



SUPPORTING YOUR LEGAL ARGUMENTS: TECHNIQUES FOR RESEARCHING SURVIVOR-BASED REMEDIES

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OBJECTIVES

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As a result of participating in this webinar, you will be better able to:

- Identify relevant sources of law and policy guidance for survivor-based forms of immigration remedies
- Locate relevant statutes, regulations, and policies for survivor-based remedies
- Incorporate research strategies into your legal representation work on behalf of survivors

POLL

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- What research tool do you currently use the most?
 - Google
 - Westlaw/Lexis/other subscription-based legal search engine
 - Kurzbans/other private publications
 - Government website (USCIS, DOS, DOJ)
 - Other

POLL

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- How easily can you locate relevant statutes and regulations when you are doing research?
 - Very easily
 - Pretty easily
 - Not very easily
 - Not at all easily
 - What are statutes and regulations?

Why Aren't Google and Samples Enough?

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“There is nothing strategic or tactical about ignorance.”

- Ethical duty to do your legal research
- Could miss key issues, recent developments
- Samples may be incorrect or outdated

Your case

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- Sarah EWI'd in 2002. She left her son, Daniel, in home country.
- She met and married Mark, a US citizen, in 2006.
- Sarah divorced Mark because he physically and emotionally abused her.

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SOURCES OF IMMIGRATION LAW

STATUTE: Immigration and Nationality Act (INA)

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- Statute = The Law
- Passed by both houses of Congress and signed by President
- All statutes for Us, Ts, VAWAs, and I-751s contained in INA
- aka 8 USC [+ section number, generally 1101-1537]

Where do I find the INA?

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Free online sources:

- INA citations:

- <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/act.html>

- US Code citations:

- <http://uscode.house.gov/browse/prelim@title8/chapter12&edition=prelim>

- <https://www.govinfo.gov/app/collection/USCODE>

- INA to US Code conversion: private publishers, e.g.,

- <https://www.soundimmigration.com/ina-to-usc-conversion-table/> ; Kurzban

Where do I find the INA?

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Private sources:

- Printed format – GPO (government), private publishers like ALA
- Legal search engines, e.g., Westlaw or Lexis

How do I use the INA?

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- Roughly organized by topic, for example:
 - Definitions = Section 101
 - Family-based petitions = Section 204
 - Inadmissibility and inadmissibility waivers = Section 212
 - Nonimmigrant visas = Section 214
 - Removal proceedings = Section 240
 - Immigrant visas and Adjustment of Status = Section 245

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- Where would you expect to find the statutes on VAWA self-petition eligibility? Check all that apply:
 - INA 101
 - INA 204
 - INA 214
 - INA 245

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- Where would you expect to find the statutes on U visa eligibility? Check all that apply.
 - INA 101
 - INA 214
 - INA 235
 - INA 240
 - INA 245

Reading the statute

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- What other facts do we need to know whether Sarah can qualify for a VAWA self-petition under the statute? How do we know that?
- Can Sarah include Daniel as a derivative on her VAWA self-petition? How do we know that?
- If Sarah's VAWA self-petition is approved, can she remarry prior to adjustment? How do we know that?

How do I cite to the INA?

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- Sections aren't enough; look at sub sections and sub sub sub sections
 - E.g., 212(a)(6)(A)(i) – unlawful entry
- Can't find the subsection on the USCIS.gov online version?
 - Click “next document” to see if your subsection falls on a later page
 - CTRL+f is your friend

REGULATIONS: What are they, and where do they come from?

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- Regulations = Federal agency interpretation of statute, i.e., how will agency carry out statute?
- Regulations are not The Law, but the agency will follow them
- Promulgated by agency itself through Federal Register publication
 - □ public notice and comment □ final rule □ Code of Federal Regulations

Regulations, continued

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- Regulations may be outdated if statute was amended after issuance of regulations
 - Example: VAWA self-petitions, I-751 waivers

- Much more detailed than statutes
 - Look to regs for deadlines, additional requirements for eligibility and filing, factors for tests, etc
 - Often go beyond what statute requires – ultra vires?

