

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

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|--|---|--------------------------------|
| Ronal Porfirio Ordonez Orosco | : | |
| | : | |
| Plaintiff | : | Cause No. 1:07-CV-00153 |
| | : | |
| vs. | : | |
| | : | October 9, 2007 |
| Michael Chertoff, Secretary of the United States | : | |
| Department of Homeland Security--Immigration | : | |
| and Customs Enforcement and US Citizenship and | : | |
| Immigration Services; Eduardo Lozano, | : | |
| Immigration and Customs Enforcement Officer; | : | |
| Unnamed Supervisory Immigration and Customs | : | |
| Enforcement Officers; and, | : | |
| The United States of America | : | |
| Defendants | : | |

**Amended ACTION FOR WRIT OF HABEAS CORPUS AND CLASS ACTION
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Ronal Porfirio Ordoñez Orosco, through counsel, files this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. He also files a Complaint for Declaratory and Injunctive Relief pursuant to 28 U.S.C. § 1331, as to federal question, with 5 U.S.C. § 702 *et seq.*, Administrative Procedures Act (APA), 28 U.S.C. § 1361 Mandamus Act (MA) and 28 U.S.C. 2201 Declaratory Judgment Act (DJA).

He seeks to force defendants to issue a law enforcement certification to him (and those in the class he seeks to represent) so that he may apply for U interim relief, or U Nonimmigrant Status pursuant to 8 U.S.C. § 1184 (p)(1), (INA § 214).

He seeks declaratory and injunctive relief enjoining the application and use of new 8 C.F.R. § 214.14(a)(14)(iii) and 8 C.F.R. § 212.17(a).

I. INTRODUCTION AND SUMMARY

Congress passed the *Victims of Violence Protection Act (VTVPA)*, Pub. L. 106-386 on October 28, 2000.¹ *VTVPA* created a new non-immigrant visa classification, the U visa. The petition for U status “shall” contain a law enforcement certification (LEC) from the investigating authority pursuant to 8 U.S.C. § 1184 (p)(1), (INA § 214). A person may be the beneficiary of a U visa despite grounds of inadmissibility under 8 U.S.C. § 1182(a) (INA § 212) as they may apply for a waiver of grounds of inadmissibility pursuant to 8 U.S.C. § 1182 (d)(14).² No regulations had been promulgated regarding the U visa and its accompanying waiver until now, 72 FR 179, p53014 (September 17, 2007). U interim relief in the form of deferred action, stay of removal, parole has instead been granted to victims of crimes who submit an LEC with an application for relief and other supporting documents, Yates, Wm. R., *Memorandum for Director of Vermont Service Center*, October 8, 2003 [re: Centralization of Relief for U Nonimmigrant Status Applicants].³ Absent a LEC an application is incomplete and can not be adjudicated, 8 U.S.C. § 1184 (p)(1), (INA § 214).

The LEC must state that the person signing it is so authorized, that the applicant is a victim of an enumerated crime, that the applicant has information concerning that crime, that the applicant was, is being, or is likely to be helpful in investigating, or prosecuting the crime and that the crime took place in the United States (US), or if outside of the United States that it violated US law, *see* 8 U.S.C. § 1101(a)(15)(U)(iii), (INA § 101) and

¹ The relevant portions are codified as sections 101(a)(15)(U), 212(d)(14), 214(p), and 245(I) of the Immigration and Nationality Act(INA): also known as Title 8 of the United States Code

² The statute allows for the waiver of something as serious as terrorism; the only statutory exclusion is for Nazism, or genocide.

³ All U interim relief applications have been adjudicated by the VSC since 2003. All applications for U Nonimmigrant Status will continue to be filed with and adjudicated by the VSC.

