liability] does not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000, if that conduct is caused by, or incident to, that trafficking.<sup>78</sup>

The same type of protection must be afforded to U visa recipients, who are just as victimized as human trafficking victims in many cases. Affording such protection to U nonimmigrant victims would signal to judges and prosecutors that victims are just that. They are not trying to game the system, seek special privileges, or cut to the front of the line. Affording protection would also recognize that the employment structures encouraged by employer sanctions have serious and concrete deleterious effects on some of the most vulnerable employees in the workplace. Finally, it would signal to judges and prosecutors that Congress's intent with respect to immigration law is more nuanced and complex than simply removing everyone from our borders regardless of their life situation.

#### 2. *Amend Social Security Act to Exclude False Use of Social Security Numbers for Work From Criminal Sanctions*

Although this suggestion does not affect the Immigration and Nationality Act exclusively, it does affect immigration policy and the immigration system, especially its removal and detention mechanisms. Over and over again we see in ICE propaganda and media materials that current enforcement goals include the elimination of criminals involved in document

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75. 8 U.S.C. § 1101(a)(15)(T)(i)(I).

76. 22 U.S.C. § 7105(b)(1)(E)(i)(I) (2006).

77. 18 U.S.C. § 1592(b) (2006).

78. *Id.*



fraud, identity theft, and social security fraud.<sup>79</sup> In fact, criminalizing the use of false social security numbers for work is a relatively recent phenomenon that occurred after the passage of IRCA. Interestingly, the fraud provisions of the Social Security Act, which were amended with the passage of IRCA, provide some indication that the use of false social security numbers for work was not contemplated as a fraud offense.<sup>80</sup> Congress implemented identity theft and related fraud statutes not as part of an overall immigration enforcement regime, but rather as a general set of laws meant to curb activities related to and stemming from identity theft.<sup>81</sup> Some indication of this is provided in the social security fraud statute, which exempts the use of a social security number by certain immigrants from the definition of fraud.<sup>82</sup> When identity theft was considered for false use of social security numbers for employment after the last immigration overhaul in 1986, Congress exempted the false use of a social security number for obtaining work from the ambit of the social security fraud statute.<sup>83</sup> The government's use of fraud statutes in cases where, for example, victims step forward to challenge labor-related crimes undermines both labor law and arguably, the intent of the fraud statutes themselves.

### 3. *Increase the Number of U Visas Available Every Year*

Currently, the U visa program is capped at 10,000 visas per year.<sup>84</sup> For the first time since the implementation of the U visa regulations in 2007, the program has reached the cap before the end of the fiscal year.<sup>85</sup> USCIS announced on July 15, 2010 that it approved 10,000 U visa petitions for fiscal year 2010.<sup>86</sup> U visa petitioners must now wait until the beginning of the new fiscal year in October to receive U visas.<sup>87</sup> The fact that the program reached its cap three-quarters of the way through the fiscal year indicates not only that demand is high, but also immigrant victims are coope-

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79. ICE, Worksite Enforcement Strategy, Apr. 30, 2009, *supra* note 16, at 2.

80. *See* Social Security Act, 42 U.S.C. § 408(e)(1) (2004) (exempting certain noncitizens, namely those legalized under the provisions of the IRCA—temporary residents and special agricultural workers—from liability for fraud offenses under 42 U.S.C. § 408(a)(6), (7)).

81. *See, e.g.*, 42 U.S.C. § 408.

82. *Id.* § 408(e)(1).

83. *Id.*

84. Immigration and Nationality Act § 214(p)(2)(A), 8 USC § 1184(p)(2)(A) (2006).

85. Press Release, U.S. Citizenship & Immigr. Servs., USCIS Reaches Milestone: 10,000 Visas Approved in Fiscal Year 2010 (July 15, 2010), *available at* <http://www.uscis.gov/pressroom> (follow “USCIS Reaches Milestone: 10,000 U Visas Approved in Fiscal Year 2010”).

86. *Id.*

87. *Id.*

rating with law enforcement officials in important and effective ways. This also means, however, there will likely be a backlog for years to come in the granting of such visas. The implementation of the program was based on a recognition that immigrants were being victimized and were afraid to come forward for fear that cooperation with law enforcement would lead to deportation. The fact that the cap was reached so long before the end of the fiscal year indicates that the program reached its intended audience and victimized immigrants perceive the visa as a form of protection from their victimized status. The numbers also indicate the demand far surpasses that expected by Congress when it first created the program. Congress should re-evaluate the program in light of its goals and purpose, and increase the cap so the program can continue to be available as workplace-related criminal activity becomes more exposed.