Where do I find the regulations?

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- Code of Federal Regulations, Title 8
 - <https://www.ecfr.gov/cgi-bin/ECFR?page=browse>
(most updated)
 - Sections 1-499 = Department of Homeland Security
 - Sections 1000-1399 = Executive Office for Immigration Review (EOIR)
- Also published in hardcopy
- Legal search engines, e.g., Westlaw or Lexis

How do I use the CFR?

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- Roughly organized by topic, and roughly follows organization and section numbers of INA, e.g.:
 - Inadmissibility waivers for U: 8 CFR 212.17
 - Inadmissibility waivers for T: 8 CFR 212.16
 - Adjustment for U: 8 CFR 245.24
 - Adjustment for T: 8 CFR 245.23
 - DV waiver for I-751: 8 CFR 216.5

How do I use the CFR, continued

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- Contains agency's rules for itself
 - See 8 CFR 103 (DHS)
 - 8 CFR 1003 (EOIR)

- Practice Pointer: Check the regs to make sure agency is following its own rules

How do I cite to the CFR?

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- Format: Title + “CFR” + Section
 - E.g, 8 CFR 103

- Sections not enough – look at sub sub sub sections
 - E.g, 8 CFR 245.24(h)(1)(iv) (factors for extreme hardship for I-929)
 - Pattern differs from INA – (lowercase letter)(number)(lowercase Roman numeral)

Federal Register

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- Daily federal publication in which agencies publish notices of new proposed regulations and final rules
 - Example: public charge proposed rule, Federal Register Vol. 83, No. 196, pp 51114-296
- Includes reasoning for regulations, final rule may address public comments
 - See VAWA self-petition and U visa rules
- Can be persuasive to issuing agency

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- Where should I expect to find USCIS's interpretation of what constitutes substantial abuse for a U visa?
Select all that apply.
- INA
- CFR
- Federal Register

Bonus question: In what section is this reg located?

How would you actually find it?

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- USCIS's interpretation of what constitutes "substantial mental or physical abuse" for U visa purposes?

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- What if Sarah and her husband lived together in her home country but never shared a residence in the US? Will USCIS find her eligible for a VAWA self-petition?
- Yes
- No
- Not sure

Bonus question: What's the reg?

2nd bonus question: How does that compare to the statute?

POLL

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- What if Sarah remarries while her VAWA self-petition is pending? Will USCIS still consider her eligible for a self-petition?
 - Yes
 - No

Bonus question: What's the reg?

2nd bonus question: How does that compare to the statute?

CASELAW: What is it?

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- Caselaw = court's interpretation of statute (or regs)
- Caselaw also = The Law
 - But only published cases
 - Only certain types of cases will have caselaw
 - Generally very little binding caselaw for Us, Ts
 - A little more for VAWAs, I-751

Where does caselaw come from?

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- Administrative v. Judicial case law
- Makers of immigration caselaw:
 - Administrative Appeals Office (AAO)
 - Board of Immigration Appeals (BIA)
 - Federal Courts (district court or circuit court)
 - Supreme Court
- What's missing?
- Where would U and T visa caselaw come from?

Where do I find caselaw?

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- Legal databases
 - Westlaw/Lexis: AAO, BIA, all state and federal cases (published and unpublished)
 - Immigrant and Refugee Appellate Center – Unpublished BIA case index by subject (subscription)
- Books
 - Kurzban, Immigration Law & the Family, other immigration law treatises
- Internet search
 - Hit or miss, can't tell if it's current

Where to find caselaw, cont.

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□ Government websites

□ AAO:

■ Unpublished:

<https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-non-precedent-decisions>

■ Adopted:

<https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/adopted-aao-decisions>

□ BIA (published):

■ <https://www.justice.gov/eoir/ag-bia-decisions>

How do I find AAO cases?

