
NOTES

COUNTERACTING THE BIAS: THE DEPARTMENT OF LABOR'S UNIQUE OPPORTUNITY TO COMBAT HUMAN TRAFFICKING

In the 1990s, human trafficking received increased attention both internationally and in the United States.¹ With the passage of the Trafficking Victims Protection Act of 2000² (TVPA), Congress committed the United States to attacking human trafficking on three fronts: prosecuting violators, protecting victims, and preventing trafficking.³ The TVPA prohibits “severe forms of trafficking in persons,”⁴ of which it designates two types: “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion”⁵ and labor trafficking, which involves “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁶ Under the TVPA, three federal agencies have domestic antitrafficking responsibilities in all three primary areas (prosecution, protection, and prevention): the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the Department of Labor (DOL).⁷

¹ See ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 16 (2010).

² Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

³ See 22 U.S.C. § 7101(a) (2006 & Supp. V 2011); U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* 16 (2011) [hereinafter *TIP REPORT 2011*] (“The TVPA’s minimum standards measure a country’s efforts to combat trafficking under the ‘3P’ paradigm: prosecution, protection, and prevention.”).

⁴ 22 U.S.C. § 7102(8).

⁵ *Id.* § 7102(8)(A). The definition also includes “a commercial sex act . . . in which the person induced to perform such act has not attained 18 years of age.” *Id.* As used in this Note, “sex trafficking” refers to the severe forms of sex trafficking prohibited by the TVPA.

⁶ *Id.* § 7102(8)(B). The TVPA has been reauthorized three times. Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003, Pub. L. No. 108-193, 117 Stat. 2875; TVPRA of 2005, Pub. L. No. 109-164, 119 Stat. 3558; William Wilberforce TVPRA of 2008, Pub. L. No. 110-457, 122 Stat. 5044. As of the time of writing, the TVPRA of 2011 had yet to be enacted. See S. 1301, 112th Cong. (2011); H.R. 2830, 112th Cong. (2011).

⁷ See generally U.S. DEP’T OF JUSTICE, *ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2010* (2011) [hereinafter *ATTORNEY GENERAL’S REPORT 2010*], available at <http://www.justice.gov/ag/annualreports/tr2010/agreporthumantrafficking2010.pdf>. Other agencies with significant antitrafficking responsibilities are the Department of State (in the area of international human trafficking) and the Department of Health and Human Services (in the area of victim services). See generally *id.*

Both scholars and practitioners have criticized U.S. antitrafficking efforts as heavily influenced by antiprostitution and border control forces.⁸ As Professor Dina Francesca Haynes notes, antitrafficking efforts within the United States have been inadequate largely because “the same persons charged with protecting [victims] are also charged with deporting undocumented persons, arresting prostitutes, and detaining and charging those working without authorization.”⁹ Unlike DOJ and DHS, DOL has no authority to address domestic sex trafficking, and it enforces labor standards without regard to workers’ immigration statuses. In the early years of the TVPA, DOL’s lack of authority in those areas corresponded with its anemic antitrafficking efforts.¹⁰ Although DOL still does not occupy a traditional law enforcement position within the federal antitrafficking apparatus, under President Obama it has shown a greater willingness to take advantage of the enforcement and regulatory tools it does have to combat key components of labor trafficking.

Part I briefly describes the scope and consequences of labor trafficking in the United States. Part II explains how antiprostitution and immigration concerns have contributed to the shortcomings of antitrafficking efforts in the United States. Part III explores how DOL, without the distractions of fighting prostitution and enforcing borders, has begun to take a stronger role in combating labor trafficking through its enforcement of employment laws, its certification of victims’ eligibility for U visas, and its regulation of nonimmigrant visa programs.

I. LABOR TRAFFICKING IN THE UNITED STATES

The scope of labor trafficking in the United States is difficult to estimate. According to the State Department, trafficking in the United States “can occur in many licit and illicit industries or markets, including in brothels, massage parlors, street prostitution, hotel services, hos-

⁸ See, e.g., ANTHONY M. DESTEFANO, *THE WAR ON HUMAN TRAFFICKING* 107–17 (2007); MAGGY LEE, *TRAFFICKING AND GLOBAL CRIME CONTROL* 109–20 (2011); Denise Brennan, *Competing Claims of Victimhood? Foreign and Domestic Victims of Trafficking in the United States*, SEXUALITY RES. & SOC. POL’Y, Dec. 2008, at 45, 46–53; Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010); James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1, 25–41 (2008); Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 44–48 (2009) [hereinafter Haynes, *Exploitation Nation*]; Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 363–65 (2007) [hereinafter Haynes, *(Not) Found Chained*].

⁹ Dina Francesca Haynes, *Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act*, 6 U. ST. THOMAS L.J. 77, 91–92 (2008).

¹⁰ Cf. generally Haynes, *(Not) Found Chained*, *supra* note 8 (criticizing federal agencies’ implementation of the TVPA but omitting any discussion of DOL’s efforts).

pitality, agriculture, manufacturing, janitorial services, construction, health and elder care, and domestic service.”¹¹ Confirmed numbers of individuals trafficked in the United States are impossible to obtain, but in the last decade, the federal government has settled on an estimated average of 14,500 to 18,000 per year.¹² In addition, DOJ tracks the victims certified each fiscal year under the TVPA to receive federal benefits and services. In 2010, 55% of such certified victims were male, reflecting a sharp increase in the certification of male victims since 2006, when only 6% were male.¹³ The vast majority of victims certified in 2010 — 78% — were victims of labor trafficking; another 10% were victims of both labor trafficking and sex trafficking.¹⁴

The core of human trafficking is exploitation; trafficking does not necessarily involve movement of individuals across borders.¹⁵ Nevertheless, noncitizens working in the United States are especially vulnerable: Undocumented workers may labor under conditions in which “employers take advantage of their status and fail to pay adequate (or any) wages, discriminate openly in the workplace, and violate labor and safety laws with impunity because of weak laws and weak employer enforcement efforts.”¹⁶ Migrant workers tend to concentrate in low-wage industries where employers may be less likely to follow workplace laws and regulations, and this is particularly true of undocumented migrant workers.¹⁷ Labor trafficking of noncitizens is not limited to undocumented workers, however; temporary workers with valid visas are also vulnerable to exploitation.¹⁸ Trafficked workers are often forced to work long, exhausting hours in dangerous conditions, placing them at great risk of serious work-related illnesses and accidents.¹⁹ Trafficking victims also frequently experience long-term psychological damage because “[t]he constant abuse, violence, and intimidation they have suffered make it nearly impossible for them to return to normal lives.”²⁰

Labor trafficking’s negative effects go far beyond the harm to the trafficked individual. The use of trafficked workers in an industry de-

¹¹ U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* 359–60 (2012) [hereinafter *TIP REPORT 2012*].

¹² KATHRYN CULLEN-DUPONT, *HUMAN TRAFFICKING* 44 (2009); see also Haynes, (*Not*) *Found Chained*, *supra* note 8, at 343.

¹³ ATTORNEY GENERAL’S REPORT 2010, *supra* note 7, at 29.

¹⁴ *Id.*

¹⁵ See, e.g., *TIP REPORT 2012*, *supra* note 11, at 13–14.

¹⁶ Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 893 (2008).

¹⁷ Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125, 128 (2009).

¹⁸ See *TIP REPORT 2012*, *supra* note 11, at 360.

¹⁹ See LOUISE SHELLEY, *HUMAN TRAFFICKING* 75 (2010).

