



# ADMINISTRATIVE APPEALS, MOTIONS TO REOPEN, AND MOTIONS TO RECONSIDER

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# Objectives

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Participants will:

- Identify the options for administrative review following a denial by USCIS
- Articulate strategic considerations in choosing an administrative review option
- Identify requirements for filing requests for administrative review

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What happens when a case is denied?

# POLL

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- I have had a case denied by USCIS
  - Yes
  - No

# POLL

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- I have filed an appeal or Motion to Reopen or Reconsider with USCIS in the past.
  - Yes
  - No

# Denial Procedure

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- Service Center issues denial notice with explanation for denial
  - 8 CFR 103.3(a)
- CIS may have provided earlier opportunity to address issues through RFE or NOID
  - But maybe not: See July 13, 2018 USCIS Memo on RFE policy, PM 602-0163

# Denial Procedure, continued

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- CIS should have provided opportunity to rebut unknown derogatory information
  - 8 CFR 103.2(b)(16)(i)
    - Exceptions for classified information

# Consequences of Denial

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- Denial means case is closed UNLESS appeal filed timely
  - If I-485 for U holder denied and I-918 expired → no longer in U status
- Ancillary forms may also be denied. Ex:
  - I-192 denial for principal → I-918 + I-918A + I-765 also denied
  - Only if other forms are dependent upon approval of the denied application



# Initiation of Removal Proceedings

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- Applicant may be subject to enforcement action once application denied and all appeals exhausted
- June 28, 2018 USCIS Memo, PM 602-0050.1
- Notice to Appear may be issued for:
  - Removable aliens after application has been denied
  - Higher priority for criminal history, public benefits fraud, fraud generally
  - BUT: memo is not in effect for humanitarian cases at this time

# Notice to Appear

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- Form I-862, issued by DHS
- Filing of NTA with immigration court initiates removal proceedings
- CIS says it will generally not issue NTA until appeals/motions period has expired

# 8 USC 1367

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- Protections against nondisclosure end after all appeals exhausted
- But protections against basing inadmissibility/deportability determination solely on information provided by abuser or abuser's household continue

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# Post-Denial Options

# Post-Denial Options

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1. Appeal
  2. Motion to Reopen
  3. Motion to Reconsider
- All filed on Form I-290B
  - All require \$675 fee or fee waiver
  - All filed with office that adjudicated underlying application/petition

# Arguments

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- Did USCIS properly apply law and regs?
- Did USCIS properly address and apply facts?
- Do you have new evidence?
- Has the law changed?
- Make a record – include all viable arguments

# What error?

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- VSC denies VAWA self-petition for lack of battery/extreme cruelty but they
  - Failed to mention several important pieces of evidence
  - Dismissed the rest of your evidence which included
    - Client's own declaration and
    - Declaration from counselor
  - Because, they said, client lacked credibility without witness and counselor did not witness abuse
  - What errors?

# What error?

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- VSC denies VAWA self-petition stating she failed to show good moral character because
  - She was convicted of DV misdemeanor that VSC says is a CIMT
  
  - But you showed that this was connected to DV
  
- What is/are errors you argue?



# What error?

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- VSC denies the I-918 because
  - Your client's conviction for shoplifting is a CIMT
  - But facts are
    - Only one conviction
    - State shoplifting statute has maximum possible penalty of less than a year and
    - No actual sentence or deprivation of liberty
  - Your client is otherwise admissible
  
- What is/are errors you challenge?

# What error?

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- VSC denies I-360 self-petition for for lack of good faith marriage because
  - No children in common and no comingled finances
  - VSC says no verification that text message, email, and social media correspondence actually came from client and spouse
- What errors do you challenge?

# What error?

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- In the denial notice for your client's I-360, VSC alleges that your client never resided with her former spouse and that she paid him to marry her for immigration purposes. The denial notice does not state the source of this information.
- You suspect the information came from her abuser.
- What errors do you challenge?

# Post-denial Options: Appeal

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- Adjudicated by Administrative Appeals Office (AAO)
- Filed on Form I-290B
  - Cannot be combined with motion on same form (only check one box!)
- De novo review
  - Can submit additional evidence
- Outcomes: Sustain and remand, sustain and approve, or Dismiss

# Appeals, continued

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- Underlying case remains open pending appeal decision

If applicant had status pending decision, status remains in effect

- E.g., U AOS denied → file appeal → U status and work authorization remain in effect through adjudication of appeal
- Amicus support?
  - ASISTA has done several to AAO
  - AAO has granted extensions of time to file

# Post-denial Options: Motion to Reopen

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- Adjudicated by Service Center that issued denial
- Filed on Form I-290B
  - Can be combined with Motion to Reconsider but not appeal
- Must show new facts
  - New facts need not be previously unavailable – just not previously submitted
- Underlying case remains closed unless MTR is granted
- Outcomes: Grant or Deny

# Post-denial Options: Motion to Reconsider

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- Adjudicated by Service Center that issued denial
- Filed on Form I-290B
  - Can be combined with Motion to Reopen but not appeal
- Must show error of fact or law in denial
  - No new evidence
- Underlying case remains closed unless MTR is granted
- Outcomes: Grant or Deny

# Deadlines

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- Notice indicates deadline for appeal or motion to reopen/reconsider – usually 33 days from postmark date of denial
- Practice Pointer: Save your envelopes!
  
