

June 7, 2022

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Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
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Via email: EngagewithEOIR@usdoj.gov

Re: Recommendations for Updates to the EOIR Immigration Court Practice Manual and Board of Immigration Appeals Practice Manual

Dear Assistant Director Reid,

We are responding to the invitation to provide feedback to the Executive Office for Immigration Review (EOIR) for the Immigration Court Practice Manual and the Board of Immigration Appeals (BIA) Practice Manual.¹ The undersigned are organizations that were instrumental in the development of policy protections for immigrant survivors from their inception and have long provided guidance to government entities charged with implementing these protections, including the Departments of Justice and Homeland Security. We are all members of the Alliance for Immigrant Survivors, a network of advocates defending the rights of all survivors of domestic violence, sexual assault, trafficking, and gender-based abuses for access to life-saving protections.

I. Background of Statutory Duties of Confidentiality in Immigrant Survivor Protections

Beginning in 1996, Congress added Violence Against Women Act (VAWA) confidentiality protections designed to accomplish two goals. The nondisclosure provisions protected the confidentiality of information provided to the Department of Justice and its sub-agencies by an immigrant survivor of violence, so as to prevent abusers and traffickers from using the information to locate or harm them.² The second important goal of the VAWA confidentiality protections was to prevent the use of information provided by abusers in removal and deportation proceedings and ensure

¹ Department of Justice, Executive Office for Immigration Review Immigration Court Practice Manual and the Board of Immigration Appeals Practice Manual; Public Forum, FR Doc. 2022-10185 (May 12, 2022), <https://public-inspection.federalregister.gov/2022-10185.pdf>.

² See Non-Disclosure and Other Prohibitions Related to Battered Aliens: IIRIRA § 384, Memo by Paul Virtue, U.S. IMMIGR. & NATURALIZATION SERV., 2 (May 5, 1997), <https://niwaplibrary.wcl.american.edu/pubs/conf-vawa-gov-insconfvawamemo-05-05-1997>.

that government officials do not contact abusers, call abusers as witnesses, or rely on information furnished by abusers against victims removal or deportation proceedings, in the deciding the victim's immigration case, or deciding to apprehend or detain a victim.³ VAWA's immigration confidentiality protections were enacted as 8 USC § 1367, and the remedies to which they apply set forth at 8 USC § 1367(a)(2), including petitions for T and U visas, VAWA self-petitions, I-751 waivers of the joint filing requirement, and VAWA Cancellation of Removal and VAWA Suspension of Deportation. The immigration enforcement agencies have long understood these provisions to apply in deportation and removal proceedings, "...from the time the application for relief is submitted until such time as the application for relief is denied and all opportunities for appeal of the denial have been exhausted."⁴ The Attorney General must also abide by these protections, as required by 8 USC § 1367(a). Section 1229a(c)(7)(C)(iv) of the immigration law recognizes that survivor protections extend to post-removal order motions to reopen proceedings as well.

EOIR implemented VAWA confidentiality protections and applied them to immigration judges and the immigration courts in 1997 by issuing [Operating Policies and Procedures Memorandum No. 97-7: Procedures For Identifying Potential Battered Spouse/Battered Child Cases](#).⁵ It is important that the EOIR practice manual explicitly incorporate this policy that has been in place since 1997, and that the manual be consistent with this policy, with the legislative history of VAWA confidentiality, and with the DHS policies implementing VAWA confidentiality.⁶

II. Recommendations for Implementing Immigrant Survivor Protections Throughout the Immigration Court and BIA

In addition to recommending updates to the Practice Manuals used at the Immigration Court and BIA in section III below, we make the following suggestions to ensure greater uniformity of decision making and compliance with VAWA confidentiality protections by the Immigration Courts and the Department of Homeland Security (DHS).

³ See DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009, H.R. NO. 109-233, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, 122 (2005), <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005/>.

