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

© ASISTA and National Employment Law Project
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
• 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
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

© ASISTA and National Employment Law Project
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)
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

© ASISTA and National Employment Law Project
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, ccng 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