Effectively Framing a Workplace-Based U Visa Application

June 17, 2013

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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

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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

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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
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

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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
• 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
• 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.
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


• *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
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
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
• 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
• 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, cc'ing 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:
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www.nelp.org
ASISTA Resources

• Free website = asistahelp.org

• For members = questions@asistahelp.org

• For interventions
  – Gail Pendleton = gailpendleton@comcast.net