²⁰ *Id.* at 72.

presses wages, undermining other workers' economic stability.²¹ Similarly, if employers of trafficked workers are able to neglect workplace health and safety because those workers are afraid to complain, then all employees are exposed to more dangerous workplaces.²² Moreover, at the same time that they increase workplace risks, businesses that employ trafficked workers provide no health care benefits to those workers, thereby shifting the costs of their medical care to the larger society.²³

II. SHORTCOMINGS OF DOMESTIC ANTITRAFFICKING EFFORTS

Most trafficking cases in the United States are not prosecuted.²⁴ Further, although the available evidence indicates that there are at least as many labor trafficking victims as sex trafficking victims in the United States, the government has, since the advent of the TVPA, prosecuted more sex trafficking cases than labor trafficking cases.²⁵ Antitrafficking investigation and prosecution resources have for years been devoted disproportionately to sex trafficking.²⁶ Even when the government has prosecuted labor trafficking violations, it has tended to focus on noncitizen employees rather than on U.S. companies.²⁷

One of the largest obstacles to protecting victims and prosecuting traffickers is the difficulty of identifying victims.²⁸ The trauma of exploitation, fear of employer retaliation, and unfamiliarity with workplace rights prevent trafficking victims from identifying themselves to authorities.²⁹ Undocumented immigrants, particularly those who have recently arrived in the United States, may be especially unlikely to report violations.³⁰ Further, the more widespread exploitative labor conditions are in an industry, the more difficult it is to distinguish trafficking victims within the broader category of exploited workers.³¹

²¹ See *id.* at 77.

²² *Id.*

²³ *Id.*; see also *id.* at 75 ("In the United States, uninsured trafficked laborers often arrive at the emergency rooms of hospitals. Their acute injuries often require expensive medical care that is not compensated by the employer of the illegal laborer.").

²⁴ Sarah C. Pierce, Note, *Turning a Blind Eye: U.S. Corporate Involvement in Modern Day Slavery*, 14 J. GENDER RACE & JUST. 577, 578 (2011).

²⁵ See ATTORNEY GENERAL'S REPORT 2010, *supra* note 7, at 29, 62; TIP REPORT 2012, *supra* note 11, at 360–62; TIP REPORT 2011, *supra* note 3, at 372–73.

²⁶ Brennan, *supra* note 8, at 51–53.

²⁷ Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1623–24, 1628–29 (2010).

²⁸ See Brennan, *supra* note 8, at 45–47, 53–57; Haynes, *Exploitation Nation*, *supra* note 8, at 44–48; Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1678 (2007).

²⁹ Nam, *supra* note 28, at 1678.

³⁰ See, e.g., Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 966–71 (2006).

³¹ See Brennan, *supra* note 8, at 53; Haynes, *Exploitation Nation*, *supra* note 8, at 44–45.

The tendency in the United States to view trafficking from anti-prostitution and border control perspectives has severely exacerbated the difficulty of identifying labor trafficking victims.³² By narrowing law enforcement agencies' conceptions of and responses to trafficking, those two warping influences have hampered antitrafficking efforts all down the line, from providing needed assistance to victims to effectively prosecuting their traffickers.³³

A. Antiprostitution Influences

Prostitution and human trafficking have long been conflated.³⁴ When, in the late twentieth century, the international legal community began to define "trafficking" in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,³⁵ a group of states propelled by antiprostitution nongovernmental organizations (NGOs) insisted there was no distinction between voluntary and forced prostitution.³⁶ They sought to include in the Trafficking Protocol "use in prostitution," regardless of consent, as a specific end purpose of trafficking.³⁷ The negotiators ultimately rejected that proposal and instead incorporated "exploitation of the prostitution of others" as one enumerated purpose of trafficking.³⁸

But antiprostitution forces in the United States — a coalition of feminists, evangelical Christians, and neoconservatives — were also working to link prostitution and human trafficking in domestic law.³⁹ In 1999, Republican Representative Chris Smith introduced the bill that would become "the true framework" for the TVPA.⁴⁰ Unlike other antitrafficking legislative proposals, Representative Smith's bill ex-

³² See TIP REPORT 2012, *supra* note 11, at 363 ("NGOs noted that some . . . law enforcement officials were reluctant to identify individuals as trafficking victims when the[y] have participated in criminal activity, facilitated their own smuggling, and/or were subjected to debt bondage or peonage by a smuggler."); Haynes, (*Not*) *Found Chained*, *supra* note 8, at 349 ("[V]iewing the trafficking act through the law enforcement filter may itself exacerbate the tendency of U.S. government personnel to treat trafficked persons as criminals, particularly when the victim does not fit into the expected mold of being rescued after being found chained to a bed in a brothel.").

³³ See Haynes, *supra* note 9, at 83 (speculating that traditional law enforcement agencies' "perceptions of the 'criminal actions' of the victim (being in the country illegally, using false documents, being illegally employed, being a sex worker — all crimes these same law enforcement officers are much more accustomed to prosecuting than to seeing as evidence of being a *victim* of human trafficking) are obscuring their willingness to apply the law").

³⁴ See GALLAGHER, *supra* note 1, at 13–15.

³⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Annex 2, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol].

³⁶ See GALLAGHER, *supra* note 1, at 26.

³⁷ See *id.* at 28.

³⁸ Trafficking Protocol, *supra* note 35, art. 3(a); see GALLAGHER, *supra* note 1, at 28.

³⁹ See Chuang, *supra* note 8, at 1664–69.

⁴⁰ DESTEFANO, *supra* note 8, at 35.

pressly denounced sex trafficking, which, as one commentator notes, “conservative Republicans seemed to equate with the trafficking phenomenon in general.”⁴¹ This conflation came to fruition during the George W. Bush Administration. The President, himself an evangelical Christian, announced that combating sex trafficking was a high priority. In September 2003, addressing the U.N. General Assembly, President Bush referred to human trafficking as “a special evil in the abuse and exploitation of the most innocent and vulnerable” and focused on child “victims of sex trade [who] see little of life before they see the very worst of life.”⁴² These statements — what they emphasized and what they downplayed — reflected Administration policy.

In 2004, the State Department issued a fact sheet titled *The Link Between Prostitution and Sex Trafficking*, which claimed that “[p]rostitution and related activities . . . fuel the growth of modern-day slavery” and that “[w]here prostitution is legalized or tolerated, there is a greater demand for human trafficking victims.”⁴³ The U.S. Government Accountability Office questioned the asserted link between prostitution and trafficking,⁴⁴ as did many human rights activists, researchers, and lawyers.⁴⁵ Nevertheless, the Bush Administration continued to conflate prostitution and trafficking, channeling antitrafficking funds to antiprostitution groups and away from organizations that focused on forced labor and the exploitation of migrant workers.⁴⁶ The Administration began requiring NGOs that used U.S. antitrafficking funds to sign an antiprostitution pledge.⁴⁷ The Trafficking Victims Protection Reauthorization Act of 2003 formalized that requirement for foreign and U.S.-based organizations.⁴⁸ Subsequent reauthorizations of the TVPA allocated funds specifically to ending demand for prostitution.⁴⁹

⁴¹ *Id.*

⁴² President George W. Bush, Address at the United Nations General Assembly (Sept. 23, 2003) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/09/20030923-4.html>).

⁴³ U.S. DEP’T OF STATE, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING 1 (2004), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1037&context=humtraffdata>.

⁴⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, HUMAN TRAFFICKING 25 (2006), available at <http://www.gao.gov/assets/260/250812.pdf>.

⁴⁵ See DESTEFANO, *supra* note 8, at 112; see also, e.g., CHRISTAL MOREHOUSE, COMBATING HUMAN TRAFFICKING 88 (2009) (“Countries[] in which prostitution is legal, such as Germany, have found no correlation between increased human trafficking and legalized prostitution.”).

⁴⁶ See Brennan, *supra* note 8, at 51–53.

⁴⁷ *Id.* at 50.

⁴⁸ See DESTEFANO, *supra* note 8, at 107. To receive antitrafficking funds from the U.S. government, an organization must formally state “that it does not promote, support, or advocate the legalization or practice of prostitution.” 22 U.S.C. § 7110(g)(2) (2006 & Supp. V 2011).

⁴⁹ See, e.g., 42 U.S.C. § 14044 (2006 & Supp. V 2011); see also Brennan, *supra* note 8, at 50–51.

