national IMMIGRATION project of the National Lawyers Guild

PRACTICE ADVISORY

Remedies to DHS Enforcement at Courthouses and Other Protected Locations[1]

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I. Overview

Few are aware that Congress provided a statutory remedies in 8 U.S.C. § 1229(e)[2] that may enable an individual who the Department of Homeland Security (DHS) arrests at certain protected locations to terminate removal proceedings. At a time when DHS enforcement is terrifying immigrant communities, 8 U.S.C. § 1229(e) may provide a potential mechanism to enable noncitizens avoid removal. The advisory discusses the

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[2] For ease of reading, this advisory the parallel cites to the Immigration and Nationality Act that correspond to Title 8 of the United States Code.

statutory protections, suggests a termination remedy for violations, and addresses selected arguments that DHS might make to oppose termination.

II. Certification Requirement under 8 U.S.C. § 1229(e)

The immigration law prevents DHS, subject to certain narrow exceptions, from conducting enforcement based on a tip from a domestic abuser. 8 U.S.C. § 1367.[3]

In enforcement actions leading to the issuance of a Notice to Appear (NTA) at certain locations, DHS must certify on the Notice to Appear that the agency has complied with 8 U.S.C. § 1367; e.g., that it did not rely on a tip from abuser or his or her family to initiate the enforcement action.

There are two types of protected locations that require DHS to provide this certification. The first includes when DHS arrests someone "at a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization." 8 U.S.C. § 1229(e)(2)(A).

The second location involves arrests:

> At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 101(a)(15).

8 U.S.C. § 1229(e)(2)(B). We believe that DHS rarely, if ever, complies with the certification requirement.

III. Differences between Courthouse and Non-Courthouse Locations

Congress required DHS to certify the NTA for both protected locations and certain courthouse arrests. Significantly, for arrests at protected locations identified in 8 U.S.C. § 1229(e)(2)(A) (domestic and sexual violence shelters and centers and community-based organizations), DHS must include the certification *without* any individual showing that

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[3] See 1367(b)(2) provides, in relevant part:

> The Secretary of Homeland Security or the Attorney General may provide in the discretion of the Secretary or the Attorney General for the disclosure of information to law enforcement officials to be used solely for a legitimate law enforcement purpose in a manner that protects the confidentiality of such information.

person has been battered, suffered extreme cruelty, or is described in T or a U-visa categories. This requirement to demonstrate some connection to abuse exists only for courthouse arrests. 8 U.S.C. § 1229(e)(2)(B).

However, there may be times a defendant qualifies for the courthouse-based certification. Congress has recognized that dual arrests and convictions may take place where the police charge both parties involved in a domestic dispute rather than identifying true aggressor.[4] Congress created a waiver to respond to this issue. *See* 8 U.S.C. § 1227(a)(7) (providing waiver to domestic violence ground of deportability to domestic violence victim with conviction who was "not the primary perpetrator of violence in the relationship).

III. Analyzing whether DHS Violated Statute

We believe DHS systematically violates the certification requirement in 8 U.S.C. § 1229(e)(1). That being said, practitioners are advised to verify that the NTA for a client who DHS arrested at one of the specified locations lacks the required certification. If the NTA does not contain such certification, the NTA is statutorily deficient.

IV. A Respondent has a Remedy for a Violation

In the same section of the law as the certification requirement, Congress included language compelling the Attorney General to conduct prompt removal proceedings for someone deportable for a criminal conviction. 8 U.S.C. § 1229(d)(1). Congress further provided that the provision providing for a prompt removal was not a right that a noncitizen could enforce. 8 U.S.C. § 1229(d)(2). Other than the Ninth Circuit, courts have relied on the disclaimer to deny a remedy to a noncitizen seeking to enforce the prompt hearing requirement.[5]

In contrast to the preceding provision, the provision requiring certification contains no disclaimer whatsoever. *Compare* 8 U.S.C. § 1229(d)(2) (disclaiming enforceability of the provision requiring a prompt removal hearing) *with* 8 U.S.C. § 1229(e)(2)(A); (lacking a disclaimer). The Supreme Court attaches significance to such differences.

> [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed

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[4] Vol. 146, No. 126 Congressional Record. Trafficking Victims Protection Act of 2000—Conference Report, Page S10169, S10170 (Senate-October 11, 2000).

[5] *Compare Soler v. Scott*, 942 F.2d 597 (9th Cir. 1991) (holding that noncitizen below had made out a cause of action under Mandamus and Venue Act); *with Aguirre v. Meese*, 930 F.2d 1292 (7th Cir. 1991) (holding that statute did not confer to noncitizen a private right action);, *Gonzalez v. U.S. I.N.S.*, 867 F.2d 1108 (8th Cir. 1989) (same); *Prieto v. Gluch*, 913 F.2d 1159, 1161 (6th Cir. 1990), cert. denied, 498 U.S. 1092 (1991) (same) *Orozco v. U.S. I.N.S.*, 911 F.2d 539 (11th Cir. 1990) (same); *Campillo v. Sullivan*, 853 F.2d 593 (8th Cir. 1988) (same).