⁴ Memorandum for All OPLA Chief Counsel: VAWA 2005 Amendments to the Immigration Laws, DEP'T OF HOMELAND SECURITY, 4 (Feb. 1, 2007), <https://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia>; 8 USC § 1367 (VAWA confidentiality protections apply to individual victims who continue to receive these protections indefinitely unless the case is denied on its merits and all opportunities for appeal of the denial have been exhausted).

⁵ Operating Policies and Procedures Memorandum No. 97-7: Procedures For Identifying Potential Battered Spouse/Battered Child Cases, Office of the Chief Immigration Judge, <https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/pdf/CONF-VAWA-Gov-EOIRGuidance.pdf>

⁶ VAWA Confidentiality, Statutes, Legislative History and Implementing Policy (April 4, 2022), <https://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history>

1. A separate panel of BIA members for immigrant survivor cases should be established.

Proceedings brought by respondents seeking immigrant survivor protections should be heard on appeal by a three-member panel with specialized training in immigrant survivor petitions and protections, including the duties of confidentiality outlined in the 1997 Operating Policies and Procedures Memorandum from Chief Immigration Judge Michael J. Creppy.⁷ The panel should be alert to violations of 8 USC § 1229(e) requiring certifications of compliance with 8 USC § 1367 to be included in Notices to Appear, and dismiss proceedings initiated in violation of these provisions.⁸ 8 CFR § 1003.1(e)(6) provides that cases may be assigned to a three-member panel if they present the need to settle inconsistencies among the rulings of different immigration judges and resolve complex and recurring issues of law or fact. Violations of VAWA confidentiality provisions and restrictions on disclosure represent complex and recurring issues that require specialized attention from the appellate board in order to ensure compliance with the law and protection for immigrant survivors.

2. EOIR adjudicators and employees should receive specialized, anti-bias, and trauma informed training in immigrant survivor confidentiality provisions and relief applications.

All Immigration Judges and BIA members who are assigned to proceedings initiated against immigrant survivors must include training in confidentiality protections and immigrant survivor applications, to ensure that these matters are handled with the sensitivity to which they are due, and so that confidentiality and non-disclosure requirements under law are honored. Section 1367(d) requires the Attorney General to provide guidance to its officers and employees “who have access to the information covered by this section regarding the provisions of this section, including the provisions to protect victims of domestic violence and [T and U visa applicants] from harm that could result from the inappropriate disclosure of covered information.”⁹ Employees of EOIR responsible for maintaining the court calendar, managing filings, and responding to public inquiries must also be trained and aware of the confidentiality and non-disclosure requirements of VAWA.

⁷ *Supra* n. 5.

⁸ 8 USC § 1229(e)(1) (“In cases where an enforcement action leading to a removal proceeding was taken against [a noncitizen] at any of the locations specified in paragraph (2), the Notice to Appear *shall* include a statement that the provisions of section 1367 of this title have been complied with.”)(Emphasis added); DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009, H.R. NO. 109-233, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, 122 (2005), <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005/> (“Removal proceedings filed in violation of section 384 of IIRIRA [8 USC § 1367] should be dismissed.”)

⁹ 8 USC § 1367(d).

Moreover, all Immigration Judges and BIA members should receive training in the complex dynamics of intimate partner violence, the impacts of trauma, and dangers of biased adjudications before being assigned to removal proceedings that involve survivor issues. As immigrant survivors may be so identified at any point in the removal proceeding, all EOIR adjudicators and court personnel should receive this specialized training.

III. Recommendations for Updates to the Practice Manuals

Although the Immigration Court practice manual recognizes that hearings involving abused children and spouses should be closed to the public, it does not go far enough to implement these longstanding confidentiality protections, or their underlying principles, and continue to put immigrant survivors at risk of harm or retaliation by their abusers. Notably, the Immigration Court practice manual fails to acknowledge that confidentiality protections extend to immigrant survivors beyond abused spouses and children, including abused parents, trafficking survivors, and crime victims who are unrelated or unmarried to their abusers. Nor does it address the non-disclosure requirements that apply to these cases under 8 USC § 1229(e).