Although the TVPA defines as prohibited “severe forms of [sex] trafficking” only those commercial sex acts that either involve minors or are “induced by force, fraud, or coercion,”⁵⁰ the statute requires federal law enforcement agencies to devote antitrafficking efforts and funds to commercial sex acts in general.⁵¹ Thus, the TVPA authorizes state and local law enforcement agencies to use federal antitrafficking grants to combat prostitution that does not constitute a severe form of human trafficking.⁵² This framework not only heightens law enforcement agencies’ tendency to focus more on potentially “easier” cases involving brothels, escort services, and massage parlors than on exploitative but otherwise legal workplaces⁵³ but also reinforces the federal government’s bias toward sex trafficking, as local police refer possible trafficking cases to federal agencies for prosecution.⁵⁴

The Obama Administration’s approach to trafficking appears less ideologically motivated than was the Bush Administration’s.⁵⁵ Yet the current Administration has not entirely rejected the prostitution-trafficking causal link.⁵⁶ It has continued to enforce the antiprostitution pledge⁵⁷ as well as to defend it against legal challenge.⁵⁸ President Obama’s State Department has, however, clearly made efforts in its annual *Trafficking in Persons* reports to increase recognition of labor trafficking.⁵⁹ And in September 2012, the President devoted his re-

⁵⁰ 22 U.S.C. § 7102(8).

⁵¹ See, e.g., *id.* § 7103(d)(7)(I)(i); 42 U.S.C. §§ 14044, 14044c.

⁵² See 42 U.S.C. § 14044c(a).

⁵³ See DESTEFANO, *supra* note 8, at 83; Julia C. Mead, *A Slow War on Human Trafficking*, N.Y. TIMES, May 28, 2006, at M1 (describing a DOJ-funded antitrafficking task force on Long Island that, despite a locally publicized forced-labor case and a growing Hispanic immigrant population, concentrated on raiding massage-parlor brothels with Asian employers and employees).

⁵⁴ See DESTEFANO, *supra* note 8, at 83.

⁵⁵ SHELLEY, *supra* note 19, at 259.

⁵⁶ See, e.g., TIP REPORT 2012, *supra* note 11, at 364 (describing a prevention effort as focused on “factors contributing to human trafficking, such as the demand for commercial sex”).

⁵⁷ See, e.g., U.S. DEP’T OF LABOR, PARTNERSHIP TO REDUCE CHILD LABOR AND FORCED LABOR IN IMPORTED AGRICULTURAL PRODUCTS 16 (2012), available at <http://www.dol.gov/ilab/grants/sga12-04-usda-solicitation-for-grants-final-web.pdf> (in a grant opportunity announcement, prohibiting both U.S.-based and foreign grantees and their contractors and subcontractors from “lobby[ing] for, promot[ing] or advocat[ing] the legalization or regulation of prostitution as a legitimate form of work” and including the following assertion: “The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing and contribute to the phenomenon of trafficking in persons.”).

⁵⁸ Cf. *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651 F.3d 218, 223–24 (2d Cir. 2011) (upholding preliminary injunctions against several U.S. health agencies to prevent them from enforcing an identical antiprostitution pledge in another statute), *petition for cert. filed*, 81 U.S.L.W. 3039 (U.S. July 2, 2012) (No. 12-10).

⁵⁹ See, e.g., TIP REPORT 2011, *supra* note 3, at 18 (criticizing countries that “ignore certain types of human trafficking, such as the forced labor of men and boys”); Melissa Ditmore, *The Sweep of Modern-Day Slavery*, GUARDIAN (June 25, 2009), <http://www.guardian.co.uk/commentisfree/cifamerica/2009/jun/24/human-trafficking-report-obama> (“Instead of adopting the Bush adminis-

marks at the Clinton Global Initiative's annual meeting entirely to the subject of trafficking. He used the opportunity to announce a new executive order prohibiting federal contractors, subcontractors, and their employees from engaging in recruitment practices that are hallmarks of labor trafficking: charging exorbitant recruitment fees, confiscating identification documents, refusing to pay return transportation costs, and using fraudulent or misleading recruitment practices.⁶⁰

B. Border Control Influences

In U.S. antitrafficking policy, there has long been tension between protecting national borders and protecting trafficking victims.⁶¹ Attempts to expand the TVPA's immigration protections are continually met with resistance from members of Congress who assume that immigrants will "game the system."⁶² The United States is not alone in fearing that providing unlimited assistance to trafficking victims would lead to abuse of immigration laws.⁶³ Professor James Hathaway argues that "the [international] antitrafficking campaign has . . . resulted in significant collateral human rights damage by providing a context for developed states to pursue a border control agenda under the cover of promoting human rights."⁶⁴ Indeed, the Trafficking Protocol requires states to "strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons."⁶⁵ Hathaway argues that such border control-focused antitrafficking obligations increase the likelihood of human smuggling, make the human

tration's myopic focus on sex trafficking, the Obama administration has expanded the definition of trafficking to include a wider variety of examples of labour abuses than ever before."

⁶⁰ President Barack Obama, Remarks to the Clinton Global Initiative Annual Meeting (Sept. 25, 2012) (transcript available at <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>); see Exec. Order No. 13,627, 77 Fed. Reg. 60,029, 60,029–30 (Oct. 2, 2012). Human trafficking allegations against private contractors in Iraq and Afghanistan no doubt prompted the announcement of the order. See TIP REPORT 2012, *supra* note 11, at 364.

⁶¹ See, e.g., DESTEFANO, *supra* note 8, at 107 (discussing DOJ's opposition to a provision in the TVPRA of 2003 that would have allowed trafficking victims to train border personnel in victim identification, which it feared "would potentially undermine the ability of Federal law enforcement to conduct border interdiction").

⁶² Amber McKinney, *House Committee Approves Legislation to Reauthorize Anti-Trafficking Statute*, [2011] Daily Lab. Rep. (BNA) No. 194, at A-16, 2011 WL 4613808 (Oct. 6, 2011) (discussing Representative Elton Gallegly's concern about a provision of H.R. 2830 that would require that trafficking victims be granted continued presence status within fifteen days and quoting him as saying, "I don't want to see all illegal immigrants in the United States begin to claim that they were trafficking victims just to stay in this country"); see also DESTEFANO, *supra* note 8, at 38–42 (describing similar fears expressed during debate of the TVPA).

⁶³ See LEE, *supra* note 8, at 72 ("In general, states are reluctant to give unconditional assistance and protection to trafficked victims on the assumption this will act as a 'pull factor' for irregular migrants and false claimants."); Chacón, *supra* note 27, at 1627–28.

⁶⁴ Hathaway, *supra* note 8, at 26.

⁶⁵ Trafficking Protocol, *supra* note 35, art. 11(1).

smuggling business more attractive to organized crime, and make migrants even more vulnerable to exploitation — a confluence of factors that actually increases human trafficking.⁶⁶

Of course, as former United Nations Adviser on Human Trafficking Anne Gallagher notes in response, “[i]f borders were truly open, the market for smugglers would cease to exist,”⁶⁷ but in reality, “states take full advantage of the carefully preserved international legal right to control their own borders.”⁶⁸ It would take a “radical shift” in migration regimes to correct the “market distortion” — that is, the present situation of insufficient safe, legal migration opportunities for all who wish or are forced to migrate — that results in trafficking.⁶⁹ As President Obama has observed, the other crucial element of the long-term international solution is “development and economic growth that creates legitimate jobs” and thereby reduces the “likelihood of indentured servitude around the globe.”⁷⁰

Nevertheless, the United States’ present concern with border control, heightened since 9/11, conflicts with its commitments to prosecuting traffickers and protecting trafficking victims.⁷¹ From the prosecution standpoint, the border control focus exacerbates the tendency of law enforcement officials to target undocumented trafficked workers far more than they target traffickers.⁷² From the victim-protection standpoint, when local, state, or federal law enforcement officials locate undocumented workers, the inordinate focus on border control encourages those officials to view the workers primarily as criminals who need to be deported and secondarily, or not at all, as potential trafficking victims who need to be assisted.⁷³ This is so even though the TVPA explicitly requires federal agencies to serve trafficking victims “without regard to the immigration status of such victims.”⁷⁴

⁶⁶ Hathaway, *supra* note 8, at 32–34.

