

# Effectively Framing a Workplace-Based U Visa Application

June 17, 2013

Eunice Hyunhye Cho

Staff Attorney, National Employment Law Project (NELP)

Gail Pendleton

Co-Director, ASISTA



# Webinar Recording

To view a live recording of this webinar, please visit:

<http://www.screencast.com/t/1yzhrMCOwbm>

# Effectively Framing a Workplace-Based U Visa Application

June 17, 2013

Eunice Hyunhye Cho

Staff Attorney, National Employment Law Project (NELP)

Gail Pendleton

Co-Director, ASISTA



# Agenda

- Filing a U visa application for workplace-related crimes
- Practice pointers: Preparing a winning claim; Dealing with Requests for Evidence (RFEs)
- Emerging legal and policy developments

# **Filing U Visa Applications for Workplace Crime**

# U Visa Applications for Workplace Crimes

- U visa qualifying crimes in the workplace
- Certifying agencies for workplace crime
- Identifying and establishing substantial abuse for workplace-based crime
- Inadmissibility waivers

# Qualifying Criminal Activities

Most often relevant in workplace crime cases

**Abduction**

**Abusive sexual contact**

**Being held hostage**

**Blackmail**

**Domestic violence**

**Extortion**

**False imprisonment**

**Felonious assault**

**Female genital**

**mutilation**

**Fraud in foreign labor  
contracting\***

**Incest**

**Involuntary servitude**

**Kidnapping**

**Manslaughter**

**Murder**

**Obstruction of justice**

**Peonage**

**Perjury**

**Prostitution**

**Rape**

**Sexual assault**

**Sexual exploitation**

**Slave trade**

**Stalking**

**Torture**

**Trafficking**

**Unlawful criminal  
restraint**

**Witness tampering**

# Most Common Workplace U Visa Crimes

- Abusive sexual contact/rape/sexual assault/sexual exploitation
- Blackmail/extortion
- Felonious assault
- Involuntary servitude/peonage/trafficking
- Obstruction of justice/witness tampering
- **New crime:** Fraud in foreign labor trafficking



# Abusive Sexual Contact, Rape, Sexual Assault, Sexual Exploitation

- Unwelcome sexual contact, sexual assault, rape or attempt to do so by employer, agents, co-workers, or customers.
- Clients may minimize examples of abusive sexual contact.
- Check state statutes:

National Crime Victim Law Institute:

<http://www.lclark.edu/org/ncvli/clpps.html>

# Abusive Sexual Contact, Rape, Sexual Assault, Sexual Exploitation

## Potential intake questions:

- Did your employer post posters, drawings, pictures of a sexual nature?
- Did your employer make comments about clothing/appearance or make sexual jokes or comments? Look at you in a sexual manner?
- Did your employer ask for sexual favors, ask you to have sex with him/her, spread rumors?
- Did your employer touch you inappropriately? Force you to have unwanted sex?

# Blackmail/Extortion

- Generally—use of a threat or fear to coerce someone to give up something of value
  - Did employer threaten violence, report immigration status, or destroy your reputation to obtain property or money or force to do something you didn't want to do?
  - VA and CO: extortion statute specifically includes threat to report immigration status to induce an individual to give up money or item of value

# Involuntary Servitude

## Involuntary servitude:

*a condition of servitude induced by means of—*

- (A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer **serious harm** or physical restraint; or*
- (B) the abuse or threatened **abuse of the legal process**.*

*--22 U.S.C. § 7102(5).*

# Involuntary Servitude

- Threats of physical, psychological, financial, or reputational restraint or harm
- Threats to contact law enforcement/immigration to compel work
- Confiscation of identity documents, passports, travel documents
- Supporting facts: wage violations, inadequate food, housing, medical care, clothing; verbal/physical abuse, restricted contact, use of locks/fences to restrict mobility

# Trafficking

- Generally: compelling or inducing another person to engage in labor; includes recruiting, enticing, harboring, or transporting another person for labor
- See involuntary servitude fact patterns
- Look at both federal and state definitions (some state definitions broader)
- Consider filing T Visa

# Obstruction of Justice, Witness Tampering

## Obstruction of justice:

- Attempts to influence, obstruct, or impede any pending proceeding through use of threats or force;
- Destruction, alteration, or falsification of records, including labor certification, wage/hour records, birth certificates
  - 8 U.S.C. § 1519—prohibits act done with the intent to obstruct investigation of any matter within federal agency's jurisdiction

# Obstruction of Justice, Witness Tampering

**Witness Tampering:** Did an employer ever:

- Intimidate or threaten you to delay or prevent testimony in “official proceeding”;
- Alter, destroy, conceal records?
- Hinder, delay, or prevent communication to authorities;
- Threaten to damage property or cause bodily harm to delay or prevent witness participation?