#### 4. *Make Explicit That Work-Related Crimes are Included in the U Visa Scheme*

The statute on its face gives clear indication that the U visa was implemented in part to protect against workplace criminal activity.<sup>88</sup> The statute enumerates the following crimes, which are typically found in a work-related setting: trafficking, peonage, involuntary servitude, and slave trade.<sup>89</sup> There are other categories of crime listed in the statute that could fit the workplace context. For example, there may be workplace scenarios in which the following enumerated crimes may also occur: rape, torture, sexual assault, abusive sexual contact, sexual exploitation, unlawful criminal restraint, false imprisonment, blackmail, extortion, felonious assault, witness tampering, obstruction of justice, and/or perjury.

In the immigration context, one set of crimes that should be considered operative in relationships between unscrupulous employers and immigrant employees includes the crimes of extortion, witness tampering, and obstruction of justice. These are crimes the public would not necessarily associate with the hiring of undocumented workers. As we have seen in the *Moreno-Lopez* case and similar incidents, however, to the extent employers rely on immigration status (or lack thereof) to maintain a coercive, substandard, or subjugating workplace, their actions may rise to the level of criminal activity.<sup>90</sup>

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88. See *supra* notes 55-56 and accompanying text; see also *supra* Part II.C.

89. See *supra* notes 55-56 and accompanying text.

90. See *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894 (M.D. Tenn. 2009); see also Amici Brief, *supra* note 24, at 11 (noting that the EEOC and DHS both found defendants' employer to have committed extortion).

In any future reauthorization of the Battered Immigrant Women's Protection Act (the authorizing statute for the U visa provision), Congress should signal its serious commitment to worker protection regardless of immigration status by reiterating that the criminal activity contemplated in the Act includes work-related activity. Such an indication would serve two primary purposes: (1) it makes clear congressional intent to protect workers from the negative effects of retaliation that occurred at Durrett Cheese Sales,<sup>91</sup> namely the prosecution of workers who complain about workplace conditions and face retaliation in the form of threatened deportation; and (2) it provides clear guidance to all executive agencies, including government prosecutors, that U visa petitioners deserve protection from criminal prosecution for acts underlying the criminal activity including working without authorization.

5. *Expand Workplace Related Crimes to Include Wage and Hour Violations, Discrimination, and Collective Bargaining Violations*

As I argued earlier in this essay, employer sanctions provisions that are enforced to encourage employer compliance actually create a workplace structure that places undocumented workers at a great disadvantage.<sup>92</sup> Employers in compliance with these minimal requirements will generally not be held liable for immigration law violations or even prosecuted.<sup>93</sup> This does not necessarily create a disincentive to hire undocumented workers. Instead, the current enforcement regime places a great burden on employees, who—once they use the documentation employers require (without asking questions)—have become liable to charges of criminal use of

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91. See *Montano-Perez*, 666 F. Supp. 2d 894. In *Montano-Perez*, twelve immigrant-workers employed by Durrett Cheese Sales complained that they were victims of abuse, discrimination, and unfair wages. *Id.* at 897. After multiple demands for back pay, the workers protested by refusing to work and refusing to leave the premises. *Id.* at 897-98. Their employers called the police and reported the workers to immigration authorities. *Id.* at 898. The court denied a motion to dismiss retaliation claims, holding that the plaintiffs provided significant factual support that ICE was called because they complained about pay. *Id.* at 901. Retaliation is illegal under 29 U.S.C. § 215(a)(3) (1938).

92. See *supra* notes 9-10 and accompanying text.

93. For a description of the "minimalist approach," see JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 49-50 (2005) ("If a worker presents documents that appear reasonably legitimate when she is hired, the employer records them on the I-9 form designed for the purpose, drops the form in a file, and thinks no more about it—until the day comes when such workers make some demand the employer wants to resist. It may be a simple request for a bathroom break or for overtime wages. More often, it comes as the first stirrings of a union organizing campaign. Suddenly, the employer remembers employer sanctions. If he had never filled out I-9 forms, he gets the urge to comply with the law, forcing all the workers to provide legal papers on the spot. If he has I-9 files, he begins to pay new attention to them, calling the Social Security Administration to check on the validity of numbers, demanding to see new versions of documents that have expired.").

fraudulent documents for work.<sup>94</sup> The imbalance in the employer-employee relationship creates great leverage in favor of employers. Unscrupulous employers—and even fair-minded ones that comply with the minimal requirements to avoid prosecution—can take advantage of the subservient labor force created by the immigration enforcement regime.

