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.

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

POLL

I have represented clients in removal proceedings before:

- Yes
- No

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)

POLL

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

No jurisdiction for IJ	Yes jurisdiction for IJ
U/T nonimmigrant status	212(d)(3) nonimmigrant waiver (7th & 11th circuits)
U/T Adjustment of status	
VAWA self-petition	245(a) adjustment of status (incl. VAWA)
Initial I-751	I-751 review of denial by USCIS
	VAWA Cancellation

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

Elements	Cancellation	Self-Petition
Relationship to Abuser	No abused parents of USC No deadline post-divorce, death, abuser's loss of status; no marriage needed if abuse to child by LPR/USC parent	Spouse or child of LPR/USC; parent of USC File within 2 years of divorce, death, abuser's loss of status Not eligible if LPR abuser dies before I-360 filed
Joint Residence	None	Yes
Continuous Physical Presence	3 years CPP, NTA does not stop accrual of CPP	None but must be in US or some abuse must occur in US
Good Moral Character	3 years statutory - counting back from date of adjudication	3 years agency regulatory interpretation - counting back from date of filing
Inadmissibility/Deportability	No agg fel convictions; not inadmissible under 212(a)(2) or (3); not deportable under 237(a)(1)(G) or (2)-(4); (5)	None
Extreme Hardship	Yes	None

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

POLL

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 face 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?

POLL

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)

POLL

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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- 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