# Fraud in Foreign Labor Contracting

- New qualifying criminal activity:  
“*Knowingly and with intent* to defraud, recruits, solicits, or hires a person outside the United States . . . For purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment . . . .”
    - Also applies to work outside the United States (U.S. government contracts; military installations)
- 8 U.S.C. § 1351

# Fraud in Foreign Labor Contracting

- Helpful where employers have provided false representations on:
  - Terms and conditions of employment, housing, fees to labor brokers, food and transportation, ability to work for other employers, material aspects of work arrangement
  - Broader than trafficking or involuntary servitude
- In discussions with DOL to include as Qualifying Criminal Activity (QCA)

# Who can certify a U visa for a workplace based crime?

- Federal Agencies: certification authority specified in 8 C.F.R. § 214.14(a)(2)
- State Agencies
- Local Law Enforcement Agencies
- Judges



# U.S. Department of Labor

- Certification currently limited to 5 qualifying crimes:
  - Involuntary servitude, peonage, trafficking, obstruction of justice, witness tampering
- Can request certification before, during, or after WHD investigation



# U.S. Equal Employment Opportunity Commission

- Qualifying criminal activity must be related to unlawful employment discrimination alleged in EEOC complaint or under investigation by EEOC.
- EEOC will certify for any of U visa qualifying crimes.



# National Labor Relations Board

NLRB: conducts elections for labor unions; investigates unfair labor practices against workers organizing/collective bargaining.

- No restrictions on qualifying criminal activity
- Must be related to meritorious unfair labor practice under investigation by NLRB

# State/Local Agencies

- New York Department of Labor
- California Department of Fair Employment and Housing
- Illinois Department of Labor
- *(California Division of Labor Standards Enforcement)*
- Local law enforcement officials

# Judicial Certification

- *Garcia v. Audobon Cmty Mgmt*, 2008 WL 1774584 (E.D. La. Apr. 15, 2008).
- *Prima facie* requirement, detection of qualifying criminal activity
- Motions for judicial certification of workplace-based crimes



# **Identifying and Establishing Substantial Abuse in Workplace U Visa Applications**

# Substantial Abuse Issues in Workplace U visas

- Victim must have suffered “substantial mental or physical abuse” as a result of the *qualifying crime* to qualify for a U visa.
  - USCIS considers:
    - nature of the injury inflicted or suffered;
    - severity of the perpetrator’s conduct;
    - severity of the harm suffered;
    - duration of the infliction of harm;
    - Extent of permanent or serious harm to health of victim, including aggravation of pre-existing conditions.
- 8 C.F.R. § 214.14(b)(1)

# Substantial Abuse Issues in Workplace U visas

## Forms of Abuse in the Workplace:

- Physical abuse
- Sexual abuse
- Psychological abuse
- Immigration abuse
- Economic abuse

# Substantial Abuse Issues in Workplace U visas

## Effects of Abuse on Victims of Workplace Crime

- Psychological harm: depression, mood disorders, substance abuse, suicide attempts, PTSD
- Physical harm: direct injury, secondary somatic symptoms, STDs
- Social harm: impact on interpersonal relationships, conflict in intimate relationships

# Substantial Abuse Issues in Workplace U visas

## Tips on establishing substantial abuse

- Discuss effects of abuse during intake;
- Investigate patterns of abuse—other workers?;
- Investigate prior trauma of client;
- Psychological evaluations by social workers or psychologists familiar with immigration/workplace issues;
- Letters of support from organizers, friends
- Include details in declaration

# Substantial Abuse Issues in Workplace U visas

- Nexus issue hard for obstruction etc.
  - Harm must be from qualifying crime, not underlying crimes or violations
  - CIS is easily led astray when declarations focus on or meld together harm from prior acts
  - Think of it as you do abuse in VAWA marriages:
    - Some occurred before qualifying crime and that, by itself doesn't work, but it may be
    - Part of larger pattern of abuse and be aggravating factor for later harmful acts
    - Focus on harm after first qualifying crime act

# Substantial Abuse Issues in Workplace U visas

## Working with psychologists or social workers

- Assess familiarity with immigrant community/worker issues
- Provide background resources on abuse of immigrant workers
- May be time intensive; costly

# Preparing a Winning Claim

- Make simple arguments
- Include information that only corroborates with qualifying crimes; avoid distracting arguments and information
- Use corroborating, individualized declarations from outside counselors unaffiliated with agency with factual details of patient, and draw nexus between harm and QCA as cause



# Preparing a Winning Claim

- Selecting the proper Qualifying Criminal Activity (QCA)
  - Some QCAs (i.e. obstruction of justice/witness tampering) may be easier to certify, but more difficult with USCIS
  - Advocates may uncover other crimes, i.e., sexual assaults, that are easier for CIS, maybe harder to certify
  - Focus certification and declarations on the QCA itself, not on underlying workplace violations

