

**Practice Advisory: Fee Waivers for VAWA self-petitions, U and T visa applications**  
**Appendix: Sample Language for Submitting Initial Fee Waiver Requests or Contesting Denials**  
**February 2019**



This appendix is provided to supplement ASISTA's [Practice Advisory: Fee Waivers for VAWA self-petitions, U and T visa applications \(August 2018\)](#). The scenarios described below illustrate some of the most common fee waiver problems that practitioners have reported to ASISTA. We have provided sample language to assist you in writing your cover letter for an initial fee waiver request or when contesting an erroneous fee waiver denial. As each case is fact-specific, however, you must customize the facts and arguments to suit your client's case. Depending on your client's circumstances, you may wish to use language from more than one of these sample scenarios.

**1. Initial Submissions:**

The purpose of a cover letter in initial submissions is to brief the adjudicator on what the applicable standard is for deciding a fee waiver request and to show how the evidence provided meets that standard.

**A. Any Credible Evidence:**

We recommend that all practitioners argue in the fee waiver cover letter that the "any credible evidence" standard that applies to all VAWA, U, and T submissions likewise applies to fee waiver requests submitted in conjunction with a VAWA, U, or T filing. This is especially important in cases where your client lacks primary evidence of financial resources or must demonstrate that s/he has no income.

Sample language:

The same "any credible evidence" standard that applies in [VAWA self-petitions/U visas/T visas] should apply to fee waivers submitted by [self-petitioners/U visa petitioners/T visa applicants].

Many survivors need fee waivers to access the vital immigration protections Congress created. They may be fleeing abusive situations, may not have resources to pay for fee-based ancillary

forms, nor have "primary documentation" (pay stubs, taxes, bank accounts) to demonstrate their economic need. Congress recognized the evidentiary barrier when it created the special "any credible evidence" standard for these forms of relief, and it also recognized the financial barriers that many survivors face when it required DHS to allow VAWA self-petitioners, U petitioners and T visa applicants to seek fee waivers. See William Wilberforce Trafficking Victims Protection Reauthorization Act, Section 201(d)(7), Public Law No: 110-457 (December 23, 2008), available at: <https://www.congress.gov/110/plaws/publ457/PLAW-110publ457.pdf>. Thus, requiring primary evidence of financial resources for survivors violates not only DHS's own policies, but also Congress's intent in creating the any credible evidence standard for survivors.

Here, [Applicant] has provided the best evidence available to her to show her inability to pay the filing fee. As explained in her Affidavit [Exh. X at para. Y], [describe facts and evidence, why primary evidence is not available, explain why evidence shows inability to pay]

#### **B. Client receives a means-tested benefit:**

If an applicant currently receives a means-tested benefit and provides appropriate documentation of that fact, his/her fee waiver request should be approved. As everyone who receives a means-tested benefit should have access to documentation of it, this should be one of the most straight-forward paths to get a fee waiver. Still, we are seeing VSC erroneously deny fee waivers requested on this basis, so we recommend including the following language in your cover letter.

Sample language:

Under USCIS's 2011 policy memo, Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule (PM-602-0011.1), an applicant who receives a federal, state, or local means-tested benefit will normally be granted a fee waiver. See p. 5. In other words, such an applicant is per se eligible for a fee waiver. A means-tested benefit "is a public benefit where a person's eligibility for the benefit, the amount of the benefit, or both, is based on the person's income and resources." See I-912 Form Instructions at p. 4. Satisfactory documentation of the receipt of a means-tested benefit should consist of documentation from the awarding agency containing the beneficiary's name, the name of the agency, the type of benefit, and an indication that the benefit is currently being received. I-912 Form Instructions at p. 5.

Applicant is receiving [benefit]. See Exh. X [documentation of applicant's receipt of benefit]. [Benefit] is a [federal/state/local] benefit awarded based on an applicant's income and resources. [See Exh (documentation that substantiates this claim)]. As shown in Exh. X, a [type of document] issued by [awarding agency], [applicant] is the beneficiary of [type of benefit]. [His/her benefit] is valid through [date]. As [Applicant] has provided documentation conforming with the I-912 instructions that s/he currently receives a means-tested benefit, s/he has demonstrated an inability to pay the filing fee and merits a fee waiver.

