Special Considerations in Representation of Foreign Nationals

by
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Family lawyers are being presented with clients and potential clients whose immigration or lawful residency status in the United States is uncertain or unclear. This article will examine the circumstances under which family law practitioners have to examine and make determinations about the protection of clients who are or may be in legal proceedings in the probate and family courts and who do not or may not have permanent lawful residency status in the United States.

This article will not discuss the ways in which foreign nationals who do not have legal status might acquire legal status. It will limit itself to the ways in which family law practitioners can best attempt to protect undocumented clients (those who do not or are believed to not have lawful status) who need access to the legal system for family court matters.

I. Forms of Unlawful Status

There are several types of unlawful status for which there are some protections from removal (deportation). Only two of them, the Violence Against Women Act ("VAWA")[1] and refugee designation,[2] provide a pathway to legal residency and eventual citizenship.[3]

A brief historical summary of those possible protected categories follows:

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1 Pub. L. No. 102-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.).

2 8 C.F.R. § 244.9 (2011).

3 There is a category for fiancé visa holders who go on to marry citizens, but that will not be addressed in this article.

A. *Temporary Protected Status*

The purpose of the Temporary Protected Status (TPS) program is to provide safe haven in the United States for foreign nationals whose nation is experiencing a humanitarian or environmental crisis. The TPS program is promulgated under Section 244 (c)(2) of the Immigration and Nationality Act (INA).[4] The program is designed to address serious concerns that arise when civil unrest, armed conflict, extreme violence, or natural disasters compromise the ability of foreign nationals in the United States to safely return to their home countries.[5] The TPS program has been administered by the Department of Homeland Security since 2003.[6]

Foreign nationals may be granted TPS for periods of between 6 and 18 months and the Secretary of Homeland Security reviews the conditions under which TPS has been granted to nationals of a particular country at least 60 days prior to the termination of TPS status. That status automatically renews unless the Secretary determines otherwise and it can be extended on an unlimited basis.[7] Persons who are granted TPS status may apply for work permits and lawfully work in the United States.[8]

With a loss of TPS status foreign nationals cannot lawfully work or receive health benefits, and will be subject to imminent removal. This is of critical importance to family lawyers who represent those foreign nationals or their family members, and the current status of TPS is precarious for previously protected persons.

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4 Pub. L. No. 101-649, § 302(a), 104 Stat. 4978 (codified as 8 U.S.C. § 1254a).

5 Until recently nationals of El Salvador, Haiti, and Honduras have received continual TPS status but El Salvador's designation was terminated effective September 9, 2019, Haiti's was terminated effective July 22, 2019, and Honduras' was terminated effective January 5, 2020.

6 *See* Homeland Security Act Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended at 6 U.S.C. §§ 251, 291).

7 JILL WILSON, CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: OVERVIEW AND CURRENT ISSUES 48 (2018); INA § 244(a)(1)(A), (a)(1)(B), (d)(4).

8 WILSON, *supra* note 7.

B. *Violence Against Women Act*

The Violence Against Women Act was first enacted in 1994 and significantly strengthened with enactment of the Violence Against Women Reauthorization Act of 2013.[9] The 2013 Act, among other things, expanded protections for gays and lesbians and also for non-Native Americans who are tried by tribal courts on reservations, and protections for battered Indian women.

The 2013 Act[10] amends the Immigration and Naturalization Act to expand the definition of non-immigrant U-Visa[11] to include victims of stalking. It also makes the child of an alien VAWA petitioner eligible for lawful permanent resident alien status under his or her parent's petition if that petition is successful.[12] And it grants an exclusion to any alien who is a VAWA petitioner, a U-Visa applicant, or a battered spouse or child from the requirement that he or she not be a public charge.[13]

VAWA further amends the Immigration and Naturalization Act to provide that if a child who is under 21 and unmarried when his or her parent petitions and he or she turns 21 during the pendency of the petition process, he or she will still be eligible, and also extends the waiver of the two-year waiting period for permanent resident status to a battered spouse.[14]

VAWA protections are critical for family lawyers to understand and apply where appropriate. A VAWA candidate may self-petition for adjustment of status without notice to or reliance upon the status of an abusive family member. Protections are available even if the self-petitioner made an illegal entry into the United States and would otherwise be inadmissible under INA section 212(a)(6)(A)(i).[15]

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9 Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of 18 and 42 U.S.C.).

