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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON,

 Plaintiff,

and

SOCORRO DIAZ SILVAS,
ROXANA RODRIQUEZ,
YESICA CABRERA NAVARRO,
YASMIN CABRERA NAVARRO,
and SAMANTHA MENDOZA,

 Plaintiffs-Intervenors,

 v.

HORNING BROTHERS, LLC, and
HERMILO CRUZ,

 Defendants.

NO. 2:17-CV-0149-TOR

ORDER DENYING DEFENDANT'S
MOTION TO COMPEL AND
GRANTING PLAINTIFFS-
INTERVENORS' MOTION FOR
PROTECTIVE ORDER

BEFORE THE COURT are Defendant Horning Brothers, LLC's Motion to
Compel Production of U-Visa Documents (ECF No. 35) and Plaintiffs-Intervenors'
Motion for Protective Order Regarding Discovery of U Visa and Immigration
Status Information (ECF No. 39). These matters were submitted for consideration

1 without oral argument. The Court has reviewed the record and files herein, and is
2 fully informed. For the reasons discussed below, Defendant's Motion to Compel
3 Production of U-Visa Documents (ECF No. 35) is **DENIED** and Plaintiffs-
4 Intervenors' Motion for Protective Order Regarding Discovery of U Visa and
5 Immigration Status Information (ECF No. 39) is **GRANTED**.

6 **BACKGROUND**

7 On April 25, 2017, Plaintiff State of Washington filed this action against
8 Defendants Horning Brothers, LLC and Hermilo Cruz for violations of Title VII of
9 the Civil Rights Act of 1964 (Title VII) and the Washington Law Against
10 Discrimination (WLAD). ECF No. 1. This action concerns allegations of
11 discriminatory hiring and segregated employment practices because of sex, sexual
12 harassment, retaliation, and aiding and abetting others in violation of the WLAD.
13 *Id.* Plaintiff asserts these claims against Horning Brothers, which operates an
14 onion packing shed in Quincy, Washington, and its supervisor, Mr. Cruz. *Id.* at 5.
15 Plaintiff contends that Defendants employed a policy or practice of hiring only
16 women to sort onions, limited women to certain positions, and discriminated
17 against women on the basis of sex, including retaliation, quid pro quo sexual
18 harassment, and/or severe, pervasive, and unwelcome sexual conduct that gave rise
19 to a hostile work environment. *Id.* at 5-6.

1 On June 15, 2017, the Court granted the Proposed Motion to Intervene for
2 Plaintiffs-Intervenors who were employed by Horning Brothers, supervised by Mr.
3 Cruz, and were allegedly subjected to sexual harassment, retaliation, and
4 constructive discharge. ECF No. 10.

5 On April 13, 2018, Defendant Horning Brothers filed a Motion to Compel,
6 requesting this Court require the Plaintiffs-Intervenors to produce any U visa
7 documents. ECF No. 35. Also on April 13, 2018, Plaintiffs-Intervenors filed a
8 Motion for Protective Order to protect them from annoyance, embarrassment,
9 oppression, and undue burden resulting from inquiries into U visa and immigration
10 status information. ECF No. 39. A U visa is a temporary nonimmigration status
11 for immigrant victims who suffered substantial abuse as a result of criminal
12 activity, possess information about that criminal activity, and have been helpful to
13 the investigation or prosecution of that criminal activity. ECF Nos. 39 at 11; 35-1
14 at 2; 8 U.S.C. § 1101(a)(15)(U)(i).

15 DISCUSSION

16 I. Standard of Review

17 Under Federal Rule of Civil Procedure 26(b)(1), the scope of discovery is
18 broad and includes “any nonprivileged matter that is relevant to any party’s claim
19 or defense” Fed. R. Civ. P. 26(b)(1). Yet, the Court may, for good cause, issue
20 an order limiting discovery to protect a party from “annoyance, embarrassment,

1 oppression, or undue burden or expense” Fed. R. Civ. P. 26(c)(1). The burden
2 is upon the party seeking the order to “show good cause” by demonstrating harm
3 or prejudice that would result from the discovery. *Rivera v. NIBCO, Inc.*, 364 F.3d
4 1057, 1064 (9th Cir. 2004) (quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors*
5 *Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002)). “If a court finds particularized harm
6 will result from disclosure of information to the public, then it balances the public
7 and private interests to decide whether a protective order is necessary.” *Id.* at 1063
8 (quoting *Phillips*, 307 F.3d at 1211).