⁶⁷ Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 833 (2009).

⁶⁸ *Id.* at 834.

⁶⁹ *Id.*

⁷⁰ Obama, *supra* note 60.

⁷¹ See generally Chacón, *supra* note 27.

⁷² See SHELLEY, *supra* note 19, at 260; Chacón, *supra* note 27, at 1623–24, 1628–29; Haynes, *supra* note 9, at 91.

⁷³ See, e.g., REBECCA SMITH ET AL., ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS’ RIGHTS 30–31 (2009), available at http://www.americanrightsatwork.org/dmdocuments/ARAWReports/icedout_report.pdf; Chacón, *supra* note 27, at 1625–26; Haynes, *supra* note 9, at 91.

⁷⁴ See 22 U.S.C. § 7105(b)(1)(B) (2006 & Supp. V 2011).

III. DOL'S POTENTIAL TO COMBAT LABOR TRAFFICKING

DOL has broad authority to administer and enforce employment laws.⁷⁵ The TVPA thus assigns DOL antitrafficking responsibilities in all three areas: prosecution through participation in antitrafficking task forces,⁷⁶ protection through “expand[ing] benefits and services to victims of severe forms of trafficking in persons in the United States,”⁷⁷ and prevention through conducting public awareness campaigns.⁷⁸ Without the distractions of prostitution and immigration, DOL is in a unique position to focus on labor trafficking, and it has begun to take advantage of that position under President Obama.

A. DOL's Unique Position

DOL should be at the forefront of anti-labor trafficking efforts within the United States, particularly because its Wage and Hour Division (WHD) field investigators tend to be the government authorities who uncover the exploitation of workers.⁷⁹ As Secretary of Labor Hilda Solis has explained: “In those industries where high numbers of vulnerable workers are found, like restaurants, garment manufacturing, and agriculture, [WHD] investigators interview workers and assess situations where workers may have been intimidated, threatened, or held against their will. Investigators also review payroll records and inspect migrant farm worker housing.”⁸⁰ Nevertheless, the federal government's preoccupations with prostitution and border control have until recently hampered DOL's ability to apply its regulatory and enforcement tools to labor trafficking.

The focus on combating prostitution during the first several years of the TVPA discouraged recognition of DOL as a major force in the antitrafficking realm. If, for example, the trafficking victims whom the federal government was most committed to identifying were sex-

⁷⁵ See *Summary of the Major Laws of the Department of Labor*, U.S. DEP'T OF LAB., <http://www.dol.gov/opa/aboutdol/lawsprog.htm> (last visited Dec. 1, 2012).

⁷⁶ See, e.g., 22 U.S.C. § 7103 (establishing the Interagency Task Force to Monitor and Combat Trafficking). DOL is a member of other antitrafficking task forces as well, including the Federal Enforcement Working Group, which in 2012 launched six pilot Anti-Trafficking Coordination Teams around the country. *Obama Administration Accomplishments on Combating Trafficking in Persons as of February 2012*, U.S. DEP'T OF STATE (Mar. 15, 2012), <http://www.state.gov/j/tip/rls/reports/2012/184881.htm> [hereinafter *Obama Administration Accomplishments*].

⁷⁷ 22 U.S.C. § 7105(b)(1)(B). All agencies must expand services to victims to match those provided to refugees. *Id.* § 7105(b)(1)(A).

⁷⁸ *Id.* § 7104(b).

⁷⁹ See TIP REPORT 2012, *supra* note 11, at 364; Hilda Solis, Sec'y, Dep't of Labor, Remarks at the 2010 DOJ National Conference on Human Trafficking: The TVPA Decade: Progress and Promise (May 3, 2010) (remarks as prepared for delivery available at http://www.dol.gov/_sec/media/speeches/20100503_Trafficking.htm).

⁸⁰ Solis, *supra* note 79.

ually exploited women and children — not migrant farm workers or garment factory workers — then there was no need to provide for training of DOL personnel to identify trafficking victims.⁸¹ The conceptual shift away from equating trafficking with prostitution is far from complete. In this context, DOL's inability to focus on sex trafficking and prostitution is an asset to the United States' overall anti-trafficking efforts, helping to counterbalance the lingering effects of the antiprostitution influence. DOL has no statutory authority to address prostitution or sex trafficking in the United States.⁸² Thus, DOL alone among federal enforcement agencies can devote all of its domestic anti-trafficking resources to combating labor trafficking.

In the area of border control, too, DOL is in a unique position among federal agencies precisely because of its lack of enforcement authority. Both DHS and DOJ are tasked with prosecuting not only those who recruit, transfer, or employ illegal aliens but also the aliens themselves⁸³ — that is, potential trafficking victims as well as those who traffic them. Thus, in DOJ's and DHS's investigations of exploitative labor conditions, it is only the workers' possible statuses as trafficking victims that stand between them and prosecution, deportation, or both.⁸⁴ By contrast, in DOL's investigations of exploitative labor conditions, the immigration statuses of the workers are irrelevant.⁸⁵ Crucially, DHS itself recognizes DOL's authority to investigate workplaces without interference from Immigration and Customs Enforcement (ICE). In a memorandum of understanding (MOU) signed on December 7, 2011, DHS and DOL agreed to take specific steps “to ensure coordination and deconfliction of their respective civil enforce-

⁸¹ See 22 U.S.C. § 7105(c)(4) (requiring that “[a]ppropriate personnel of the Department of State, the Department of Homeland Security, the Department of Health and Human Services, and the Department of Justice” receive trafficking victim identification training). The TVPRA of 2011 could add DOL to the list of agencies in this provision. See S. 1301, 112th Cong. § 224 (2011).

⁸² DOL's 1913 organic statute declares that the agency's purpose is “to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.” 29 U.S.C. § 551 (2006). The TVPA gives DOL's Bureau of International Labor Affairs authority to monitor forced labor and child labor internationally. 22 U.S.C. § 7112(b).

⁸³ See, e.g., 8 U.S.C. §§ 1321–1330 (2006).

⁸⁴ See Haynes, *supra* note 9, at 91–92.

⁸⁵ See, e.g., Letter Brief of U.S. Department of Labor at 1, *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292 (11th Cir. 2011) (No. 09-12266), available at <http://www.dol.gov/sol/media/briefs/josendis%28A%29-8-26-2010.pdf> (“The longstanding position of the Department of Labor . . . is that undocumented workers are entitled to minimum wages and overtime pay for hours worked under the [Fair Labor Standards Act (FLSA)].”); see also SMITH ET AL., *supra* note 73, at 13. As one court has observed, “the FLSA's coverage of undocumented aliens goes hand in hand with the policies behind” U.S. immigration law, for “[i]f the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them.” *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988).

ment activities.”⁸⁶ According to the MOU, except under certain limited circumstances, “ICE agrees to refrain from engaging in civil work-site enforcement activities at a worksite that is the subject of an existing DOL investigation of a labor dispute during the pendency of the DOL investigation and any related proceeding.”⁸⁷ The agreement applies to enforcement activities by DOL’s Office of Federal Contract Compliance Programs, Office of Labor-Management Standards, Occupational Safety and Health Administration, and WHD.⁸⁸

DOL has also taken a public stance against the encroachment of immigration control on its enforcement of worker-protection statutes. In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*,⁸⁹ the Supreme Court ruled that undocumented workers whose rights under the National Labor Relations Act (NLRA) had been violated could not be awarded back wages.⁹⁰ WHD, which routinely seeks back-pay awards on behalf of workers whose employers have violated labor standards, issued a statement boldly declaring that the Court’s decision applied only to the NLRA.⁹¹ It explained, “[t]he Supreme Court did not address laws the Department of Labor enforces, such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), that provide core labor protections for vulnerable workers.”⁹² Therefore, WHD insisted, it would “continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented.”⁹³

B. DOL’s Antitrafficking Tools

As the prostitution focus of other law enforcement agencies’ domestic antitrafficking efforts lingers and as DOL’s commitment to enforcing workplace protections without concern for workers’ immigration statuses becomes better recognized, DOL has begun to take advantage of its

⁸⁶ Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites 2 (Dec. 7, 2011), available at <http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf> [hereinafter DHS-DOL MOU]. The MOU replaced one that had been signed in 1998 but was not consistently followed. See SMITH ET AL., *supra* note 73, at 13, 30–31.