10 Pub. L. No. 113-4, § 801, 127 Stat. 110 (2013); 8 U.S.C. § 1101(a)(15)(U)(iii).

11 Aliens who are victims of certain crimes.

12 Pub. L. No. 113-4, § 803; U.S.C. § 1154(1)(2).

13 Pub. L. No. 113-4, § 804; 8 U.S.C. § 1182(A)(4).

14 Pub. L. No. 113-4, § 805; 8 U.S.C. § 1184(p).

15 NAWAL AMMAR, NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT, SOCIAL SCIENCE RESEARCH DOCUMENTS THE NEED FOR VAWA SELF-PETITIONS AND U-VISAS 1 (2012).

C. *Deferred Action for Childhood Arrivals*

Beginning on June 15, 2012, foreign nationals without lawful status who came to the United States before reaching their sixteenth birthday and had continuously resided in the United States since at least June 15, 2007, and were physically present in the United States when making an application, were either in school or obtained a high school diploma, or were honorably discharged from any branch of the military, had not been convicted of a felony, significant misdemeanor, or three or more misdemeanors, and did not otherwise pose a threat to national security or public safety were entitled to request deferred action against removal from the United States (DACA).[16]

DACA status did not and does not grant or provide lawful status to anyone and is a protection against removal for only a period of two years (subject to renewal). If DACA is granted to an individual he or she may be eligible to receive work authorization.[17]

On September 5, 2017, DACA was rescinded by executive order, but due to several recent court decisions the U.S. Customs and Immigration Service (USCIS) is currently accepting requests for renewal of status.[18]

To request DACA renewal a person must be at least 15 years of age unless removal proceedings have already begun or there is a removal order, in which case the renewal applicant can be younger than 15. An applicant for renewal must be under age 31 in all cases.[19]

DACA applicants must be able to prove that they came to the United States before their sixteenth birthday, prove that they are not lawful immigrants, they were present in the United States on June 15, 2012 and continuously resided in the United States, and they meet the educational requirements or were in the United States military and were honorably discharged.

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16 *Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZEN AND IMMIGR. SERV., https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca [hereinafter DACA].

17 *Id.*

18 DACA remains unavailable to anyone who had never been granted DACA status before September 5, 2017.

19 DACA, *supra* note 16.

Applicants who do not meet the criteria are referred to U.S. Immigration and Customs Enforcement (ICE) for removal proceedings if the Department of Homeland Security determines that there are criminal offenses involved, or there is evidence of fraud, or there are threats to national security or public safety. USCIS has a stated policy of not referring individual cases to ICE otherwise.

D. *Refugee Status*

The term "refugee" is a defined term under the Immigration and Nationality Act (INA).[20] A refugee is a person who is *not* in his or her own country and who is unable or unwilling to return to his or her country because of either "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular group, or political opinion, or nationality, membership in a particular social group, or political opinion or, if the president so determines, is *in* his or her country of nationality and has either "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular group, or political opinion, or nationality, membership in a particular social group, or political opinion."[21]

A person who has been forced to abort a pregnancy or to undergo involuntary sterilization or who has been persecuted for failure or refusal to undergo such a procedure or for other "resistance to a coercive population control program" also falls within the ambit of the Act. Forced marriage or the threat of forced marriage is also considered a criterion.

A person who qualifies for refugee status may be eligible to adjust his other status and receive legal permanent residency, and later U.S. citizenship.

E. *Asylum Status*

The term "asylum" differs from the term "refugee" in that an asylum seeker is a person who meets the definition of "refugee" but who is already in or at the border of the United States.

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20 8 U.S.C. § 1101(a)(42).

21 This definition comes originally from the United Nations 1951 Convention and the 1967 Protocol and was then incorporated into the INA as part of the Refugee Act of 1980.

If a person is granted asylum he or she is protected from being returned or removed, may get authorization to work in the United States, may request permission to travel, and may petition to bring in family members. After one year an asylee may apply for permanent resident alien status. After four more years he or she may apply for citizenship. An application for asylum is also a request for withholding of removal.

There are two categories of asylum. Affirmative asylum applies to a person who is not in removal proceedings and, until adjudicated, will not be removed. Defensive asylum applies to persons who are actually in removal proceedings and an application is filed with the immigration judge; it is in essence a defense against removal.