9 Pursuant to Federal Rule of Civil Procedure 37, a party may move the Court
10 for an order compelling disclosure or discovery responses. Fed. R. Civ. P.
11 37(a)(1). The motion must include certification that the moving party “in good
12 faith conferred or attempted to confer” with opposing counsel in an effort to obtain
13 discovery before resorting to court action. *Id.* As an initial matter, the Court finds
14 that Defendant has met this obligation, certifying that it held a discovery
15 conference on March 23, 2018 and the parties were unable to resolve the discovery
16 issue. ECF No. 35 at 7.

17 **II. Disputed Declarations**

18 **A. Ramirez Declaration**

19 Plaintiffs-Intervenors move this Court to strike or not consider the
20 Supplemental Declaration of Maria Ramirez (ECF No. 38) because it was filed in

1 violation of the parties Stipulated Confidentiality Agreement and Protective Order
2 (ECF No. 29) and contains hearsay. ECF No. 42 at 6. Maria Ramirez was an
3 employee of Defendants as a seasonal worker. ECF No. 38 at ¶ 3. Ms. Ramirez
4 declares that she never experienced the sexual harassment allegations nor did she
5 ever hear about such allegations when she worked in the onion shed. *Id.* Ms.
6 Ramirez states that if she had suffered any sexual harassment, she would have no
7 problem speaking to the owners. *Id.* at ¶ 4.

8 The Court finds that Ms. Ramirez’s declaration is rife with hearsay and
9 should not be considered. Ms. Ramirez’s allegations of rumors in the community,
10 comments by Plaintiffs-Intervenors, and mental capacity of those Plaintiffs-
11 Intervenors is merely hearsay and speculation. The Court is not persuaded by Ms.
12 Ramirez and the Defendant’s attempt to introduce hearsay testimony with serious
13 accusations of mental health and attempted fraud without any factual
14 substantiations. The Court also does not consider Ms. Ramirez’s own experience
15 that she did not suffer any alleged sexual harassment. Plaintiffs-Intervenors do not
16 argue that all of Defendant’s employees experienced sexual harassment, simply
17 that they specifically suffered sexual harassment. Accordingly, the Court does not
18 consider Ms. Ramirez’s declaration.

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1 **B. Smith Declaration**

2 Defendant argues that the Declaration of Rebecca Smith (ECF No. 40)
3 should be stricken or disregarded as improper expert testimony. ECF No. 46 at 3.
4 Ms. Smith is a licensed attorney in Washington and her practice involves
5 representing low-wage and immigrant workers in employment related litigation.
6 ECF No. 40 at ¶ 2. She asserts that many clients choose to forego valid claims due
7 to their perception that immigration status would become an issue in litigation. *Id.*
8 at ¶ 14. Ms. Smith argues that employers regularly engage in aggressive attempts
9 to seek disclosure of otherwise irrelevant immigration status in litigation. *Id.* at ¶
10 18.

11 Defendant states that the declaration is not a proper subject of expert
12 testimony and Ms. Smith's opinions of law are inadmissible because the applicable
13 law is within the purview of the Court. ECF No. 46 at 3-4. Defendant insists that
14 to the extent the declaration attempts to suggest that the Plaintiffs-Intervenors and
15 Defendants may think or act in ways similar to other parties in other cases, the
16 declaration is irrelevant and inadmissible. *Id.* at 4. Defendant asserts that the
17 declaration is merely an additional legal brief on agricultural employment law. *Id.*

18 Plaintiffs-Intervenors respond that the declaration is properly considered by
19 the Court as a sworn declaration to facts based on personal knowledge that are
20 illustrative of the chilling effect that will result from U visa discovery. ECF No. 47

1 at 9-10. Plaintiffs-Intervenors contend that Ms. Smith establishes the basis of her
2 personal knowledge as an attorney who has represented immigration workers for
3 over 36 years. ECF Nos. 47 at 10; 40 at ¶¶ 2-13, 16-17. Based on her direct
4 experiences, Ms. Smith testified to her personal knowledge regarding the chilling
5 effect of disclosing immigration status. ECF Nos. 47 at 10-11; 40 at ¶ 14.
6 Plaintiffs-Intervenors note that Ms. Smith does not opine about the facts of this
7 case, and they argue that her testimony illustrates their argument that immigration-
8 related discovery would have an *in terrorem* effect on individuals outside of this
9 litigation.