⁸⁷ DHS-DOL MOU, *supra* note 86, at 2.

⁸⁸ *Id.* at 1–2.

⁸⁹ 535 U.S. 137 (2002).

⁹⁰ *Id.* at 151–52.

⁹¹ U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FACT SHEET #48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF *HOFFMAN PLASTICS* DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION 1 (2008), available at <http://www.dol.gov/whd/regs/compliance/whdfs48.pdf>.

⁹² *Id.*

⁹³ *Id.*; see also Letter Brief of U.S. Department of Labor, *supra* note 85, at 1 (arguing that “in *Hoffman*, the Court held only that undocumented workers terminated in violation of the National Labor Relations Act . . . are not entitled to the remedy of backpay for work they never performed”).

uniquely strong position. It is expanding its efforts to combat components of labor trafficking as it enforces employment laws, certifies victims' eligibility for U visas, and regulates nonimmigrant visa programs.

1. *Enforcing Employment Laws.* — Of the DOL-enforced statutes relevant to trafficking victims, the FLSA⁹⁴ is among the most important because it imposes minimum-wage,⁹⁵ overtime,⁹⁶ and record-keeping requirements⁹⁷ on covered employers. WHD has participated in numerous trafficking-related investigations under the FLSA,⁹⁸ but it collects no enforcement data on human trafficking⁹⁹ and often does not underscore the antitrafficking elements of its work. For example, in 2006, DOL announced that the WHD Seattle District Office had determined that a Tacoma, Washington, restaurant had violated the FLSA's minimum-wage, overtime, and record-keeping provisions.¹⁰⁰ WHD's press release merely noted that "[t]he \$51,923 ordered to be paid by the owners will be paid as back wages to the workers they unlawfully employed in their restaurant."¹⁰¹ DOJ gave a fuller picture: in addition to violating labor laws, the defendants had harbored illegal aliens and induced them to stay in the United States.¹⁰² DOL's blindness to workers' immigration statuses helps explain its sometimes incomplete accounts of the antitrafficking cases in which it participates.¹⁰³

From an antitrafficking perspective, WHD's investigative authority is a double-edged sword. On the one hand, WHD investigators are not inherently limited by the identification problems that traditional federal law enforcement officials face. Professor Jennifer Chacón explains the typical approach of other federal agencies:

If an individual falls in a gray area — between an outright victim of “severe” trafficking and a smuggled migrant who is subject to everyday forms

⁹⁴ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006 & Supp. V 2011).

⁹⁵ *Id.* § 206.

⁹⁶ *Id.* § 207.

⁹⁷ *Id.* § 211(c).

⁹⁸ See, e.g., *Obama Administration Accomplishments*, *supra* note 76 (discussing WHD's involvement in, inter alia, *United States v. Sabhani*, 599 F.3d 215 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1000 (2011)).

⁹⁹ TIP REPORT 2012, *supra* note 11, at 364.

¹⁰⁰ Press Release, U.S. Dep't of Labor, Wage & Hour Div., U.S. Dept. of Labor Wins \$51,923 in Back Wages for Employees of Rainbow Buffet, Tacoma, Wash. (Feb. 16, 2006), *available at* <http://www.dol.gov/whd/media/press/whdpressVB2.asp?pressdoc=Western/archived/20060252.xml>.

¹⁰¹ *Id.*

¹⁰² Press Release, U.S. Attorney's Office for the W. Dist. of Wash., Tacoma Resident Sentenced to Prison for Harboring and Inducing Illegal Aliens (Feb. 2, 2006), *available at* <http://www.justice.gov/usao/waw/press/2006/feb/shu.html>.

¹⁰³ Of course, the two agencies' different areas of enforcement necessarily lead to different perspectives. DOL may order the trafficker to pay fines and back wages, but DOJ prosecutes the charges of human trafficking. See, e.g., DESTEFANO, *supra* note 8, at 69–71 (describing one of the first large human trafficking cases prosecuted by the federal government, involving a garment manufacturer in American Samoa).

of labor exploitation — the government's approach has been to treat the gray-area case as one involving a voluntary migrant who is not eligible for the protections available to trafficking victims.¹⁰⁴

WHD, by contrast, does not have to take that approach: even if it is unclear whether exploited workers have been subjected to conditions that constitute human trafficking, WHD can investigate and penalize employers for labor violations. Further, WHD can secure a wide range of relief that not only assists the workers in the instant case but also prevents exploitation of future workers. In August 2012, for example, DOL settled complaints involving more than 1100 blueberry pickers in Oregon, many of whom allegedly worked without pay.¹⁰⁵ In addition to collecting over \$240,000 in back pay, damages, and penalties, DOL secured consent decrees requiring that farm foremen receive training from WHD personnel and that the farms select third-party monitors who speak the workers' languages to audit the farms' pay practices in 2013 and 2014.¹⁰⁶

On the other hand, WHD investigators have no authority to enter workplaces except to assess compliance with the statutes that WHD enforces.¹⁰⁷ Further, if DOL is not the first agency to investigate a business suspected of employing undocumented workers, it may not be notified of any labor violations observed there, because immigration officials do not automatically involve DOL when they detect worker exploitation.¹⁰⁸ More broadly, any reliance on DOL enforcement actions must take into account the insufficient numbers of workplace inspectors.¹⁰⁹ According to one report, WHD had a mere 709 investigators in 2008, down from a high of 1343 in 1978.¹¹⁰ Combined with relatively small penalties, the low probability that a workplace will be

¹⁰⁴ Chacón, *supra* note 27, at 1635.

¹⁰⁵ See Press Release, U.S. Dep't of Labor, Wage & Hour Div., US Department of Labor Recovers \$240,000 in Back Wages, Damages and Penalties from 3 Oregon Berry Farmers (Aug. 31, 2012), available at http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Western/20120831.xml#.UJVI_YbZ2_8.

¹⁰⁶ See *Solis v. B&G Ditchen, LLC*, No. 6:12-CV-01566-TC (D. Or. Aug. 30, 2012) (consent judgment and order); *Solis v. E&S Farms, Inc.*, No. 6:12-CV-01564-HO (D. Or. Aug. 30, 2012) (same); *Solis v. Pan-Am. Berry Growers, LLC*, No. 6:12-CV-01474-HO (D. Or. Aug. 18, 2012) (same).

¹⁰⁷ See Gabriela D. Lemus, Senior Advisor & Dir. of the Office of Pub. Engagement, U.S. Dep't of Labor, Statement Before the Commission on Security and Cooperation in Europe (May 23, 2011) (transcript available at http://www.dol.gov/_sec/media/congress/20110523_Lemus.htm) (explaining that WHD "does not have responsibility to investigate trafficking directly").

¹⁰⁸ See SMITH ET AL., *supra* note 73, at 5.

¹⁰⁹ See, e.g., Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 330 (2005); Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 554 (2010); ANNETTE BERNHARDT & SIOBHÁN MCGRATH, BRENNAN CTR. FOR JUSTICE, TRENDS IN WAGE AND HOUR ENFORCEMENT BY THE U.S. DEPARTMENT OF LABOR, 1975–2004 (2005), available at http://www.brennancenter.org/page/-/d/download_file_35553.pdf.

¹¹⁰ Fine & Gordon, *supra* note 109, at 554.

investigated encourages employers to treat labor-standards enforcement actions as a cost of doing business rather than as a deterrent.¹¹¹ Further complicating this picture is the likelihood that trafficking victims, particularly noncitizens, will be too fearful to report their employers to DOL or to cooperate with DOL investigators if their workplace is inspected.