An asylum seeker has the burden of proof that he or she meets the definition of "refugee." Although asylum seekers are generally very vulnerable people (children, single mothers, victims of violence or torture, etc.), they may be detained while their applications are being considered, sometimes for considerable periods of time. The decision to detain an asylum seeker while an application is pending is entirely within the discretion of the Department of Homeland Security (DHS) and USCIS.

F. *Immigration and Customs Enforcement*

Immigration and Customs Enforcement (ICE) was created in 2003, contemporaneously with the creation of the Department of Homeland Security. The U.S. Customs Service and the Immigration and Naturalization Service were merged to form ICE. Among its other functions, ICE identifies and apprehends "removable" aliens and removes them from the United States.

II. Recognizing the Client's Status

It is of utmost importance to determine the lawful or unlawful status of a client who is in the United States.

1. Is the client in the United States on any type of visa? If so, is the visa dependent upon his or her marital status or status as a dependent?

2. If dependent upon marital status or status as a dependent, can the client seek VAWA protection?[22]
3. Did the client enter the United States as a refugee seeking asylum?
4. If so, at what stage are the proceedings? And has the client been threatened with detention pending a determination?
5. Have any hearings already been held or scheduled in immigration court? With what outcomes?
6. Does the client have either DACA status or children entitled to DACA status?
7. If so has DACA status been granted to anyone in the family?
8. Did or does the client or anyone in the immediate family have TPS?
9. If so, what is the status of his or her TPS and can it be converted to refugee or asylum status?

III. Possible Protections

A. *Closing of the Courtroom During Hearings and Trials*

In the mid 1970s four undocumented couples living in Texas had the courage to challenge a law that required any child who wanted to enroll in public school to either show proof of lawful status or pay an annual enrollment (tuition) fee of $1,000.00, a lot of money since, among other things, the four couples who came forward had, between them, sixteen school-age children. Their challenge eventually made its way to the U.S. Supreme Court.[23] But in the first instance the trial judge was asked to protect the identities of the parents (who feared immediate deportation) by closing the court proceedings and allowing the parents to testify in chambers. That request was denied, but the judge, in addition to allowing the plaintiffs to use pseudonyms, took the extraordinary step of conducting the hearings before dawn so that the

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22 Query – Might a state court finding that abuse has occurred operate as res judicata on the issue of abuse before an immigration judge? Or might it operate to collaterally estop ICE from contesting whether abuse has occurred or has been threatened?

23 *See* Plyler v. Doe, 457 U.S. 202 (1982).

press and local citizenry would be strongly discouraged from attending.

Closing a courtroom during testimony is more common in cases involving juveniles charged with delinquency, the abuse of minors, adoption proceedings, and other situations in which the court wants to protect a victim or that involve sensitive facts regarding the special education of a minor.[24] But the argument can be made that the threat posed by ICE agents coming into court proceedings in which victims of domestic violence, or refugees with pending asylum claims or challenges to removal orders are exercising their right to due process[25] weighs in favor of closing a hearing to anyone other than the litigants and their counsel. ICE has the discretion to detain anyone who does not have lawful status, even if it does not attempt to remove him or her.

B. *Seeking Injunctive Relief*

Recently, after a number of ICE requests for the assistance of state and local law enforcement in detaining individuals who were subject to ICE detainers, the Massachusetts Supreme Judicial Court held that state law enforcement personnel lacked the authority under state statutes to detain individuals subject to ICE detainers.[26] Ohio and Kansas courts[27] also found that there was no basis in state law for detention by state law enforcement, although in so finding those courts were examining a different issue.[28]

On April 10, 2018, a class action complaint was filed in Massachusetts federal court seeking a writ of habeas corpus on behalf of several married couples. In each instance one of them is a citi-

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24 Tim Reagan & George W. Cort, *Sealed Cases in Federal Courts*, FEDERAL JUDICIAL CENTER, (Oct. 23, 2009), https://www.fjc.gov/content/sealed-cases-federal-courts-0.

25 A right guaranteed to all "persons" under the Fourteenth Amendment and a right that the Supreme Court has determined to apply to foreign citizens. *See Plyler*, 457 U.S. at 230.

26 *See* Lunn v. Commonwealth, 78 N.E.3d 1143 (Mass. 2017).

27 *See* State v. Montes-Mata, 253 P.3d 354 (Kan. 2011); State v. Sanchez, 853 N.E.2d 283 (Ohio 2006).

