



PREVENTING AND RESPONDING TO RFES AND NOIDS FOR U AND VAWA CASES

Presenters: Gail Pendleton and Amy Cheung

This project was supported by Grant No. 2017-TA-AX-K061 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

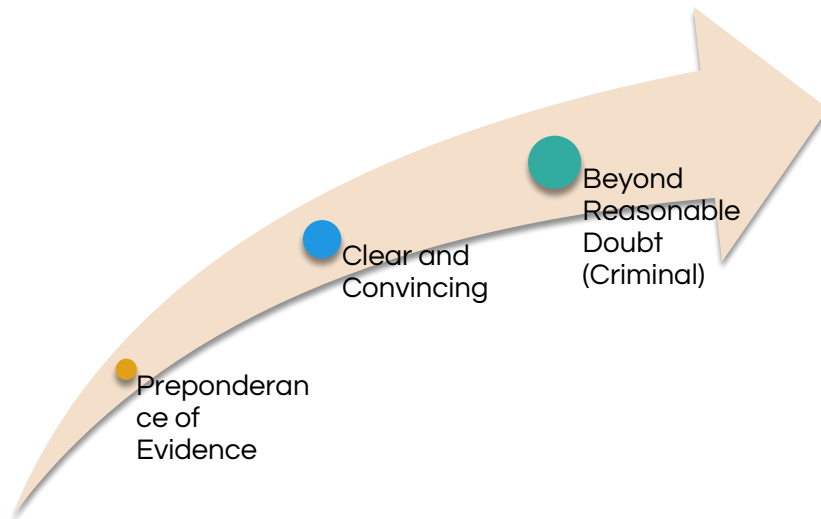
Goals



- Apply best practices for for RFE/denial prevention and response
- Understand USCIS policy and practice
- Discuss expected challenges to survivor relief and what that means for your work

Let's Review: Standard and Burden

Burden and Standard of Proof



- Burden is on the Applicant to show eligibility for relief
- VAWA, Us and Ts = preponderance of evidence standard
- 51%

Forms of Evidence



Primary Evidence



Secondary Evidence

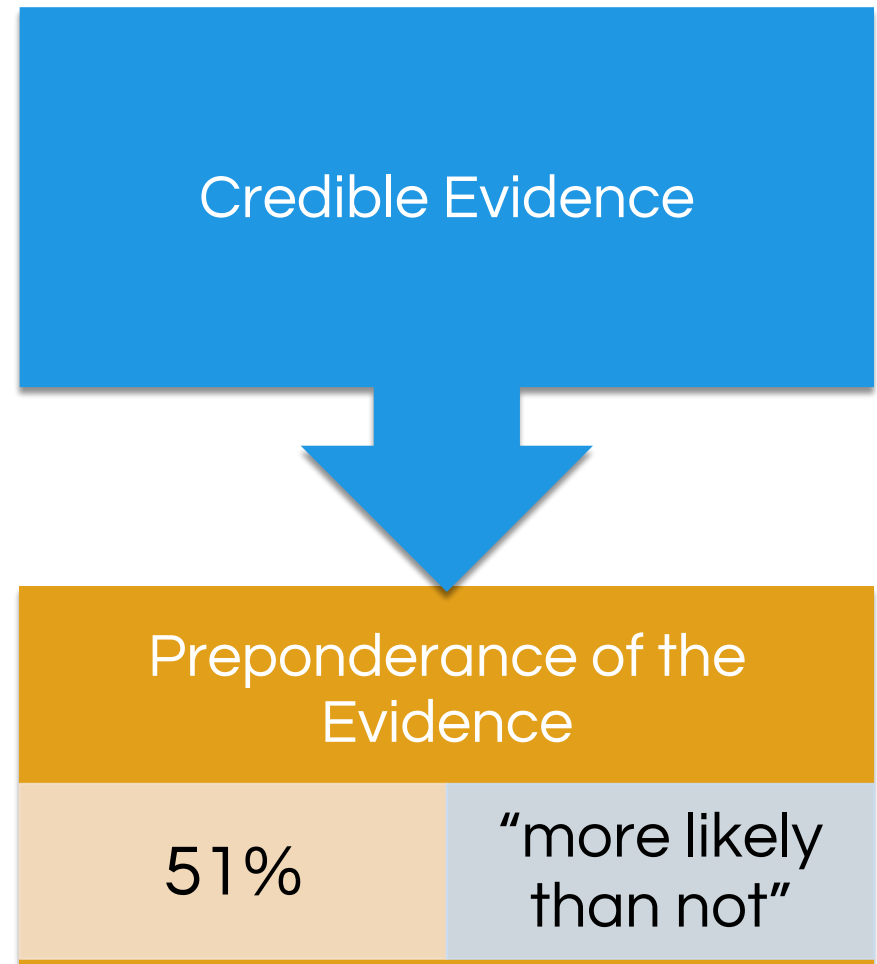


Other Credible Evidence



What kind of evidence?