### **C. Client's household income is under 150% of the federal poverty guidelines:**

As with the receipt of a means-tested benefit, showing a household income under 150% of the federal poverty guidelines should lead to a fee waiver approval. However, advocates report denials of fee waiver requested on this basis. For this reason, we suggest including the following language in your cover letter.

Sample language:

Under USCIS's 2011 policy memo, Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule (PM-602-0011.1), an applicant whose household income is under 150% of the federal poverty guidelines will normally be granted a fee waiver. See p. 7. In other words, such an applicant is per se eligible for a fee waiver. An Applicant with a household size of [#] will qualify for a fee waiver if the household income is under [\$]. See Form I-912P. [Describe household; e.g. Applicant's household consists of [#] people: Applicant and her minor children, A [age], B [age], and C [age], and her adult child [D]. See Exh. X [documentation showing that A, B, C, D and Applicant reside in same household and ages of A, B, C, D]. [If applicable: A, B, C are enrolled in school full-time and do not work. See Exh. Y [evidence of school enrollment].] Applicant and D are the only employed household members.

Consistent with the Form I-912 Instructions at page 6, Applicant and D have provided [insert your evidence here; for example: consecutive pay stubs for the past month to show their income or other best available evidence of income]. Applicant and D's gross monthly income is [\$\$], which projects to an annual income of [\$\$] when multiplied by 12. The household receives no other financial support. Applicant's household income therefore falls below 150% of the federal poverty guidelines, which demonstrates an inability to pay the filing fee.

### **D. Client has a financial hardship**

It can be more difficult to satisfy the financial hardship ground, simply because there is no bright line rule as to what constitutes financial hardship. However, we recommend that in addition to your client's explanation and documentation of his/her hardship, you include the following language in your cover letter.

Sample language:

Under USCIS's 2011 policy memo, Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule (PM-602-0011.1), an applicant who is unable to pay the filing fee because of a financial hardship may also qualify for a fee waiver. There is no statutory or regulatory definition of "financial hardship," but USCIS's examples include medical expenses of self or family members, situations that could not normally be expected in the regular course of life events, unemployment, eviction, and homelessness. See Page 8 of I-912 instructions; Page 7 of

2011 Policy Memo. In his/her request, "the individual should demonstrate that he or she has suffered a sufficiently negative financial impact as a result of this hardship in a reasonably recent period preceding the filing of the fee-waiver request so as to render the applicant's income during that period insufficient to pay the fee." 2011 Policy Memo, page 7. [Applicant] is currently experiencing financial hardship because of [reason]. [Include documentation to substantiate].

## **2. Challenging Denials:**

Upon the denial of a fee waiver request, you may believe that USCIS's denial of the fee waiver was in error and/or that USCIS did not comply with the applicable regulations in issuing the denial. Depending on the circumstances, you may choose to resubmit the fee waiver request, along with the underlying application or petition, or you may wish to file a Form I-290B Motion to Reconsider to contest the denial. (see Section 2.D. below). Regardless of which procedural path you choose, we suggest including the sample language below (as applicable). As noted above, you must adapt this language to fit your facts and circumstances, as each fee waiver is fact-specific.

### **A. USCIS failed to provide any reason for the denial:**

We have seen many instances in which USCIS has denied a fee waiver request using a form denial letter (typically Form G-1054) without providing any specific reasons for the denial. We have also seen instances in which USCIS has denied a fee waiver request without even the form denial letter. We believe such denials are plainly contrary to the regulations and practitioners should object to USCIS's refusal to comply with its own administrative requirements.

Sample language:

USCIS violated its own regulation by failing to explain its reasons for denying [applicant's] fee waiver request. USCIS must provide a written explanation with the specific reasons for denying a benefit request. See 8 CFR 103.3(a)(1)(i). Here, the officer used a form denial letter (G-1054, Request for Fee Waiver Denial Letter), and far from providing "specific reasons" for the denial, merely checked [select applicable option]

- Box 1.a., which simply restates the ground on which a fee waiver may be granted and states, with no reasoning or analysis, that the applicant has "failed to demonstrate an inability to pay."
- Box 2.a., which simply states that "due to insufficient information . . . USCIS was not able to determine your 'inability to pay' the required filing fee" without any reasoning or analysis to show why the evidence provided was insufficient or what evidence might prove sufficient.