28 The issue before those courts was whether a speedy trial statute was tolled because of an ICE detainer.

zen and one a non-citizen with a final order of removal.[29] In each of their cases ICE is seeking to remove or has already removed the non-citizen. In each case the non-citizen has followed a process to legalize his or her immigration status as the spouse of a U.S. citizen and is now detained in immigration custody or is wearing a GPS monitoring bracelet. The plaintiffs' claims, among other things, are that they are entitled to injunctive relief and/or habeus corpus relief.[30] That action is pending.

Based upon these class claims raised in *Jimenez*,[31] it would be reasonable for a family law attorney to make a request for injunctive relief to stay removal proceedings or detention so long as the person requesting that relief had been following lawful and prescribed avenues to obtain legal status.

On May 21, 2018, the First Circuit Court of Appeals ruled on a case in which Samuel Pensamiento, a native of Guatemala, had been charged with a misdemeanor offense in state criminal court. He duly reported to the criminal court for a pretrial hearing and was picked up and detained by ICE agents waiting at the courthouse for him.[32] Pensamiento filed a habeus petition pursuant to 28 U.S.C. § 2241 because ICE was refusing to transport him to his criminal court hearings and he risked default. An emergency order was issued so that he could attend his criminal court hearings.

Pensamiento also claimed the right to a detention hearing on dangerousness and flight risk and the right to a bond hearing before ICE could or should further detain him. Pensamiento had already had a bond hearing at which an immigration judge determined that he had not met the burden to prove that he was not dangerous or a flight risk.

The case is significant because the court of appeals ordered that Pensamiento could not be detained unless the immigration court held a second bond hearing at which it would be the government's burden to prove dangerousness or risk of flight, not the petitioner's.[33]

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29 *See* Jimenez, v. Nielson, No. 18-10225-MLW, 2018 WL 910716 (D. Mass. Feb. 15, 2018).

30 Pursuant to 28 U.S.C. § 1361 and § 2241.

31 *See Jimenez*, No. 18-10225-MLW.

32 *See Pensamiento v. McDonald*, 315 F. Supp. 3d 684 (D. Mass. 2018).

33 *Id*. at 40.

On June 6, 2018, the U.S. District Court for the Eastern District of Pennsylvania[34] entered a declaratory judgment in favor of the City of Philadelphia directing ICE not to use immigration detainers and instead requiring that ICE agents obtain court orders when they attempt to take custody of aliens released from Philadelphia jails. This declaratory judgment appears to contradict that portion of INA 8 U.S.C. § 1226 which allows an officer or employee of the Service to arrest any alien without a warrant "if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulations and is likely to escape before a warrant can be obtained for his arrest."[35]

The family lawyer with an at-risk client who must make court appearances may reasonably consider a request for preliminary restraint if there is the threat that local ICE agents will attempt to pick up and detain a client should he or she exercise his or her right to attend court proceedings and there has not been a previous determination of dangerousness or risk of flight.

Although the Trump administration had ended TPS for El Salvador, Haiti, and Honduras this year, to be effective in 2019 and 2020, U.S. District Court Judge Edward Chen sitting in the Northern District of California in San Francisco, on October 3, 2018, granted a request for a preliminary injunction against the administration's decision to end TPS for four countries, namely: Sudan, Nicaragua, Haiti, and El Salvador.[36] This is another case in which lawsuits have been filed seeking injunctive relief over government decisions to separate families at the border, end legal protections for young immigrants, remove people who entered lawfully, and ban people from some predominantly Muslim countries from entering the United States.

C. *Impoundment or Sealing of Papers and Pleadings and Protective Orders*

Another approach to the protection of undocumented clients is the precautionary impoundment of case files or the obtaining of a protective order at or before the filing of a case so

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34 *See* City of Philadelphia v. Sessions, 309 F. Supp. 3d 289 (E.D. Penn. 2018).

35 8 U.S.C. § 1226 (a)(2).

36 *See* Ramos v. Nielsen, 321 F. Supp. 3d 1083 (N.D. Cal. 2018).

that documents are not available for inspection and non-witnesses are not present for the giving of testimony.

The Federal Rules of Civil Procedure, which are closely tracked in many states through use of the same or similar rules, provide for protective orders in discovery and deposition practice.[37] For good cause shown the court may designate the persons who may be present while discovery is conducted[38] or require that a deposition be sealed and opened only on court order[39] or require that certain documents or information be filed in sealed envelopes to be opened as the court directs.[40] Therefore, by analogy, a court may apply those discovery rules to testimony or documents provided to the court in the course of a hearing or trial upon a showing of good cause.

