Giving Voice to the Silenced: The POWER Act as a Legislative Remedy to the Fears Facing Undocumented Employees Exercising Their Workplace Rights

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Undocumented workers in the United States number nearly eight million and are key contributors to major industries and regional economies across the country. Yet undocumented workers often hesitate to report labor law violations due to the fear of making themselves known to immigration authorities. In recent years, employers have felt emboldened to ignore the labor rights of undocumented workers amidst a political climate marked by anti-immigrant rhetoric and increased government monitoring of immigrants. Although federal, state, and local law all provide criminal and civil remedies for undocumented workers who have experienced workplace violations, these forms of relief do not protect undocumented workers from their greatest fear — deportation. Consequently, many undocumented workers continue to suffer workplace abuse in silence.

This Note explores two complementary federal government reforms to insulate undocumented workers who report workplace abuse from deportation: 1) expansion of the U nonimmigrant status visa program, and 2) restriction of U.S. Immigration and Customs Enforcement's ability to deport individuals who have pending actions against employers. This Note then analyzes proposed legislation that fixes the shortcomings of these attempts at reform: The Protect Our Workers from Exploitation and Retaliation Act (POWER Act), most recently introduced in Congress in November of 2019. Finally, given enforcement trends that emerged under the Trump Administration, this Note critically assesses the viability of the POWER Act and considers ways to bolster the legislation's protections for undocumented workers.

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I. INTRODUCTION

Xue Hui Zhang was in the middle of giving a deposition when he was picked up by Immigration and Customs Enforcement (ICE) agents in early August 2019.[1] Mr. Zhang's deposition was part of a lawsuit he had brought against his former employer.[2] Mr. Zhang, an undocumented immigrant, had worked as a chef in Albany, New York, and claimed that he was due over $200,000 in back wages accumulated over a seven-year period on the job.[3] The deposition took place at the opposing counsel's office; as Mr. Zhang left the building during a lunch break, he was taken into custody by several ICE agents.[4] Given the timing and location of the arrest, Mr. Zhang and his lawyer believe that Mr. Zhang's employer tipped off ICE in retaliation for pursuing the lawsuit.[5]

This episode is by no means unique. Undocumented workers who experience mistreatment or discrimination on the job frequently face immigration consequences for pursuing legal recourse against employers.[6] This retaliation can take the form of employers reporting or threatening to report their undocumented workers to the government.[7] ICE also sometimes conducts enforcement operations after discovering on its own the immigration status of a worker involved in pending investigations or lawsuits.[8] Together, these actions generate a chilling effect among undocumented workers who fear that coming forward with complaints will result in deportation instead of resolution of their claims. As a result, they are forced to endure workplace abuse silently.[9] Employers, in turn, know they can more easily take advantage of undocumented

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1. *See* Beth Fertig, *Undocumented Restaurant Worker is Arrested by ICE During Deposition Against His Employer*, WNYC (Aug. 16, 2019), https://www.wnyc.org/story/undocumented-restaurant-worker-arrested-ice-during-deposition-against-his-employer/ [https://perma.cc/6X2H-RFLR].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *See generally* REBECCA SMITH ET AL., ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS' RIGHTS (2009), https://ecommons.cornell.edu/bitstream/handle/1813/88125/afl_cio16_IcedOut_report.pdf [https://perma.cc/5UP4-KA4P] (documenting various instances of employer retaliation in response to undocumented workers initiating claims of employer misconduct).
7. *Id.* at 7.
8. *Id.* at 23.
9. *Id.*

workers for financial gain.[10] With American employers in constant search of cheap labor, this dynamic creates a perverse incentive for employers to hire and mistreat undocumented workers.[11]

The failure to protect undocumented workers' labor rights derives, in large part, from the federal government's prioritization of immigration over labor and employment enforcement.[12] This dynamic became increasingly pronounced under a Trump Administration that embraced a stridently anti-immigrant agenda.[13] Among other hardline immigration enforcement policies, the Executive Branch effectuated sharp increases in raids and audits of workplaces.[14] In fact, the *Wall Street Journal* reported that as of Fiscal Year 2019, ICE workplace investigations had quadrupled compared to Fiscal Year 2016.[15] Meanwhile, the agencies entrusted with regulatory oversight of labor infractions took on a less robust enforcement agenda.[16]

The Executive Branch's reordering of priorities has had a dangerous impact on undocumented workers' abilities to exercise their civil and labor rights. While civil and criminal remedies exist to penalize employers who mistreat undocumented workers, the underlying fear of deportation discourages workers from availing themselves of these remedies.[17] Undocumented workers who come forward risk deportation; those who don't are vulnerable to abuse from employers who know their workers have been cowed into silence.

Employers have, in turn, taken advantage of a climate that has made their workers even more fearful of speaking out.[18] Indeed,

10. *See* Irene Zopoth Hudson & Susan Schenck, Note, *America: Land of Opportunity or Exploitation*, 19 HOFSTRA LAB. & EMP. L.J. 351, 356 (2002).

11. *Id.*

12. *See infra* Part II.B (describing the long-standing enforcement asymmetry among federal government agencies prioritizing immigration enforcement).

13. *See* Kati L. Griffith & Shannon Gleeson, *Trump's 'Immployment' Agenda: Intensifying Employment-Based Enforcement and Un-authorizing the Authorized*, 48 SW. L. REV. 475, 477 (2019).

14. *Id.*

15. *See* Michelle Hackman, *Workplace Immigration Inquiries Quadruple Under Trump*, WALL ST. J. (Dec. 5, 2019, 8:00 AM), https://www.wsj.com/articles/workplace-immigration-inquiries-quadruple-under-trump-11575550802 [https://perma.cc/SJ3F-WSTC].

16. *See infra* Part II.B (highlighting the reduced enforcement of labor rights more generally during the Trump Administration, as well as the diminished collaboration between undocumented workers and labor-related agencies due to heightened deportation fears).

17. *See infra* Part II.A (discussing current legal avenues available to undocumented workers seeking to decrease the prospect of immigration-related retaliation in response to initiating workplace claims against employers).

18. *See* Griffith & Gleeson, *supra* note 13 at 495.

workplace violations involving undocumented immigrants have skyrocketed, with reported incidents of immigration-based retaliation jumping ten-fold in California between 2016 and 2018.[19] Abuse of immigrant workers has grown even more rampant during the COVID-19 pandemic, as agricultural, poultry, and other industries that rely on undocumented labor ignored their employees' health concerns.[20]

This Note responds to these concerns by analyzing a more robust check on the Executive Branch's regulatory discretion to prioritize immigration enforcement over labor rights. Part II provides a brief overview of the legal rights provided to undocumented laborers under current law and the ways in which these protections can fail to safeguard workers from abuse and fear of deportation. Further, Part II explores the persistent asymmetry in regulatory oversight that has empowered the Department of Homeland Security (DHS), instead of the relevant labor agencies, to dictate the federal government's response to undocumented workers with claims of workplace violations. Part II also depicts the ways in which this inter-agency dynamic became more pronounced under the Trump Administration.

Part III then evaluates two frequently proposed reforms designed to help protect mistreated undocumented workers from deportation: (1) the U nonimmigrant status visa program and (2) a Memorandum of Understanding (MOU) between federal labor and immigration agencies intended to limit immigration enforcement activities at worksites subject to pending labor investigations. Congress enacted the U visa in 2000 to provide a pathway to legal residency for immigrant victims of various crimes who might otherwise fear cooperating with law enforcement due to their immigration status.[21] The U visa program does offer support to undocumented workers who suffer certain employment-related crimes, but many immigrant and labor advocates have called for greater

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19. *See* Deepa Fernandes, *Undocumented Workers Fight for Wages Under the Threat of Deportation*, WORLD (Mar. 20, 2018, 5:45 PM), https://www.pri.org/stories/2018-03-20/undocumented-workers-fight-wages-under-threat-deportation [https://perma.cc/Z3SZ-NDLK].

20. This has manifested in documented occupational safety hazards within work sites that rely heavily on undocumented workers. For example, some enclosed residential facilities on farms and tight work environments in factories have led to increased exposure to COVID-19. *See, e.g.*, Brooke Jervis, *The Scramble to Pluck 24 Billion Cherries in Eight Weeks*, N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/magazine/cherry-harvest-workers.html [https://perma.cc/WWT5-SJP9].

21. Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, § 1513(a)(2)(B), 114 Stat. 1464, 1534 (codified as amended at 8 U.S.C. § 1101).

utilization of its protection for undocumented victims of employment violations.[22] The MOU, although not legally binding, serves as an interagency agreement that aims to minimize the deportation risks facing workers while they bring labor complaints against employers.[23] Part III posits that by granting discretion to the Executive Branch, both proposals fail to protect undocumented workers. This Note highlights these shortcomings by analyzing policy decisions that have frustrated the effectiveness of the U visa and the MOU under the Trump Administration.

Part IV argues that the Protect Our Workers from Exploitation and Retaliation (POWER) Act can address these long-standing concerns facing undocumented workers as well as the new regulatory barriers enacted by the Trump Administration. The POWER Act aims to codify the MOU and improve the U visa program to better serve the interests of undocumented workers.[24] Finally, Part V of this Note critically analyzes the legal effectiveness and political viability of the POWER Act and considers ways of bolstering the legislation to better protect workers from deportation.

II. HISTORICAL AND LEGAL BACKGROUND: UNDOCUMENTED WORKERS IN THE UNITED STATES

A. THE REALITY FACING UNDOCUMENTED WORKERS: LEGAL RIGHTS AND CONTINUED ABUSES

Undocumented workers' employment experiences in the U.S. are governed by two different, and often opposing, legal regimes: immigration law and labor law. On one hand, the U.S. immigration enforcement regime shapes the lives of undocumented individuals on and off the job. The Immigration Reform and Control Act (IRCA), passed in 1986, prohibited the hiring of undocumented individuals and also established deportation as a punishment for

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22. *See, e.g.*, Leticia Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 893 (2008).

23. *See* Julie Braker, Note, *Navigating the Relationship Between the DHS and the DOL: The Need for Federal Legislation to Protect Immigrant Workers' Rights*, 46 COLUM. J.L. & SOC. PROBS. 329, 348 (2013).

24. *See* Protecting Our Workers from Exploitation and Retaliation (POWER) Act, S. 2929, 116th Cong. (2019) (amending Section 239(e) of the Immigration and Nationality Act, 8 U.S.C. § 1229(e)).

working without valid work authorization.[25] Since the passage of IRCA, the federal government has raided worksites and audited businesses to identify individuals for deportation.[26] Under IRCA, Congress enlisted the support of employers in furtherance of the government's workplace enforcement objectives.[27] Employers may be held criminally and civilly liable for employing undocumented workers and must provide employment records to immigration authorities upon request.[28]

Yet despite these changes, undocumented workers continue to fuel large parts of the economy. Pew Research Foundation estimates that, as of 2017, there are nearly eight million undocumented workers in the United States, representing nearly five percent of the U.S. labor force.[29] These workers often take jobs that citizens and legal residents are reluctant to take in lower-paid sectors of the economy, including agriculture, construction, and child care.[30] And undocumented workers, according to one analysis, pay nearly twelve billion dollars a year in state and local taxes.[31]

Undocumented workers, despite their unauthorized status, retain many of the same labor rights as ordinary employees. They are considered "employees" under the National Labor Relations Act and are afforded fully-protected participation in union and other workplace organizing efforts.[32] Federal employment discrimination laws also cover undocumented workers.[33] The Fair

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25. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C and 42 U.S.C.).

