

Litigating for Survivors

Where are we?

What do we need to learn?

Topics

- Current litigation on U-visa issues
- Federal litigation basics
- The uses of APA and mandamus actions
- Habeas claims on behalf of survivors

Current U-visa Litigation

- **Goals of litigation: force USCIS to adjudicate EAD applications and to determine whether U-visa petitioners eligible for the regulatory waiting list**
- **Why litigate?**
 - **USCIS failure to adjudicate EAD applications despite statutory and (prior) regulatory language**
 - **Extreme and growing delay (4+ years) from submission of U petition to waiting list**
 - **No reliable administrative procedure for forcing USCIS's hand**

Claims

- 1) 8 U.S.C. § 1184(p)(6) requires USCIS to adjudicate EAD applications for U-visa petitioners
- 2) Before January 27, 2017, 8 C.F.R. § 274.13a(d) required USCIS to adjudicate EAD applications, or provide an interim EAD, within 90 days
- 3) All petitioners who would be granted a U visa but for the statutory cap “must be placed” on the waiting list (8 C.F.R. § 214.14(d)(2))

Past and Pending Individual Cases

- ***Rodriguez v. Nielsen*** (E.D.N.Y. Sept. 30, 2018)
 - Motion to dismiss denied as to EAD claims
- **Cases within the Fourth Circuit**
 - ***Gonzalez v. Cuccinelli*** (4th Cir. No. 19-1435)
 - E.D.N.C. dismissed both § 1184(p)(6) claim and waiting-list claim
 - ***Solis v. Cissna*** (D.S.C. July 11, 2019)
 - Summary judgment granted to plaintiffs on EAD and waiting-list claims
- ***Patel v. Cissna*** (M.D. Ga. Aug. 20, 2019)
 - Dismisses § 1184(p)(6) claim, denies motion to dismiss waiting-list claim
- ***A.C.C.S. v. Nielsen*** (C.D. Cal. Sept. 17, 2019)
 - Denies motion to dismiss EAD and waiting-list claims

New Class Action

- *N-N- v. McAleenan*, E.D.N.Y. No. 1:19-cv-5295 (filed Sept. 17, 2019)
 - All three claims
 - Who is covered?
 - U-visa petitioner who submitted petition, and application for EAD, before 3/17/19 (§ 1184(p)(6) claim)
 - If filed before 9/17/17, also a waiting-list claim
 - If filed before 1/27/17, also an interim EAD claim
 - Timeline?

Immigration Litigation Basics

- **Can I sue?**
 - Jurisdictional bars
- **Should I sue?**
 - What's the goal?
 - Resource commitment
- **Where can/should I sue?**
- **When can I sue?**
 - Limitations periods (often capacious in this realm)
 - “Unreasonable” delays/“prolonged” detention

The Administrative Procedure Act - 1

- Applies to gigantic rulemakings (*e.g.*, asylum ban; expansion of expedited removal) and to agency decisions/actions in individual cases
 - Supplanted by the PFR procedure in removal cases
- A reviewing federal court “shall compel agency action unlawfully withheld or unreasonably delayed” and “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” (5 U.S.C. § 706(1) & (2)(A); *see also* 5 U.S.C. § 555(b))
- “the court shall review the whole record or those parts of it cited by a party” (5 U.S.C. § 706)
- “due account shall be taken of the role of prejudicial error” (5 U.S.C. § 706)

The Administrative Procedure Act – 2

- Finality & exhaustion requirements
- Lengthy limitations period (6 years)
- Venue: where plaintiff resides, or where a defendant resides, or where a substantial part of the events occurred
 - Consider the experts in D.C.
- Relief generally involves remand to the agency

Mandamus

- For “the clearest, most obvious, and wholly irreparable” agency errors (*Allegheny Def. Project v. FERC*, 932 F.3d 940, 955 (D.C. Cir. 2019))
- Need:
 - Clear & undisputed right to relief
 - No other adequate means to obtain relief
 - Exceptional circumstances = judicial usurpation of power or clear abuse of discretion
- Which to choose? Can always bring both (with minimal extra effort).

Actions Unlawfully Withheld

- **For USCIS's failure to follow statutory & regulatory commands**
 - U-visa EADs – failure to implement § 1184(p)(6) & failure to follow interim EAD regulation
 - Also, *e.g.*, EADs for asylum-seekers
 - Not used to challenge discretionary determinations
- **Arguments to anticipate**
 - It's really a matter of discretion
 - The petitioners didn't actually apply for EADs (in asylum context, the clock)
 - Resource constraints
 - “Queue-jumping”

Unreasonable Delays

- **For significant delays in processing**
 - U visa waitlist determinations
 - Also naturalization, AOS, affirmative asylum decisions
 - If trends continue, Ts
 - *Not* issuance of actual U visas
- **How long is too long?**
 - *TRAC* factors (*Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984))
 - Rule of reason
 - Congressional timetable
 - Economic or health/welfare
 - Competing agency priorities
 - Interests prejudiced by delay
 - Agency impropriety not necessary

Challenges to Denials of Status

- Suits re: withheld/delayed actions require USCIS to make *a* decision, but not *what* decision to make
- Denials of status (after AAO appeals) are final agency actions that can be challenged under the APA
- Relatively rare, but becoming more frequent
- Claim is generally that an individual denial is contrary to the statute, contrary to regulations, or arbitrary & capricious

Beware 8 U.S.C. § 1252(a)(2)(B)