10 While the Court agrees that affidavits may be based on personal knowledge,
11 the Court finds that it need not consider Ms. Smith's declaration. *See Kim v.*
12 *United States*, 121 F.3d 1269, 1267-77 (9th Cir. 1997). As discussed below, the
13 Ninth Circuit in *Rivera* outlined the chilling effect of disclosing immigration status
14 and the personal knowledge of Ms. Smith is not needed to supplement the Ninth
15 Circuit's previous findings. *See Rivera*, 364 F.3d at 1063-64. The Court then need
16 not consider Ms. Smith's declaration when there is controlling case law on the
17 chilling effect of immigration status discovery.

18 III. U Visa Disclosure

19 Defendant seeks discovery of U visa information from Plaintiffs-Intervenors,
20 not their immigration status generally. ECF Nos. 46 at 2-3; 48 at 2. Plaintiffs-

1 Intervenor request the Court prohibit Defendant from discovery of U visa
2 information, arguing that discovery of immigration status has a well-established
3 chilling effect. ECF No. 39 at 2.

4 The Ninth Circuit has expressed concern regarding the “chilling effect that
5 the disclosure of plaintiffs’ immigration status could have upon their ability to
6 effectuate their rights.” *Rivera*, 364 F.3d at 1064. In *Rivera*, the Ninth Circuit
7 determined that “requiring the plaintiffs to answer such questions [regarding
8 immigration status] in the discovery process would likely deter them, and future
9 plaintiffs, from bringing meritorious claims.” *Id.* The court emphasized that
10 granting discovery requests for information related to immigration status involving
11 discrimination under Title VII would cause “countless acts of illegal and
12 reprehensible conduct ... [to] go unreported.” *Id.* The court noted that “[e]ven
13 documented workers may be chilled by the type of discovery” because they “may
14 fear that their immigration status would be changed, or that their status would
15 reveal the immigration problems of their family or friends.” *Id.* at 1065.

16 **A. Disputed Cases**

17 The Ninth Circuit has not addressed the specific issue of discovery into U
18 visa status, this Court then considers the two relevant cases discussed by the
19 parties. *See* ECF Nos. 35 at 8-10; 39 at 6 n.1, 7 n. 2.

1 In *Cazorla v. Koch Foods of Mississippi, LLC*, an employer sought
2 discovery of U visa information, alleging that the employees fabricated the
3 allegations to obtain benefits under the U visa program. 838 F.3d 540 (5th Cir.
4 2016). The district court found that the employer could obtain U visa information
5 subject to certain limiting requirements. *Id.* at 547. The Fifth Circuit vacated and
6 remanded the case, instructing the district court to consider the chilling effect of
7 allowing discovery of U visa information that would imperil important public
8 purposes beyond merely the individuals in the case. *Id.* at 564.

9 On remand, the district court found that the circumstances of the case
10 warranted limited U visa discovery. *Cazorla v. Koch Foods of Mississippi, LLC*,
11 No. 310CV00135DPJFKB, 2018 WL 1405297, at *1 (S.D. Miss. Mar. 20, 2018).
12 The district court ordered that all U visa discovery be conducted in writing with
13 questions approved by the court, each individual's name must be substituted with
14 an assigned number so that the responses were anonymous, and the plaintiffs'
15 counsel was ordered to redact any factual information that would reasonably reveal
16 a responder's identity. *Id.* Here, Plaintiffs-Intervenors emphasize that this case is
17 distinguishable because there were 50-70 individuals, but here there are only five
18 intervenors and anonymity would be impossible. ECF No. 42 at 10. Plaintiffs-
19 Intervenors insist that the discovery limitations would not reduce the chilling effect
20 or harm to Intervenors here. *Id.*

1 In *E.E.O.C. v. Global Horizons, Inc.*, the Eastern District of Washington
2 found that evidence regarding T visa applications for victims of human trafficking
3 was permissible discovery. No. CV-11-3045-EFS, 2013 WL 3940674, at *6-7
4 (E.D. Wash. July 31, 2013). The court reasoned that it was undisputed that all of
5 the claimants were in the United States unlawfully so there was no undue prejudice
6 if the defendants discover that the claimant had a T visa. *Id.* at *6. Here,
7 Plaintiffs-Intervenors argue that this case was a unique situation because
8 immigration status was not at issue. ECF No. 42 at 11.