26. *See* Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 500 (2004). As a result of IRCA, employers must collect immigration information from employees. These records are tracked on I-9 Employment Eligibility Verification forms that, as per IRCA, must be made available to DHS upon demand. *Id.*

27. *Id.*

28. *Id.*

29. *See* Jens Manuel Krogstad et al., *5 facts about illegal immigration in the U.S.*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/ [https://perma.cc/Q2NZ-PUGX].

30. *See* Miriam Jordan, *8 Million People Are Working Illegally in the U.S. Here's Why That's Unlikely to Change.*, N.Y. TIMES (Dec. 11, 2018), https://www.nytimes.com/2018/12/11/us/undocumented-immigrant-workers.html [https://perma.cc/C836-Y3XC].

31. *See* Dan Kosten, *Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power*, NAT'L IMMIGR. F. (Sept. 6, 2018), https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/ [https://perma.cc/AD85-AS4K].

32. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984).

33. *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1070 n.13 (9th Cir. 2004) (determining that federal employment discrimination statutes apply to workers regardless of immigration status); EEOC v. Restaurant Co., 490 F. Supp. 2d 1039, 1047 (D. Minn. 2007)

Labor Standard Act's (FLSA) minimum wage and overtime provisions likewise apply to undocumented workers.[34] Additionally, employers are not legally permitted to retaliate against undocumented workers for exercising these rights.[35] Indeed, most relevant to the undocumented workforce, courts have found that reporting employees to immigration authorities or threatening to do so in response to employee self-advocacy violates federal anti-retaliation laws.[36]

Courts have noted that labor and immigration legal regimes concerning undocumented workers are not inherently in tension.[37] As Justice O'Connor argued in *Sure-Tan v. NLRB*, if labor and employment rights are not applicable to the undocumented community, employers will be incentivized to hire undocumented labor.[38] By extension, this will inevitably increase the flow of undocumented workers across the border, directly contravening the federal government's immigration enforcement agenda.[39] Enforcement of labor law therefore strengthens, rather than undermines, enforcement of immigration law.

(holding that Title VII employment discrimination protections extend to undocumented workers).

34. *See* Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 243 (2d Cir. 2006) ("[A]n order requiring an employer to pay his undocumented workers the minimum wages . . . for labor actually and already performed[ ] . . . does not itself condone that [immigration] violation or continue it. It merely ensures that the employer does not take advantage of the violation by availing himself of the benefit of undocumented workers' past labor without paying for it in accordance with minimum FLSA standards."); Patel v. Quality Inn S., 846 F.2d 700, 706 (11th Cir. 1988).

35. In January 2017, the major federal agencies overseeing labor and employment issues — the Equal Employment Opportunity Commission, Department of Labor, and National Labor Relations Board — issued a fact sheet noting that the anti-retaliation provisions of several key federal labor and employment laws all apply equally to workers regardless of immigration status. *See Fact Sheet: Retaliation Based on the Exercise of Workplace Rights Is Unlawful*, U.S. DEP'T OF LAB. (Dec. 10, 2015), https://www.dol.gov/dol/fact-sheet/immigration/RetaliationBasedExerciseWorkplaceRightsUnlawful.htm [https://perma.cc/2ETQ-DTLT].

36. *See* Arias v. Raimondo, 860 F.3d 1185, 1192 (9th Cir. 2017); Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d 1056, 1061–62 (N.D. Cal. 2002); Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053, 1056, 1058–59 (N.D. Cal. 1998).

37. *See, e.g.*, *Sure-Tan*, 467 U.S. at 893–94.

38. *Id.* at 893 ("If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened."); *see also* SMITH ET AL., *supra* note 6, at 5 ("The single-minded focus on immigration enforcement without regard to violations of workplace laws has enabled employers with rampant labor and employment violations to profit by employing workers who are terrified to complain about substandard wages, unsafe conditions, and lack of benefits[.]").

39. *See* R. Paul Faxon, Comment, *Employer Sanctions For Hiring Illegal Aliens: A Simplistic Solution To A Complex Problem*, 6 NW. J. INT'L L. & BUS. 203, 212 (1984).

Despite these formal labor law protections, undocumented laborers still suffer from high levels of employer misconduct.[40] A 2009 study found that undocumented workers were nearly twice as likely as their U.S.-born counterparts to experience minimum wage violations.[41] Retaliation is also rampant.[42] One study of National Labor Relations Board (NLRB) certification elections in which employees voted whether to unionize found that employers threatened to make referrals to immigration authorities in 50% of instances where undocumented workers comprised the workforce's majority.[43] And while the judicial and legislative branches have repeatedly made clear that undocumented workers deserve equal workplace protections to their legal counterparts, the Executive Branch's enforcement of these labor rights has proven inconsistent. Part II.B will address these regulatory considerations.

B. THE REGULATORY APPROACH TO UNDOCUMENTED WORKERS

The federal government retains nearly exclusive control over immigration enforcement and regulation.[44] The Department of Homeland Security (DHS) is the agency entrusted with primary immigration oversight and enforcement duties.[45] DHS maintains several components with varying immigration-related responsibilities. ICE conducts internal immigration enforcement against individuals who are not legally permitted to be in the country.[46] Further, ICE conducts raids to locate such individuals, oversees

40. *See* Eunice Hyunhye Cho et al., *A New Understanding of Substantial Abuse: Evaluation Harm in U Visa Petitions for Immigrant Victims of Workplace Crime*, 29 GEO. IMMIGR. L.J. 1, 2 (2014).

41. *See* Michael Felsen & M. Patricia Smith, *Wage Theft is a Real National Emergency*, THE AMERICAN PROSPECT (March 5, 2019), https://prospect.org/power/wage-theft-real-national-emergency/ [https://perma.cc/6PDW-AUQV].

42. *See* KATE BRONFENBRENNER, NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 12 (2009), https://www.epi.org/files/page/-/pdf/bp235.pdf [https://perma.cc/EK63-VZVS].

43. *Id.*

44. While not explicitly detailed in the Constitution, the federal government's immigration powers are rooted in enumerated and implied powers. The enumerated powers that bear on immigration are the: Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; *id.* cl. 4; War Powers Clause, *id.* cl. 11; and Migration and Importation Clause, *id.* § 9, cl. 1. The Supreme Court has also identified implied federal constitutional powers implicating immigration via national sovereignty concerns. *See, e.g.*, Ping v. United States, 130 U.S. 581, 596–97 (1889); Fong v. United States, 149 U.S. 698, 711 (1893).

45. 2 KIDS IN NEED OF DEFENSE, OVERVIEW OF IMMIGRATION LAW AND RELEVANT AGENCIES 5 (2015), https://supportkind.org/wp-content/uploads/2015/04/Chapter-2-Overview-of-Immigration-Law-and-Relevant-Agencies.pdf [https://perma.cc/9B6K-WQUB].

46. *Id.*

subsequent detention, and manages the deportation process.[47] The United States Citizenship and Immigration Services (USCIS) is another sub-agency within DHS.[48] USCIS has a mandate to process and adjudicate immigration benefits such as visa, asylum, and citizenship applications.[49]

Responsibility for labor enforcement, on the other hand, is more diffuse, with federal, state and local governments sharing regulatory power.[50] On the federal level, labor agencies such as the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), and the Occupational Safety and Health Administration (OSHA) have broad investigatory powers into employment and labor abuse and can punish employers for violations.[51] Many state and local jurisdictions maintain their own employment laws that supplement federal statutes and entrust labor agencies alongside legal actors like state attorneys general with oversight responsibilities.[52]

While, for the reasons stated by Justice O'Connor, this dynamic should lead to a collaborative relationship between two co-equal federal regulatory regimes, workplace oversight has instead largely been driven by immigration enforcement objectives.[53] Indeed, this "asymmetric allocation of power" has allowed ICE to frequently guide the extent to which the government tackles workplace conditions facing undocumented workers.[54]

The asymmetrical relationship between labor and immigration agencies derives, in large part, from their different enforcement strategies. The DOL and other labor agencies largely depend on worker-submitted complaints to investigate and punish employer

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47. *Fact Sheet: Immigration Customs Enforcement (ICE)*, NATIONAL IMMIGRATION FORUM (JULY 10, 2018), https://immigrationforum.org/article/fact-sheet-immigration-and-customs-enforcement-ice/ [https://perma.cc/R8QE-Q2LU].

48. *See* 2 KIDS IN NEED OF DEFENSE, *supra* note 45.

49. *Id.*

50. *See* Jayesh Rathod, *Protecting Immigrant Workers Through Interagency Cooperation*, 53 ARIZ. L. REV. 1157, 1158 (2011).

51. *See Federal Agencies*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/federalagencies [https://perma.cc/62LT-9R89] (last accessed Mar. 1, 2021).

52. *See* TERRIE GERSTEIN, ECON. POL'Y INST., WORKERS' RIGHTS PROTECTION AND ENFORCEMENT BY STATE ATTORNEYS GENERAL: STATE AG LABOR RIGHTS ACTIVITIES FROM 2018 TO 2020, at 3–4 (2020), https://files.epi.org/pdf/207014.pdf [https://perma.cc/X8R4-RMXU].

53. *See* Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1100 (2011); SMITH ET AL., *supra* note 6, at 5 ("[T]he balance between worksite immigration enforcement and labor standards enforcement must be recalibrated.").

