

MEMORANDUM

To: New York City Bar Immigration & Nationality Committee
From: Monique Haynes, Committee Fellow
Date: March 13, 2014
Re: Proposed Amendments to New York Penal Law §195.05 to Facilitate Successful U-Visa Applications by Victims of *Notario* Fraud

Question Presented

How can New York Penal Law §195.05, Obstructing Governmental Administration (“OGA”), best be legislatively amended so that immigration services fraud (a.k.a. “*notario* fraud”) constitutes a qualifying crime for a U-visa under federal immigration law, thus helping New York victims of *notario* fraud to more successfully apply for a U-visa?

Brief Answer

Most likely, New York Penal Law §195.05 would best be amended to include an explicit reference to immigration services fraud, and clarification of the prohibited activities. The federal U-visa statute, which allows victims of crime to gain U.S. nonimmigrant residency in return for assisting law enforcement with prosecution, enumerates multiple qualifying crimes, including “obstruction of justice.” 8 U.S.C. §§ 1101(a)(15)(U)(iii); 1184(p); 8 CFR § 214.14(a)(9). However, New York’s obstruction of justice law (Penal Law §195.05), as written, does not clearly encompass *notario* fraud. To better allow New York officials to prosecute *notario* fraud under obstruction of justice, and in turn help victims secure U-visas, Penal Law §195.05 could be amended. Specifically, the existing language “intentionally obstructs, impairs or perverts the administration of law or other governmental function... by means of... any independently unlawful act,” could be amended to add a clarification of “independently unlawful act” that encompasses *notario* fraud, as described below.

I. Current Law—New York Penal Law § 195.05, Obstructing Governmental Administration in the Second Degree

New York Penal Law § 195.05, “Obstructing Governmental Administration in the Second Degree,” currently provides:

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering, whether or not physical force is involved, with radio, telephone, television or other telecommunications systems owned or operated by the state, or a county, city, town, village, fire district or emergency medical service or by means of releasing a dangerous animal under circumstances evincing the actor's intent that the animal obstruct governmental administration. Obstructing governmental administration is a class A misdemeanor. NYPL § 195.05 (McKinney).

II. Proposed Amendments to New York Penal Law § 195.05

This memorandum proposes to amend New York Penal Law § 195.05 so that it would provide:

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, **including the unauthorized practice of law or fraudulent conduct by any immigration service provider that substantially interferes with the proper administration of the immigration laws, or willful misrepresentation of such provider's legal authority to provide representation before immigration authorities...**¹

¹ Based on the language within the proposed Protecting Immigrants From Legal Exploitation Act of 2013, H.R. 2936, 113th Cong. (2013) (Act proposes to provide remedies for victims of notario fraud).

III. Analysis

In an effort to combat *notario* fraud, this memorandum proposes amendments to New York Penal Law §195.05, Obstructing Governmental Administration (“OGA”), to include an explicit reference to immigration services fraud and clarification of prohibited activities, so that Penal Law §195.05 meets the standards for a “qualifying crime” under the federal U-visa statute. 8 U.S.C. § 1101(a)(15)(U)(iii); 8 CFR § 214.14(a)(9).

Congress created the “U-visa” to encourage unauthorized immigrants to report and assist in the prosecution of U.S. crimes, by offering victims of crime an opportunity for legal nonimmigrant residence for a 4-year period (extendable),² if they assist in bringing the perpetrators of the crime to justice.³ 8 U.S.C. § 1184(p). To file a U-visa petition, a law enforcement agency must certify that the victim “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of criminal activity.” *Id.* at (p)(1). The applicant must be the victim of one of several specifically enumerated crimes, or a “substantially similar” crime. One of the specifically enumerated crimes is “obstruction of justice.” 8 U.S.C. § 1101(a)(15)(U)(iii).⁴

² The 4-year period is extendable if the law enforcement agency certifies that the noncitizen’s presence remains required to assist investigation or prosecution; for “exceptional circumstances”; or if the noncitizen is eligible for a green card under the Violence Against Women Act (VAWA), and DHS has not promulgated regulations. 8 U.S.C. § 1184(p)(6).

³ *See* New Classification for Victims of Certain Criminal Activity; Eligibility for the U Nonimmigrant Status, 88 Interpreter Releases 25 (Jan. 3, 2011). DHS may grant work authorization to those with a pending “bona fide” application for a U-visa. 8 U.S.C. § 1184(p)(6).

⁴ The specifically enumerated crimes are “rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, or attempt, conspiracy, or solicitation to commit any of the above.” 8 U.S.C. § 1101(a)(15)(U)(iii).

That said, there are no reported New York prosecutions of *notario* fraud under obstruction of justice statutes. More commonly, *notario* fraud has been prosecuted under general fraud, larceny, or unauthorized practice of law statutes.⁵

Here, this memorandum considers two related questions. First, the memorandum addresses whether, under federal precedents, *notario* fraud would constitute a substantially similar crime to “obstruction of justice,” if prosecuted under other statutes. Second, the memorandum addresses how to amend the New York obstruction of justice statute to facilitate prosecution of *notario* fraud under it, and thus help New York victims better make their case for a U-visa.

