REMOVAL PROCEEDINGS: PURSUING LEGAL RELIEF FOR IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT

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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.

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Objectives

By participating in this webinar, participants will be better able to:

- Identify survivor-based arguments for termination and continuation of proceedings
- Assess eligibility for survivor-based remedies that fall within EOIR’s jurisdiction
POLL

I have a client who has received an NTA from Vermont or Nebraska after being denied a humanitarian application:

- Yes
- No
I have represented clients in removal proceedings before:

- Yes
- No
| 5 | Initiation and Termination of Removal Proceedings |
Termination of Proceedings

- Is the NTA deficient? Does it comply with statutory requirements?

- Was NTA served properly?

- Are allegations and charge correct? Can DHS meet its burden?
Does NTA comply with INA 239?

- Service of process of NTA:
  - Personal service on respondent
  - Service on attorney of record
  - What about service on minors?

- Must NTA contain time and date of hearing for jurisdiction to vest?
  - BIA says no
  - Conflict with Pereira v. Sessions, 138 S. Ct. 2105 (2018)?
Does NTA comply with 8 USC 1367?

- 8 USC 1367 requires:
  - Determination of inadmissibility or deportability may not be based solely on info provided by abuser/abuser’s family
    - What are allegations of inadmissibility/deportability? What is basis for allegations?
  - ICE must certify compliance with 8 USC 1367 if enforcement action took place at prohibited location. INA 239(e)
When representing a respondent in proceedings, I have denied the allegations in the NTA before:

- Yes
- No
- I have never represented anyone in proceedings
Pleading to NTA

When pleading:

- Check for accuracy of allegations and charge(s)
  - Is client properly charged under 212 or 237?
  - Are manner and date of entry correct?

- Conceding allegations and charge relieves DHS of its burden to prove its case
  - DHS must prove alienage by clear and convincing evidence
  - What if client has a strong case for relief?
Special VAWA Challenge

212(a)(6)(A) VAWA exception:

- Is a “VAWA self-petitioner”
  - “VAWA self-petitioner” includes survivors presenting DV based Conditional Residency waivers
- Suffered battery/extreme cruelty or child suffered
- Substantial connection between battery/extreme cruelty and unlawful entry
Obtaining Relief in Removal
# Obtaining Relief in Removal Proceedings

Jurisdiction of immigration judge limited to matters authorized by statute or delegated by AG

<table>
<thead>
<tr>
<th>No jurisdiction for IJ</th>
<th>Yes jurisdiction for IJ</th>
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<tbody>
<tr>
<td>U/T nonimmigrant status</td>
<td>212(d)(3) nonimmigrant waiver (7th &amp; 11th circuits)</td>
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<tr>
<td>U/T Adjustment of status</td>
<td></td>
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<tr>
<td>VAWA self-petition</td>
<td>245(a) adjustment of status (incl. VAWA)</td>
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<tr>
<td>Initial I-751</td>
<td>1-751 review of denial by USCIS</td>
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<td>VAWA Cancellation</td>
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Adjustment of Status

- Most relevant to VAWA self-petition adjustments
- No limit on number of AOS granted per year (no cap)
- 212(a) inadmissibility applies

Filing:
- If not in removal proceedings = USCIS
- If in removal proceedings = EOIR
  - What if proceedings admin closed?
  - Explore termination
INA 212(d)(3) nonimmigrant waiver

- Alternative waiver for U and T nonimmigrant status
  - Hranka factors: (1) seriousness of immigration/criminal violation(s); (2) risk of harm to society; (3) reasons for wishing to remain in the US

- Only available in 7th and 11th circuits at the moment

- If granted, still have to go back to USCIS for adjudication of U or T nonimmigrant status
VAWA Cancellation of Removal