8 U.S.C. § 1184 (p)(1), (INA § 214).

Until recently, if a person had a part in the commission of the crime they were not precluded from receiving an LEC and U Interim Relief. With the promulgation of the regulations pertaining to U visas and Waivers of inadmissibility for U visa applicants this has changed, 72 FR 179, p 53037 at (B)(2)(iii), this is *ultra vires* to the statute which when taken together with the applicable waiver for U applicants allows for the waiver of all grounds of inadmissibility other than Nazism or genocide. In other words, if an alien committed a crime, such as illegal entry by the use of a smuggler, and was later abandoned by the smuggler under conditions which would place that aliens life in danger and that aliens accompanying relative died as a result, the alien victim of negligent homicide could provide law enforcement with information regarding the smugglers, receive a LEC, apply for the U visa with a waiver for the illegal entry and aiding and abetting alien smuggling. Although waivers are granted on a discretionary basis, the applicant must be able to apply for the waiver along with the U visa petition so that it may be adjudicated on the merits. A finding that a person somehow participated in a crime that later led to their victimization prior to filing an application thwarts the dual intent of Congress in protecting alien victims of crimes to which they are extremely vulnerable and the assistance in the detection and investigation of these types of crimes. The regulation is a departure from agency precedent in that victims of delineated crimes committed by smugglers, who also had paid to be smuggled in to the US have been issued LECs and were able to apply for and receive U Interim Relief and employment authorization.

Leaving the authority to issue a LEC or not in the hands of the law enforcement officer without providing a written denial of the request for the LEC creates a procedural due process problem. The alien victim is left with no means for any type of review of that decision, even if the alien victim had provided information which is valuable towards an investigation of the crime. It is necessary that an impartial decision maker review the merits of an application.

II. JURISDICTION AND VENUE

1. The petitioner is a citizen of Guatemala who entered the United States of America in April 2007 with his brother and the assistance of various smugglers from Guatemala into the US who abandoned them in Brooks County, Texas. As a direct result his brother died and the plaintiff suffered physical and emotional injury. The smugglers actions violated *Texas Penal Code* § 22.05, Deadly Conduct ; 18 U.S.C. § 1112, Manslaughter; and 8 U.S.C. § 1324(a)(1)(A)&(B)(iv) (INA § 274) Alien Smuggling resulting in Death; but not limited to those crimes; these crimes are similar to the crimes delineated in 8 U.S.C. § 1101(a)(15)(U)(iii)(INA § 101).

2. The petitioner provided information to Immigration and Customs Enforcement (ICE) regarding the alien smugglers and the death of his brother. He obtained further information from family members and provided that information as well. He can identify all of the smugglers in a photo line-up and was willing to do so. He requested through counsel that a LEC be signed and he was refused as being ineligible for a U visa.

3. Because he is being refused a LEC, he is ineligible to have his request for U Interim Relief adjudicated, he is not able to apply for work authorization, or victims

services⁴ and he is not able to apply for a U visa placing restrictions on his liberty and in his property interests⁵ that are inherent in the above numerated benefits, these restrictions are within the meaning of custody and undue taking for habeas jurisdiction as set out in *Jones v. Cunningham*, 371 U.S. 236, 240 (1963).

4. Other similarly situated victims of crimes have received LEC and were able to apply for these benefits thus ending the restrictions on their liberty and property interests; because the petitioner is being denied a LEC he is being denied the equal access to and equal protection of the laws.

5. The petitioner is being detained by the United States Department of Homeland Security at the Port Isabel Servicing and Processing Center (PISPC) in Los Fresnos, Texas on a reinstatement of a removal order. He is not seeking a review of that order, therefore PISPC is not named as a party, but will be served a copy of the summons because they have physical custody of the petitioner—unless the Court orders otherwise.

III. THE PARTIES

6. The petitioner, Plaintiff, is a citizen of Guatemala who is detained at PISPC.

7. The respondent, Defendant, Michael Chertoff is the Secretary of the Department of Homeland Security he is sued in his official capacity.

8. The respondent, Defendant, Eduardo Lozano is the investigating ICE officer in the alien smuggling case, he is supervised by an unknown supervisory officer at ICE, they are sued in their professional capacities only.

