



PURSUING U VISAS UNDER TRUMP: ADVANCED TOPICS AND EMERGING ISSUES

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GOING TO FEDERAL COURT

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Why federal court?



In this environment, may be one of the most effective (and only!) tools we have

Another bite at the apple (or two or three)

Shake loose a “stuck” case

Can be last line of defense before removal

Federal Court Options

Mandamus – Compelling agency action that is delayed

Administrative Procedure Act, (5 USC 701-706)

Court can compel agency action unreasonably delayed (a.k.a. “APA mandamus”)

Court can set aside agency action that is contrary to law, arbitrary or capricious, or unsupported by substantial evidence

Habeas – Challenging detention or imminent removal

Petitions for Review – *Only* of a final removal order and *only* in Federal Court of Appeals

Court procedures & admission processes

All federal courts require bar membership

Admission procedures and certificates of good standing – read the rules

Barred in that state?

- Pro hac vice (using other counsel)

Electronic filing registration—CM/ECF

May be training required

Local counsel?

Sponsorship

Mentors

Federal court: preliminary considerations

A federal district court complaint must show:

- (1) jurisdiction
- (2) venue
- (3) cause of action
- (4) remedy

Federal court: preliminary considerations

Jurisdiction

28 USC 1331 — Federal question jurisdiction;

28 USC 2241 — Habeas

28 USC 1361 – All writs act (mandamus, prohibition)

INA jurisdiction-stripping minefield:

- INA 242(a)(2)(B)(ii) – No review of discretionary denial
- INA 242(a)(5), (b)(9) – Cannot seek review of removal order in district court. Must seek review in Court of Appeals via PFR
- INA 242(g) – No judicial review of AG's decision to commence proceedings, adjudicate cases or execute removal orders.

The Administrative Procedure Act is NOT a source of jurisdiction

Federal court: preliminary considerations

Venue

District Court: Where client resides or where agency personnel reside.

- But generally not Washington, DC

Habeas case: In most circuits, habeas jurisdiction the site of detention. *See Rumsfeld v. Padilla*, 124 S.Ct. 2711(2004)

Circuit Court in PFR: Location of immigration court which issued removal order dictates venue.

Federal court: preliminary considerations

Parties – All individual defendants named “in official capacity”

USCIS: Name service center director, district director (if local office decision), USCIS Director, DHS Secretary

DOS: Secretary of State

ICE: Field Office Director, ICE National Director, DHS Secretary

Exhaustion of Administrative Remedies

Required for Court of Appeal review of PFR (unless constitutional or statutory interpretation claim)

Not generally required for appeals of AAO or USCIS decisions

Emma . . .

Emma has an approved U visa based on DV; she filed an application for her derivative, Lavinia, who has not yet been approved, although you responded to an RFE in Lavinia's case over a year ago.

Is there anything you could file in federal court to get CIS to decide Lavinia's application?

What is mandamus?

What does it do?

A “writ of mandamus” is a court order to an agency directing it to perform a non-discretionary duty.

Only available when there is a clear right, a clear duty, and no other adequate remedy

What will it not do?

Force the agency to approve the case. You will get a decision, but client needs to be prepared that it may not be a favorable decision.

Compel the agency to take a discretionary action. Will only compel a mandatory duty (such as adjudicating a case).

APA Unreasonable Delay

Similar to a mandamus action

5 USC 706(1) = A court can compel agency action that unreasonably delayed

Unreasonable Delay is determined by the TRAC Factors:

- Rule of Reason? (agency guidance, press releases, etc.)
- Congressionally indicated timeline? 8 U.S.C. 1571(b) (6 Months)
- What does agency action impact? (health and welfare or economic)
- Does compelling action hurt competing priority versus prejudice to plaintiff?
- Does it require finding agency impropriety?

Telecommunications Research & Action Ctr. v. FCC ("TRAC"), 750 F.2d 70 (D.C. Cir. 1984).

APA Unreasonable Delay

Not enough to show that your client's application is delayed.

See Calderon-Ramirez v. McCament, 877 F.3d 272, 274 (7th Cir. 2017)

But see Haus v. Nielsen, 2018 WL 1035870 (Feb. 23, 2018 N.D. Ill.)