- Congress said “any credible evidence”
- Recognizes abusers may control documentation



Credible Evidence-Virtue Memo (1998)

- VAWA
 - Cannot deny for failure to submit particular evidence
 - Case-by-case
 - Internal credibility: Check for inconsistency within application and with prior applications

New RFE and NOID Guidance

- Issued July 13, 2018, went into effect Sept. 11, 2018
- Adjudicators have full discretion to deny application without RFE or NOID when
 - Lack of sufficient initial evidence
 - E.g., waivers with no supporting evidence
 - When applicant has no basis for benefit sought
 - E.g. Family petition for ineligible family member

New RFE Guidance

- Rationale: prevent “frivolous” applications and “placeholder” filings

- Not intended to penalize
 - “innocent mistakes”
 - “misunderstanding of evidentiary requirements”

- Does NOT apply to
 - DACA
 - Asylum

Practice Pointers

- Always read form instructions and check regulations
- Review checklists (available at www.uscis.gov)
 - Checklists do not supplant instructions, regs, or

Did you provide the following?

- Evidence of the abuser's U.S. citizenship or lawful permanent resident status
- Marriage and divorce decrees, birth certificates, or other evidence of your legal relationship to the abuser
- One or more documents showing that you and the abuser have resided together, such as employment records, utility receipts, school records, hospital or medical records, birth certificates of children, mortgages, rental records, insurance policies, or affidavits
- Evidence of the abuse, such as reports and affidavits from police, judges, court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. If you have an order of protection, or have taken other legal steps to end the abuse, you should submit copies of those court documents.

Preparing the application

- Your client is a victim of domestic violence and has a son who will turn 21 in November.
- She remembers speaking to an immigration official when she crossed the border but doesn't remember what else happened.
- How would you file the U visa?

POLL

- A. File stand-alone I-918, with no I-192
- B. File I-918 with I-192 indicating that you may be supplementing/amending I-192 later on
- C. File I-918 with I-192 assuming worst case scenario (kitchen sink)
- D. Wait to file until you have all the information

Practice Pointers

- Review instructions, review guidance, review application
- Be aware of deadlines
 - VAWA -- 2 years post divorce, birthdates of derivatives
 - U visa -- cert expiration, birthdates of derivatives and principals under 21
- Advisals about denials and possibility of NTA



Common RFEs & How to Respond

Boilerplate RFE

- Problem:
 - RFE requests information without discussing how what was submitted is inconsistent or insufficient
- Rule:
 - USCIS must explain what's lacking and
 - Why what you submitted isn't credible or sufficient
 - AFM 10.5(a)(2)
- Fix:
 - Request supervisory review in RFE response

Documents already submitted

- Make sure road map and index clearly indicate what evidence was submitted
- Literally highlight where it was supplied
- Don't go overboard trying to find new evidence if already supplied; ask us for help raising with unit heads

The RFE is wrong

- Problems
 - Asks for documentation immaterial to eligibility
 - Mischaracterizes the evidence you supplied
 - Factually wrong about what you supplied
- Strategy
 - Respond timely
 - Ask for supervisory review through hotline

Unknown Derogatory Information

- What if RFE alleges criminal history/gang affiliation but client denies?
- 8 CFR 103.2(b)(16)(i)
 - Exception: Classified information
 - Generally, no obligation to provide actual derogatory information but should provide enough to give opportunity to rebut
- FOIA
- Run criminal background checks

General RFE Response Tips

The “best” evidence is the most credible evidence

- What is best evidence? (hint: usually systems evidence)
- How did you try to get that?
- Why is it unavailable?
- Why what you’re submitting is credible

General RFE Response Tips

- ALWAYS review front and back of RFE
- ALWAYS respond on time
 - If don't have what they want, explain
 - why you don't have it
 - what you are doing to get it (if you are)
 - why what you supplied is credible and sufficient

General RFE Response Tips

- Be civil: Focus on what's wrong factually or legally
- ALWAYS place original RFE on top of RFE response package
- NEVER Respond to RFE via email
- ALWAYS get tracking number and delivery confirmation



RFE Prevention

Avoid Problems Up Front

- Organize so easy to follow
 - Road map cover letter by element
 - Index and mark documents

- Identify inconsistencies
 - Determine if they are a problem
 - Material?
 - If not, why not?