⁴ If a person meets the statutory definition of an alien described in 8 U.S.C. § 1101(a)(15)(U), (INA § 101) the AG has a duty to refer them to non-governmental victims services agencies and provide a work permit once in status, 8 U.S.C. § 1184 (p)(3)(A)&(B), (INA § 214).

⁵ Welfare benefits are a clear property interest, *Goldberg V. Kelly*, 397 U.S. 254 (1970).

9. The United States of America is necessarily a party respondent, defendant, as Homeland Security and ICE are its agencies.

IV. FACTS

10. The petitioner and his brother left Guatemala in or about March 2007 with the assistance of an alien smuggler who brought them from Guatemala into Mexico.

11. They traveled through Mexico to the US border with the assistance of one, or more alien smugglers who are related to the first smuggler by either birth or marriage.

12. They were brought into the United States by one, or more alien smugglers, also related to the others by birth, or marriage.

13. While at the Mariposa Ranch in Falfurrias, Texas the petitioner and his brother were abandoned by the smugglers without food, water, or direction.

14. They walked for what the petitioner believes to be three days.

15. Petitioner had to assist his brother several times, as his brother became very weak and stumbled often.

16. His brother could not get up anymore and petitioner dragged him to shelter from the rain, under a bush, while he went to look for help.

17. He saw a house and returned to get his brother, but he too was exhausted at that point and laid down next to him, where he fell asleep.

18. When he woke up his brother was dead.

19. Petitioner went for help and found Customs and Border Protection officers who he told about his brother.

20. Petitioner was given medical attention and interrogated, in what order is not certain.

21. While at PISPC ICE Officer Lozano interviewed petitioner regarding the smuggling without the presence of counsel and without reading him his *Miranda* Rights.
22. Petitioner was forthcoming regarding the incident.
23. Petitioner, through counsel, on several occasions made written and verbal requests for a LEC, which was denied.
24. Petitioner, through counsel, filed an application for U Interim Relief with an application for a 212(d)(14) waiver with the Vermont Service Center (VSC) which is responsible for adjudicating these types of benefits; and noted that we would submit the LEC as soon as it was received, these applications are pending and will only be granted if a LEC is submitted to them prior to October 17, 2007; after which, he would be required to apply for a U Visa rather than U Interim Relief.
25. If adjudicated now the applications will be denied in writing for lack of a LEC.
26. LECs have been issued in the past to others similarly situated to the petitioner.
27. The recent promulgation of regulations has changed the manner in which ICE decides who will receive a LEC. The U Nonimmigrant Visa has associated with it a waiver for all grounds of inadmissibility, other than Nazism, or genocide, despite that fact ICE has begun to deny the issuance of a LEC to victims who have partaken in some type of criminal activity.
28. ICE and the United States Department of Homeland Security, US Citizenship and Immigration Services (USDHS/USCIS) has influenced other law enforcement authorities in their issuance of LECs to victims, in addition to the reasoning stated above, by informing them that they do not have to sign a LEC if they do not want to; leaving many victims who have assisted law enforcement, including plaintiff, without recourse, which

is contrary to the intent of Congress.

29. The LEC is not conclusive that a person will be granted U Interim Relief, or U Nonimmigrant Status, however it is a mandatory statutory requirement that it be submitted with the petition.

30. The new 8 CFR § 212.17(a) requiring that the petitioner have applied for a waiver of INA § 212 (a)(9)(B) prior to reentry to the United States is inconsistent with Congressional intent, that such section is waivable on application within the United States, as are all other grounds of inadmissibility that concern being unlawfully present after a prior removal. For example, if a person was ordered removed pursuant to a removal hearing, departed the United States, later re-entered and then became the victim of an enumerated crime they could apply for a waiver of any of the grounds of inadmissibility. The statute INA § 212(d)(14) is clear that a person can apply from inside the United States as it refers to the Secretary of Homeland Security's determination on the application, rather than as in INA § 212(d)(3) in its reference to the Consular Officer or Secretary of State who would make the determination prior to entry. If Congress had intended the application to have been filed outside of the United States they would have so stated, either explicitly, or by the use of the same terms used in INA § 212(d)(3).

