Immigration

Crime Victim Visa Could Have Undocumented Workers Saying #MeToo

An undocumented restaurant worker in Boston partially won her administrative sexual harassment case against her employer. Now she could be on a path to citizenship.

The Massachusetts Commission Against Discrimination recently issued a certification allowing Luvina Hernandez to apply for a special visa designed for crime victims who help prosecute the alleged perpetrators. An MCAD hearing officer previously found that Hernandez faced sexual harassment at the hands of the restaurant’s executive chef.

Her next step is to apply for a U visa which, if granted, will protect her from deportation and eventually allow her to apply for permanent residence and citizenship.

Undocumented workers historically have been reluctant to report labor and employment law violations out of fear their employers could retaliate by having them deported. Could the U visa make them more likely to come forward?

Limitations on Visas The visas aren’t a free-for-all option. There’s a limited list of crimes that qualify, and applicants must have experienced “mental or physical abuse” as a result of the crime. They also must get a certification from a law enforcement agency.

U visas also are in short supply, capped at 10,000 each year. There were 117,738 U visa applications still pending as of Dec. 31, 2017, according to U.S. Citizenship and Immigration Services.

The ability to get a U visa certification for sexual harassment “will certainly encourage more people to come forward,” said Laura Maslow-Armand, an attorney with the Boston-based Lawyers’ Committee for Civil Rights and Economic Justice.

“This is the very first certification” from the MCAD “as far as I know,” Maslow-Armand said.

The MCAD may have been swayed by the New York City Commission on Human Rights issuing the certifications, she said. The New York commission first did so in February 2016, and at the time was the first such agency in a major U.S. city to issue the certifications.

The federal Labor Department and Equal Employment Opportunity Commission also issue U visa certifications.

‘Viable Option’ in Some Cases The U visa “is a viable option” for undocumented workers whose employers commit workplace-related crimes, but not every workplace infraction will “rise to the level of a crime that qualifies for a U visa,” Hina Shah, director of the Women’s Employment Rights Clinic at Golden Gate University in San Francisco, told Bloomberg Law.

“Certain types of sexual harassment violations would qualify,” but not “garden-variety sexual harassment,” said Shah, whose clinic is part of the California-based Coalition of Low-Wage and Immigrant Worker Advocates.

“The U visa not only helps protect legitimate victims of crime, but is a key tool in the work performed by law enforcement,” USCIS spokesman Michael Bars said in a statement provided to Bloomberg Law. “USCIS reviews each petition on a case-by-case basis to determine whether the victim meets all eligibility requirements, including whether the person is a victim of a qualifying crime and whether the person was helpful or complied with reasonable requests for assistance,” he said.

A law enforcement agency’s certification also isn’t a guarantee that the immigrant gets the visa, a USCIS official said. Rather, it’s just a piece of the evidence the agency considers in determining whether to award the visa.

Unclear What Crimes Count “One of the struggles that employment advocates have” is figuring out which employment law violations count as a U visa qualifying crime if they’re not the “obvious” ones like involuntary servitude or human trafficking, Shah said.

It’s possible, however, that immigrants could qualify for U visas if an employer retaliates or threatens to retaliate by calling Immigration and Customs Enforcement, she said. The argument could be made that such action is obstruction of justice or witness tampering, both of which are U visa qualifying crimes, she said.

The CLIWA is putting together a Freedom of Information Act request to get more information from USCIS on which types of employment-related crimes are getting approvals and which are getting denied, Shah said.

It’s “very clear” that “traditional crimes” such as assault, rape, and murder are much easier to get certified by a law enforcement agency than workplace-related crimes, she said. But “we have a knowledge gap” in terms of what crimes qualify in the eyes of the USCIS, she said.

U visa petitions were approved in fiscal year 2017 for all of the qualifying crimes except slavery and forced labor.
data don’t, however, detail whether any of the crimes stemmed from workplace violations.

**Protection From Deportation?** “You have protection from deportation with the U visa,” but not while waiting for an application to get approved, Maslow-Armand said.

In fact, she said, immigrants awaiting U visas are particularly vulnerable if their sexual harassment or other claims eventually wind up in court because ICE officers are often posted in and around courthouses.

That’s why the Lawyers’ Committee, Greater Boston Legal Services, and public defenders in the state are asking the Massachusetts Supreme Court to consider issuing an order that protects immigrants who come to courthouses to conduct business from arrest by ICE, she said.

But ICE says it does encourage crime victims to come forward and cooperate with law enforcement.

“ICE has long recognized the importance of victims and witnesses and the critical role they play in successful investigations and prosecutions,” agency spokeswoman Danielle Bennett told Bloomberg Law July 3.

“ICE works closely with its state and local law enforcement partners to help make eligible individuals aware of, and pursue, U visas for victims of crimes including domestic violence and T visas for victims of human trafficking,” she said. The agency also has a victim assistance program for victims of crime being investigated by ICE’s Homeland Security Investigations, as well as an anonymous tip line, she said.

ICE also continues to follow policies established under the Obama and George W. Bush administrations regarding the treatment of U visa applicants and other crime victims, Bennett said.

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