A. Whether Notario Fraud Constitutes a Qualifying Crime of “Obstruction of Justice”

An argument can be made that *notario* fraud would be “substantially similar” to the qualifying crime of “obstruction of justice,” at least under federal immigration law interpretations of that term, if prosecuted under other New York statutes such as fraud, larceny, or unauthorized practice of law.

No case law exists that specifically interprets U-visa regulations as to whether crimes are “substantially similar” to obstruction of justice.⁶ There are also no reported successful U-visa

⁵ See D.A.Vance Announces Indictment of Fake Immigration Agent Who Defrauded Dominican Immigrants, SoHoJournal (January 2011) (Rafael Masso indicted for Grand Larceny in the Third Degree, Criminal Impersonation in the First Degree, Scheme to Defraud in the First Degree, and Unauthorized Practice of Law), at <http://www.sohojournal.com/content/davance-announces-indictment-fake-immigration-agent-who-defrauded-dominican-immigrants>; Yasmin Vazquez, *Enforcement, Education, Collaboration: Fighting Immigrant Services Fraud*, The Fraud Examiner (April 2012) (Jennifer Lam pled guilty to grand larceny); Sewell Chan, *Immigration Lawyer Is a Fake, Prosecutors Say*, N.Y. Times (Jan. 21, 2009) (Victor Espinal indicted for larceny, scheming to defraud, and unauthorized practice of law), at <http://cityroom.blogs.nytimes.com/2009/01/21/man-arrested-for-pretending-to-be-immigration-lawyer/>.

⁶ Only one successful U-visa claim under a “notario fraud” theory has been reported, and its theory was that *notario* fraud related to blackmail, not obstruction of justice. Georgetown University Law Ctr., Community Justice Project, Ayuda, *Notario Fraud Remedies, A Practical Manual for Immigration Practitioners* (Ayuda ed., 2013), available at <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/Community-Justice/upload/Notario-Fraud-Remedies-A-Practical-Manual-for-Immigration-Practitioners.pdf>

claims based on the New York OGA statute. That said, DHS' U-visa regulations further define "witness tampering, obstruction of justice, or perjury" to encompass instances where "reasonable grounds" exist that the perpetrator committed his crime, in "principal part," to further his or her "abuse or exploitation of, or undue control over the petitioner through manipulation of the legal system." 8 C.F.R § 214.14 (a)(14)(ii)(B).⁷ One could argue that *notario* fraud involves abuse, exploitation, or undue control over petitioners. For example, clients of noted New York *notario* Victor Espinal reported that he threatened clients who told him they would file disciplinary complaints concerning case mishandling.⁸ Lives were affected by misadvice as well.⁹

Additionally, administrative Board of Immigration Appeals ("BIA") case law has defined "relating to obstruction of justice" relatively broadly, in a different context. *See Matter of Valenzuela Gallardo*, 25 I & N Dec. 838 (B.I.A. June 27, 2012) (interpreting accessory after the

(referencing posting of attorney, David E. Funke). The perpetrator (*notario*) filed an unsuccessful I-360 application on the victim's behalf and later unlawfully converted the victim's income tax monies. After requests for return of the funds, the perpetrator threatened to expose the victim's non-immigrant status to immigration officials. The attorney of record, David E. Funke, was able to file a successful U-visa claim for this *notario* fraud under Kentucky's blackmail statute, a different enumerated crime under 8 U.S.C. § 1101(a)(15)(U)(iii).

⁷ 8 C.F.R § 214.14 (A)(14)(ii) provides (emphases added):

(14) Victim of qualifying criminal activity generally means an alien who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity.

(ii) A petitioner may be considered a victim of witness tampering, obstruction of justice, or perjury, including any attempt, solicitation, or conspiracy to commit one or more of those offenses, if:

(A) The petitioner has been directly and proximately harmed by the perpetrator of the witness tampering, obstruction of justice, or perjury; and

(B) There are reasonable grounds to conclude that the perpetrator committed the witness tampering, ***obstruction of justice***, or perjury offense, at least in principal part, as a means:

(1) To avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity; or

(2) ***To further the perpetrator's abuse or exploitation of or undue control over the petitioner through manipulation of the legal system.***

⁸ Jennifer L. Colyer, Sarah French Russell, Robert E. Juceam, and Lewis J. Liman, *The Representational and Counseling Needs of the Immigrant Poor*, 78 Fordham L. Rev. 461, 480-81 (2009).