> that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

INS v. Cardozo-Fonseca, 480 U.S. 421, 433 (1987). Accordingly, Congress' inclusion of a disclaimer of enforceability in § 1229(d)(2) and its failure to include a similar disclaimer of enforceability in § 1229(e)(2) evidences that Congress intended a noncitizen to be able to enforce DHS' failure to certify NTA's stemming from arrests at protected locations.

V. Termination is the Proper Remedy for a Violation

Congress required NTA's stemming from arrests at protected locations and courthouses to contain a certification. As such, the certification is a condition precedent to a legally proper NTA. As a result, termination would be the appropriate remedy. *See* Montes-*Lopez v. Holder*, 694 F.3d 1085, 1093-94 (9th Cir. 2012) (holding that petitioner need not demonstrate prejudice for violation of statutory right to counsel); (*Montilla v. INS*, 926 F.2d 162, 169 (2d Cir. 1991) (recognizing that an agency's failure to follow its processes suggests favoritism and a lack of consistency); *Leslie v. Attorney General of U.S.*, 611 F.3d 171, 174 (3d Cir. 2010) (treating denial of right to counsel as inherently prejudicial); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1297 (7th Cir. 1975) (same).

Were DHS to seek to amend the NTA to add a certification to the NTA after the fact, one could argue that doing so would be inconsistent with the plain language and purpose of§ 1229(e), which is to limit the negative impact of its enforcement actions in sensitive locations *before* it engages in the actions. See 8 U.S.C. § 1229(e)(1) ("In cases where an enforcement action *leading to* a removal proceeding…, the Notice to Appear shall include a statement that the [certification provisions] *have been* complied with") (emphasis added). Moreover, allowing DHS to belatedly add a certification would create a strong disincentive for DHS' to follow the law.

VI. What is a Community-Based Organization?

The term "community-based organization" in 8 U.S.C. § 1229(e)(2)(A) should have its ordinary meaning, which is a nonprofit group that works at a local level to improve life for residents.

It is possible that DHS might attempt to argue that the definition of "community-based organization" that Congress provided in 42 U.S.C. § 13925(a)(3) should apply to 8 U.S.C. § 1229(e)(2)(A) too.[6]

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[6] Section 13925(a)(3) of Title 42, provides:

> The term ''community-based organization'' means an organization that— (A) focuses primarily on domestic violence, dating violence, sexual assault, or stalking; (B) has established a specialized culturally specific program that addresses domestic violence,

Application of the definition set forth in 42 U.S.C. § 13925, which relates to laws dealing with public health, social welfare, and civil rights, would be wrong.[7] When Congress wants an existing definition to apply to the Immigration and Nationality Act, it knows how to do so. *See, e.g.*, definition of aggravated felony "crime of violence" under 8 U.S.C. § 1101(a)(43)(F), which specifically incorporates 18 U.S.C. § 16. Congress has not done so here.

In addition, 42 U.S.C. § 13925(a) provides for "Definitions. In this subchapter" Title 8 of the United States Code is not in any subchapter of Title 42 of the United States Code. Furthermore, 42 U.S.C. § 13925 is entitled "Definitions and grant provisions." The title of a statute can assist in determining a statute's meaning if there is ambiguity. *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189 (1991). Here there is no ambiguity, however, even if there were, by specifying "grants" in § 13925, Congress demonstrated that it was defining "community-based organization" only in connection with eligibility for federal Violence Against Women Act grants.

VII. Conclusion

Congress did not intend for DHS to be able to arrest individuals in protected locations without complying with 8 U.S.C. U.S.C. § 1229(e). We urge practitioners to raise the arguments in this advisory to keep DHS from removing your clients in violation of the immigration laws.

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dating violence, sexual assault, or stalking; (C) has a primary focus on underserved populations (and includes representatives of these populations) and domestic violence, dating violence, sexual assault, or stalking; or (D) obtains expertise, or shows demonstrated capacity to work effectively, on domestic violence, dating violence, sexual assault, and stalking through collaboration.

[7] Congress created a separate definition for "community-based organization, which approximates plain meaning of the term by in that it covers a group that "provides educational or related services to individuals in the community. **See** 20 U.S.C. § 7011(2). Although closer to the meaning we believe applies, Congress did not tether that definition to Title 8 of the United States Code so it should not apply to 8 U.S.C. § 1229(e).

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