Can be effective cause of action for detained clients or clients facing imminent removal.

May be able to obtain discovery

Other pointers regarding delayed agency decisions

Generally advisable to raise BOTH APA and mandamus causes of action

Most important fact is harm to your client

Work permit renewal is delayed more than 180 days, so auto-renewal has expired.

Irreparable harm to client, may lose job, eviction, etc.

In mandamus cases, consider drafting complaint and sending to the agency and to your local U.S. Attorney's Office with a letter stating that the case will be filed in __ days if there is not action on the case.

Saves client the filing fees and will often work to get case moving.

Mandamus/APA unreasonable delay: request for relief

Court should direct that agency adjudicate the case within 14 days.

Award of reasonable attorneys' fees and costs.

Grant any other such relief as justice may require.

Sources of law?



Constitution

5th Amendment's Due Process Clause

Statutes (INA)

Regulations (CFR)

Other policies, i.e., memoranda

Note:

Each of the above is subordinate to the authority above it. A policy memo cannot contradict a reg, nor may a reg contradict a statute. Generally policy memos are not legally enforceable, but agency must show why it's deviated from policy to explain why it is not arbitrary and capricious.

Meanwhile...

ICE picked up Lavinia as collateral damage in a raid of their neighborhood (she was hanging on the corner with her buddies when ICE swept through).

You asked ICE to request a PF determination from VSC, which they did.

VSC granted it but refuses to expedite.

Anything you can do in federal court to get Lavinia out of detention and/or stop her removal?

Mandamus/unreasonable delay



Under the unreasonable delay theory, argue that detained client is not in the same position as other U petitioners who are not delayed;
Humanitarian factors exist to compel adjudication

“Habeas Corpus”

Used as a mechanism to secure release from detention.

Latin phrase meaning, “You Have the Body.”

\$5 filing fee (even that may be waived if client is indigent)

Typically handled quicker than a regular district court case, but varies by circuit

Federal habeas statute

28 U.S.C. § 2241

may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge

Habeas remedy available if –

- (1) the person is in custody of the United States (in this case, ICE custody)
- (2) the custody violates the Constitution or laws, or treaties of the United States

Real ID Act of 2005

No challenge to “final orders of removal” in district court

Circuit Courts of Appeals = sole jurisdiction

BUT habeas review over challenges to detention that are independent of challenges to removal orders

Trickiness: Need to show constitutional or statutory violation, which is difficult where client is still awaiting her U visa

Advise client that habeas petition is not slam-dunk

Case Law

Habeas may be used for statutory and constitutional challenges to detention

Indefinite detention (deportable): Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Zadvydas v. Davis, 533 U.S. 678 (2001)

Also for inadmissible = Clark v. Martinez, 543 U.S. 371 (2005)

Mandatory detention = Demore v. Kim, 538 U.S. 510 (2003)

May also be used to preserve right to judicial review. E.g., pending Motion to Reopen before BIA, but no decision. Or preparing such a motion. Client in immediate danger of removal.

Hamama v. Adduci, ___ F. Supp. 3d. ___, 2017 WL 2953050 (E.D. Mich. 2017).

Habeas: What relief?

Release from detention
Provide a bond hearing

Does it stop removal?

No; would need a Temporary Restraining Order from judge

Jurisdictional bar poses a problem here—8 USC 1252(g)

BUT! Recently courts have found Suspension Clause problems with removing noncitizens before given a chance to present their claims

- *See Hamama v. Adduci*, 258 F.Supp.3d 828 (E.D. Mich. 2017) (appeal pending).

Options for Detained Clients: Seek *LDG* Waiver

Clients with inadmissibility problems will need a waiver

INA § 212(d)(3)(A)—general waiver

INA § 212(d)(14)—U-visa-specific waiver

Circuit court disagreement about IJ authority to grant waiver

Seventh Circuit: IJ **has authority** to grant waiver (*LDG v. Holder*, 744 F.3d 1022 (7th Cir. 2014); *Baez-Sanchez v. Sessions*, 872 F.3d 854 (7th Cir. 2017))

Third Circuit: IJ **does not have authority** to grant waiver (*Sunday v. Att’y. Gen’l.*, 832 F.3d 211 (3d Cir. 2016))

Board of Immigration Appeals: IJ **does not have authority** to grant waiver (*Matter of Khan*, 26 I. & N. Dec. 797 (2016)).