# Preparing a Winning Claim

- Preparing the declaration:
  - Identify facts that are directly related to the QCA;
  - When establishing substantial harm, remember:
    - Highlight effects of the qualifying crime itself.
    - Particularly for obstruction of justice/witness tampering, emphasize harm that flowed from the criminal activity in question itself.
  - Include factual detail, but only details that are relevant to the crime and harm

# Preparing a Winning Claim

- Example of a elements for obstruction of justice/witness tampering declaration:
  - How is the applicant a visa of the qualifying crime? How did what happen meet the elements of the crime?
  - What direct harm did the petitioner experience that resulted from the QCA? Describe facts after the crime itself.
    - Discuss underlying conditions only as an aggravating factor to pre-existing trauma or to establish patterns/certainty of harm

# Inadmissibility Issues

# What inadmissibility issues?

- Related to unlawful presence
- Crimes
- Immigration violations

# Identify them clearly

- Cite the statute
- Cite (d)(14) – form says (d)(3)
- Provide documents they may want up front

# Waiver arguments

- National or public interest
- Unlawful presence related to fear of reporting and crime itself in workplace cases
- Immigration violations similar plus think good moral character, VAWA extreme hardship factors
  - Children and victim needs for judicial systems, services, support networks
  - Lack of above in home country

# Crimes

- Why it happened
  - Especially if related to being crime victim
  - BUT not enough
- Think convincing your neighbors that
  - This person has changed his or her life so
  - It won't happen again
- Juvenile delinquent derivatives
  - Key to principal's ability to cope/survive



# **Practice Pointers: Framing the Claim Clearly and Dealing with RFE's**

# Road Map Cover Letter

- Bullet point how your client meets eligibility requirements
  - Imagine facing a pile of thick cases; which would you do first?
- Highlight any urgent issues
  - In detention and need prima facie/expedited
  - Derivatives abroad

# Detailed Document Index

- Organize by eligibility category
  - Name and describe what each document shows
  - Highlight within document
- Substantial Harm
  - Applicant declaration, see paras. 14 – 16, discussing psychological impact: sleep problems, fear of going outside, [insert details]
  - Corroborating declaration from counsellor, see paras. 3 – 5, showing facts above related to experiencing the crime

# Avoiding RFEs: Other Tips

- If your client mentions accessing a system, you MUST either supply documents from that system or explain why you don't have them
  - If exist but not helpful, explain why not helpful (i.e., applicant too afraid to reveal crime)
  - If don't exist, provide what you can and explain why credible
  - “Credible evidence” is standard but “best evidence” is what's most credible

# Check for credibility issues

- Any discrepancies at all?
  - Among documents you are supplying
    - Tax returns, addresses, dates
- If yes, explain up front
  - If there was confusion, why
  - If not “material” why not material

# Details, details, details

- Lots of facts not opinions from everyone
  - Applicant declaration
  - Anyone else's corroborating declaration
- Cull and organize
  - Delete non-qualifying crime facts
    - For crime
    - For harm
- Include waiver arguments separately

# Responding to RFEs

- Is it boilerplate?
- Did they address each piece of evidence and say why it was insufficient?
- Does the adjudicator seem uneducated about this kind of crime and how victims experience it?
- Are they dismissing evidence individually rather than looking at totality?

# What to do

- Reply to RFE
- Send email to hotline once you know VSC received your reply, ccing Gail, asking for supervisor review and explaining why
- Send to joint ASISTA/AILA RFE project
- Gail takes to heads of unit and CIS HQ if it's a legal, policy or procedural issue



# Emerging Legal and Policy Developments

# In the Senate Bill (S.744)

(as of May 30, 2013)

- Enabling applicants with pending VAWA self-petitions, U and T visa applications to **receive work authorization** no later than 180 days after their application was filed.
- Expansion of U visas to **workers involved in civil workplace claims** and who fear or have received threats of force, physical restraint, or harm in retaliation by employers.
- Proposed **increase of available U visas** from 10,000 to 18,000 —3,000 of which are reserved for workplace violations.
- **Stronger protections for workers who are recruited abroad by foreign labor contractors** to prevent workers from falling victim to worker exploitation, abuse or human trafficking.

# U Visas for Victims of Workplace Abuse

- NELP listserv for advocates around workplace U visas; bi-monthly calls: email [echo@nelp.org](mailto:echo@nelp.org) to be added
- U visa certification protocols available at [www.just-pay.org](http://www.just-pay.org)

**For more information:**

Eunice Hyunhye Cho  
510-663-5707

[echo@nelp.org](mailto:echo@nelp.org)  
[www.nelp.org](http://www.nelp.org)

# ASISTA Resources

- Free website = [asistahelp.org](http://asistahelp.org)
- For members = [questions@asistahelp.org](mailto:questions@asistahelp.org)
- For interventions
  - Gail Pendleton = [gailpendleton@comcast.net](mailto:gailpendleton@comcast.net)