The Obama Administration has devoted attention to several of these problems. First, in the December 2011 MOU between DHS and DOL, the agencies “agree[d] to create a means to exchange information to foster enforcement against abusive employment practices directed against workers regardless of status.”¹¹² Thus, when ICE uncovers violations of worker-protection statutes, it is now expected to refer those cases to DOL.¹¹³ In turn, DOL agreed to provide information to ICE about criminal human trafficking violations.¹¹⁴ Second, Secretary Solis announced in May 2010 that she was increasing every DOL agency’s enforcement staff to “focus on protecting the most vulnerable workers in today’s economy.”¹¹⁵ She noted that she had already added 250 WHD investigators.¹¹⁶ Third, WHD has increased the cost of noncompliance by using enforcement tools such as the FLSA’s “hot goods” provision, which permits DOL to seek an injunction against the sale or transportation of products made by workers who have not been legally compensated.¹¹⁷ In the Oregon blueberry pickers cases, for example, DOL used the threat of an embargo to secure quick settlements that included back wages for the underpaid and unpaid workers.¹¹⁸ Finally, DOL has begun the “We Can Help” campaign, a public-awareness initiative that aims to educate workers about their rights and inform them that they can safely and privately report workplace violations, even if they are undocumented.¹¹⁹

To the extent that trafficked workers become aware that DOL enforces their rights without regard to immigration status, those workers should be more likely to contact DOL to report workplace abuses, and to cooperate with DOL investigators, than they would be to contact or cooperate with other law enforcement authorities. And, as is true of all

¹¹¹ See Estlund, *supra* note 109, at 330.

¹¹² DHS-DOL MOU, *supra* note 86, at 4.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Solis, *supra* note 79.

¹¹⁶ *Id.*

¹¹⁷ 29 U.S.C. §§ 215, 217 (2006).

¹¹⁸ Paul Shukovsky, *DOL Knocked for Using “Hot Goods” Provision in Wage Charges Against Blueberry Farmers*, [2012] Daily Lab. Rep. (BNA) No. 173, at A-4, 2012 WL 3862103 (Sept. 6, 2012). Critics of DOL’s use of this enforcement tool complain that it violates employers’ due process rights, but supporters underscore the requirement that DOL secure an injunction before issuing a hot goods order. *Id.*; see 29 U.S.C. § 217.

¹¹⁹ Solis, *supra* note 79. The campaign utilizes investigators who speak multiple languages. *Id.*

of DOL's domestic enforcement efforts, any antitrafficking resources it expends must necessarily be aimed at labor trafficking, not sex trafficking. Moreover, whereas traditional law enforcement agencies might find brothel and massage-parlor cases easier to prosecute than labor cases,¹²⁰ DOL has specific expertise in investigating violations that occur in exploitative but otherwise lawful workplaces. Under these circumstances, DOL is far better positioned than are other federal agencies to detect and alleviate many of the forms of abuse that labor trafficking victims experience, gaining not only awards of back wages for trafficked workers but also injunctions to prevent future exploitation.

2. *Assessing Trafficking Victims' U Visa Eligibility.* — For many labor trafficking victims in the United States, securing an immigration status that allows them to avoid deportation is a prerequisite to rebuilding their lives after escaping exploitative situations.¹²¹ The TVPA's main visa provision for victims of severe trafficking is the "T visa,"¹²² for which DOL has been delegated no specific authority. But the TVPA also added trafficking victims to those noncitizen crime victims protected from removal under the Immigration and Nationality Act of 1952¹²³ (INA) by the "U visa."¹²⁴ The U visa provides four years of nonimmigrant legal status,¹²⁵ as well as the ability to seek permanent resident status.¹²⁶ In addition, "any alien who has a pending, bona fide application for [U visa] nonimmigrant status" may be granted workplace authorization¹²⁷ — another key to labor trafficking victims' ability to recover from their exploitation.

Seven years after passage of the TVPA, the U.S. Citizenship and Immigration Services (USCIS) of DHS promulgated regulations governing the U visa.¹²⁸ To be eligible for this protected status, an individual must have been a victim of a qualifying criminal activity¹²⁹ (QCA), must have relevant information about the QCA,¹³⁰ must have

¹²⁰ See DESTEFANO, *supra* note 8, at 83.

¹²¹ See Haynes, (*Not*) *Found Chained*, *supra* note 8, at 377–78.

¹²² 8 U.S.C. § 1101(a)(15)(T) (2006 & Supp. V 2011); see DESTEFANO, *supra* note 8, at 105–06.

¹²³ Pub. L. No. 82-414, 66 Stat. 163.

¹²⁴ See 8 U.S.C. § 1101(a)(15)(U).

¹²⁵ See *id.* § 1184(p)(6).

¹²⁶ See *id.* § 1255(m).

¹²⁷ *Id.* § 1184(p)(6).

¹²⁸ See New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (codified in scattered parts of 8 C.F.R.).

¹²⁹ 8 U.S.C. § 1101(a)(15)(U)(iii). Qualifying criminal activities include "rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes." *Id.*; see also 8 C.F.R. § 214.14(a)(9) (2012).

¹³⁰ See 8 U.S.C. § 1101(a)(15)(U)(i)(II).

cooperated or be willing to cooperate with law enforcement efforts,¹³¹ and must have “suffered substantial physical or mental abuse as a result of” the victimization.¹³² The USCIS regulations require that the first three criteria be certified in Form I-918, Supplement B.¹³³ Only an authority “that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity” can provide such a certification; the USCIS regulations explicitly identify DOL as one such authority.¹³⁴ Of course, DOL’s “area[] of expertise” limits the range of criminal activities subject to its certification authority; unlike almost every other certifying agency, DOL has authority to certify only victims of labor-related crimes, not victims of sex crimes.¹³⁵ During the Bush Administration, DOL declined to use its U visa authority.¹³⁶ In March 2010, Secretary Solis announced that DOL would begin exercising its certification authority¹³⁷ and delegated it to the WHD Administrator.¹³⁸

In April 2011, the WHD Administrator disseminated Supplement B certification guidelines to WHD regional administrators and district directors.¹³⁹ These guidelines specify that “WHD will consider exercis-

¹³¹ See *id.* § 1101(a)(15)(U)(i)(III). This requirement, like the similar requirement of the T visa, has received negative attention from commentators who insist that trafficking victims’ protection from deportation should not be conditioned on their cooperation with investigations. See, e.g., Chacón, *supra* note 27, at 1622–23. It is important to note, however, that Congress created the U visa to “encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens,” viewing the visa as an incentive for otherwise reluctant victims to cooperate in investigations. 8 U.S.C. § 1101 note. The TVPA contains a separate provision that allows trafficking victims to petition for “continued presence,” a temporary immigration status and work authorization that, although it requires the recipient to be a potential witness in a trafficking investigation, is not conditioned on the victim’s cooperation. See 22 U.S.C. § 7105(c)(3) (2006 & Supp. V 2011); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, CONTINUED PRESENCE: TEMPORARY IMMIGRATION STATUS FOR VICTIMS OF HUMAN TRAFFICKING 2 (2010), available at <http://www.ice.gov/doclib/human-trafficking/pdf/continued-presence.pdf>. DOL has no authority over continued presence.

¹³² 8 U.S.C. § 1101(a)(15)(U)(i)(I).

¹³³ See 8 C.F.R. § 214.14(c)(2)(i) (2012). The form must state, inter alia, that “the applicant has been a victim of qualifying criminal activity that the certifying official’s agency is investigating or prosecuting; the petitioner possesses information concerning the qualifying criminal activity of which he or she has been a victim; [and] the petitioner has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying criminal activity.” *Id.* USCIS itself makes the “substantial physical or mental abuse” determination. *Id.* § 214.14(b)(1), (c)(2)(ii).

¹³⁴ *Id.* § 214.14(a)(2).

¹³⁵ See *id.*

¹³⁶ See, e.g., Solis, *supra* note 79.