Advice: Unless in the Third Circuit, seek the waiver.

Options for Detained Clients: Seek Continuance from IJ

Seek continuance for the purposes of USCIS adjudicating the U visa

If denied, appeal to the Board of Immigration Appeals

Options for Detained Clients: Petition for Review + Stay

Why is this helpful?

Even without a stay, ICE sometimes will not execute removal order if a PFR has been filed

Only way to challenge any factual or legal issues that were determined in removal proceedings.

Jurisdiction

Limited to “final orders of removal.”

Other practice pointers

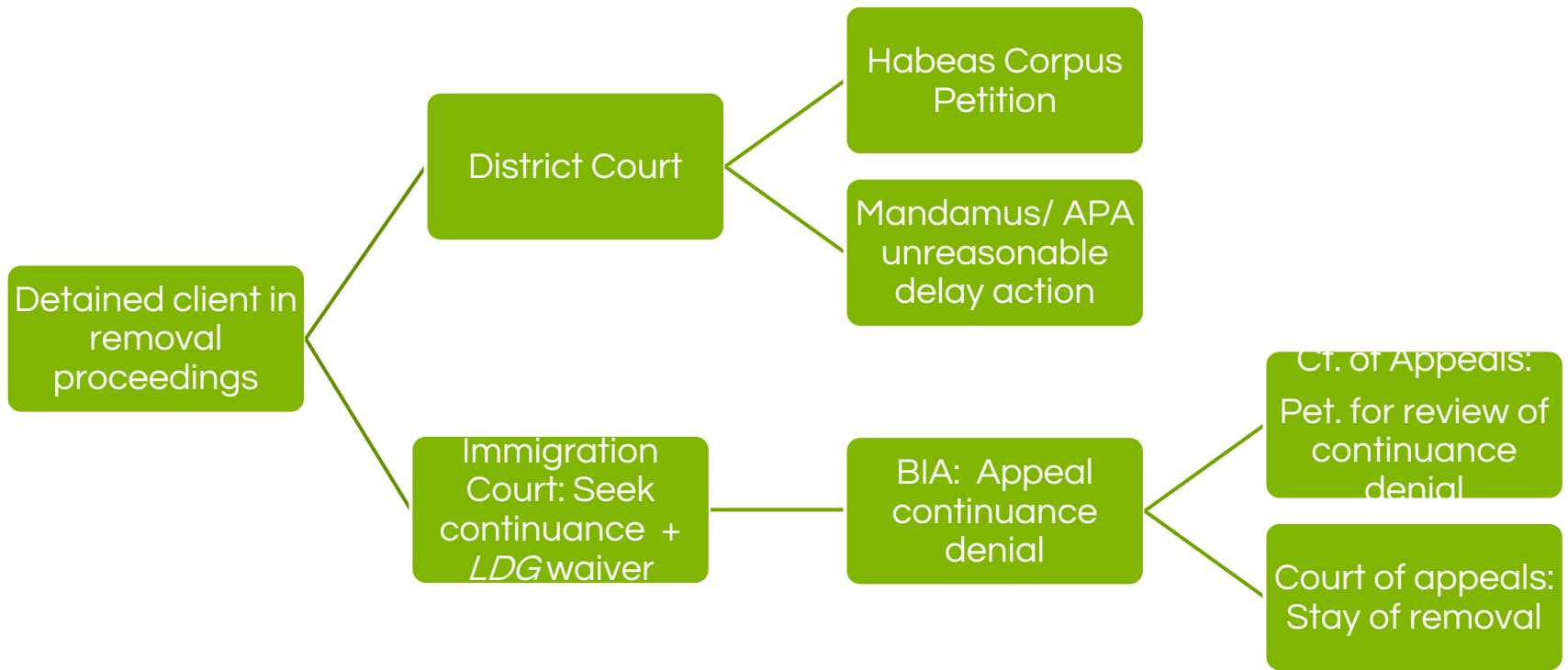
Must file within 30 days of BIA’s final order – no exceptions

Must exhaust appeal to BIA first, cannot appeal from IJ order (except for RF/CF denial, where there is no admin appeal).