- Only granted by IJ – must be in removal proceedings
- 4,000/year cap for all non-LPR cancellation except NACARA
  - Once cap met → IJ reserves decision
- If granted, leads to LPR status
  - No derivatives, but children of Respondent or parent of child Respondent SHALL be granted parole
<table>
<thead>
<tr>
<th>Elements</th>
<th>Cancellation</th>
<th>Self-Petition</th>
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</thead>
<tbody>
<tr>
<td>Relationship to Abuser</td>
<td>No abused parents of USC</td>
<td>Spouse or child of LPR/USC; parent of USC</td>
</tr>
<tr>
<td></td>
<td>No deadline post-divorce, death, abuser’s loss of status; no marriage needed if abuse to child by LPR/USC parent</td>
<td>File within 2 years of divorce, death, abuser’s loss of status</td>
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<td></td>
<td></td>
<td>Not eligible if LPR abuser dies before I-360 filed</td>
</tr>
<tr>
<td>Joint Residence</td>
<td>None</td>
<td>Yes</td>
</tr>
<tr>
<td>Continuous Physical Presence</td>
<td>3 years CPP, NTA does not stop accrual of CPP</td>
<td>None but must be in US or some abuse must occur in US</td>
</tr>
<tr>
<td>Good Moral Character</td>
<td>3 years statutory - counting back from date of adjudication</td>
<td>3 years agency regulatory interpretation - counting back from date of filing</td>
</tr>
<tr>
<td>Inadmissibility/Deportability</td>
<td>No agg fel convictions; not inadmissible under 212(a)(2) or (3); not deportable under 237(a)(1)(G) or (2)-(4); (5)</td>
<td>None</td>
</tr>
<tr>
<td>Extreme Hardship</td>
<td>Yes</td>
<td>None</td>
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VAWA Extreme Hardship Factors

8 CFR 1240.58

- Does client suffer physical or psychological consequences of abuse?
- Does client need access to US legal system and legal protections?
- Will batterer’s family/friends harm client or children in home country?
- Do client or children need victims’ support services that are unavailable or difficult to access in home country?
- Do laws and customs in home country punish victims of DV or those who have left abusive household?
- Can abuser travel to home country? Could/would authorities protect client and children from future abuse?
Discussion

- What evidence would you provide to show extreme hardship?

- What about extreme cruelty?
Other considerations for cancellation

Discretionary factors:

- Lack of GMC outside of 3 year lookback period
- Has respondent remarried?
- Has respondent previously been granted VAWA relief?
- Other discretionary factors?
  - Criminal history even if no GMC/inadmissibility/deportability issues
When No Relief is Available
I believe I have a removal case in which the client is not eligible for any relief before the IJ:

- Yes
- No
- Unsure
- I don’t have any cases in proceedings right now
What if no relief available?

- Does client have pending USCIS case?

- If U visa pending:
  - Request termination – maybe DHS won’t oppose
  - Request status docket
  - If on appeal to BIA, request motion to remand
  - Continuance?
Continuance for Pending U Visa: The “Protective Web”

ICE memoranda: Prima facie system for stays, detention, cases in removal

- ICE asks VSC for prima facie determination
- VSC is part of DHS, is best equipped to determine eligibility

Sanchez Sosa: Prima facie system in EOIR

- Did ICE get PF from VSC?
- Is ICE refusing to ask?
- Relevance to IJ and BIA arguments?
Sanchez-Sosa is still good law

- Pre-LABR elaboration of “good cause” analysis for U visas
- Built on existing prima facie system to deter U removals by ICE
- The web ensures Congressional goals
  - Encourage those who fear removal to access our criminal justice system
    - And help LEOs work with those who fear contacting them
Sanchez-Sosa good cause considerations

- DHS response to motion
  - Is ICE refusing to follow its own memos?
  - If yes, IJ/BIA/fed court should discount ICE opposition

- Prima facie approvable?
  - Did VSC issue PF? = rebuttable presumption favoring continuance
  - If yes, then IJ need not do analysis
    - VSC has sole jurisdiction over Us and
    - IJs have no training on victim issues or the U visa
  - If no, then either insist ICE ask VSC for prima facie determination or
    - Make offer of proof for prima facie eligibility

- Reason for continuance = delay is caused by USCIS not client
  - Some IJs are denying despite lack of client control; avoid client-generated delays
Proffering Prima Facie Factors

- Harm resulting from qualifying crime?
  - Certification; client declaration; corroboration by crime victim counselors

- Helpfulness of the victim?
  - Certification

- Inadmissibility Issues – Likelihood of I-192 approval
  - Explain (d)(14) waiver to IJs/BIA
    - S-S focuses on serious crime exceptions, never mentions (d)(14) standard
Other option: Expedite U visa?