54. Lee, *supra* note 53, at 1100.

mistreatment.[55] Since undocumented workers live in fear of deportation, however, they often avoid initiating contact with public entities whenever possible.[56] ICE rarely initiates investigations based on employer tips, as employers are far from eager to part ways with their cheap labor.[57] ICE instead focuses on widespread surveillance, auditing, and cooperation with local law enforcement to pursue employment-based enforcement.[58] Consequently, labor agencies find themselves at a disadvantage relative to immigration-related authorities who do not rely on the assistance of undocumented individuals to fulfill their enforcement duties.[59]

Political factors also contribute to this asymmetrical relationship. The September 11th attacks placed national security at the forefront of public consciousness and, as a result, governmental priorities. Given that the attackers were foreign nationals, security concerns became inextricably linked with immigration policy.[60] In the nearly twenty years since the attacks, the federal government has often prioritized its expanded homeland security powers over the social and economic rights of U.S. citizens and noncitizens.[61]

The government's increased emphasis on immigration enforcement is evident from the ballooning size and power of ICE.[62] By 2012, during President Obama's second term, half of all federal prosecution was immigration-related.[63] That same year, Congress appropriated $18 billion for immigration programs, nearly $4 billion more in funding than the collective budgets of all other major criminal federal law enforcement agencies.[64] ICE and other agencies also began publicly employing national security rhetoric in conjunction with their worksite enforcement efforts, a domain of

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55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *See Post-911*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/about-us/our-history/post-911 [https://perma.cc/L2DC-TQQR] (last accessed Mar. 1, 2021).
61. *See* Rathod, *supra* note 50, at 1163.
62. *See* Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sept. 2018), https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772/ [https://perma.cc/BXR8-MXUT].
63. *Id.*
64. *Id.*

immigration policy previously viewed predominantly through an economic lens.[65]

The disparity between labor and immigration federal enforcement regimes increased under the Trump Administration. Workplace investigations rose dramatically.[66] In October 2017, then-Acting ICE Director Tom Homan pledged to quintuple worksite enforcement actions.[67] Homan nearly made good on this pledge: in the first full Fiscal Year (FY) of the administration, FY 2018, ICE quadrupled its workplace investigations and audits.[68] Under the Trump Administration, ICE also resumed carrying out large worksite raids, in addition to conducting the targeted audits preferred by the Obama Administration.[69] The expansion of raids led to the detention of large numbers of workers. In FY 2018, ICE made 2,304 worksite arrests, a seven-fold increase from the previous year.[70] In August 2019, ICE conducted its largest-ever single-state raid, rounding up nearly 700 workers in Southern Mississippi.[71]

Meanwhile, the DOL, Department of Justice (DOJ), EEOC, NLRB, and other agencies entrusted with protecting immigrants' work-based rights shirked many of their broader enforcement responsibilities beyond matters impacting the undocumented community. The Trump Administration's regulatory decisions resulted in denial of overtime pay eligibility to 8.2 million workers,

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65. *See* Rathod, *supra* note 50, at 1163–64 (describing the national security-based framing of the E-Verify program, used by the government to certify the authorized status of employees, as well as the significance placed on raids picking up undocumented individuals working at sensitive sites such as airports, nuclear plants, and military facilities).

66. *See* Nomaan Merchant, *ICE raids raise question: What about employers?*, ASSOCIATED PRESS (Aug. 14, 2019), https://apnews.com/e7113c50a6fd4d2688fc2f2b8a9a91cd [https://perma.cc/UTE5-D4QG].

67. *See* Tal Kopan, *ICE Chief Pledges Quadrupling or More of Workplace Crackdowns*, CNN, (Oct. 17, 2017, 9:32 PM), https://www.cnn.com/2017/10/17/politics/ice-crackdown-workplaces/index.html [https://perma.cc/P3PH-58ZA].

68. *See* Merchant, *supra* note 66.

69. *See* Griffith & Gleeson, *supra* note 13 at 477, 481. While IRCA aimed to deter employers from hiring undocumented labor through a variety of penalty structures, prosecution of employers has remained stagnant under the Trump Administration despite the severe uptick in workplace enforcement, with fewer managers convicted of crimes in workplace cases in FY 2018 than in FY 2017. *Id.* at 480–81. This reluctance to prosecute employers raises the question whether the government is effectively disincentivizing employers from using unauthorized labor.

70. *See* Merchant, *supra* note 66.

71. *See* Camilo Montoya-Galvez, *ICE rounds up hundreds of undocumented workers in immigration sweeps in Mississippi*, CBS NEWS (Aug. 8, 2019, 1:03 PM), https://www.cbsnews.com/news/ice-raids-in-mississippi-officials-tout-largest-single-state-immigration-sweeps-in-us-history-today-2019-08-07/ [https://perma.cc/8469-6XTH].

allowance of mandatory arbitration agreements on a broader scale, and reductions in workplace safety protections.[72] These agencies were further hamstrung by the increased reluctance of undocumented laborers to cooperate with agency representatives due to fears of deportation.[73] During the Trump presidency, workers, anxious of contact with government representatives, refused to accept owed back wages from DOL officials, and, in several instances, individual workers literally ran from agency investigators who appeared at worksites.[74] Reports from government officials noted more broadly that levels of trust and cooperation between the undocumented workforce and labor enforcement agencies deteriorated significantly.[75]

Employers, in turn, capitalized on the rising fear among undocumented workers. Employees reported increased levels of employer retaliatory behavior.[76] The *Los Angeles Times* detailed the steep rise following the 2016 election of immigration-based retaliatory behavior where employers threaten to turn their workers in to ICE.[77] In the first eighteen months of the Trump presidency, the California Labor Commissioner's Office received 172 allegations of employer retaliation based on immigration status, compared to only twenty-nine total complaints from 2014 to 2016.[78]

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72. *See* Saharra Griffin & Malkie Wall, *President Trump's Anti-Worker Agenda*, CTR. FOR AM. PROGRESS ACTION FUND (Aug. 28, 2019, 10:09 AM), https://www.americanprogressaction.org/issues/economy/reports/2019/08/28/174893/president-trumps-anti-worker-agenda/ [https://perma.cc/LA5D-NWW8] (describing the decision by the Trump Administration to lower the salary threshold for overtime protections, resulting in the removal of $1.2 billion in annual overtime payments due); *see also* Deborah Berkowitz, *Workplace Safety Enforcement Continues to Decline in Trump Administration*, NAT'L EMP. L. PROJECT (Mar. 14, 2019), https://www.nelp.org/publication/workplace-safety-enforcement-continues-decline-trump-administration/ [https://perma.cc/XZ7Q-K7TT] (showing a rise in serious workplace injuries under the Trump Administration accompanied by a significant decline in safety enforcement activity pursued by DOL).

73. *See* Sam Levin, *Immigration crackdown enables worker exploitation, labor department staff say*, GUARDIAN (Mar. 30, 2017, 6:00 AM), https://www.theguardian.com/us-news/2017/mar/30/undocumented-workers-deportation-fears-trump-administration-department-labor [https://perma.cc/M8L5-9VPB].

74. *Id.*

75. *Id.*

76. *See* Andrew Khouri, *More workers say their bosses are threatening to have them deported*, L.A. TIMES (Jan. 2, 2018, 7:00 AM), https://www.latimes.com/business/la-fi-immigration-retaliation-20180102-story.html [https://perma.cc/6HSG-HUJV].

77. *Id.*

78. *See* Kartikay Mehrotra et al., *In Trump's America, Bosses Are Accused of Weaponizing the ICE Crackdown*, BLOOMBERG (Dec. 18, 2018, 5:00 AM), https://www.bloomberg.com/news/features/2018-12-18/in-trump-s-america-bosses-are-accused-of-weaponizing-the-ice-crackdown [https://perma.cc/2QFU-KVZE].

C. THE NEED FOR SAFEGUARDS TO ALLAY WORKERS' DEPORTATION CONCERNS

Perhaps the biggest impediment to workers' willingness to pursue claims is the fear of jeopardizing their U.S. residency.[79] These concerns respond to frequent instances of employer retaliation.[80] Indeed, employers have made referrals to ICE in the midst of ongoing litigation regarding employment-related complaints that have resulted in the deportation of claimants.[81] In addition, some employers who uncovered an employee's unlawful status through discovery have subsequently sent referrals to ICE.[82] ICE has even arrested undocumented workers at courthouses immediately following court appearances.[83] Likewise, ICE has borrowed information gathered from agency investigations of possible labor infractions for immigration enforcement purposes.[84] In 2006, the EEOC filed an employment discrimination lawsuit against a Houston company in connection with alleged mistreatment of undocumented workers.[85] After learning about the lawsuit, ICE arrested twenty of the company's workers.[86]

Several existing remedies help support workers in bringing forward claims with diminished fear of deportation. Courts often grant protective orders restricting discovery of a worker's immigration status during an employment proceeding.[87] Yet, in response to such actions, employers frequently embark on expensive and time-consuming legal challenges to the propriety of a protective order.[88] Moreover, protective orders are usually only granted at the liability phase of a trial, with courts typically ruling that immigration status is relevant to the determination of damages.[89]

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79. *See* Griffith & Gleeson, *supra* note 13, at 495–96.
80. *Id.*
81. *See* SMITH ET AL., *supra* note 6, at 23.
82. *Id.* at 14.
83. *Id.* at 29.
84. *Id.* at 27.
85. *Id.*
86. *Id.*
87. These protective orders ban or restrict an employer's ability to inquire into a worker's immigration status. Many courts, recognizing the potential chilling effect such discovery would have on workers' desire to pursue claims, have been willing to grant such orders. *See* Roxana Mondragón, Note, *Injured Undocumented Workers and Their Workplace Rights: Advocating for a Retaliation Per Se Rule*, 44 COLUM. J.L. & SOC. PROBS. 447, 470–71 (2011).
88. *Id.* at 472.
89. *Id.*

Following the filing of an employment-based claim, legal counsel for workers can also preemptively alert employers that they will consider any investigation into a worker's immigration status or any transfer of personal information to immigration authorities a retaliatory act.[90] In response to such actions, clients will bring retaliation claims under the FLSA, Title VII of the Civil Rights Act, or state and local laws that contain anti-retaliation provisions.[91] In theory, the prospect of facing additional penalties can serve as a deterrent for employers, given the increased fines and possibility of imprisonment for federal retaliation crimes.[92] Advocates have also favored per se retaliation rules that create a rebuttable presumption that any employer inquiry into immigration status or any ICE referral that takes place after an individual files a complaint constitutes retaliatory conduct.[93] California passed such a law in 2019, as have municipal jurisdictions including Seattle, San Francisco, and Los Angeles.[94]

Yet all of these efforts, however well-intentioned, do not sufficiently address workers' deportation concerns. For one, these measures are largely retrospective punishments for prior bad acts by employers; they can prevent such bad acts only through deterrence.[95] This deterrence effect largely relies on lawsuits that undocumented workers often have neither the will nor the means to pursue.[96] And, perhaps more importantly, these proposed solutions also fail to account for instances in which immigration authorities themselves discover unauthorized workers through actions taken by undocumented workers to protect their workplace rights. As such, these measures still permit ICE to pursue enforcement objectives regardless of the impact on individuals' labor rights.

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90. *Id.* at 472–73.

91. *Id.*

92. *Id.* at 472–73. Violating FLSA anti-retaliation provisions can lead to compensatory damages, imprisonment, steep fines, and attorney's fees. 29 U.S.C. § 216. Title VII violations based on discriminatory behavior can lead to increased damages, injunctive relief, and attorney fees. 42 U.S.C. § 2000e-5.

93. *See* Mondragón, *supra* note 87, at 474–75.

94. *See* TANYA L. GOLDMAN, RUTGERS SCH. OF MGMT. & LAB., ADDRESSING AND PREVENTING RETALIATION AND IMMIGRATION-BASED THREATS TO WORKERS 14 (2019), https://www.clasp.org/sites/default/files/publications/2019/04/2019_addressingandpreventingretaliation.pdf [https://perma.cc/LK4R-DUXZ].

95. *See* Mondragón, *supra* note 87, at 472.

96. *See* Nicole Taykhman, Note, *Defying Silence: Immigrant Women Workers, Wage Theft, and Anti-Retaliation Policy in the States*, 32 Colum. J. Gender & L. 96, 105 (2016).

III. Federal Legal Changes Aimed at Workers' Deportation Concerns

Advocates have underscored the need for better protection of undocumented claimants from deportation risks.[97] This Part addresses two existing legal avenues overseen by the federal government that aim to support undocumented workers: (1) the U visa program and (2) the interagency MOU signed between federal labor and immigration agencies, restricting enforcement activities at worksites that are subject to pending labor investigations.