⁹ For example, one client of *notario* Victor Espinal reported that she had waited 10 years to travel back to her native country due to mistaken advice. Other clients reported incorrect advice that would have resulted in deportation or bars on return. *Id.* Nina Bernstein, *An Immigration Attorney Is Accused of Being a Fraud, and His Clients Scramble for Help*, N.Y. Times, Feb. 25, 2009, at <http://www.nytimes.com/2009/02/25/nyregion/25immigration.html>.

fact criminal statute to constitute aggravated felony because it met definition of “relating to obstruction of justice” under 8 U.S.C. § 101(a)(43)(S)).¹⁰ There, the BIA defined a crime to relate to obstruction of justice if it involved an “intentional attempt to interfere with the process of justice”).¹¹ *Id.* One could argue that *notario* fraud, at least in certain factual instances, would involve an attempt to interfere with the process of justice (namely, hindering the ability of a petitioner to seek proper relief under the immigration laws).¹² For example, clients of noted *notario* Victor Espinal reported that he missed deadlines, failed to file petitions as directed, and filed baseless or multiple petitions.¹³

Thus, an argument exists that *notario* fraud could be interpreted as “substantially similar” to obstruction of justice, albeit without much precedent in support.

B. Amending the New York Obstruction of Justice Statute to Better Encompass *Notario* Fraud

Amending New York obstruction of justice statutes to more explicitly encompass *notario* fraud might better enable New York authorities to prosecute *notario* fraud as obstruction, and in turn, help victims make a stronger case to DHS for a U-visa.

Obstruction of justice is a specifically enumerated crime under the federal U-visa statute, as noted. New York Penal Law §195.05 already includes the element of intent to interfere with the administration of justice, as required by BIA caselaw. *See* Penal Law §195.05 (“intentionally

¹⁰ Notably, and even broader than the U-visa statute, *Matter of Valenzuela Gallardo*, held that a crime “relates to obstruction of justice” within the meaning of INA §101(A)(43)(S) even in the absence of an ongoing criminal investigation or proceeding. *Valenzuela Gallardo*, at 842.

¹¹ “This element—the affirmative and intentional attempt, with specific intent, to interfere with the process of justice—demarcates the category of crimes constituting obstruction of justice.” *Id.*

¹² For example, one client of Victor Espinal reported that “nothing had been filed and that all the application fees would have to be paid over again.” Nina Bernstein, *An Immigration Attorney Is Accused of Being a Fraud, and His Clients Scramble for Help*, N.Y. Times, Feb. 25, 2009, at <http://www.nytimes.com/2009/02/25/nyregion/25immigration.html>. Another client reported that Espinal may have faked a government letter granting asylum. Other clients reported incorrect advice that would have resulted in deportation or bars on return. *Id.*

¹³ Jennifer L. Colyer, Sarah French Russell, Robert E. Juceam, and Lewis J. Liman, *The Representational and Counseling Needs of the Immigrant Poor*, 78 Fordham L. Rev. 461, 480-81 (2009).

obstructs, impairs or perverts the administration of law or other governmental function...”). Additionally, the references in Penal Law §195.05 to “intimidation, physical force or interference” echo DHS’ regulatory interpretation that obstruction of justice may encompass instances of “abuse,” “exploitation,” or “undue control.” 8 C.F.R § 214.14 (a)(14)(ii)(B).

Here, we propose amending the New York obstruction of justice statute to include language derived from the federal Protecting Immigrants From Legal Exploitation Act of 2013.¹⁴ Similar to our goals here, this Act seeks to make *notario* fraud an independent crime.¹⁵ The proposed language would clarify “any independently unlawful act,” under New York Penal Law §195.05 to include “the unauthorized practice of law or fraudulent conduct by any immigration service provider that substantially interferes with the proper administration of the immigration laws, or willful misrepresentation of such provider's legal authority to provide representation before immigration authorities...”

By broadening the language of the statute, there is no issue as to whether *notario* fraud constitutes a qualifying crime of obstruction of justice under federal U-visa statutes. For our purposes, the language specifically enumerates *notario* fraud as “obstruction of justice,” and is broad enough to encompass unauthorized practice of law, threats against a victim and unscrupulous acts by an attorney. The language also indicates an ongoing crime that furthers the unlawful provider's exploitation and influence over the applicant.

¹⁴ Protecting Immigrants From Legal Exploitation Act of 2013, H.R. 2936, 113th Cong. (2013)

¹⁵ Daniel Colbert, *Combating Notario Fraud: New Tools Needed to Protect Consumers of Immigration Services*, American Criminal Law Review (Jan. 25, 2014), at <http://americancriminallawreview.com/Drupal/blogs/blog-entry/combating-notario-fraud-new-tools-needed-protect-consumers-immigration-services-01>. The bill encourages victims of *notario* fraud to report the acts of fraudulent immigration providers, without fear of immediate deportation. The proposed bill would also allow the government to bring actions against *notarios*.

Amending the New York OGA statute to explicitly include immigration services fraud thus facilitates not only greater opportunity for prosecution of *notarios* by New York prosecutorial offices, but may assist victims in remaining in the United States.