 - If material explain up front

Avoiding problems, continued

- Same best evidence guidance applies: Explain why primary and secondary evidence not available
 - Your/client's efforts to locate evidence, if it does exist
 - Why best evidence does not exist

Avoiding problems, continued

- For fact-based issues, include nitty-gritty detail:
 - “He always watched me, even in the house” v.
 - “He moved the sofa in the living room so that he could sit there and have a direct line of sight to the kitchen while I cooked”

Criminal History Generally

- Connect criminal history to victimization, and
 - E.g., substance abuse as coping mechanism/self-medication
- Show remorse and rehabilitation
 - Detailed declaration about specific steps and actions client has taken to reform
 - Corroboration: counselor letters, letters from employers/teachers/neighbors/family/probation officers; disciplinary records from school/jail



Most common VAWA RFEs

Good Faith Marriage

- Problem:
 - RFEs commonly occur if marriage was short due to abuse or if application otherwise lacks evidence

- Strategy
 - State why evidence not available and how what is submitted is credible evidence of relationship
 - Point to Congressional intent creating “credible evidence standard”
 - Review and use two ASISTA Amicus briefs to AAO

RFEs on abuse

- Problem:
 - RFE dismisses supporting letters from “those who did not witness the abuse firsthand”
 - CIS agrees this is incorrect standard for VAWAs
 - Statements made to counselor for purposes of application
 - Corroborating declarations must focus on FACTS of abuse
 - A list of times your client attended counselling sessions is not sufficient
 - Guidelines for DV advocate corroboration outline what is helpful

Corroborating declarations must:

- Explain how writer knows DV and when someone is telling the truth
- Provide detailed FACTS of what survivor told them
 - Opinions by themselves are unhelpful
- How is that DV?
 - Economic control, humiliation, other forms of extreme cruelty
- What impact did writer see on survivor?
 - How is that typical of DV?



U visa related RFEs

Criminal case after filing

- Client has a pending I-918A as the derivative of her mother, who was the victim of domestic violence, but was charged with a violent offense after filing. There were allegations of gang involvement documented in the police report.

POLL

- A. Let USCIS know right away there is a pending criminal case
- B. Wait for an RFE
- C. Update the application once the case has been completed
- D. Update the application later to include evidence of additional equities

POLL: RFE for police report

You get an RFE asking for the police report. Do you:

- A. Submit it, explain why not legally or factually relevant
- B. Don't submit it, explain why not legally or factually relevant.
- C. Other

Qualifying Criminal Activity

- Your client was the victim of contempt of court that arose from her abuser's violation of a protection order. The Supplement B lists domestic violence as the crime but the police report and charging documents list the state contempt of court statute.
- What challenges do you see with this?
- How do you address it?

Framing your arguments

- “similar” is a losing argument for most cases
 - Only use after argue your crime fits a category

- What’s does Supp B say?
 - Much harder if it doesn’t mention a category
 - Mentioning lots of categories is confusing, not helpful

- Do a chart comparing elements of chosen category with your crime’s elements and facts

RFEs after case is waitlisted

- They say you get these as
 - quality control check or
 - New information that comes to VSC's attention
- Case is taken off the waitlist until RFE issue is reviewed
- Deferred action EAD remains valid unless denied

U Adjustment

- Continued cooperation with law enforcement?
- Regs clear that new certification is NOT required
- Use best evidence approach =
- If not submitting new certification
 - Statement from client (can be very brief)
 - Proof case is closed (if available)
- Revisiting issues at U adjudication

U Adjustment



- Continuous presence evidence
- Do best evidence argument up front
 - Vary types of proofs, if possible
 - Explain any deficiencies and why what you have is credible

What if case is denied?

- Motion to Reopen (8 CFR 103.5(a)(2))
- Motion to Reconsider (8 CFR 103.5(a)(3))
- Appeal (8 CFR 103.3)
- Meet your deadlines! 33 days from date of denial
- Stay tuned for next webinar on administrative review on November 14, 2018!

Thank you!

Gail Pendleton: gail@asistahelp.org

Amy Cheung: amy@asistahelp.org

For Individual Technical Assistance:

http://www.asistahelp.org/en/technical_assistance/



www.asistahelp.org