Part III.A provides an overview of the origins and eligibility criteria behind the U visa program. This section proceeds to highlight the ways advocates have called for bolstering the visa's applicability to victims of employment-based violations. Part III.B then describes the evolution of the interagency MOU and how it tries to better equalize the relationship between DHS and labor agencies in addressing workplace issues. Part III.B also demonstrates the weaknesses associated with a non-binding agreement and how the MOU still enables the deportation of undocumented claimants.

A. The U Visa Program as a Legal Recourse for Undocumented Workers

Congress enacted the U nonimmigrant status visa as part of the Victims of Trafficking and Violence Prevention Act (VTVPA) passed in 2000.[98] The visa program's goals were twofold: first, to bolster law enforcement efforts to investigate crimes; and second, to protect immigrant victims of certain crimes who might otherwise fear cooperating with law enforcement due to their immigration status.[99] To qualify for U visa status, applicants must demonstrate: (1) that they were the victims of a qualifying criminal activity;[100] (2) that they can provide information about the crime; (3)

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97. *See, e.g.*, Smith et al., *supra* note 6, at 4–5.

98. Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1534 (codified as amended at 8 U.S.C. § 1101).

99. The VTVPA provides the following stated purposes: "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." 8 U.S.C. § 1101(a)(2)(B).

100. The following qualifying crimes are listed in the U-Visa statute: "rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage;

that they have cooperated or are likely to be helpful to a law enforcement or governmental agency investigating the crime; and (4) that they have suffered severe physical or mental abuse as a result of the crime.[101] U visa recipients receive work authorization and can legally reside in the U.S. for four years.[102] Recipients are able to apply for legal permanent resident status three years after receipt of the visa.[103]

Employment rights advocates have called on the federal government to take greater advantage of this program on behalf of immigrants who suffer workplace violations.[104] Workers who support law enforcement or labor agencies in investigating employer-related violations would, as a result, have a possible means of gaining protected status, helping to eliminate the fear of deportation associated with bringing labor-related claims.

Congress passed the U visa program largely to protect victims of domestic violence and violent crime.[105] Yet several qualifying crimes are clearly labor-related.[106] The clearest examples are "involuntary servitude," "trafficking," and "peonage."[107] However, these crimes, as typically understood, do not capture many of the less severe labor-related infractions that affect undocumented workers such as wage theft or workplace health and safety violations. Accordingly, advocates have urged prospective applicants — with varying degrees of success — to creatively find ways for more conventional labor violations to qualify.[108] Suggestions include applying the "blackmail" or "involuntary servitude" qualifying crimes to instances of employers threatening to disclose workers'

involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in Section 1351 of Title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes." *Id.* § 1101(a)(15)(U)(iii).

101. *Id.*

102. *Id.* § 1184(p).

103. *See Green Card for a Victim of a Crime (U Nonimmigrant)*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card-for-a-victim-of-a-crime-u-nonimmigrant [https://perma.cc/D6D9-CNNM] (last accessed Mar. 1, 2021).

104. *See, e.g.*, NAT'L IMMIGR. L. CTR., THE U VISA AND HOW IT CAN PROTECT WORKERS (2010), https://www.nilc.org/wp-content/uploads/2016/03/u-visa-protect-workers-2010-09-15.pdf [https://perma.cc/77LK-LCU7]; Saucedo, *supra* note 22, at 891–92.

105. In fact, the VTVPA, when introduced, served as a companion bill to the Violence Against Women Act, with the aim of protecting victims of domestic violence and sex crimes. *See* Saucedo, *supra* note 22, at 892.

106. 8 U.S.C. § 1101(a)(15)(U)(iii).

107. *Id.*

108. *See, e.g.*, Cho et al., *supra* note 40, at 7.

unauthorized status.[109] Additionally, workers pressured by employers to lie to law enforcement about labor conditions may qualify under the Act's "obstruction," "perjury," or "witness tampering" provisions.[110]

To prove their helpfulness towards investigations, U visa applicants must obtain a certification from an entity investigating the criminal behavior.[111] Regulations permit federal, state, and local agencies overseeing labor and employment protections to certify U visa petitions.[112] Indeed, agencies including the DOL, NLRB, and the EEOC, as well as multiple state labor agencies have published guidance regarding their certification procedures.[113]

The final requirement of the U visa regime mandates that workers show "substantial physical or mental abuse" resulting from the crime.[114] An applicant must demonstrate an "injury or harm to the victim's physical person, or harm to or impairment of the emotional soundness of the victim."[115] USCIS, the component of DHS responsible for U visa adjudications, has struggled to apply the substantial abuse standard to employment-related U visa applications.[116] Adjudicators have requested further proof of injury than typically sought when evaluating cases involving more common U visa qualifying crimes.[117] In rejecting workplace-based claims, USCIS officials found the psychological effects of workplace abuse insufficient to meet the substantial abuse threshold without

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109. *See* Saucedo, *supra* note 22, at 908.

110. *See* EUNICE HYUNHYE CHO, NAT'L EMP. L. PROJECT, U VISAS FOR VICTIMS OF CRIME IN THE WORKPLACE: A PRACTICE MANUAL 22 (2014), https://www.nelp.org/wp-content/uploads/2015/03/U-Visas-for-Victims-of-Workplace-Crime-Practice-Manual-NELP.pdf [https://perma.cc/HS69-TY4A].

111. *See* 8 U.S.C. § 1184(p)(1).

112. Department of Homeland Security regulations accompanying the statute clearly envision the involvement of labor-related agencies in the process. The regulations stipulate that certifications can be issued at the federal, state, and local levels by "agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to . . . the Equal Employment Opportunity Commission, and the Department of Labor." 8 C.F.R § 214.14(a)(2).

113. *See* CHO, *supra* note 110, at 25–33.

114. *See* 8 U.S.C. § 1101(a)(15)(U)(i)(I).

115. 8 C.F.R. § 214.14(a)(8) (2021).

116. *See* CHO, *supra* note 110, at 35.

117. *Id.* As previously mentioned, Congress passed U visa legislation aiming primarily to protect domestic violence and sex crimes victims. *See* Saucedo, *supra* note 22, at 892. Thus, some of the more common qualifying crimes that come before USCIS adjudicators include sexual assault, rape, and felonious assault. These crimes provide more straightforward markers of "substantial physical or mental abuse." *See* Cho et al., *supra* note 40, at 12–14 (internal quotation marks omitted).

accompanying physical harm.[118] In addition, regulators are more likely to question the nexus between employer misconduct and employee emotional distress than for cases of sexual assault and domestic abuse, which can involve similar forms of psychological trauma.[119] This obstacle further frustrates efforts to expand the use of U visas to protect undocumented workers.[120]

Moreover, VTVPA only allows for 10,000 U visas per year, leading to a backlog of over 140,000 applications.[121] USCIS often opts to place eligible applicants on a waitlist if the agency reaches the 10,000-a-year maximum.[122] Once added to the waitlist, applicants who have demonstrated prima facie eligibility for the visa can receive a temporary deportation reprieve — referred to as "deferred action" — alongside a work permit.[123] Yet as of June 2019, USCIS takes four to five years to grant deferred action after the initial U visa application submission,[124] while final U visa adjudications take approximately ten years from the initial application submission date.[125] This substantial gap in adjudicating deferred action and final U visa decisions, deriving in large part from U visa cap and processing delays, continues to leave many U visa applicants vulnerable to possible deportation.[126]

B. INTERAGENCY AGREEMENTS LIMITING ICE WORKSITE ENFORCEMENT CAPABILITIES

A second category of federal regulatory proposals focuses on the use of interagency agreements to restrain federal immigration authorities from deporting individuals with employment or labor

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118. *See* CHO, *supra* note 110, app. D2, at 8.
119. *Id.* app. D2, at 11–12.
120. *See* Cho et al., *supra* note 40, at 2.
121. U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, BY FISCAL YEAR, QUARTER, AND CASE STATUS 2009-2019, https://www.uscis.gov/sites/default/files/document/data/I918u_visastatistics_fy2019_qtr3.pdf [https://perma.cc/733K-FZ2B] (last accessed Mar. 1, 2021).
122. *See* VERONICA GARCIA, IMMIGRANT LEGAL RES. CTR., HUMANITARIAN FORMS OF RELIEF PART I: U, T, VAWA 3 (2019), https://www.ilrc.org/sites/default/files/resources/humanitarian_part_i.u.t.vawa_.pdf [https://perma.cc/J9S5-ELQ8].
123. *Id.*
124. *Id.* at 4.
125. *Id.* at 2.
126. *See* Isabela Dias, *ICE's New Policy Will Give the Agency More Discretion to Deport Victims of Crime*, PAC. STANDARD (Aug. 5, 2019), https://psmag.com/news/ices-new-policy-will-give-the-agency-more-discretion-to-deport-victims-of-crimes [https://perma.cc/DG5Q-KQHC].

claims being investigated by federal labor agencies. Since 1992, a MOU between federal immigration agencies — originally Immigration and Naturalization Services (INS), now ICE — and federal labor agencies aims to coordinate immigration and labor enforcement.[127]

This enhanced interagency coordination initially prioritized improving the federal government's immigration enforcement capacity by ensuring that the DOL referred any evidence of unauthorized employment to the INS.[128] But in 1998, DOL and INS updated the original 1992 MOU and for the first time attempted to address undocumented workers' labor rights.[129] The revised agreement specifically prohibited DOL from implementing an audit of the immigration status of workers at a particular employment location upon receiving claims regarding employer behavior at that worksite.[130] INS worksite investigations and immigration enforcement, however, remained unfettered.[131]

In 2011, the agencies once again revised the MOU.[132] This version of the MOU attempts to better calibrate the federal government's labor and immigration interests.[133] In signing the agreement, DOL and ICE pledged to "recognize the importance of enforcing labor and immigration laws relating to the worksite."[134] The document further acknowledged the need to uphold the workplace rights of all employees irrespective of immigration status

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127. *See* Braker, *supra* note 23 at 341.

128. *Id.*

129. *Id.* at 341–42.

130. *Id.* Employers are obligated to complete I-9 forms for every hired employee. The form is used to confirm an employee's identity and prevent unauthorized hires. *See I-9, Employment Eligibility Verification*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/i-9 [https://perma.cc/KKV2-6RJY].

131. *See* Braker, *supra* note 23 at 342.

132. *See* DEP'T OF HOMELAND SEC. & DEP'T OF LAB., REVISED MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF HOMELAND SECURITY AND LABOR CONCERNING ENFORCEMENT ACTIVITIES AT WORKSITES pt. I (2011), https://www.dol.gov/ofccp/regs/compliance/directives/files/DHSICE-DOLMOU-Final3-31-2011ESQA508c.pdf [https://perma.cc/8K6P-XJVW] [hereinafter "Revised MOU"]. The 2011 MOU remains essentially intact today. In May 2016, the EEOC and NLRB were added as parties to the agreement. The 2016 version limits the worksite enforcement capacities of ICE in nearly-identical respects to the 2011 document while extending the MOU's applicability to standing EEOC or NLRB investigations. *See* DEP'T OF HOMELAND SEC. & DEP'T OF LAB., ADDENDUM TO THE REVISED MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF HOMELAND SECURITY AND LABOR CONCERNING ENFORCEMENT ACTIVITIES AT WORKSITES 1–3 (2016), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-4684/dol-ice_mou-addendum_w.nlrb_osha.pdf [https://perma.cc/6NM8-YL9K].