- USCIS must RECEIVE I-290B by deadline
  - Don't wait until the last minute to file!
  - ALWAYS send I290B via trackable delivery method



# Imagine this:

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- You received a denial of your client's I-485 on November 2, 2018 via regular mail. The date at the top of the denial notice is October 24, 2018. The postmark date on the envelope is October 30, 2018.
- What is your deadline for filing the I-290B?
- Hint: <https://www.timeanddate.com/date/dateadd.html>

# POLL

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- Sunday, December 2, 2018
- Monday, December 3, 2018
- Monday, November 26, 2018
- Don't know
- Other

# What if you missed the deadline?

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- Motion to accept late filing for:
  - Motion to Reopen
  - Motion to reconsider
  
- No provision for AAO to accept late appeals
  - If late-filed appeal otherwise meets requirements for motion, then service center may treat appeal as MTR
    - Should still include arguments for acceptance of late filing

# Arguments for Missed Deadline

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- Delay must be “reasonable and beyond the applicant’s control”
- Ineffective Assistance of Counsel
- USCIS error
  - Example: I290B filed timely but was erroneously rejected
- What are some other reasons?

# Fee Waivers

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- I-290B fee: \$675
- Fee waiver: Form I-912
- If filing fee waiver with I-290B, no guarantee CIS will deem I-290B timely if fee waiver rejected

# Imagine this:

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- Your client's I-360 was denied for lack of good faith marriage. You have additional evidence of GFM and also believe CIS did not apply the "any credible evidence" principle. You timely filed the appeal with a fee waiver request. CIS denied the fee waiver but you did not receive the denial until after the I-290B deadline had passed. What would you do?

# POLL

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- File late appeal to AAO
- File late motion to reconsider to service center
- File late motion to reopen to service center
- File late motion to reopen and reconsider to AAO

# What would you argue?

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- What errors do you see?
- Other arguments for I-290B?



# Where to file

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- Check [www.uscis.gov/I-290B](http://www.uscis.gov/I-290B) for filing addresses
- I-290B always filed with service center that issued denial
- If appeal, Service Center will forward to Administrative Appeals Office of USCIS (AAO)
- If motion, Service Center will adjudicate

# What if more than one denial?

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- File one I-290B for each form that was denied
- Example:
  - U visa: I-192 denied → I-918 also denied
    - File I290B for I-192 and I-918
- \$\$\$\$\$\$ (or fee waiver)

# How to minimize costs to your client?

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- When delay is not critical, consider re-filing other forms after I-290B granted
- Example:
  - I-192 denied → I-918, I-765(c)(14) also denied
  - File I-290B for I-192 and I-918
  - Refile I-765 once I-918 conditionally approved

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# Strategic Considerations

# Appeal v. Motion: Which to choose?

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- Need to decide whether to file appeal or MTRs
- If appeal denied, can file MTR to reopen or reconsider denial of appeal to AAO
- If MTR denied, can file appeal of motion denial to AAO if underlying case type was appealable to AAO

# Appeal First: Pros and Cons

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## PROS:

- Underlying case remains open
- May preserve EAD eligibility
- Service Center reviews appeal first, can reopen or reconsider prior to sending to AAO

## CONS:

- Not all case types can be appealed
  - E.g., I-192
- If appeal denied, MTR filed with AAO – same body that adjudicated appeal

# MTR First: Pros and Cons

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## Pros

- All case types eligible for MTR
- If issue is simple (clear error of law; missing doc that you are now providing) MTR may be more efficient

## Cons

- Goes back to same adjudicator
- Underlying case remains closed unless/until MTR granted
- Must file all new evidence for MTR Reopen with I-290B

# POLL

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- Your U-1 client timely filed her I-485, which was denied on discretion. She does not qualify for a fee waiver but can only afford to file one I-290B. She is concerned about losing her job at the airport.
- Would you file:
  - Appeal to AAO
  - Motion to Reconsider/Reopen to Service Center



# Appeal/MTR was denied: Now What?

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- Can file motion to reopen/reconsider the denied appeal or appeal the denied motion
  - New I-290B, new fee
  - Can only appeal denied MTR if underlying case type was appealable
  
- Refile the application
  - Lose filing date – long delays
  - If U visa, need new cert
  - Age-outs

# Other options: EOIR

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- Limited to case types over which EOIR has jurisdiction
  - No I-918/I-918A/U based AOS
  - Potentially 212(d)(3) waiver for U – check your circuit
  - I-360 for VAWA Self-petitioners (BIA)
  - I-485 for VAWA self-petitioner (Immigration Court)
- See 8 CFR 1003.1(b) (BIA jurisdiction)
  
- Identify relief to pursue if NTA issued

# Other options, continued

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- USCIS Ombudsman
  - <https://www.dhs.gov/case-assistance>
  - Attempt to resolve with USCIS first
  
- Client's Congressperson
  - Can be helpful for unsticking cases

# Administrative Procedures Act

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- Administrative Procedures Act - 5 USC
  - 702 = suffering legal wrong due to agency action or adversely affected by agency action
  - 706 = federal action that is arbitrary, unconstitutional or contrary to statute
  - 500 - “arbitrary and capricious” decision

# If All Else Fails

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- Assess for other forms of relief
  - Asylum/Withholding/CAT?
  - Cancellation (VAWA or 10 year)?
  - Family petition through qualifying relative?
  - What else?
  
- Practice pointer: Assess for other forms of relief at outset of case – don't wait for denial

# Thank you!

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