The Federal Rules also provide for privacy protection for filings[41] and those rules permit redaction of Social Security numbers, except for the last four digits, dates of birth, the names of individuals known to be minors, and certain financial information. By analogy, pleadings may be redacted for other reasons upon a showing of good cause.

Documents may also be filed under seal in federal courts under both Federal Rules of Civil Procedure 5.2 and 26. The well settled principle of public access to court filings can be overcome to protect privacy interests. Requests to seal documents are made by motion before filing since, once filed, the documents automatically become public and no longer confidential.[42]

Child victims and child witnesses have a special form of protection under 18 U.S.C. § 3509. In those cases all papers that disclose the name or identifying information about a child are required to be filed under seal and, when the child testifies, the courtroom may be closed.[43]

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37 FED. R. CIV. P. 26(c).

38 FED. R. CIV. P. 26(c)(E).

39 FED. R. CIV. P. 26 (c)(F).

40 FED. R. CIV. P. 26(c)(H).

41 FED. R. CIV. P. 5.2.

42 *See* Apple, Inc. v. Samsung Electronics Co., Ltd., 727 F. 3d 1214 (Fed. Cir. 2013).

43 18 U.S.C. §§ 3509 (d)(2), (e).

Many, if not all, states have Rules on Impoundment Procedure[44] (sometimes called filing under seal) which are applicable to both civil and criminal proceedings. Good cause must generally be shown. Good cause may include a consideration of (a) the nature of the parties and the controversy, (b) the type of information and the privacy interests involved, (c) the extent of community interest, (d) constitutional rights, and (e) the reason(s) for the request. Moreover, where a public hearing may risk disclosure of information that deserves privacy protection, the court may conduct an *in camera* hearing the transcript of which would be similarly impounded. Risk of warrantless arrest and detention are strong arguments to be considered.

On January 10, 2018, ICE issued a directive[45] which operates against specific, targeted aliens with criminal convictions, gang members, national security or public safety threats, aliens who have been ordered removed but have failed to depart, and aliens who have re-entered illegally after being removed. ICE's policy states that courthouse arrests "are often necessitated by the unwillingness of jurisdictions to cooperate with ICE in the transfer of custody of aliens from their prisons and jails."[46] In response to ICE policy on May 17, 2018, California enacted a new law[47] which imposes a panoply of restrictions on when and how evidence of someone's alien status can be admitted into evidence or even mentioned in a court proceeding. The new law requires that before any mention of a person's immigration status in court a judge must hold a separate *in camera* hearing to determine admissibility.

Many states also have abuse prevention statutes allowing information concerning an alleged abuse victim to be impounded for reasons of safety.[48] By analogy, safety may be argued to be

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44 Examples are California – CAL. RULES OF CT. 2.550; Massachusetts – MASS. TRIAL CT R. VIII the (URIP); Pennsylvania – PA. R. CIV. P. 205.6; Texas – Tex. R. Civ. P. 76a(2)(a)(3). .

45 *See* ICE Directive No. 11072.1, *Civil Immigration Enforcement Actions Inside Courthouses* (Jan. 10, 2018).

46 U.S. DEPT. OF JUSTICE, INTERPRETER RELEASES ART. 95 No. 6 (2000).

47 S.B. 785 (Cal. 2018) which added to sections 351.3 and 351.4 of the Evidence Code.

48 Some examples are: California – CAL. FAM. CODE §§ 6200-6219 (1993); Illinois – 750 ILL. COMP. STAT. 60; Massachusetts – MASS. GEN. LAWS Ch. 209A, § 8 (1978); Minnesota – MINN. STAT. § 518B.01 (1979); New York – N.Y.

protection from a warrantless arrest and detention without a hearing (absence of due process) by ICE.

Conclusion

In a changing world where migrant and refugee issues dominate the press on an almost daily basis, family lawyers now need to be aware of and take precautions against unwittingly putting needy or abused, asylum-seeking clients, or clients who are otherwise in need of services at risk of government action if they seek help through the courts. It is hoped that judges and court officials will take the high road to protect people in need of services. Nevertheless, the lawyer must recognize the client who is in such a precarious position, ask the right questions, advise the client of his/her potential risks, and take the path that poses the least risk after evaluating all the circumstances.

LAW § 6-A 459-H (2012); Pennsylvania - 23 PA. CONS. S. §§ 6101-6122 (1980); Minnesota (1979); New York – New York Consolidated Laws Article.