9 This Court finds that *Global Horizons* is distinguishable because the
10 Plaintiffs-Intervenors here do not admit information about their immigration status
11 nor do they admit or deny the existence of U visa information. ECF No. 39 at 7
12 n.3. The Court also finds that *Cazorla* is not very persuasive considering that the
13 Fifth Circuit was unable to conclude whether U visa evidence was admissible, but
14 left the issue to the discretion of the district court. Yet, this Court finds the case
15 instructive to show the importance of considering the chilling effect of allowing
16 such evidence regarding immigration status. The Court agrees with Plaintiffs-
17 Intervenors that the district court's decision on remand is not a viable solution here
18 because providing anonymity to five Intervenors well-known to Defendants is
19 likely impossible.

1 The Court finds that while *Rivera* did not consider the specific issue of U
2 visas, it is still the controlling authority on the chilling effect of allowing discovery
3 on immigration status and emphasizes the Ninth Circuit's preference for finding
4 this information impermissible. *See Rivera*, 364 F.3d at 1065. The Court
5 considers this potential chilling effect below.

6 **B. Jury Disclosure**

7 Defendant insists that it should be entitled to inform the jury of the alleged
8 motivation of the Plaintiffs-Intervenors to fabricate or embellish their claims of
9 sexual harassment as a compelling sources of bias. *Id.* Defendant notes that it is
10 amendable to a protective order that addresses the Plaintiffs-Intervenors' concerns,
11 so long as it is able to use the U visa information and accompanying sworn
12 statements as possible impeachment evidence. ECF Nos. 46 at 5; 48 at 7.

13 Defendant suggests that these portions of the trial could be conducted in a closed
14 courtroom and sealed. ECF Nos. 46 at 5; 48 at 7. Defendant argues that a flat ban
15 on their access to this relevant information or their use of it at trial would be unfair.
16 ECF No. 46 at 5.

17 Plaintiffs-Intervenors respond that confidentiality agreements do not
18 eliminate the chilling effect of U visa discovery. *See* ECF No. 47 at 7-8; *see also*
19 *Rivera*, 364 F.3d at 1065 n.5. Plaintiffs-Intervenors note that Defendant's
20 objective to present immigration information to the jury calls into question any

1 commitment to confidentiality. ECF No. 47 at 9. They also state that the issue of
2 admissibility is not before the Court and should be addressed by motions in limine.
3 *Id.* at 9 n.3. The Court agrees and does not address disclosure before the jury here,
4 as this issue is premature.

5 **C. Chilling Effect of U Visa Discovery**

6 Defendant argues that “the U-visa provides a perhaps life-or-death incentive
7 for an applicant to fabricate or exaggerate his or her allegations in order to stave
8 off adverse immigration consequences by alleging that the applicant has been a
9 victim of essentially *criminal* sexual assault.” ECF No. 35 at 10 (emphasis in
10 original). While Defendant concedes that the immigration status of litigants is
11 generally protected and not discoverable, Defendant argues that the U visa
12 applicants here have already reported their immigration status and thus the concern
13 of undocumented workers fearing deportation for reporting a crime is inapplicable.
14 *Id.* at 7-8; *see Rivera*, 364 F.3d at 1063-66. Defendant emphasizes that it only
15 seeks discovery of U visa information from those that applied for them, not their
16 immigration status generally. ECF Nos. 46 at 2-3; 48 at 2. Defendant states that if
17 none of the Plaintiffs-Intervenors applied for U visas, then the Defendant does not
18 seek discovery on their immigration status which is irrelevant and undiscoverable.
19 ECF Nos. 46 at 2-3; 48 at 2.

1 Plaintiffs-Intervenors emphasize that an application for a U visa includes
2 information regarding petitioner and her family, which creates a fear of retaliation
3 by Defendants and harm by Mr. Cruz. ECF Nos. 39 at 8; 47 at 2. Plaintiffs-
4 Intervenors note that even though they are no longer employed by Defendant, they
5 risk loss of employment if their immigration status became known to a current
6 employer. ECF No. 39 at 10. Plaintiffs-Intervenors emphasize that a petitioner's
7 sworn statement includes not only her U visa qualifications, but her immigration
8 history. ECF No. 47 at 3.