¹³⁷ Press Release, U.S. Dep’t of Labor, US Labor Department to Exercise Authority to Certify Applications for U Visas (Mar. 15, 2010), available at <http://www.dol.gov/opa/media/press/opa/OPA20100312.htm>.

¹³⁸ See Memorandum from Nancy J. Leppink, Acting Adm’r, Wage & Hour Div., U.S. Dep’t of Labor, to Reg’l Adm’rs & Dist. Dirs., Certification of Supplement B Forms of U Nonimmigrant Visa Applications, Field Assistance Bulletin No. 2011-1, at 1 (Apr. 28, 2011), available at http://www.dol.gov/whd/FieldBulletins/fab2011_1.pdf.

¹³⁹ *Id.*

ing its authority to certify Supplement B forms” only if all of the following conditions are met: “(1) [T]he detected QCA is involuntary servitude, peonage, trafficking, obstruction of justice or witness tampering; (2) the alleged QCA arises in the context of a work environment or an employment relationship; and (3) there is a related, credible allegation of a violation of a law that WHD enforces.”¹⁴⁰ WHD emphasizes that DOL has no investigatory or prosecutorial jurisdiction over QCAs — its certification authority stems from its *detection* of the QCA during a WHD investigation.¹⁴¹ This relatively passive role is confirmed by WHD’s prediction that U visa petitioners will come to it seeking assistance,¹⁴² an odd expectation given victims’ precarious employment and immigration statuses. However, as discussed above, DOL’s efforts to publicize its immigration-blind workplace enforcement actions may increase the likelihood that undocumented trafficked workers will come forward to DOL investigators.

Unfortunately, because DOL has such limited authority over U visa applications, its ability to disregard immigration statuses has a less powerful effect in this context than it does in others. The continuing preoccupation with border control and the concomitant fear that immigrants will abuse the visa program led Congress to cap the number of U visas granted annually at 10,000.¹⁴³ For three consecutive years, the cap has been reached before the fiscal year’s end.¹⁴⁴ Still, within these confines, DOL’s role in assessing labor trafficking victims’ U visa eligibility continues to evolve and may expand over time.¹⁴⁵

3. *Regulating Work Visa Programs.* — As noted above, not all non-citizen labor trafficking victims are undocumented workers; workers with valid visas may also be trafficked. The H-2 visa program, which provides visas for temporary and seasonal employment,¹⁴⁶ has received special attention in the antitrafficking arena. Workers who seek these

¹⁴⁰ *Id.* at 2.

¹⁴¹ *Id.* at 4; *see also id.* at 6 (“WHD investigators will not initiate an investigation or return to a workplace for the sole purpose of detecting information about a QCA.”).

¹⁴² *Id.* at 4 (“WHD anticipates that Supplement B form certification requests will arise in two primary contexts: (1) during a WHD workplace investigation, or after the investigation is completed, an individual connected with the investigation requests that WHD complete and certify a Supplement B form based on a detected or alleged QCA; (2) a U Visa petitioner contacts WHD with an allegation of both a violation of a law that WHD enforces and a related QCA and requests that WHD complete and certify a Supplement B form.”).

¹⁴³ *See* 8 U.S.C. § 1184(p)(2)(A) (2006 & Supp. V 2011).

¹⁴⁴ *See* Press Release, U.S. Citizenship & Immigration Servs., USCIS Reaches Milestone for Third Straight Year: 10,000 U Visas Approved in Fiscal Year 2012 (Aug. 21, 2012).

¹⁴⁵ *See, e.g.,* S. 1301, 112th Cong. § 212 (2011) (adding “fraud in foreign labor contracting” to the list of QCAs); ATTORNEY GENERAL’S REPORT 2010, *supra* note 7, at 54 (noting that “WHD has trained interim U visa coordinators in each of the agency’s five regions to review and process U visa applications, and make recommendations regarding certification,” and that DOL “is in the process of hiring permanent U visa coordinators in all five regions”).

¹⁴⁶ *See* 8 U.S.C. § 1101(a)(15)(H)(ii).

visas often pay high recruiting fees to foreign labor contractors, incurring enormous debts, and then find upon their arrival in the United States that their employers illegally confiscate their passports and other documents, alter the terms of their employment and working conditions, and even withhold their wages.¹⁴⁷ Further, these relatively low-wage workers are authorized to work only for their sponsoring employers, leaving them particularly vulnerable to labor exploitation.¹⁴⁸ During the first Obama Administration, DOL attempted to increase its regulatory oversight of the wages and treatment of workers in these nonimmigrant visa programs, but not without challenge.

The INA originally included only one visa program for unskilled foreign workers, the H-2 program, which covered both agricultural and nonagricultural work.¹⁴⁹ DOL and DOJ together administered the H-2 program.¹⁵⁰ DOL issued program-wide regulations requiring employers applying for certification of temporary workers to show “that qualified persons in the United States are not available and that the terms of employment will not adversely affect the wages and working conditions of workers in the United States similarly employed.”¹⁵¹ In 1986, Congress amended the H-2 provision, separating it into the H-2A program, which applies to agricultural labor and services,¹⁵² and the H-2B program, which covers nonagricultural work.¹⁵³ Unfortunately, Congress “provided very little guidance as to the H-2B program”¹⁵⁴ and failed to “specifically use the magic words ‘DOL shall promulgate regulations to administer the H-2B program.’”¹⁵⁵ Thus, whereas DOL

¹⁴⁷ See generally MARY BAUER, CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES (2007), available at http://www.splcenter.org/sites/default/files/downloads/Close_to_Slavery.pdf (reporting widespread abuses of the H-2 visa program).

¹⁴⁸ See *id.* at 2; Elliott Dube, *Speakers Blast Attempts to Block DOL Rules that Would Boost H-2B Worker Protections*, [2012] Daily Lab. Rep. (BNA) No. 143, at A-6, 2012 WL 3025572 (July 25, 2012); cf. Haynes, (*Not*) Found Chained, *supra* note 8, at 378 (“Expanding opportunities to immigrate and obtain status, ones that do not tie victims’ statuses to their ‘employers,’ could reduce the propensity of potential users to exploit migrants for domestic or sex work.”). Congress acknowledged nonimmigrant visa holders’ vulnerability in the Wilberforce TVPRA of 2008 but provided only for the development of “an information pamphlet on legal rights and resources for aliens” by the State Department in consultation with DHS, DOJ, and DOL. 8 U.S.C. § 1375b (Supp. V 2011); see Haynes, *Exploitation Nation*, *supra* note 8, at 55–58.

¹⁴⁹ See Pub. L. No. 82-414, § 101(a)(15)(H)(ii), 66 Stat. 163, 168 (1952).

¹⁵⁰ *Id.*

¹⁵¹ 20 C.F.R. § 621.3(a) (1969).

¹⁵² 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2006 & Supp. V 2011).

¹⁵³ *Id.* § 1101(a)(15)(H)(ii)(b).

¹⁵⁴ *La. Forestry Ass’n v. Solis*, No. 11-7687, 2012 WL 3562451, at *2 (E.D. Pa. Aug. 20, 2012) (noting that Congress’s “entire discussion of the program was, and remains, limited to altering the specialized definition of ‘nonimmigrant’ alien”).