- “no court shall have jurisdiction to review”
 - (i) specified decisions, including “any judgment regarding the granting of relief under” 8 U.S.C. § 1255
 - (ii) “any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security”
- “this subchapter” = INA subchapter 2 = 8 U.S.C. §§ 1151-1382
- “in the discretion of” means that the INA itself expressly vests discretion in the executive branch

Reach of (a)(2)(B)

- Should *not* be barred:
 - Challenges to U-visa, T-visa, and SIJ determinations
- At least affected by (a)(2)(B)(i):
 - Challenges to AOS determinations (8 U.S.C. § 1255)
- At least affected by (a)(2)(B)(ii):
 - Decisions on U-visa EADs (“may grant” found in 8 U.S.C. § 1184(p)(6))
 - Credibility findings & weight of evidence in VAWA self-petitions (8 U.S.C. § 1154(a)(1)(J); *Butalova v. Attorney General*, 768 F.3d 1179 (11th Cir. 2014))
 - Denials of waivers of inadmissibility under 8 U.S.C. § 1182(a)(3)(D)

Immigration Habeas

- **Use:** To challenge “custody”
 - Unlawful detention/orders of supervision
 - Unduly prolonged detention (pre-final order and post-final order)
 - Failure to provide bond hearing
 - Improper denial of bond
- **The statute – 28 U.S.C. § 2241(c)(3):** writ of habeas corpus extends to anyone “in custody in violation of the Constitution or laws or treaties of the United States”
- **Exhaustion requirement**

Habeas Nuts & Bolts 1: Preliminaries

- **Caveat:** Always check the local rules
- **Respondents: Basically everyone relevant**
 - Warden of detention facility
 - ICE Field Office Director
 - ICE Director
 - DHS Secretary
 - Attorney General
- **Beware of jurisdictional bars** – 8 U.S.C. §§ 1226(e), 1252(a)(2)(B)(ii) & (b)(9).
- **Venue – 28 U.S.C. § 1391(b) & (e): Typically, where the client is detained**
 - Must be admitted in the district (*pro hac vice*)
 - Post-petition transfer does *not* divest court of jurisdiction

Habeas Nuts & Bolts 2: The Petition

- **Caveat:** Always check the local rules
- **Initial filing**
 - Local civil cover sheet
 - Verified petition
 - Exhibits
 - Redact!
 - Memorandum
- **But first...**
 - Consider starting a dialogue with the relevant U.S. Attorney's Office

Habeas Nuts & Bolts 3: The Process

- **Caveat:** Always check the local rules
- **What to expect:**
 - Referral to magistrate judge
 - Order directing government to show cause why writ should not be granted
 - Government response (“return”) within 3 days, or up to 20 days for good cause shown (28 U.S.C. § 2243)
 - Quick turnaround reply (“traverse”)
 - Hearing within 5 days of return, extendable for good cause shown
 - Report & recommendation
 - Objections filed with district judge
- **Ways to speed up process**
 - Request expedited order to show cause
 - Ask for TRO
- **Mootness**

Types of Habeas Claims

- **Unlawful detention** – ICE had no authority to detain client in the first place.
 - Client now a citizen, or has adjusted status and is not removable
- **Post-final order (indefinite) detention (*Zadvydas* claim)**
 - Order of removal issued
 - Presumed six-month waiting period
 - Unlikely to be removed in the reasonably foreseeable future
- **Pre-final order detention**
- **Habeas to prevent imminent removal**

Pre-final order habeas claims

- ***Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)**
 - Under INA, anyone detained at entry *must* be in detention until completion of removal proceedings (8 U.S.C. § 1225(b))
 - Exception: Parole for urgent humanitarian reasons or significant public benefit
 - Anyone detained in the interior is generally eligible for bond (8 U.S.C. § 1226(a))
 - Exception: Certain criminal convictions
- **The way around *Jennings* – Due Process**
 - Indefinite detention would violate due process, so length of detention allowed by statute must be reasonable. *See, e.g., Portillo v. Hott*, 322 F. Supp. 3d 698 (E.D. Va. 2018) (ordering bond hearing for withholding-only petitioner after 14 months of detention)
 - Due Process Clause requires bond hearings for asylum seekers who pass CFIs (*Padilla v. ICE*, 387 F. Supp. 3d 1219 (W.D. Wash. 2019))
 - Family separation likely violates substantive due process (*Ms. L v. ICE*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018))

Habeas to Prevent Imminent Removal

- ***INS v. St. Cyr***, 533 U.S. 289 (2001) – habeas available to LPR who was eligible for cancellation of removal pre-AEDPA/IIRIRA but whose removal proceedings began post-AEDPA/IIRIRA
- ***Hamama v. Homan***, 912 F.3d 869 (6th Cir. 2019)
 - Under 8 U.S.C. § 1252(g), district courts lack jurisdiction to hear removal-based habeas claims from applicant for withholding/CAT relief
 - This is not a Suspension Clause violation, because possibility of removal to a safe third country means that not seeking traditional habeas relief/a release from custody
 - Key is release into U.S. (*St. Cyr*) versus non-release into a specified country (*Hamama*)
 - *Ashqar v. Hott*, E.D. Va. No. 1:19-cv-716 (June 5, 2019)
- ***Thuraissigiam v. DHS***, 917 F.3d 1097 (9th Cir. 2019) – limits on habeas relief for those in expedited removal violates the Suspension Clause
 - Creates a circuit split. *See Castro v. DHS*, 835 F.3d 422 (3d Cir. 2016)

Questions

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- Join ASISTA's litigation mentoring program