133. *See* Braker, *supra* note 23 at 342.

134. Revised MOU, *supra* note 132, at pt. I.

while also working to thwart illegal hiring practices.[135] Moreover, the revised MOU aimed to minimize the influence of external parties within both labor and immigration enforcement schemes.[136] This admission suggested a growing acknowledgment of the deleterious impact ICE and retaliatory reporting by employers have on labor and civil rights oversight.

For the first time, the 2011 revised MOU imposed limits on ICE's enforcement powers.[137] The agency agreed to no longer initiate enforcement actions at worksites subject to "an existing DOL investigation of a labor dispute during the pendency of the DOL investigation . . . ."[138] In addition, DOL promised to supply ICE with information about existing labor rights investigations and alert ICE about anticipated retaliatory behavior on the part of an employer planning to report workers to the agency.[139] ICE, in turn, pledged to be "alert to and thwart" any retaliatory conduct by disgruntled employers who choose to tip off ICE to the presence of undocumented workers.[140] Yet this last commitment contained much weaker language than other parts of the agreement, stating that ICE would "continue its existing practice of assessing" if a tip was motivated by a desire to suppress a labor dispute.[141]

In certain extraordinary circumstances, discussed below, the MOU permits ICE to pursue a worksite enforcement action despite a pending labor investigation.[142] In these instances, ICE agrees to notify DOL and allow DOL to interview any detained individuals.[143] The MOU also contemplates the possibility that individuals

135. *Id.*

136. *Id.* ("[E]ffective enforcement of both labor- and immigration-related worksite laws requires that the enforcement process be insulated from inappropriate manipulation by other parties.").

137. *Id.* at pt. IV.

138. *Id.* The MOU defines "labor disputes" broadly, specifying a range of possible disagreements between management and labor surrounding wage and hour conditions, workplace safety, family and medical leave (along with other benefits), discriminatory treatment, collective bargaining and union activity, and protection from retaliation. *Id.* at pt. III.

139. *Id.* at pt. IV.

140. *Id.* The MOU's language here is somewhat soft regarding ICE's obligations vis-à-vis retaliatory conduct by an employer. "ICE further agrees to be alert to and thwart attempts by other parties to manipulate its worksite enforcement activities for illicit or improper purposes. ICE will continue its existing practice of assessing whether tips and leads it receives concerning worksite enforcement are motivated by an improper desire to manipulate a pending labor dispute, retaliate against employees for exercising labor rights, or otherwise frustrate the enforcement of labor laws." *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

detained by ICE and eligible for deportation could be integral to resolving a DOL investigation.[144] ICE "agreed to make available" to DOL detained individuals who are deemed necessary witnesses for a pending labor investigation.[145] The MOU, however, does not guarantee these witnesses a deportation reprieve during the pendency of the investigation, as ICE only committed to "consider[ing]" requests for halting deportation in such instances.[146]

While Executive Branch officials and advocates consistently point to the MOU as a way to manage interagency conflict, the MOU suffers from several major shortcomings. First, MOUs are generally informal interagency agreements that are neither binding nor enforceable.[147] In response to changing presidential policy preferences, agencies have unchecked freedom to ignore or amend the terms of the agreement.[148] Indeed, the signatories have displayed varying levels of adherence to the MOU's terms under different administrations.[149]

As mentioned above, the MOU provides for certain exemptions when ICE can pursue enforcement actions despite a pending labor investigation. These exceptions may be triggered when ICE leadership determines that enforcement activity is necessary due to national security concerns, "protection of critical infrastructure," or the prevention of non-labor-related federal crimes.[150] The MOU also grants the Secretary of Homeland Security broad power to permit otherwise prohibited enforcement activity without requiring any stated reason.[151] One can readily imagine a scenario in which an administration's pro-enforcement policy priorities would lead DHS to liberally avail itself of these exceptions.

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144. *Id.*

145. *Id.*

146. *Id.* ("ICE further agrees to make available for interview to DOL any person ICE detains for removal through a worksite enforcement activity. . . . ICE agrees to consider DOL requests that ICE grant a temporary law enforcement parole or deferred action to any witness needed for a DOL investigation of a labor dispute during the pendency of the DOL investigation and any related proceeding where such witness is in the country unlawfully.").

147. *See* Braker, *supra* note 23, at 339.

148. MOUs are not enforceable by courts, leaving agencies free to ignore prior MOUs with little consequence. *See id.* at 348.

149. *See* Rathod, *supra* note 5061, at 1160 ("[D]uring the George W. Bush administration, the federal government was largely silent about the 1998 [MOU] between the DOL and the Immigration and Naturalization Service ("INS"), with advocates questioning its ongoing applicability."); SMITH ET AL., *supra* note 6, at 23–27 (describing how ICE enforcement actions took place at sites with existing labor claims despite the 1998 MOU).

150. *See* Revised MOU, *supra* note 132, at pt. IV.

151. *Id.*

Furthermore, the MOU only restricts ICE's enforcement authority when a federal labor agency has already opened an investigation into a possible labor infraction.[152] If claimants or their counsel have yet to approach a federal labor agency bound by the MOU, the MOU does not apply.[153] Nor does the MOU extend to state agencies or to litigation taking place beyond agency jurisdiction.[154] And ICE only agrees to limit enforcement activities "at the worksite" that is subject to an agency investigation; the MOU permits enforcement actions that take place outside of the worksite and target workers involved in a pending agency investigation.[155]

U visas and MOUs have offered hope to undocumented workers and their advocates, but successive administrations have failed to realize their full potential. The response of relevant federal agencies to both the U visa program and the MOU has been inconsistent and, at times, hostile. Reacting to this regulatory intransigence, advocates have identified a need for Congress to step in and pass legislative reforms. Part IV will review one such legislative proposal — the POWER Act — with an emphasis on how its most recent iteration takes into account new barriers facing undocumented workers instituted during the Trump Administration.

IV. THE POWER ACT: A LEGISLATIVE ATTEMPT TO SUPPORT WORKERS

The POWER Act was first introduced in the Senate in 2010 and most recently re-introduced in both chambers of Congress in November 2019.[156] The bill, introduced by Senator Robert Menendez and Congresswoman Judy Chu, aims to protect undocumented workers from negative immigration-related effects resulting from

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152. *Id.*

153. This would encompass a scenario in which an individual is picked up in an enforcement action without previously bringing a claim and is found post-hoc to have suffered abuse at the hands of an employer. *See* Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1, 4 n.16 (2013).

154. *See* Braker, *supra* note 23, at 347–49.

155. *See* Revised MOU, *supra* note 132, at pt. IV.

156. POWER Act, S. 2929, 116th Cong. (2019) (amending Section 239(e) of the Immigration and Nationality Act, 8 U.S.C. § 1229(e)). Importantly, the POWER Act was part of the bipartisan comprehensive immigration reform bill that was passed by the Senate in 2013 but that failed to pass the House of Representatives. *See The POWER Act: Protect Our Workers from Exploitation and Retaliation Act*, NAT'L IMMIGR. L. CTR. (Nov. 2019), https://www.nilc.org/issues/workersrights/poweract/ [https://perma.cc/THW4-QHPE].

the defense of their labor rights.[157] More specifically, the bill broadens U visa eligibility to better protect immigrants who suffer employment-related crimes and assist authorities with subsequent investigations. It also codifies elements of the 2011 interagency MOU that restrict ICE's activities surrounding individual cases involving pending labor complaints. With the rise in workplace immigration enforcement under the Trump Administration, immigrants' and workers' rights organizations have attempted to increase public awareness of the bill.[158] While previous iterations of the bill lingered in Congressional committees,[159] the latest version of the POWER Act has gained newfound attention among Democratic Party leaders. For instance, the Biden-Sanders Unity Task Force policy platform, which laid out the domestic policy agenda of the Democratic party in advance of the 2020 Democratic National Convention included the POWER Act.[160] And President Biden's proposed immigration reform legislation, The U.S. Citizenship Act of 2021, embraces expanded access to the U visa program for workers, as contemplated by the POWER Act.[161]

Part IV.A examines the ways in which the most recent version of the POWER Act strengthens the U visa to encompass employment violations. It also takes a closer look at regulatory decisions by the Trump Administration that weakened the U visa and the POWER Act's response to some of these policy decisions. Part IV.B then addresses the provisions of the bill codifying the MOU, and

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157. *See* S. 2929. The legislation is supported by organizations such as the AFL-CIO, Jobs with Justice, the National Employment Law Project, the National Immigration Law Center, and the New Orleans Workers' Center for Racial Justice. *See* Press Release, Bob Menendez, Senator, U.S. Senate, Sen. Menendez, Rep. Chu Introduce Bicameral Bill to Protect Immigrant Workers Reporting Labor Violation Claims (Nov. 21, 2019), https://www.menendez.senate.gov/news-and-events/press/sen-menendez-rep-chu-introduce-bicameral-bill-to-protect-immigrant-workers-reporting-labor-violation-claims [https://perma.cc/K3RY-U3MJ].

158. *See, e.g.*, S. 2929; DANIEL COSTA, ECON. POL'Y INST., EMPLOYERS INCREASE THEIR PROFITS AND PUT DOWNWARD PRESSURE ON WAGES AND LABOR STANDARDS BY EXPLOITING MIGRANT WORKERS 6 (2019), https://files.epi.org/pdf/174093.pdf [https://perma.cc/4CPB-93G2].

159. *See, e.g.*, Protect Our Workers from Exploitation and Retaliation (POWER) Act, H.R. 5908, 115th Cong. (2018) (no action taken).

160. *See* BIDEN-SANDERS UNITY TASK FORCE RECOMMENDATIONS 14, 16, 108 (2020), https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf [https://perma.cc/7AHG-Q6GG].

161. *See Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/ [https://perma.cc/NN4R-3QD7].

details how passage of the bill would help prevent deportation during the pendency of labor investigations involving undocumented workers.