¹⁵⁵ Defendants-Appellants’ Reply Brief at 13–14, *Bayou Lawn & Landscape Servs. v. Solis*, No. 12-12462 (11th Cir. Aug. 27, 2012). The Secretary’s brief emphasizes that “[t]he Supreme Court has never established an explicit statement requirement for agency rulemaking authority, except in the limited context of retroactive rulemaking.” *Id.* at 14.

had clear statutory authority to regulate the H-2A program — and did so, requiring a host of protections ranging from free housing, travel reimbursement, and workers' compensation benefits to a guarantee of payment for at least three-quarters of the total hours agreed to in workers' contracts¹⁵⁶ — its authority over the H-2B program was less clear, leaving H-2B workers with far fewer substantive protections.¹⁵⁷

In January 2009, DHS delegated to WHD the “enforcement authority to ensure that H-2B workers are employed in compliance with the H-2B labor certification requirements.”¹⁵⁸ Two years later, DOL published a final rule describing a new wage methodology for the H-2B program.¹⁵⁹ It explained its statutory grant of authority in this way:

Section 214(c)(1) of the INA requires DHS to consult with appropriate agencies before approving an H-2B visa petition. That consultation occurs according to a USCIS regulatory requirement that an employer first obtain a temporary labor certification from the Secretary of Labor . . . establishing that U.S. workers capable of performing the services or labor are not available, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers.¹⁶⁰

According to the new rule, the prevailing wage for workers in the H-2B program would be the rate established in a valid collective bargaining agreement, the rate established by DOL for that type of job when performed under a federal contract in that area, or the mean of similar workers' wages in that area as determined by the Occupational Employment Statistics wage survey compiled by the Bureau of Labor Statistics — whichever was highest.¹⁶¹ DOL estimated that the new rule would increase the hourly wages of both H-2B workers and “similarly employed U.S. workers hired in response to the recruitment required as part of the H-2B application” by an average of \$4.83.¹⁶²

The wage rule, however, has yet to be implemented. In September 2011, a group of employer associations challenged the rule in the Dis-

¹⁵⁶ See 20 C.F.R. § 655.1304 (2012).

¹⁵⁷ See BAUER, *supra* note 147, at 7–8.

¹⁵⁸ Memorandum from John L. McKeon, Deputy Adm'r, Wage & Hour Div., U.S. Dep't of Labor, to Reg'l Adm'rs & Dist. Dirs., Travel and Visa Expenses of H-2B Workers Under the FLSA, Field Assistance Bulletin No. 2009-2, at 1 (Aug. 21, 2009), *available at* http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.pdf.

¹⁵⁹ Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 76 Fed. Reg. 3452 (Jan. 19, 2011) (codified at 20 C.F.R. pt. 655).

¹⁶⁰ *Id.* at 3452 (citation omitted).

¹⁶¹ 20 C.F.R. § 655.10.

¹⁶² Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 76 Fed. Reg. at 3469.

trict Court for the Eastern District of Pennsylvania,¹⁶³ alleging, *inter alia*, that DOL lacked rulemaking authority over the H-2B program.¹⁶⁴ In August 2012, the district court granted summary judgment to DOL, validating DOL's characterization of its rulemaking authority as derived from the DHS-consultation provision of the INA.¹⁶⁵ The regulation was scheduled to take effect on October 1, 2012.¹⁶⁶ However, in the interim, Congress defunded the rule: a policy rider attached to the Consolidated Appropriations Act, 2012¹⁶⁷ prohibited DOL from using its funds to implement the new H-2B wage rule,¹⁶⁸ and the continuing resolution that President Obama signed in September 2012 continues that ban through March 27, 2013.¹⁶⁹

DOL's attempt at a more comprehensive overhaul of the H-2B system has faced similar obstacles. The final rule, published in February 2012, was scheduled to take effect in April 2012.¹⁷⁰ Among other provisions, it would establish significant worker protections, requiring employers to equalize pay and benefits for H-2B workers and non-H-2B workers doing substantially similar work, to provide a three-fourths guarantee similar to that of the H-2A program, and to pay subsistence and round-trip worksite transportation costs.¹⁷¹ A group of businesses and business associations challenged this rule in court.¹⁷² In April 2012, the District Court for the Northern District of Florida issued a nationwide injunction prohibiting enforcement of the new rule, based in part on the plaintiffs' assertion that DOL lacked rulemaking authority over the H-2B program.¹⁷³ DOL's appeal is pending.¹⁷⁴

Workers' groups, decrying these efforts to block DOL's attempts to increase protection of H-2B workers, have highlighted the positive impact the rules' enforcement would have on trafficking victims. In July 2012, Mary Bauer, the Legal Director of the Southern Poverty Law Center and the author of a scathing 2007 report on the H-2 pro-

¹⁶³ The plaintiffs' suit was filed in the Western District of Louisiana but transferred to the Eastern District of Pennsylvania, where related litigation was ongoing. *See* *La. Forestry Ass'n v. Solis*, No. 11-7687, 2012 WL 3562451, at *5 (E.D. Pa. Aug. 20, 2012).

¹⁶⁴ *Id.* at *6.

¹⁶⁵ *Id.* at *1, *6-15.

¹⁶⁶ *See* Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Delay of Effective Date, 76 Fed. Reg. 82,115 (Dec. 30, 2011).

¹⁶⁷ Pub. L. No. 112-74, 125 Stat. 786 (2011).

¹⁶⁸ *Id.* § 110, 125 Stat. at 1064.

¹⁶⁹ *See* Pub. L. No. 112-175, § 101(a)(8), 126 Stat. 1313, 1313 (2012).

¹⁷⁰ Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,038, 10,038 (Feb. 21, 2012).

¹⁷¹ Dube, *supra* note 148, at A-6.

¹⁷² *Bayou Lawn & Landscape Servs. v. Solis*, No. 3:12-cv-183 (N.D. Fla. filed Sept. 21, 2011).

¹⁷³ *Bayou Lawn & Landscape Servs. v. Solis*, No. 3:12-cv-183 (N.D. Fla. Apr. 26, 2012) (order granting preliminary injunction).

¹⁷⁴ *Id.*, *appeal docketed*, No. 12-12462 (11th Cir. May 8, 2012).

gram,¹⁷⁵ noted that DOL's new "guidelines provide important protections to prevent human trafficking, debt servitude, fraud, charging exorbitant fees by overseas recruiters, gross wage underpayment, and other severe abuses."¹⁷⁶

DOL has also undertaken revision of the H-2A program, where abuses continue despite DOL's more extensive oversight.¹⁷⁷ DOL admits that "the constraints imposed by prior regulatory language have made it difficult for us to take action in response to flagrant violations."¹⁷⁸ In February 2010, DOL published final rules that not only increased protection of both U.S. and foreign agricultural workers¹⁷⁹ but also strengthened DOL's authority to audit employers of H-2A workers and to revoke labor certifications and debar employers when they have violated H-2A requirements.¹⁸⁰ DOL's attempts to provide increasingly stringent regulation of the H-2 visa program demonstrate a trend toward assuming greater responsibility both for protecting workers and for punishing and preventing their exploitation.

CONCLUSION

Across the federal government, efforts to combat labor trafficking have been inadequate in large part because of lingering preoccupations with prostitution and border control. Under President Obama, DOL has intensified its antitrafficking efforts, but as the State Department's 2011 *Trafficking in Persons* report noted, "DOL investigators have not yet been funded, trained, or given the mandate to focus on human trafficking cases."¹⁸¹ In a March 2012 update, the State Department noted that DOL was still "finalizing plans to provide basic awareness training to key enforcement field staff throughout the country in an effort to enhance the capability to detect and refer cases of trafficking in persons."¹⁸² Subsequent authorizations of the TVPA should expand DOL's regulatory and enforcement authority, permitting DOL to take advantage of its unique opportunity to counteract the biasing influences of antiprostitution and border control forces on the federal government's response to human trafficking.

¹⁷⁵ BAUER, *supra* note 147.

¹⁷⁶ Dube, *supra* note 148, at A-6.

¹⁷⁷ See, e.g., BAUER, *supra* note 147, at 9-39; David Bacon, *Borrowed Hands*, CAL. LAW. (Sept. 2011), <http://www.callawyer.com/Clstory.cfm?eid=917686>.

¹⁷⁸ Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6934 (Feb. 12, 2010).

¹⁷⁹ See *id.* at 6922-26; 20 C.F.R. § 655.135 (2012).

¹⁸⁰ 20 C.F.R. § 655.180-182.

¹⁸¹ TIP REPORT 2011, *supra* note 3, at 373; see also TIP REPORT 2012, *supra* note 11, at 360.

¹⁸² *Obama Administration Accomplishments*, *supra* note 76.