Upon filing the PFR, file a concurrent motion for a stay

Analysis depends on circuit; e.g., 7th Cir. = frequently

Options for detained clients



Lavinia's U denied!

Now VSC has denied Lavinia's application, saying she failed to meet the (d)(3) *Hranka* factors,

Even though her only criminal issues are arrests for disorderly conduct (they arrested all of her pals that hang on the corner), which were later dropped.

Can you challenge this denial in federal court?

What may you need to do first?

Administrative Procedure Act

5 U.S.C. 706(2)

A court may hold unlawful and set aside an agency action (e.g., a U visa denial) that is:

- (A) arbitrary, capricious, abuse of discretion, unlawful;
- (B) violates a constitutional right
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

APA prerequisites:

Final agency action

Non-discretionary finding (similar to INA jurisdictional bar 1252(a)(2)(B)(ii))

No other adequate remedy at law

Lavinia's case?



What could you challenge under APA?

Steps for doing this?

Recap: applying the concepts

Parties

VSC Director

USCIS Director

DHS Secretary

Jurisdiction

28 USC 1331

Venue

Either your client's domicile, District of Vermont, or District of Nebraska

Sources of law

INA, CFRs, any relevant memos

Request for relief

Reverse denial, issue declaratory judgment that Lavinia is qualified for U visa

- Note: Unlikely to get court to issue such a declaration, but doesn't hurt to ask
- Most likely outcome is a remand back to VSC for entry of a new decision

Things we'd like to challenge

ICE failure to follow its own memos

SHALL ask for PF; MUST contact OCC

SHOULD favorably review if PF granted

If deny, MUST provide summary to HQ for their review

CIS failure to implement

Bona fide EAD at 214(p)(6)

(d)(14) waiver generally

Lack of independent waiver review

Delays in wait-listing

Don't forget EAJA fees

Attorney fees MAY be available under EAJA
(Equal Access to Justice Act)

Your client is prevailing party

Covers attorneys' fees and other costs, including
filing fee

Unless court finds US position substantially
justified

What to do now

Keep careful time and expense records and
detailed statements of what you are working on.
Otherwise, you may not be able to get fees.

“Prevailing party” and “Substantial Justification”

Prevailing party = judicially sanctioned material alteration of the legal relationship between the parties

- Whether a remand counts depends on jurisdiction (e.g., Ninth Circuit allows for award in such cases)

Substantial Justification

- gov't bears the burden of proving
- May not be s/j if position diverges from IJ's or BIA's rationale
- May not be s/j if the gov't position ignored split in circuits or contrary authority in their briefs
- CIS or ICE failure to follow its own procedures?

EAJA Fees calculations

Prevailing party must show “reasonable” fees

Formula (statutory rate), may be reduced in court’s discretion

Immigration law is complex, so may be enhanced

Party files a motion with a breakdown of all fees; gov’t can/will object

Must be requested *within* 30 days of date that decision becomes final

Don't wait for crisis to get ready

Get admitted to relevant federal court

Usually “sponsored” by bar member

- Find mentor, someone you can shadow

Do this even if partnering with pro bono so you can appear to do immigration law arguments

Collect templates so ready to go

Get drafts ready to go for likely clients

Find out how to file in an emergency. Usually procedures are available on Court's websites.

Best practice: Don't file after-hours if you can help it.

Questions? Comments?

Contact Kate or Julie:

Kate Melloy Goettel –

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Julie Carpenter – JulieC@tahirih.org

Contact Asista:

Individual case help: questions@asistahelp.org

Join list serves: questions@asistahelp.org

Work with small group to advance topics
discussed today: gail@asistahelp.org

Help brainstorm litigation arguments:
gail@asistahelp.org

Evaluation & BF EAD meeting



Please fill out and leave your evaluations with Ahlam

BF EAD meeting in the lounge at 5:30

THANK YOU!