9 Plaintiffs-Intervenors also argue that disclosure would conflict with public
10 policy where Congress has shown a preference for preventing disclosure of U visa
11 information. *See* ECF No. 39 at 11-12; *see also* 8 U.S.C. § 1367. Disclosure also
12 undermines the public policy of Title VII and WLAD where both statutes' central
13 purpose is to deter and eradicate discrimination. ECF Nos. 39 at 13; 47 at 4;
14 *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415, 421 (1975); *Brown v. Scott*
15 *Paper Worldwide Co.*, 143 Wash.2d 349, 360 (2001).

16 Plaintiffs-Intervenors reject Defendant's contention that a person who has
17 applied for a U visa should not fear immigration consequences because she has
18 already reported her immigration status to immigration authorities. ECF No. 47 at
19 3. Plaintiffs-Intervenors argue that a petitioner submits her U visa application
20 materials to the United States Citizenship and Immigration Services (USCIS),

1 which has sole jurisdiction over all petitions and is not equivalent to reporting her
2 status information to immigration enforcement officials. *Id.*; 8 C.F.R. §
3 214.14(c)(1). Plaintiffs-Intervenors emphasize that a pending petition for a U visa
4 has no effect on Immigrations and Customs Enforcement’s (ICE) authority to
5 execute a removal order and does not prevent an immigrant from being detained or
6 removed. ECF No. 47 at 3; 8 C.F.R. § 214.14(c)(1)(ii).

7 Plaintiffs-Intervenors assert that the lack of protection provided by a U visa
8 application during the years of processing is so minimal as to create little
9 motivation to exaggerate claims. ECF No. 47 at 5. They note that Congress built
10 in protections against fraud, including assessments by law enforcement and USCIS
11 adjudicators as to whether the petitioner has credible information about the
12 qualifying criminal activity and meets all other statutory requirements. *Id.*; 8
13 C.F.R. § 214.14(b), (c)(4).

14 Defendant replies that the U visa application provides some immediate
15 protection because the sponsoring prosecuting agency will usually assist its
16 witnesses and alleged victims in any removal proceedings that are commenced.
17 ECF No. 48 at 5. Defendant rejects Plaintiffs-Intervenors’ “chilling” arguments
18 because Defendant insists it is clear that the U visa application provides the
19 undocumented worker with a significant practical protection from removal. *Id.* at
20 6-7. Defendant contends that the U visa application removes the “chill” that could

1 dissuade an undocumented worker from pursuing justice in the courts. *Id.* at 7.

2 The Court notes that Defendant fails to provide any evidence or precedent for these
3 claims.

4 The Court acknowledges Defendant's concern regarding possible fabrication
5 or exaggeration, but this concern is not outweighed by the potential chilling effect
6 of disclosing immigrations status. The Court rejects Defendant's contention that a
7 U visa application removes the chilling effect of discovery when a petitioner is still
8 subject to potential removal or deportation. A granted U visa may remove the
9 chilling effect because the petitioner is then protected from deportation, but a mere
10 application is insufficient.

11 The Court is persuaded that this chilling effect would harm the Plaintiffs-
12 Intervenors here and also other future civil rights plaintiffs. The Court finds that
13 Plaintiffs-Intervenors state plausible fears for themselves and others of possible
14 detention, removal, criminal prosecution, and job loss if forced to disclose U visa
15 information. *See* ECF No. 39 at 7-8. While the Court may enter a protective order
16 that prevents disclosure to the public regarding the Plaintiffs-Intervenors'
17 immigration status, Defendants would still be privy to this information and the
18 Court notes Plaintiffs-Intervenors' concern regarding retaliation to themselves and
19 their families. Considering the Ninth Circuit's preference for finding this
20 information impermissible, the Court determines that the chilling effect, public

1 policy concerns, and Plaintiffs-Intervenors' fears outweigh any alleged probative
2 value of possible exaggeration. *See Rivera*, 364 F.3d at 1065. Accordingly, the
3 Court grants Plaintiffs-Intervenors' request for a protective order prohibiting
4 discovery of their U visa immigration status and denies Defendant's request for an
5 order compelling such discovery.

6 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 7 1. Defendant Horning Brothers, LLC's Motion to Compel Production of U-
8 Visa Documents (ECF No. 35) is **DENIED**.
- 9 2. Plaintiffs-Intervenors' Motion for Protective Order Regarding Discovery
10 of U Visa and Immigration Status Information (ECF No. 39) is
11 **GRANTED**.

12 The District Court Executive is directed to enter this Order and furnish
13 copies to counsel.

14 **DATED** May 14, 2018.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
Chief United States District Judge