31. The application of this section of the new regulation, as written, is violative of agency precedent in granting U Interim Relief to those who were present after a prior order of removal; as well, it is *ultra vires* to the statute.

V. REQUEST TO BE RECOGNIZED AS A CLASS

32. Petitioner seeks to represent a nationwide class of persons who are victims of

enumerated crimes who have sought to obtain a LEC and were denied; because either they participated in some degree in criminal activity that led up to the crime, or the investigating authority was told they did not have to sign the LEC for a victim of an enumerated crime who aided in the investigation of the crime and did not sign the LEC, or the investigating authority decided on their own they did not have to sign the LEC for a victim of an enumerated crime who aided in the investigation of the crime and did not sign the LEC, or the investigating authority for some other reason contrary to congressional intent did not sign the LEC for a victim of an enumerated crime who aided in the investigation of the crime. Many of these crime victims are present in the US after a prior order of removal, some for very compelling reasons. Congress intended that these people may apply for a waiver of any ground of inadmissibility, but one which can not be waived; from within the US. Contrary to this intent USDHS is requiring applicants to apply from outside of the US, prior to re-entry. They are relying on INA § 212(d)(3) which is erroneous, as Congress created INA § 212(d)(14) specifically for waivers with U visa applications.

33. Upon information and belief plaintiffs allege that the class is so numerous so as to make the joinder of all parties impracticable, especially since the class involves future members.

34. Plaintiff's claims are typical of the claims of the members of the class.

35. Plaintiff, through counsel, will adequately protect the interests of the class.

36. There are questions of law and fact which are common to the class as a whole.

37. The defendant's acts, or failure to act, are applicable to all members of the class and final declaratory and injunctive relief will be appropriate with respect to the entire

class.

VI. PETITION FOR WRIT OF HABEAS CORPUS

The deprivation of petitioner's property and liberty interests violates the laws and the *Constitution of the United States* which is an action cognizable under 28 U.S.C. § 2241, *Habeas Corpus*.

The refusal of Officer Lozano and his supervisors to issue a LEC to the petitioner creates a deprivation of his right to apply for status as a non-immigrant, or for U Interim Relief as he is the class of person described in 8 U.S.C. § 1101(a)(15)(U), (INA § 101): he is within the class of persons the statute was designed to protect.

Such deprivation places restrictions on his liberty, not shared by the population at large within the meaning of *Jones v. Cunningham*, 371 U.S. 236, 240 (1963).

Such deprivation creates an undue taking of a property right, to wit: the referral to non-governmental agencies...and the resources available to them as crime victims, as well as employment authorization, 8 U.S.C. § 1184 (p)(3), (INA § 214), *Goldberg v. Kelly*, *supra*.

VII. DECLARATORY AND INJUNCTIVE RELIEF

The statutes provide for a U non-immigrant visa which can only be applied for with a LEC, 8 U.S.C. § 1101(a)(15)(U), (INA § 101); 8 U.S.C. § 1184 (p)(1), (INA § 214).

The new 8 C.F.R. § 214.14(a)(14)(iii) precludes someone such as the defendant from being a 'victim', thus precluding them from receiving a LEC; this over reaches the statute, violative of 5 U.S.C. § 706(2)(c).

Defendant's refusal to issue a LEC to the plaintiff is a departure from agency precedent, violative of 5 U.S.C. § 706(2)(a).

Placing the decision making authority on whether to issue a LEC, or not, even after someone has provided credible information, in the hands of the law enforcement authorities, at times, has the effect of partiality for example when an officer does not like the victim, or the victims counsel, and therefore acts arbitrarily to deny the issuance of the LEC is violative of 5 U.S.C. § 556.

USDHS' informing the investigating authority that they do not have to sign the LEC for a victim of an enumerated crime who aided in the investigation of the crime places an undue burden on the victim of the crime and deprives them of the ability to apply for benefits under the *INA*, as well it significantly restrains their liberty and property interests.