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- <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/ao-non-precedent-decisions>
 - Boolean connectors: “and”; “or”; “not”; etc
 - Or by form, then date (no keyword search)
 - Good if you already have date of decision and just need to see opinion

- Not binding, but can be helpful for understanding USCIS interpretations

Other sources

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- USCIS Form Instructions
 - 8 CFR 103.2(a)(1) – instructions incorporated into regulations by regulation

- Agency Policy Memos
 - ASISTA website – by case type
 - USCIS:
<https://www.uscis.gov/legal-resources/policy-memoranda>
 - EOIR: <https://www.justice.gov/eoir/oppm-log>
 - Developed by agency itself to provide interpretations of law/regs and operating guidance to agency staff

Other sources: Practice Manuals

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- USCIS Policy Manual and Adjudicator's Field Manual
 - Policy Manual:
<https://www.uscis.gov/policymanual/HTML/PolicyManual.html>
 - AFM:
<https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html>
 - Operating guidance for USCIS officers
 - Slow transition from AFM to Policy Manual
 - Some parts redacted

Practice Manuals, continued

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- AAO Practice Manual
 - <https://www.uscis.gov/aao-practice-manual>
- Immigration Court Practice Manual
 - <https://www.justice.gov/eoir/office-chief-immigration-judge-0>
- BIA Practice Manual
 - <https://www.justice.gov/eoir/board-immigration-appeals-2>

Foreign Affairs Manual (FAM)

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- FAM is Department of State manual for consular officers
<https://fam.state.gov/FAM/FAM.aspx?ID=09FAM>
- Describes visa requirements and processing, interview process, and agency interpretation of some statutes
 - 9 FAM [+section]
 - Generally organized by Nonimmigrant visas (NIV) and Immigrant visas (IV)
 - See, e.g., 9 FAM 402.6 (T, U, and S visas)
 - Also has keyword search

What would you do?

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- Your U-3 client goes for her consular interview, and the officer asks her about the U-1's qualifying crime and helpfulness to law enforcement. The U-3 doesn't know the answers and the visa is denied.
- How would you argue that the denial was incorrect? That the officer's questioning was inappropriate? What sources would you use to support your argument?

Legislative History

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- Congress may state in the law what its goals are
 - E.g., U purpose; VAWAs can overcome reinstatement
 - Also see conference reports
 - Should be persuasive if agency action/interpretation is contrary to Congressional intent
- Records of Congressional debates and speeches may demonstrate Congress's intent in creating a law
 - Helps to make sense of ambiguous language
 - E.g., Exceptional circumstances for VAWA motions to reopen

How to find Legislative History

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- Look to Congressional Record
 - <https://www.congress.gov/congressional-record>
- Need additional info to locate the record, such as:
 - Citation for the law for which you are seeking the record
 - See USCIS.gov version of INA for footnotes with citations to Public Laws
 - Date on which debate/conference report was passed

Foreign Law

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- Most common in questions of marriage and adoption, i.e., establishing qualifying relationship
- Best source = family law of country in which marriage or adoption took place
 - Some not available online or in English

What would you do?

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- Sarah tells you that she was married before in her home country but that she was only 15. She never got a divorce but has consulted a family law attorney in her country who said the age of consent for marriage is 17, so it wasn't a legal marriage.
- What would you do?

How to Find Foreign Law

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- Options:
 - LOC country guides – other secondary sources?
 - Library of Congress “Ask a Librarian” service
 - <https://www.loc.gov/rr/askalib/>
 - Law school libraries
 - Expert, e.g. family law attorney from country in question

- Other?

Takeaways

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- Always do your own research
- In general, start with the statute
- Check if regs, policy memos, and caselaw are current

Thank you

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- Technical Assistance:

 - Questions@asistahelp.org

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