Although Form G-1054 provides a comment box at 1.b and 2.b for further detail, the officer neglected to provide any explanation aside from the pre-printed form language. There is no indication that the officer reviewed the evidence [applicant] submitted, which consisted of [list and describe evidence]. Likewise, there is no explanation for why this evidence was insufficient to demonstrate [applicant's] [receipt of a means-tested benefits/household income under 150% of FPG/financial hardship].

By failing to provide any reasoning whatsoever, USCIS is forcing [applicant] to guess blindly at what evidence might satisfy the agency of [his/her] inability to pay. Such unreasoned decision-making violates both the agency's own regulation as well as fundamental tenets of procedural due process. *See* 8 CFR 103.3(a)(1)(i) and *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (holding that due process requires adjudicator to state reasons for decision and indicate the evidence relied upon). Therefore, [applicant] requests USCIS grant her request for fee waiver and deem his/her [Form I-192/I-485/I-290B] as filed as of [mm/dd/yyyy], the original date of filing.

#### **B. USCIS provided a legally impermissible reason for denial:**

Likewise, we have also seen instances in which USCIS has provided legally impermissible reasons for denying a fee waiver request. As a government agency, USCIS is required to follow the guidelines it has laid out and is not permitted to invent reasons to deny a benefit request.

Sample language:

USCIS's decision was erroneous because [insert reason given] is inconsistent with agency guidance. Where an agency chooses to issue guidance to govern its discretionary authority, the agency's actions should be consistent with its own policies. *See, e.g., Clifford v. Pena*, 77 F.3d 1414, 1417 (D.C. Cir. 1996). According to [8 CFR 103.7(c)/Form I-912 instructions/2011 fee waiver memo], the relevant criteria for adjudicating a fee waiver request based on [means-tested benefit/household income/financial hardship] are [use regs, instructions, and memo to list criteria here]. [Reason provided by USCIS] does not appear anywhere in USCIS's own regulations, policy, or instructions governing the adjudication of fee waiver requests.

In contrast, the evidence [applicant] submitted in support of his/her fee waiver request complies with the regulations, 2011 fee waiver memo, and instructions, and demonstrates an inability to pay the filing fee. [Explain how evidence submitted comports with USCIS requirements]. Therefore, [applicant] requests that USCIS grant her request for fee waiver and deem his/her [Form I-192/I-485/I-290B] as filed as of [mm/dd/yyyy], the original date of filing.

### **C. USCIS focused on an individual piece of evidence's insufficiency:**

As we have often seen in the VAWA good faith marriage context, USCIS sometimes picks apart each piece of evidence and states that each piece, by itself, does not meet the burden of proof. We believe this practice is incorrect and that USCIS should review the totality of the evidence submitted to determine whether the applicant has met her burden. If the adjudicator has done this in your fee waiver denial, we suggest using the following language:

Sample language:

USCIS erroneously focused on an individual piece of evidence's sufficiency, and found that, by itself, it does not show [receipt of means-tested benefit/household income under 150% of FPG/financial hardship]. This approach seems designed to result in denials, since it is unlikely any one piece of evidence will prove [receipt of means-tested benefit/household income under 150% of FPG/financial hardship] on its own. USCIS should, instead, look at all the evidence together to get the full picture of the applicant's inability to pay —the totality of the circumstances. In this respect, the numerous exhibits provide corroborating evidence of the applicant's [receipt of a means-tested benefit/household income under 150% of FPG/financial hardship]. [Explain how all of your evidence, taken together, is credible evidence of an inability to pay].

### **D. Resubmit or file I-290B?**

In cases where the denial of the fee waiver has led to the untimeliness of the underlying application or petition, it may be advantageous to file a motion to reconsider or reopen the fee waiver denial instead of resubmitting it. For example, we have heard from many practitioners that when they filed a fee waiver request with a time-sensitive application, such as an I-485 for a U visa based adjustment or an I-290B on an underlying case denial, USCIS has denied the fee waiver and rejected the I-485 or I-290B, causing the resubmitted I-485 or I-290B to be filed after the deadline. Practitioners have reported that USCIS has been inconsistent in its determinations of whether to consider the re-filed I-485 or I-290B timely in these circumstances. The result can be that USCIS's denial of the fee waiver leads to the client's loss of lawful status and possibly even enforcement action under the 2018 NTA policy. See "Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens," PM-602-0050.1 (June 28, 2018).