A. BOLSTERING U VISA PROTECTIONS

The POWER Act tackles many of the existing barriers associated with the U visa program, expanding the U visa program to better protect undocumented workers who experience workplace crimes and violations. First and most importantly, the legislation would cover more forms of labor and employment violations. It amends the Immigration and Nationality Act (INA) — the statutory home for the U visa program — to extend qualifying crimes to encompass any "bona fide workplace claim. . . ."[162] In adding the qualifying category of a bona fide workplace claim, the bill defines the term to mean "the violation of applicable Federal, State, and local labor laws, including laws concerning wages and hours, labor relations, family and medical leave, occupational health and safety, civil rights, or nondiscrimination."[163] Furthermore, under the proposed statutory change, claims include any grievance communicated or submitted to an employer, agency, or court.[164]

The POWER Act would also expand protection to undocumented workers who aid in civil investigations.[165] The current INA language specifies that an agency can only certify an individual who has supported authorities in the investigation or prosecution of "criminal activity."[166] The POWER Act updates this language to cover individuals who assist agencies in "investigating, prosecuting, or seeking civil remedies for a labor or employment violation" related to one of the workplace claims allowed by the U visa statutory text.[167] This provision also acknowledges that many employment and labor violations do not fit squarely within the criminal law parameters of the original U visa legislation.[168]

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162. *See* S. 2929 § 2(a)(4).
163. *Id.* § 3(b).
164. *Id.*
165. *See* S. 2929 § 2(a)(1)(C).
166. *See* 8 U.S.C. § 1101(a)(15)(U).
167. *See* S. 2929 § 2(a)(1)(C).
168. Critics may very well object to this change due to the existing criminal orientation of the visa program. Yet the argument can be made that this expansion adheres to one of the statutory purposes of the U Visa program because it is aimed at increasing the capacity

Additionally, the bill's expansion of qualifying grounds for the U visa extends the visa's applicability to anticipatory violations, stipulating that a reasonable fear of future violation as well as threatened abuse are sufficient bases for eligibility.[169]

Second, the proposed legislation introduces a new provision eliminating any fees tied to a U visa application.[170] This language, not included in earlier versions of the POWER Act, likely responds to a Trump Administration attempts to significantly hike the fees for supplemental forms often required as part of the U visa application process.[171] And given efforts by the Trump Administration to raise fees for a slew of immigration benefits, it is not unreasonable to imagine a scenario in which DHS institutes a U visa fee that curtails access to these benefits.[172] The POWER Act aims to preempt such a possibility and prevent fees that would inhibit low-income applicants.

Third, the POWER Act addresses the present backlog of U visa applications. Previous versions of the POWER Act raised the maximum number of visas that can be issued annually from 10,000 to 30,000.[173] The latest version of the bill, introduced in November 2019, eliminates any cap.[174] Eliminating the cap would help alleviate the backlog of pending cases and make room for an influx of employment-related claims.

Finally, the POWER Act offers two further protections to undocumented workers with pending U visa applications. It requires a stay of removal for any individual in removal proceedings who

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of government authorities to identify and prevent common areas of illegal conduct — whether criminal or not — leveled against the immigrant community.

169. An eligible individual is one who "reasonably fears, has been threatened with, or has been the victim of an action involving force, physical restraint, retaliation, or abuse of the immigration or other legal process against the alien or another person by the employer in relation to acts underlying the workplace claim or related to the filing of the workplace claim[.]" S. 2929 § 2(a)(4).

170. *Id.* § 2(c)(1)(C). This includes biometric services fees as well as fees for advance permission to enter the country as a non-immigrant. *See id.*

171. *See* Raul Pinto, *Trump administration: Poor immigrants need not apply*, NC POL'Y WATCH (Nov. 25, 2019), http://www.ncpolicywatch.com/2019/11/25/trump-administration-poor-immigrants-need-not-apply/ [https://perma.cc/K58M-8W4G].

172. *See* Cynthia Betubiza, *How increased citizenship fees could make life harder for immigrants and their communities*, MARKETPLACE (Jan. 28, 2020), https://www.marketplace.org/2020/01/28/how-increased-citizenship-fees-could-make-life-harder-for-immigrants-and-their-communities/ [https://perma.cc/992C-3DWB].

173. *See* Protecting Our Workers from Exploitation and Retaliation (POWER) Act, S. 2915, 115th Cong. § 2(c)(2) (2018).

174. *See* S. 2929 § 2(c)(2). This amends section 214(p) of the INA that contains the statutory language limiting the number of visas to 10,000 each fiscal year. *See* 8 U.S.C. § 1184(p)(2).

has filed a U visa application and is awaiting a final determination.[175] Second, the bill prohibits DOJ or DHS from using information procured as part of a U visa application for removal purposes.[176] These two provisions are especially important due to the extensive processing delays of applications and the review of deferred actions mentioned above.[177] These protections also respond to the Trump Administration's decision to permit the deportation of U visa applicants.[178] In an August 2019 guidance announcement, ICE, reversing prior agency policy, sanctioned the deportation of individuals with pending U visa applications.[179] Furthermore, USCIS guidance from June 2018 allowed agency officials for the first time to refer denied U visa applicants to ICE for enforcement purposes.[180] Immigration attorneys decried these policy changes as an effort to deter applicants, thereby diminishing the crime prevention potency of the program.[181] Application rates for U visas did indeed fall in Fiscal Years 2018 and 2019 after these new policies were announced, consistent with the claim that these measures had a chilling effect on applications.[182]

The insertion of these two new restrictions into the POWER Act lowers the deportation risk tied to applying for a U visa. Extensive processing delays would no longer enable the possibility of deportation for applicants potentially eligible for a U visa. Meanwhile,

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175. *See* S. 2929 § 3(b). This stay remains in place until the issuance of a final determination regarding the visa application or resolution of the workplace claim, whichever is later. *See id.*

176. *See id.* § 2(c)(1)(C).

177. USCIS is backlogged in reviewing U visa applications. Applicants on the visa waitlist who have demonstrated prima facie eligibility for the visa can receive a deportation reprieve referred to as "deferred action." USCIS delays have resulted in deferred action grants taking place four to five years after the submission of applications. *See* GARCIA, *supra* note 122, at 1–3.

178. *See Revision of Stay of Removal Request Reviews for U Visa Petitioners*, U.S. IMMIGR. & CUSTOMS ENF'T (Aug. 2, 2019), https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners [https://perma.cc/CRH2-64TB].

179. *Id.*

180. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MEMORANDUM: UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS (2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf [https://perma.cc/JBQ3-NTTP].

181. *See* Zack Budryk, *ICE Rule Change on U Visas Sparks Outrage*, HILL (Aug. 30, 2019, 6:00 AM), https://thehill.com/homenews/administration/459316-ice-rule-change-on-u-visas-sparks-outrage [https://perma.cc/49CT-DHUL].

182. *See* Gustavo Solis, *Fewer immigrants apply for special visa reserved for crime victims*, SAN DIEGO UNION-TRIB. (Sept. 1, 2019, 5:00 AM), https://www.sandiegouniontribune.com/news/immigration/story/2019-08-31/u-visa-decline-story [https://perma.cc/X89B-3Y5V].

the government would be unable to rely on the information of denied applicants for deportation purposes. In effect, the government could no longer use the visa program to target the very individuals who attempt to avail themselves of its benefits.

B. THE POWER ACT'S EFFORTS TO SOLIDIFY THE DHS DEPORTATION FIREWALL

The POWER Act also responds to many of the defects of the MOU agreement between DHS and labor agencies. The bill addresses the structural deficiencies of the MOU by statutorily binding immigration authorities to several key elements of the MOU. The force of the statute counteracts the power asymmetries between immigration and labor agencies. Moreover, it fills some of the substantive gaps that left the MOU, even when fully respected by its signatories, unable to fully address workers' deportation fears.

First, the bill amends INA section 239(e) to severely restrict the ability of agencies to conduct enforcement activities "[a]t a facility about which a workplace claim has been filed."[183] While still technically permitted to carry out actions at reported facilities, DHS would be held to the high standard required for enforcement actions at courthouses and victims' service centers such as domestic violence shelters.[184] For any detentions conducted at these sites, DHS must certify that it did not rely on information supplied by an individual who perpetrated the crime or misconduct against the individual that serves as grounds of eligibility for a U visa, T visa, or Violence Against Women Act forms of immigration relief.[185]

The POWER Act also restricts DHS enforcement outside of worksites that are enabled by employer retaliatory reporting. Under the MOU, ICE simply agrees to "be alert to and thwart attempts" by employers and other parties to instigate enforcement actions.[186] The POWER Act takes a harder line, amending the INA to severely restrict removal "as a result of information provided to the Secretary of Homeland Security" in response to an individual

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183. POWER Act, S. 2929, 116th Cong. § 3(a)(2).

184. *See* 8 U.S.C. § 1229(e).

185. *See id.* §§ 1229(e), 1367(a). T visas are granted to victims of human trafficking pursuant to 8 U.S.C. § 1101(a)(15)(T).

186. *See* Revised MOU, *supra* note 132, at pt. IV.

exercising employment rights.[187] If a worker has exercised employment rights and DHS subsequently initiates deportation proceedings in response to external information furnished to the agency, DHS must certify that it did not receive the information solely from the perpetrator of workplace misconduct that makes the worker eligible for a U visa under the expanded U visa eligibility.[188]

Additionally, section 3(b) of the bill would statutorily require DHS to stay removal and provide employment authorization for individuals who have filed U visa applications or initiated a workplace claim, beyond the U visa context, with any employer, any federal, state, or local agency, or any court.[189] These protections also extend to individuals who are material witnesses in any proceeding connected to a bona fide workplace claim,[190] with the protections in place until the claim's resolution.[191] This effectively deprives employers of the ability to evade liability for employment infractions by tipping off immigration enforcement authorities. Even if ICE were to detain a claimant, any regulatory, criminal, or civil proceeding would have to reach their conclusion with the complainant still present in the country.[192] As a result, this would allow labor agency investigations, alongside civil and criminal actions, to run their course, enabling higher rates of successful prosecution against employers who ignore workers' rights.

The bill also addresses the exceptional circumstances that, under the MOU, permit DHS to engage in enforcement actions at sites where claims have already been filed. The bill requires the DHS Secretary to ensure that any detained individual who is necessary to the investigation of a workplace claim is not removed until several conditions are met.[193] These include a) informing the agency with jurisdiction over the violation; b) enabling the agency to interview the individual, if desired; and c) granting stays of

187. *See* S. 2929 § 3(a)(1)(B).

188. *See* 8 U.S.C. §§ 1229(e), 1367(a). These heightened requirements, however, do not kick in if the worker has been convicted of a qualifying crime under Section 237(a)(2) of the INA. *See* 8 U.S.C. § 1367(a).

189. *See* S. 2929 § 3(b).

190. *Id.*

191. *Id.*

192. *See* Braker, *supra* note 23, at 357 ("[T]he POWER Act requires DHS to stay pending deportations of individuals who have filed labor claims[.]").

193. *See* S. 2929 § 3(b).

removal for any qualifying individuals, as per the expanded qualifications instituted by the POWER Act.[194]

And lastly, unlike the current regulatory regime, the POWER Act also covers post-hoc claims.[195] The aforementioned enforcement and deportation restrictions in the bill would apply to instances where claims are "contemporaneously filed," suggesting that undocumented workers who enter a claim immediately subsequent to a worksite immigration enforcement action are also protected.[196] Consequently, undocumented workers who have resisted filing a complaint prior to a raid — whether due to fears of retaliation, lack of resources, or other reasons — would no longer be unfairly burdened.