The BIA practice manual does not contain *any* language referencing the confidentiality requirements and the bars on reliance on perpetrator provided information in removal and deportation proceedings codified at 8 USC § 1367 and 8 USC 1229(e). Given the long pendency of both Immigration Court and BIA proceedings, it is imperative that procedures be implemented to protect respondents who become eligible for immigrant survivor remedies during the course of their proceedings.

We submit the following recommendations for amendments to the Immigration Court and BIA practice manuals to better implement these confidentiality protections and achieve the goals of the statute. Inclusion of specific language addressing immigrant survivor protections is crucial for the awareness of respondents, practitioners, the Office of Principal Legal Advisor (OPLA) and adjudicators.

1. Immigration Court Practice Manual:

4.9 Public Access

4.9(a)(1) currently provides that:

Hearings involving an abused alien child are closed to the public. Hearings involving an abused alien spouse are closed to the public unless the abused spouse agrees that the hearing and the Record of Proceedings will be open to the public.

This is aligned with the VAWA confidentiality provisions cited above, but is underinclusive as it addresses only hearings involving “abused [noncitizen] spouses.” The provision should be more consistent with the confidentiality protections codified at 8 USC § 1367, under which the Attorney General, along with DHS, is barred from disclosing any information about victims who are VAWA self-petitioners, VAWA cancellation of removal applicants, VAWA suspension of deportation applicants, or beneficiaries of battered spouse waivers or T or U visa applications, with some limited exceptions. The manual should be revised to cover all immigrant survivors entitled to confidentiality protections at 8 USC § 1367 including noncitizens who are not married to, or the children of, their abusers.

Recommendation:

Hearings involving a noncitizen applicant for, recipient of, or beneficiary of immigration relief covered by 8 USC § 1367 are closed to the public, and no information relating to the noncitizen beneficiary of 8 USC § 1367 protections shall be released to the public, including their names, A numbers, the location or date of their hearings, the status of their proceedings, actions taken in their proceedings, or the outcome of any proceedings. Attorneys of record and the noncitizen 8 USC § 1367 beneficiaries themselves shall have access to all information pertaining to their removal or deportation proceedings.

4.21 Combining and Separating of Cases

4.21(b) regarding the severance of cases. currently provides that:

Severance of cases is the division of a consolidated case into separate cases, relative to each individual. The immigration court may sever cases in its discretion or upon request of one or both of the parties. Severance must be sought through the filing of a written motion that states the reasons for requesting severance. Such motion should include a cover page labeled “MOTION FOR SEVERANCE” and comply with the deadlines and requirements for filing. See Chapter 3 (Filing before the Immigration Court), Appendix E (Sample Cover Pages). A copy of the motion should be filed for each case included in the request for severance. Parties are advised, however, that

such motion should be filed as far in advance of any filing deadline as possible. See Chapter 3.1(b) (Timing of Submissions).

Although the EOIR practice manual provides for the severance of proceedings upon the motion of one or both of the parties or in the court's own discretion, the confidentiality protections codified at 8 USC § 1367 forbid the Attorney General and agencies of the Departments of Homeland Security or State from disclosing *any* information relating to the beneficiary of an immigrant survivor petition covered by 8 USC § 1367.

When immigrant survivors begin removal proceedings as derivatives or in consolidated proceedings with their abusers, and during the pendency of proceedings become the eligible for VAWA confidentiality protections as an applicant, recipient or beneficiary, or potential beneficiary of a VAWA confidentiality case protected under 8 USC § 1367 that alleges another party as an abuser, the confidentiality protections required in 8 USC § 1367 are triggered. For this reason we propose that the manual be amended to require severance of proceedings when such circumstances are present and the beneficiary moves to sever proceedings.