There is little a U visa program can do to dismantle the broader structure that has been created. The U visa program can more directly apply in situations where employers take advantage of the imbalance in power relations that immigration enforcement has introduced in the immigrant workplace. So, in instances where undocumented workers are attempting to counter the imbalance through collective bargaining activities, complaints over wage and hour violations, or national origin or other protected class discrimination, and they experience retaliation or similar action that signals regaining employer leverage, employees should be allowed to seek the protection of the U visa. In any future reauthorization of the Trafficking Victims Protection Act, therefore, Congress should expand workplace-related crimes to include crimes that arise out of wage and hour violations, discrimination, or collective bargaining violations. Such a step would acknowledge the unintended imbalance in the employer employee relationship created by the current immigration enforcement and employer compliance regime.

*6. Define Certain Workplace-Related Crimes (e.g., Coercive or Extortionist Practices in the Workplace) as Per Se Evidence of Mental and Physical Abuse in the Regulations and/or Rework the Definition of “Victim” in the Provision*

The U visa program requires a petitioner to show that he/she has suffered substantial mental or physical abuse as a result of having been the victim of enumerated criminal activity. The regulations underlying the U visa program state:

Whether abuse is substantial is based on a number of factors, including but not limited to: 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. No single factor is a prerequisite to establish that the abuse suffered was substantial. Also, the existence of one or more of the factors automatically does not create a presumption that the abuse suffered was substantial. A series of acts taken together may be considered to constitute

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94. 18 U.S.C. § 1028(a)(1) (2006) (creating liability where a person “knowingly and without lawful authority produces an identification document”).

substantial physical or mental abuse even where no single act alone rises to that level. . . .<sup>95</sup>

A *per se* presumption of substantial abuse should apply to certain workplace-related crimes, including those arising from the structures created when employers comply with the minimal requirements of the employer sanctions provisions. So, for example, regulations should recognize that employees who must abide by an employer's desire for subservience automatically suffer mental abuse rising to the level of requisite severity just by virtue of the fact that they experience serious dignitary harms when they must act subservient in the workplace. Again, the structure created by current compliance mechanisms, and the employer's decision to not ask questions at the same time he seeks subservient immigrant labor, should be sufficient evidence of harm to the employee.

Why is this important? One of the most difficult barriers to seeking U visa status for workplace-related crimes is that the employees who step forward to vindicate their rights and seek redress in the workplace are often victims, but are not seen by the public or judicial actors as victims. Instead, they are viewed as troublemakers, agitators, or people trying to take advantage of the system. This is not the case in the vast majority of cases where employers are investigated for workplace-related crimes. And yet, because workers may start civil actions before seeking criminal sanctions, and because they have figured out how to vindicate their rights in court, they are not perceived as passive and victimized, which is the prototype of someone who might also suffer substantial mental or physical harm.<sup>96</sup> A clear statement of congressional intent would signal to law enforcement officials and judicial actors that even those who stand up for labor rights in the workplace can be victims who deserve protection. It would also remove biases experienced by law enforcement and other officials that could infect the interpretation of the term "substantial."

In addition, the congressional or executive branch could redefine the term "victim." Currently, a victim is defined as anyone who suffers directly or in some cases, indirectly, from criminal activity.<sup>97</sup> An indirect victim can be, for example, a parent whose child has been sexually assaulted or murdered. The term victim can be changed in the regulations to include

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95. 8 C.F.R. § 214.14(b)(1) (2010).

96. Marjorie S. Zatz, *Using and Abusing Mexican Farmworkers: The Bracero Program and the INS*, 27 LAW & SOC'Y REV. 851, 855 (1993) ("[T]he braceros [Mexican farmworkers] in the Pacific Northwest were not *passive* victims. They responded to exploitation, racial discrimination, and harsh living conditions with strikes, work stoppages, and demands for repatriation.").

97. BLACK'S LAW DICTIONARY (9th ed. 2009) ("A person harmed by a crime, tort, or other wrong.").

those who suffer indirect effects of employer action, such as those who are hired into discriminatory workplaces or those who work in places reputed to be involved in labor trafficking.

### B. The Limited Effect of U Visa Fixes to the INA

In this section, I will address the seemingly limited scope of the reforms I suggest to the U visa program as well as the inherent flaws in trying to reform any immigration system short of open borders. Of course, the fixes I propose amount to piecemeal reform. The fixes I propose are limited not just because they affect relatively few people, but also because they do not address the assumption in immigration law that relief must be individualized and can only be provided for humanitarian purposes. I will address each of these three flaws separately.