When an investigating authority decides that they do not have to sign the LEC for a victim of an enumerated crime who aided in the investigation of the crime they place an undue burden on the victim and deprive them of the ability to apply for benefits under the *INA*, as well it significantly restrains their liberty and property interests.

When the investigating authority for some other reason contrary to congressional intent does not sign the LEC for a victim of an enumerated crime who aided in the investigation of the crime it creates an undue burden on the alien and deprives them of the ability to apply for a benefit under the *INA*, as well it significantly restrains their liberty and property interests.

Absent the LEC the petitioner is precluded from receiving the benefits applied for, 8 U.S.C. § 1184 (p)(1), (*INA* § 214).

The victim's due process and equal protection guarantees are eroded by any one, or more of the acts, or inactions enumerated above.

The new 8 CFR § 212.17(a) requiring that the petitioner have applied for a waiver of INA § 212 (a)(9)(B) prior to reentry to the United States is inconsistent with Congressional intent, that such section is waivable on application within the United States, as are all other grounds of inadmissibility that concern being unlawfully present after a prior removal. For example, if a person was ordered removed pursuant to a removal hearing, departed the United States, later re-entered and then became the victim of an enumerated crime they could apply for a waiver of any of the grounds of inadmissibility. The statute INA § 212(d)(14) is clear that a person can apply from inside the United States as it refers to the Secretary of Homeland Security's determination on the application, rather than as in INA § 212(d)(3) in its reference to the Consular Officer or Secretary of State who would make the determination prior to entry. If Congress had intended the application to have been filed outside of the United States they would have so stated, either explicitly, or by the use of the same terms used in INA § 212(d)(3). The application of this section of the new regulation, as written, is violative of agency precedent and is *ultra vires* to the statute.

VIII. PRAYER FOR RELIEF

Wherefore the Plaintiff requests:

A Writ of Habeas Corpus freeing him from the unlawful restraint on his liberty and property interests by immediately issuing him a LEC so that he may finalize his application for U Interim Relief, if not immediately then after October 12, 2007 issue him a LEC so that he may apply for U Nonimmigrant Status.

Declaratory and Injunctive relief prohibiting the defendants from applying new 8 C.F.R. § 214.14(a)(14)(iii) to victims of crimes enumerated in 8 U.S.C. § 1101(a)(15)(U), (INA § 101), or similar to those enumerated therein.

Declaratory and Injunctive relief restraining defendants from education investigating authorities, or others authorized to sign LECs in a manner that is inconsistent with the intent of Congress.

Declaratory and Injunctive relief enjoining the defendants from applying new 8 C.F.R. § 212.17(a) in as much as it states, “prior to...re-entry...instructions”.

Costs and attorneys fees pursuant to the *Equal Access to Justice Act*;

And any other relief to which the plaintiff(s) may be entitled.

Respectfully submitted,

/s/ Marlene A. Dougherty

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EXHIBITS

- A.....Fax to Asylum Office: Sealed as containing some victim information
- B.....July 19 Fax Sheriff & LEC request; August 9, Letter Officer Lozano & LEC request; September 19 Fax Sheriff & LEC request; September 19, Letter ICE OIC-Supervisor & LEC request; September 27 Fax Sheriff & U Visa Information: Sealed as containing some victim information
- C.....July 16 Application for U Interim Relief and Waiver application-absent supporting documents: Sealed as containing some victim information
- D.....Newly implemented Form I-918 and Instructions for U Visa applicants: of particular importance is page 5 A., page 6 E. & F., page 7 H., of the instructions
- E.....Newly implemented Supplement B Certification (LEC) and instructions: of particular importance are the notes to the signing agency on pages 1 and 3 part 4 B & Part 6.

CERTIFICATION OF SERVICE

I, Marlene A. Dougherty, hereby certify that a copy of the complaint and exhibits was served with a summons this 9th day of October 2007 in accordance with the Federal Rules by mailing them Certified postage prepaid, return receipt requested by the United States Postal Service to the following:

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