Recommendation:

Where one of the parties seeks severance of proceedings to pursue relief based on a remedy available to noncitizen survivors of violence covered by 8 USC § 1367, in which another party is named as the abuser, the immigration court should find that grant of the motion is warranted, and thereafter apply the protections from public access noted in section 4.9 of the manual to the beneficiary's separate proceedings. All proceedings involving noncitizens entitled to 8 USC § 1367 protection include a statutory bar on the admission of evidence and testimony from the abuser. In addition, the immigration court should invite motions to sever proceedings where such circumstances are present, and thereafter apply the confidentiality protections required by 8 USC § 1367 to the beneficiary's separate proceedings.

2. BIA Practice Manual:

The BIA practice manual currently contains *no* provisions for the processing of requests from respondents who assert survivor protections referenced in 8 USC § 1367 following the entry of their removal orders by EOIR. 8 USC § 1367 requires that

confidentiality protections extend from filing indefinitely unless the case is denied on its merits and if denied until all avenues for relief are exhausted.

Proceedings involving noncitizens entitled to VAWA confidentiality protections under 8 USC § 1367 who include VAWA cancellation of removal and VAWA suspension of deportation applicants, beneficiaries of VAWA self-petitioners or beneficiaries of battered spouse waivers or T or U visa applications do not always start out that way. Due to the long pending nature of proceedings before the EOIR and BIA, it is not uncommon for respondents to become eligible for one or more of the forms of relief covered by 8 USC § 1367 after EOIR has issued a removal order that is pending on appeal to the BIA, or after the BIA has granted or dismissed the appeal and issued a final removal order.

The BIA manual should contain a provision for the application of confidentiality restrictions to continue throughout appeals of their removal orders, and to proceedings in which respondents seek remand or reopening of their removal proceedings from the BIA in order to pursue applications for relief covered by 8 USC § 1367, similar to the language contained in the proposed amendment to the EOIR manual above.

Recommendation #1:

Proceedings involving an applicant for, beneficiary of or recipient of immigrant survivor relief covered by 8 USC § 1367 are confidential, and no information relating to the beneficiary shall be released to the public, including their names, A numbers, the status of, actions taken in, or outcomes of their proceedings. Information relating to beneficiaries of applications covered by 8 USC § 1367 that is shielded from public access in EOIR proceedings shall continue to be shielded from public access in proceedings before the BIA. The attorneys of record and the beneficiaries themselves shall have access to all information pertaining to their removal or deportation proceedings. In all proceedings before EOIR and the BIA the 8 USC § 1367 bars on reliance upon perpetrator provided information, evidence, and testimony shall also apply.

Recommendation #2:

For individuals who are party to consolidated proceedings before the BIA and are advancing applications for relief referenced in 8 USC § 1367 naming another party in their consolidated proceedings as an abuser, the BIA shall immediately provide VAWA confidentiality 8 USC § 1367

protection to the noncitizen survivor, should grant motions to sever their proceedings and must immediately apply the confidentiality restrictions and the bars against perpetrator provided evidence, testimony and information required by 8 USC § 1367 to their separate proceedings.

Recommendation #3:

For individuals who are party to consolidated proceedings before the BIA and are advancing applications for immigrant survivor protections referenced in 8 USC § 1367 against another party in their consolidated proceedings, the BIA should consider their assertion of eligibility for the immigrant survivor protection as a factor favoring reopening or remand of their proceedings and thereafter grant motions to sever their proceedings and apply the confidentiality restrictions required by 8 USC § 1367 to their separate proceedings.

We appreciate this opportunity to provide feedback to the EOIR for improvements to the Immigration Court and BIA practice manuals. The undersigned organizations welcome further engagement with EOIR to discuss these recommendations and other protections for immigrant survivors in removal proceedings.

These recommendations are submitted by the following organizations:

ASISTA Immigration Assistance

Asian Pacific Institute on Gender-Based Violence

Freedom Network USA

National Immigrant Women's Advocacy Project (NIWAP)

Ujima Inc., The National Center on Violence Against Women in the Black Community