

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



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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 to be added
- U visa certification protocols available at www.just-pay.org

For more information:

Eunice Hyunhye Cho
510-663-5707

echo@nelp.org
www.nelp.org

ASISTA Resources

- Free website = asistahelp.org
- For members = questions@asistahelp.org
- For interventions
 - Gail Pendleton = gailpendleton@comcast.net