V. A CRITICAL ANALYSIS OF THE POWER ACT'S LEGAL AND POLITICAL SHORTCOMINGS

While the POWER Act strengthens protection for undocumented workers, several questions surround the bill's legal and political viability. Part V.A addresses potential criticism regarding the bill's treatment of fraudulent claimants. Part V.B highlights one notable shortcoming of the POWER Act: its neglect of the persistent obstacles facing visa applicants in obtaining necessary certifications from agencies involved in investigating underlying labor claims. Part V.C considers the potential impact of the bill on DHS organizational capacity. Due to the anticipated influx of visa applications that will result from implementation of the POWER Act, the agency will likely require additional resources to support increased staffing and training. And, lastly, Part V.D evaluates the likelihood of the bill's passage given the intransigent political environment surrounding immigration matters.

A. THE POTENTIAL FOR FRAUD

In response to the changes in immigration law proposed by the POWER Act, critics may argue that individuals will be able to manipulate the bill's deportation protections by fraudulently putting

194. *Id.*
195. *Id.* §§ 3(a)(2)–(b).
196. *Id.*

forth U visa applications or workplace claims.[197] The drafters of the bill foresaw this possibility. For applicants not currently in removal proceedings, it is within the Secretary of Homeland Security's discretion to grant an employment authorization and temporary residency while a U visa application or workplace claim is pending.[198] As a result, the benefits associated with the U visa do not automatically apply upon filing an application, and the agency can presumably avoid granting protections prior to final adjudication if concerns surface regarding the veracity of the claims.

Moreover, as part of the initial step in the U visa application process, an applicant must submit an I-918 Supplement B form to DHS providing certification from the relevant law enforcement office, labor agency, or court that the applicant has assisted with an investigation.[199] Likewise, the POWER Act mandates that individuals pursuing workplace claims but who have not applied for or are not eligible for a U visa must also provide a similar certification of helpfulness to qualify for a deportation stay and employment authorization prior to final adjudication.[200] These necessary certifications provide an additional layer of oversight beyond DHS and further minimize the potential for fraudulent U visa applications.[201] Indeed, local law enforcement as well as USCIS' Fraud Detection and National Security Directorate have noted the consistently low levels of fraud identified under the current U visa regime, suggesting that the agencies involved in the certification and ultimate visa adjudicatory processes are well-equipped to address potential fraudulent behavior.[202]

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197. Certain immigration critics have made similar allegations about potential fraud with regard to the current U visa program. *See, e.g.*, Jessica M. Vaughan, *Visas for Victims: A Look at the U Visa Program*, CTR. FOR IMMIGR. STUD. (Mar. 30, 2020), https://cis.org/Report/Visas-Victims-Look-U-Visa-Program [https://perma.cc/GHT5-EP79].

198. S. 2929 § 2(b) ("[T]he Secretary of Homeland Security *may* permit an alien to temporarily remain in the United States, and grant the alien employment authorization[.]" (emphasis added)).

199. *See Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 12, 2018), https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status [https://perma.cc/6L8K-4TLC].

200. *Id.*

201. *See* Sara Darehshori, *Immigrant Crime Fighters: How the U Visa Makes US Communities Safer*, HUM. RTS. WATCH (July 3, 2018), https://www.hrw.org/report/2018/07/03/immigrant-crime-fighters/how-u-visa-program-makes-us-communities-safer#_ftn65 [https://perma.cc/VNM7-Y6RE].

202. *See id.*

By contrast, if an individual is placed in removal proceedings and has initiated or subsequently initiates a U visa application or workplace claim, the bill does not grant DHS the same degree of discretion to deny a deportation stay and employment authorization.[203] In such an instance, the Secretary of Homeland Security may rescind the stay only by making a showing to the presiding immigration judge that the individual has been convicted of a felony or that "the workplace claim was filed in bad faith with the intent to delay or avoid the removal of the alien."[204] Additionally, an individual who files a workplace claim without pursuing a U visa application does not have to supply a certificate of helpfulness, as required of a similarly situated individual not in removal proceedings.[205]

This favorable treatment for employees in removal proceedings is likely associated with an enhanced concern for their deportability. Nonetheless, it could more plausibly lead to cases of fraudulent post-hoc filings of complaints following detention and initiation of the removal process. This course of action may prove especially appealing given the extensive backlogs facing immigration judges that could delay the period of time before DHS is able to appear in immigration court to establish that the claim is fraudulent.[206] Should the bill progress to committee review in either the Senate or House of Representatives, this feature of the legislation merits enhanced scrutiny.

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203. *See* S. 2929 § 3(b) ("An alien against whom removal proceedings have been initiated under chapter 4 of title II, who has filed a workplace claim, who is a material witness in any pending or anticipated proceeding involving a bona fide workplace claim, or who has field for relief under section 101(a)(15)(U), *shall* be entitled to a stay of removal or an abeyance of removal proceedings and to employment authorization until the resolution of the workplace claim. . . ." (emphasis added)).

204. *Id.* ("[The applicant shall be entitled to a stay of removal] *unless* the Secretary establishes, by a preponderance of the evidence in proceedings before the immigration judge presiding over that alien's removal hearing, that — (I) the alien has been convicted of a felony; or (II) the workplace claim was filed in bad faith with the intent to delay or avoid the removal of the alien." (emphasis added)).

205. *See supra* note 200.

206. *See Average Time Pending Cases Have Been Waiting in Immigration Courts as of December 2021*, TRAC REPS., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php [https://perma.cc/G6YX-EURV].

B. STATE AND LOCAL AGENCY PARTICIPATION IN THE U VISA CERTIFICATION PROCESS

The POWER Act undoubtedly shores up key weaknesses in the U Visa program. Yet one facet of the program that the current iteration of the bill largely overlooks is the requirement that an applicant obtain certification from the relevant agency investigating the claim.[207] This certification verifies that an applicant was, in fact, a victim of a qualifying crime, and is assisting, or is likely to assist, with an investigation.[208] As envisioned, the certification process plays a role in preventing the kinds of fraudulent claims detailed in Part V.A. But in practice, the diffused delegation to local law enforcement agencies, many of whom maintain restrictive policies regarding certification eligibility, presents an insurmountable obstacle to many individuals who otherwise qualify for the U visa.

Currently, certifying agencies are not required to complete the I-918 Supplement B certification form that all applicants must complete as part of their U visa application process.[209] As a result, certification rates vary greatly across agencies and across the country.[210] In fact, many local law enforcement offices impose significant hurdles on applicants, while others refuse to grant certifications entirely.[211] As a result, U visa applicants' success often depends on the whims and policies of law enforcement and labor agencies.[212] While the TVPRA — which codified the visa program — only considers the helpfulness of the petitioner, certain certifying agencies consider additional factors such as a petitioner's immigration record, criminal record, or employment history.[213] In other instances, agencies decline to certify for a closed case

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207. *See* 8 U.S.C. § 1184 (p)(1).

208. *See id.* § 1101(a)(15)(U).

209. *See* JEAN ABREU ET AL., UNC SCH. OF L. IMMIGR./HUM. RTS. POL'Y CLINIC, THE POLITICAL GEOGRAPHY OF THE U VISA: ELIGIBILITY AS A MATTER OF LOCALE 8–9 (2019), https://law.unc.edu/wp-content/uploads/2019/10/uvisafullreport.pdf [https://perma.cc/24HY-HQ7F].

210. *See id.* at 9–10.

211. *See* Laura C. Morel, *How law enforcement agencies undermine the U visa*, REVEAL (Nov. 7, 2019), https://www.revealnews.org/article/how-law-enforcement-agencies-undermine-the-u-visa/ [https://perma.cc/4FPA-EUE6]. In fact, a recent survey found that 165 agencies across the country have a blanket policy to not certify I-918B forms regardless of circumstance. *See* ABREU ET AL., *supra* note 209, at 27.

212. *See* ABREU ET AL., *supra* note 209, at 3–4.

213. *See id.* at 17, 108.

assuming they will no longer benefit from further partnership with a victim.[214]

Additionally, in July 2019, USCIS issued a revised U Visa Law Enforcement Resource Guide, which provided updated guidance for certifying law enforcement bodies.[215] This document emphasized the enhanced vetting that agencies should conduct before agreeing to provide a certification.[216] For example, USCIS encouraged offices to conduct background checks and consider past criminal history in evaluating whether to complete a certification.[217] But this recommendation, if carried out, would prove duplicative, as USCIS already conducts background checks as part of its review process for all U visa applications.[218] The guidance also referred repeatedly to the ability of agencies to institute time limitations on the issuance of certifications.[219] These considerations are not statutorily mandated, nor have they been a part of previous administrations' approach to the visa certification process, evincing yet another way in which the availability of immigration benefit programs is tied to the policy priorities of the Executive Branch.[220] Ultimately, this new guidance complicates applicants' ability to obtain Supplement B certification and, ultimately, access a U visa.

The drafters of the POWER Act should update the text of the bill to better address the unpredictable and unfair landscape of the certification process. If a broader overhaul to the current U visa structure proves beyond the scope of the bill, advocates should work in parallel to update the TVPRA so that U visa applicants are treated fairly regardless of where they live and which certifying entities are most accessible to them. Otherwise, the bill's expanded protections for workers could be distributed unevenly.

One possible solution would be to amend the TVPRA so that agency certification is not a required component of the U visa

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214. *Id.* at 17.

215. *See* U.S. DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT RESOURCE GUIDE (2019), https://www.uscis.gov/sites/default/files/ document/guides/U_Visa_Law_Enforcement_Resource_Guide.pdf [https://perma.cc/4DJZ-HSJX].

216. *Id.*

217. *Id.* at 3, 4.

218. *See id.* at 3.

219. *See U Visa Updates: New U Visa Law Enforcement Resource Guide and ICE Stay of Removal Policy for U Visa Petitioners*, CLINIC (Aug. 9, 2019), https://cliniclegal.org/resources/humanitarian-relief/u-visas/u-visa-updates-new-u-visa-law-enforcement-resource-guide-and [https://perma.cc/W4QJ-N29D].

220. *See* SARAH LAKHANI & ALISON KAMHI, THE 2019 DHS U VISA CERTIFIER RESOURCE GUIDE 4–5 (2020), https://www.ilrc.org/sites/default/files/resources/dhs_u_visa_law_enforcement_resource_guide_revised_july_2020.pdf [https://perma.cc/QMD5-ZUGV].

process. The T Visa program — for human trafficking victims — permits applicants to provide credible secondary affidavits from a social worker or other entity if a law enforcement certification is inaccessible.[221]

State and local governments also have a role to play. Several states have passed legislation to more clearly define the role of state and local law enforcement agencies in certifying U visa applications.[222] These laws include provisions curtailing the latitude of certifying agencies to refuse to certify eligible candidates,[223] requiring faster response rates to certification requests, and providing increased funding to cover the added responsibilities for certifying entities.[224] Similar legislative activity should take place in jurisdictions where law enforcement entities currently exercise free rein to impede or deny requests for U visa certifications.

C. DHS ORGANIZATIONAL CAPACITY TO MANAGE INFLUX OF APPLICATIONS

Broadened eligibility requirements for the U visa coupled with enhanced deportation protections for workers will likely lead to a sharp increase in visa petitions alongside evaluations for stays of removal. DHS will have to consider the availability of agency personnel to address this influx of activity. At the end of FY 2017, USCIS maintained a backlog of 2.3 million immigration visa and benefit petitions and processed 94% of its form types more slowly

221. *See* ABREU ET AL., *supra* note 209, at 120–21.

