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Another Look at DV-VNCOs - March 4, 2016

As we know, any violation of a protection order whose purpose is to prevent DV or threats of DV, is a deportable offense under INA § 237(a)(2)(E)(ii). This is not a ground of inadmissibility but it is a bar to 10-year cancellation of removal. Although the DV-VNCO ground is phrased as requiring only that a "court determine" that a non-citizen has "engaged in conduct that violates" a DV protection order, the categorical and modified-categorical approach is used when dealing with an actual conviction. *Matter of Strydom*, 25 I&N Dec. 507, 509 (BIA 2011). *See generally Alanis-Alvarado v. Mukasey* 558 F.3d 833 (9th Cir.2009) and *Szalai v. Holder*, 572 F.3d 975, 982 (9th Cir. 2009).

If the underlying order was *issued* under a provision of Chapter 26.50 "Domestic Violence Prevention" or Chapter 10.99 "Domestic Violence—Official Response" it will likely trigger the DV VNCO ground.

However, the principal statute criminalizing protection order violations is RCW § 26.50.110 and this section includes many other types of orders that are not related to DV and that originate in other chapters. Practitioners have been arguing, and IJs have been finding, that a conviction under § 26.50.110 is therefore not categorically a deportable offense under § 237(a)(2)(E)(ii).

If the underlying protection order actually was issued under RCW §§ 7.40, 7.92, 7.90, 9A.46, 9.94A, 26.09, 26.10, 26.26, or 74.34, then a "DV" conviction under § 26.50.110(1)(a), for a violation of one of those orders should not trigger the DV-VNCO deportation ground. But if the record does not establish what the specific order violated was, then DHS should not be able to meet its burden. This is only possible if you do not concede removability, and put ICE to its burden.

RCW § 26.50.110 is indisputably divisible between DV and non-DV orders. If a conviction record under § 26.50.110 does not identify the *originating* statute of the actual order which was violated-- in a record-of-conviction document submitted by ICE-- it provides a defense that the DV-VNCO ground of removal is not triggered. The permissibly reviewable documents are described in *Shepard v. United States*, 544 U.S. 13 (2005) and do not include unstipulated police reports and sentencing-only documents.

For example, if the only documents ICE presents to prove-up deportability are a judgment and sentence (J&S) and/or a plea statement, and neither of them specify more than a DV conviction under RCW § 26.50.110 (1)(a)(i-iv), or an amended complaint that does not name a specific underlying order within that section, that should not be enough to provide "clear, convincing and unequivocal" evidence of deportability. You should contest deportability and put the Service to its burden. It is ICE's job to provide the evidence which establishes deportability.

If the client's conviction has not happened yet and you are advising defense counsel:

- It would, of course, be best to explicitly state in the plea statement which statute *other than* 10.99 or 26.50 is the one under which the order was issued (e.g. "D knowingly violated an order issued under 9A.46 (anti-harassment).")

- Although hard to obtain in practice, a plea only to violating an order under RCW § 26.50.110(1)(a) that does not specify one of those types of orders in the complaint, plea or J&S, should not be enough to establish deportability under 237(a)(2)(E)(ii).

- If the underlying order was issued under 10.99 or 26.50, negotiate an alternative plea to violation of a non-DV anti-harassment order under RCW § 10.14 which should not trigger the DV-VNCO ground.

- Sometimes a knowing, voluntary and intelligent plea can be accepted as part of a plea bargain, to a statute that is counter-factual to the charged or actual conduct, under the cases *In Re Barr an State v. Zhao* (a "*Barr* plea"). *In re Barr* 102 Wn.2d 265, 684 P.2d 712 (1984); *State v. Zhao* 157 Wash.2d 188, 137 P.3d 835 (Wash., 2006).

- Regardless of the type of order, if the conviction has not happened yet it is preferable to plead to a violation provision other than the 26.50.110(1)(a)(i) restraint provisions "*prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party*," and to in general only admit to a minimum, strict liability-type, non-violent violation.