#### 1. *These Fixes Continue in the Tradition of Piecemeal Reform of the Immigration System*

As with any reform proposal short of open borders, which would allow for a complete elimination of the current immigration scheme, the changes I propose here are piecemeal. They fail to propose the paradigm shift necessary for full incorporation of the immigrant population in this country or outside the country seeking entry. Nor do they address the various calls for stricter border enforcement and more restrictive policies. What it does do, like so many of the piecemeal proposals out there, is attempt to fix the unintended consequences of some other previous fix in the Act. The enforcement regime that grew out of the employer sanctions provisions ultimately affected not the employers, who figured out how to protect themselves by influencing compliance rules, but the workers themselves, who now carry the substantial risks of using false documentation for work-related purposes.<sup>98</sup> While the initial fix was aimed at deterring employers from creating a pull for undocumented labor, its implementation did nothing to stop the employer pull, and instead places high-stakes risks on employees.<sup>99</sup> The consequence was, of course, a workforce fearing deportation for speaking out in the workplace.<sup>100</sup> Strengthening the U visa provisions for workplace violations realigns the balance of power in favor of workers, who should be protected despite the overall enforcement goals of immigration law. Yes, the fix is a piecemeal approach to immigration

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98. See Lee, *supra* note 11.

99. See generally Saucedo, *supra* note 11, at 968.

100. See generally *id.*

law. But, more importantly, it is a key step to integrating and resolving the tensions between immigration and employment law enforcement goals.

2. *These Fixes Continue to Perpetuate the Victim-Based Humanitarian Model of Immigration Relief*

The proposed changes I advocate do not address the fact that the petitioner must still be a victim. The current immigration system is based, in part, on humanitarian principles.<sup>101</sup> Providing relief to victims of serious crimes seemed an important component of a program initiated to help law enforcement encourage undocumented crime victims to come forward. The problem with accepting the U visa victim paradigm for work-related crimes is the cognitive dissonance that comes from associating workers with victims. The changes I propose may not stick without a concerted level of education around the existence and prevalence of employer actions that rise to the level of criminal activity in the immigrant workplace.<sup>102</sup> That was the case with the judge in the *Moreno-Lopez* case, who questioned whether a U visa grant amounted to amnesty for the workers involved.<sup>103</sup> Without such a paradigm shift, changes in the U visa provision alone will do little to influence the attitudes of present law enforcement officials or DHS in favor of the traditional, passive victim.<sup>104</sup>

3. *These Fixes Continue to Ignore the Collective Nature of Workplace Exploitation by Focusing Immigration Relief on Individuals*

The changes I propose do nothing to alter the paradigm of individual-based immigration relief on which the system is currently based.<sup>105</sup> A more effective worker protection system might protect all workers in a given industry, or even all workers involved in an enforcement action at a given worksite, depending on how well protected an employer has become against prosecution for knowingly hiring undocumented workers. In other words, if an employer has hired lawyers to negotiate compliance efforts

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101. See generally CONG. BUDGET OFFICE, IMMIGRATION POLICY IN THE UNITED STATES (2006), available at <http://www.cbo.gov/ftpdocs/70xx/doc7051/02-28-Immigration.pdf>.

102. Immigrant advocates are now involved in education programs aimed at providing information about work-related programs. Even the programs themselves, however, demonstrate the cognitive dissonance. One program terms law enforcement agencies such as the EEOC and the DOL as “nontraditional.” See Webinar: U Visas after an Enforcement Action: Collaborating With Non-Traditional Law Enforcement Agencies, hosted by the Immigration Advocates Network (Sept. 8, 2010) (on file with author).

103. See Transcript of Sentencing Hearing, *supra* note 31.

104. See Chacón, *supra* note 37, at 1848–49.

105. See CONG. BUDGET OFFICE, *supra* note 101 (explaining current immigration relief policies).

with the government, the workers themselves should correspondingly receive U visa protection if they seek to vindicate workplace rights. This would be an expansion of the current program, but one which would advance the desired goal of protecting workers from the disproportionate negative effects of immigration enforcement efforts aimed at employers.<sup>106</sup>

### CONCLUSION

The consequence of decades of worksite and employer-focused immigration enforcement has been the continued erosion of workplace rights for noncitizen workers. It is certainly not clear that Congress's intent was to create the resulting exploitative, second-class labor market that arguably exists today in immigrant workplaces. In fact, Congress has given an indication in its immigration legislation that criminal victims—even in the workplace—deserve protection. Providing U nonimmigrant status to workplace victims meets the goal of worker protection, at the same time employer sanctions goals are met. The fixes I propose here demonstrate how Congress can make a strong statement now to effectuate its intent to protect workplace victims from the subordinated status they face as a result of employer sanctions and the government's subsequent compliance regimes.

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106. For an exploration of a collective model of reform, see Saucedo, *supra* note 2.