We believe that another option may be to file an I-290B, Motion to Reconsider or Reopen the denial of the fee waiver. While appeals of fee waiver denials are expressly prohibited under 8 CFR 103.7(c)(2) (but see counter-argument and potential procedure for appeal below at 2.D.i), there is no such prohibition against filing a motion to reopen or reconsider. If filing a motion to reconsider, you must demonstrate that the denial was based on an incorrect application of law or policy and that the fee waiver was approvable based on the evidence in the record at the time of the initial decision. 8 CFR 103.5(a)(3). For a motion to reopen, you must show new facts. 8 CFR 103.5(a)(2).

The advantage of filing a motion instead of resubmitting the filing is that the motion is made on the denial of the original filing, which carries its original filing date. If USCIS grants the motion to reconsider or reopen, then USCIS is reconsidering its original denial of the fee waiver (or reopening the original denial), and should credit the applicant with the original filing date of the underlying application or petition once the fee waiver is granted, which would render the underlying I-485 or I-290B timely.

Both types of motions are theoretically permissible under the regulations and could lead to the same result, but we recommend filing a motion to reconsider when possible because (1) a misapplication of the law or policy is objectively provable, whereas arguing that an additional piece of evidence shows an inability to pay still leaves the decision to the officer's discretion; and (2) USCIS's admission of error provides a stronger equitable argument that they should deem the underlying petition or application filed as of the original filing date, as it was USCIS's own error that created any untimeliness in the first place.

Unfortunately, the I-290B itself requires a fee, so your client would either need to pay that fee or file an additional fee waiver, which could also be denied. While we do not have any indication that paying the I-290B fee would necessarily undermine the argument that your client was unable to pay the fee for the underlying application, you may wish to include some evidence as to how the client managed to find the funds for the I-290B, such as receiving financial aid from a charity or a short-term loan.

It is important to note, however, that we are not aware of any practitioners who have tried this procedure. As we do not definitely know that VSC would accept such a motion on a fee waiver denial, we suggest reserving this option for cases in which the fee waiver denial caused the underlying application or petition to be untimely. If you are considering this option, please contact ASISTA for assistance in structuring your arguments.

Sample language:

Applicant requests that USCIS reconsider its erroneous denial of his/her Form I-912, Request for Fee Waiver. Although the denial of a request for fee waiver may not be appealed, there is no such prohibition on motions to reopen or reconsider. *See* 8 CFR 103.7(c)(2). [insert facts and analysis to show why Applicant's fee waiver was approvable as filed] Along with the Form I-290B, Applicant is resubmitting the Form I-912 as originally filed, with supporting documentation, as well as Form(s) [I-539/I-485/I-290B] which were rejected on account of the fee waiver denial. Should USCIS reconsider its denial of his/her fee waiver, Applicant requests that USCIS accept her Form(s) [I-539/I-485/I-290B] as of the date they were originally and properly filed, [date], as it was USCIS's error that caused the rejection of those forms.

**i. Filing I-290B as appeal:**

It may also be possible to file an I-290B appeal of the denial of the fee waiver. While 8 CFR 103.7(c)(2) states that there is no appeal of fee waiver denials, the AAO has historically agreed that it retains

jurisdiction to review errors of law committed by the service centers regardless of any general regulatory prohibition against direct appeals. See, e.g., Matter of E-V-P- (AAO Nov. 19, 2018). Practitioners must, however, frame the issue as an error of law as opposed to a discretionary error.

Sample language:

The AAO has jurisdiction to consider an appeal of a fee waiver denial where the service center committed an error of law, 8 CFR 103.7(c)(2) notwithstanding. Where the field office or service center's legal error results in the denial of a benefit, the AAO retains authority to review the legal error even if a discretionary denial of the same benefit would ordinarily not be subject to appeal. See, e.g., Matter of E-V-P-, ID# 1810477 (AAO Nov. 29, 2018) (non-precedential) (finding jurisdiction to consider whether service center's finding of inadmissibility was legally correct even though no jurisdiction to review discretionary denial of I-192). Here, although the AAO would lack jurisdiction to review the Vermont Service Center's discretionary denial of [applicant's] fee waiver request, it retains authority to review the officer's erroneous [state what the legal error is]. [Explain why what VSC did was legally erroneous].

Please contact ASISTA at [questions@asistahelp.org](mailto:questions@asistahelp.org) should you need assistance with your fee waiver arguments or strategy.

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