222. States that have passed legislation include Arkansas, California, Connecticut, Delaware, Illinois, Indiana, Louisiana, Maryland, Montana, Nevada, New York, North Dakota, Rhode Island, Vermont, Washington, and Wyoming. *See* SARAH LAKHANI & ALISON KAMHI, A GUIDE TO STATE LAWS ON U VISA AND T VISA CERTIFICATIONS (April 2020), https://www.ilrc.org/sites/default/files/resources/u_visa_and_t_visa_pa-04.2020.pdf [https://perma.cc/L4FA-LULD].

223. California is one example of a state that has instituted such a mandate. Passed in 2015, SB 674 creates a rebuttable presumption that a victim has been helpful and is eligible for certification provided "the victim has not refused or failed to provide information and assistance reasonably requested by law enforcement." CAL. PENAL CODE § 679.10(h) (West 2018). The bill also incentivizes compliance by instituting an annual reporting requirement. All enforcement agencies must submit yearly data on Supplement B requests and denials to the Legislature, enabling an external means of oversight over local law enforcement conduct. *Id.* § 679.10(n).

224. *See* SALLY KINOSHITA & ALISON KAMHI, A GUIDE TO OBTAINING U VISA CERTIFICATIONS 4–6 (2017), https://www.ilrc.org/sites/default/files/resources/u_visa_certification_advisory_ab.ak_.pdf [https://perma.cc/L2YQ-UL6V].

in 2018 than it did in 2014.[225] USCIS, as a result, is likely not well-suited to handle an influx of additional cases. This is especially troubling given that USCIS has limited experience and expertise involving workplace abuse matters.[226]

The POWER Act should therefore include a provision requiring that DHS be consulted upon passage of the bill with regard to the organizational and administrative capacity needed to manage the likely increase in workload. DHS should provide a realistic appropriations request to Congress covering the added costs of hiring and training personnel. This will ensure that increased rates of petition filing do not overwhelm an already-stretched agency.

D. PROSPECTS FOR PASSAGE

Any fair-minded observer will note that the POWER Act's track record does not portend passage. Given the bill's lack of traction in past Congresses and the politically combustible nature of immigration issues on Capitol Hill, does the POWER Act have a political path forward?

The POWER Act has been introduced in nearly every Congress since 2010.[227] These efforts have largely stalled amid an increasingly intransigent Congressional environment surrounding immigration legislation over the last two decades. Congress passed the last comprehensive immigration reform package in 1986.[228] Despite bipartisan recognition of a need to address increasing numbers of unauthorized immigrants, a broken economic-based visa system, and other issues, comprehensive legislative reforms backed by the Bush Administration in 2007 and by the Obama

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225. *See* AM. IMMIGR. LAWS. ASS'N, AILA POLICY BRIEF: USCIS PROCESSING DELAYS HAVE REACHED CRISIS LEVELS UNDER THE TRUMP ADMINISTRATION (2019) (on file with author).

226. *See* Cho et al., *supra* note 40, at 10.

227. *See* Protecting Our Workers from Exploitation and Retaliation Act, S. 3207, 111th Cong. (2010); Protecting Our Workers from Exploitation and Retaliation Act, H.R. 2169, 112th Cong. (2011); Protecting Our Workers from Exploitation and Retaliation Act, S. 1195, 112th Cong. (2011); Protecting Our Workers from Exploitation and Retaliation Act, H.R 4008, 114th Cong. (2015); Protecting Our Workers from Exploitation and Retaliation Act, H.R. 5908, 115th Cong. (2018); POWER Act, S. 2915, 115th Cong. (2018); Protecting Our Workers from Exploitation and Retaliation Act, H.R. 5225, 116th Cong. (2019); POWER Act, S. 2929, 116th Cong. (2019).

228. *See* Elaine Kamarck & Christine Stenglein, *Can immigration reform happen? A look back*, BROOKINGS INST. (Feb. 11, 2019), https://www.brookings.edu/blog/fixgov/2019/02/11/can-immigration-reform-happen-a-look-back/ [https://perma.cc/Z79Q-F2VY].

administration in 2013 both failed.[229] While immigration reform was able to unite the more centrist, pro-business planks of the Democratic and Republican parties in the past, the issue has now become a political third rail.[230]

Though it has yet to pass out of committee in either chamber, much of the POWER Act was included in the Border Security, Economic Opportunity, and Immigration Modernization Act, a comprehensive immigration reform bill that the Senate passed in 2013 with bipartisan support.[231] This success demonstrates that expanding U visa qualifications to cover employment violations and restricting the deportation of individuals pursuing this avenue of relief can garner bipartisan support, even from Republican Senators often reluctant to expand protections for undocumented individuals.

Moreover, the current legislative climate in Congress is not immune from bipartisan cooperation on immigration-related matters. In fact, two immigration bills passed the House of Representatives in 2019 with significant Republican backing. The first piece of legislation removed country caps on employment-based green cards[232] while the second, the Farm Workforce Modernization Act (FWMA), paved a pathway for undocumented farmworkers to secure permanent legal status.[233] The FWMA demonstrates a framing of the POWER Act that garnered broad support from both parties. The FWMA received significant Republican backing from House Members representing districts with heavy agricultural sectors that are dependent on immigrant labor.[234] Furthermore, supportive Republican representatives saw passage of the bill as a means of weakening the "black market" for undocumented labor.[235]

Consequently, it may be wise for advocates of the POWER Act to target Republicans with constituencies that are heavily reliant

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229. *Id.*

230. *Id.*

231. *See* POWER Act, S. 2929, 116th Cong. (2019).

232. In fact, 140 Republicans joined the Democratic House majority in passing the bill. *See* Ethan Baron, *Bill to scrap per-country green card cap passes House with bipartisan support*, DENVER POST (July 11, 2019, 8:27 AM), https://www.denverpost.com/2019/07/11/per-country-green-card-bill/ [https://perma.cc/4T9L-WK89].

233. *See* Nicole Narea, *The House passed a bipartisan bill that could legalize 325,000 unauthorized immigrants*, VOX (Dec. 12, 2019, 1:47 PM), https://www.vox.com/2019/10/31/20938968/bipartisan-agriculture-farmworker-legalization-immigrant-bill-house-pass [https://perma.cc/LT2U-SYF3]; Farm Workforce Modernization Act of 2019, H.R. 5038, 116th Cong. (2019).

234. Narea, *supra* note 233.

235. *Id.* (internal quotation marks omitted).

on the undocumented workforce. Specifically, supporters of the bill can highlight how lax treatment of employer violations affecting undocumented workers creates perverse incentives for continued employment of undocumented workers.[236] Additionally, proponents can also appeal to law and order concerns, underscoring the ability of the bill to enhance cooperation between the immigrant community and law enforcement. These considerations, when analyzed in full, could help reframe the rationale for the legislation, so as to better cultivate bipartisan backing and increase the bill's political viability.

That said, garnering large-scale Republican backing for a bill of this nature will prove difficult. "Sanctuary" policies embraced by many state and local jurisdictions have limited the ability of local authorities to refer undocumented individuals within police custody to ICE.[237] Proponents of these "sanctuary" efforts have advanced similar arguments to those backing the POWER Act, emphasizing enhanced protections for undocumented individuals that likewise bolster law enforcement capabilities.[238] Yet this pro-law enforcement rationale has failed to boost bipartisan support for "sanctuary" measures.[239] Instead, a more plausible path for passage involves inserting the POWER Act within a broad immigration package involving bi-partisan concessions, including likely Democratic compromises on border security. The 2013 bill made its way through the Senate as a result of this same strategy.[240]

Given the persistently polarized nature of immigration on Capitol Hill, this approach likely remains the most plausible avenue for passage. With the election of Joe Biden and Democratic control

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236. It is worth noting a key difference between the POWER Act and the FWMA that could diminish the persuasiveness of the "perverse incentive" arguments within the context of the POWER Act. Namely, the POWER Act, beyond merely normalizing the immigration status of workers, also enhances employees' protections and bargaining power. Republicans representing districts with relevant business interests could very likely respond negatively to pro-labor reforms of this nature.

237. *See* AM. IMMIGR. COUNCIL, SANCTUARY POLICIES: AN OVERVIEW 1 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/sanctuary_policies_an_overview.pdf [https://perma.cc/3J83-A5BF].

238. *Id.*

239. *See, e.g.*, Cristina Marcos, *House passes 'Kate's Law' and bill targeting sanctuary cities*, HILL (June 29, 2017, 5:32 PM), https://thehill.com/blogs/floor-action/house/340137-house-passes-kates-law-and-crackdown-on-sanctuary-cities [https://perma.cc/RL6U-9LUE].

240. *See* Seung Min Kim, *Senate passes immigration bill*, POLITICO (June 27, 2013, 4:25 PM), https://www.politico.com/story/2013/06/immigration-bill-2013-senate-passes-093530 [https://perma.cc/2D7Z-6DUE].

of both chambers of Congress beginning in 2021, the prospects of an immigration package passing should improve.[241] Yet the slim majorities in both the Senate and the House of Representatives will require the Biden Administration to expend a significant amount of political capital on immigration reform for comprehensive immigration reform to succeed.[242]

VI. Conclusion

This Note explores the precarity of leaving dueling regulatory regimes to the whims of Executive Branch prioritization. In particular, we see how undocumented workers find themselves caught at the often-muddled intersection of labor and immigration law. Given the asymmetrical enforcement mechanisms of the federal government, agency reform has proven insufficient. This Note emphasizes the potential impact of a proposed legislative fix: the POWER Act. The POWER Act aims to restore the balance between immigration and labor enforcement objectives while allaying the persistent deportation fears of undocumented employees who are forced to endure abusive work conditions in silence.

Xue Hui Zhang, the undocumented cook picked up by immigration authorities in the midst of a suit against his employer, was released from ICE detention nearly a month after his arrest.[243] In a subsequent court filing, the government asserted that were Mr. Zhang to be deported before the resolution of his employment claim, "he would be able to continue communicating with his attorneys with his employment rights case via telephone."[244] This assertion reveals an agency posture that fails to appreciate the challenges involved in resolving workplace-based claims for members of the immigrant community. It is time for Congress to impose a check on the Executive Branch's dismissal of undocumented workers' right to due process and justice in the workplace. The POWER Act provides one such avenue to respecting the dignity of workers,

241. *See* Jordain Carney, *Biden reignites immigration fight in Congress*, HILL (Jan. 30, 2021, 11:00 AM), https://thehill.com/homenews/administration/536590-biden-reignites-immigration-fight-in-congress [https://perma.cc/GX7M-XJBX].

242. *Id.*

243. *See* Beth Fertig, *Undocumented Restaurant Worker Released by ICE After Arrest While Suing His Former Employer*, GOTHAMIST (Sept. 23, 2019) https://gothamist.com/news/undocumented-restaurant-worker-released-ice-after-arrest-while-suing-his-former-employer [https:/perma.cc/C38X-MNLB].

244. *Id.* (internal quotation marks omitted).

combating incentives for employers to mistreat employees, and equalizing the enforcement of labor and immigration laws.