- Updated expedite criteria:
  - Severe financial loss to a company or person;
  - Urgent humanitarian reasons;
  - Compelling U.S. government interests (such as urgent cases for the Department of Defense or DHS, or other public safety or national security interests); or
  - Clear USCIS error

- Will not expedite just for removal proceedings – what other reasons?
If my client has been granted U nonimmigrant status but is also in proceedings, my local OCC will:

- Move to dismiss the NTA
- Join my motion to terminate
- Oppose my motion to terminate
- Not respond or do anything
- Reissue NTA and charge under 237(a)
If my client has been granted U nonimmigrant status but is also in proceedings, my local IJs will:

- Terminate/dismiss proceedings
- Put the case on the status docket/continue proceedings
- Order removal if no other relief is presented
- Other
- Depends on the IJ
If Relief is Denied
Voluntary Departure

- **Pro:** avoids removal order and resulting grounds of inadmissibility if actually removed
  - Can be advantageous if client has family immigration option with I-601a waiver

- **Con:** civil penalty if fail to depart timely
  - Bar to AOS for 10 years if applicant fails to depart timely after granted VD!
  - Exception for VAWA self-petitioners if abuse “at least one central reason” for failure to depart
Appeals

- Notice of Appeal must be filed with BIA within 30 days
- Order of Removal not final until BIA reviews – keeps case alive

- Must assert error by IJ
  - Did IJ conduct proper Sanchez-Sosa analysis?
  - Did IJ ignore evidence of extreme cruelty, extreme hardship?
  - Did IJ properly weigh discretionary factors?
Motions to Reopen

• New Facts & Evidence Not Previously Available & Within 90 days (or exception)

• Options/Benefits While Relief Pending?

• In Absentia Orders
  • Consider Service and Notice (especially with kids)
  • Exceptional circumstances – domestic violence?
  • If basis is lack of notice → automatic stay

• Remedy for Voluntary Departure Bar
VAWA Motions to Reopen

Normal restrictions on motions do not apply if:

- Supply self-petition or VAWA cancellation application
- Physically present in US
- One year from final order EXCEPT
  - Extraordinary circumstances or harm to child
    - Legislative history on extra circs
    - Context of DV and/or
    - Thwarts justice/contrary to humanitarian purpose
- Automatic stay if meet qualified alien definition for benefits
What Would You Do?

Patricia believes she was ordered removed in-absentia in 2010, but she’s not sure. You are representing her for a U visa based on domestic violence. She is concerned that she could be removed. What would you do?
Sua Sponte Motions to Reopen

• Benefits:
  1. It’s working at the moment
  2. Gives client ability to try to move beyond removal case
  3. Don’t have to wait for AOS or jump hoops from OCC

• Concerns:
  1. No appeal of sua sponte denial in most circumstances
     • Either abuse or no appeal at all
  2. IJs prefer to have a basis to reopen an old case
  3. Departure Bar issues
  4. Unclear if these will continue to be granted
Drafting *sua sponte* MTR

- Goal is to get old removal case reopened, and then terminated based on client’s U Nonimmigrant Status (valid status overcomes (a)(6)(A) and (a)(7)(A))

- Request OCC to join before filing or not?

- Use arguments of specific public and national interest of U Nonimmigrant Status

- Identify potential hardship if client is accidentally deported due to outstanding order
Stay of Removal

- Applies to clients with unexecuted final order of removal
- Filed with ICE Enforcement and Removal Operations (ERO)
- Use 2009 ICE Memorandum if pending U visa
- Discretionary, so provide evidence of positive equities, hardship, etc
- Form I-246, $155 filing fee
Takeaways

- Plead carefully
- Remember VAWA cancellation as an option
- Sanchez-Sosa is still good law
- File FOIAs for all clients who have ever been in proceedings
- Prepare stays for those with outstanding order of removal

QUESTIONS?
Thank you!

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- Laura Flores Bachman: laura@asistahelp.org

- For individual technical assistance: http://www.asistahelp.org/en/technical_assistance/
- To get on our list serves (VAWA Experts/VAWA Updates), email questions@asistahelp.org