

# **Pro Bono Network Webinar: COVID-19 Updates and Strategies for Declaration Drafting**

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**Pro Bono Network Webinar  
May 20, 2020**



**TAHIRIH  
JUSTICE  
CENTER®**



# *Agenda*

**Welcome** Introductions

**COVID-19 Updates** Agency updates

**Other Legal Updates** Case law, administrative

**Declaration Drafting Strategies**

**Questions**

**Contact Us**

# *Today's Presenters*

## **Tahirih National Office**

**Kursten Phelps**

Director of Legal & Social Services

**Richard Caldarone**

Litigation Counsel

# *Learning Objectives*

## **TODAY'S OBJECTIVES:**

- Review critical legal updates related to immigration practice, including Covid-19 impacts
- Understand the purpose and function of your client's declaration
- Implement at least one practical strategy for crafting more detailed, compelling declarations.



# COVID-19 Updates

# Agency Operating Status

Tahirih updates its [Pro Bono e-Library](#) every day when there is a relevant agency update.

Agency	Status
EOIR- Detained Hearings	Open
EOIR- Non-detained	Postponed through <b>June 12</b>
MPP Hearings	Postponed through <b>June 19</b> , in-person document service suspended until <b>June 8</b>
USCIS	Closed through <b>June 3</b> for in-person appearances. Filings continue.
ICE ERO	Suspended In-Person & Home Visits
State	Routine Visa Interviews Suspended



# *Immigration Courts*

## **Signatures**

- Digital and electronic signatures [allowed](#) on all documents filed with it, regardless of how filed.
- Must clearly display signer's name or a reproduction of signer's handwritten signature. Signature should also include a printed version of signer's name below or adjacent to signature if it is not provided in the digital or electronic signature.

## **E-Filing**

- [Temporary email accounts](#) to facilitate electronic filing for all parties while the rollout of the EOIR Court & Appeals System (ECAS) is delayed due to COVID-19. Those who have already opted-in to ECAS should continue to use ECAS where it is available.
- Generally the address convention is *Location.Immigration.Court@usdoj.gov*, but check the above link.

# *Immigration Courts*

## **Temporal E-mail Filing Limits**

- Arlington – 2 months
- Baltimore – 3 months
- Houston – 3 months
- San Francisco – 3 months
- Applications for asylum are exempt

## **Page Limits on E-mail Filings**

- Arlington – 25 pages for pleadings; 50 pages for evidence
- Baltimore – 50 pages
- Houston – 50 pages
- San Francisco – 100 pages



# *Board of Immigration Appeals*

## **E-filing:**

- Two temporary email accounts
- Only for briefs, motions to accept a late filed brief, motion for summary affirmance, or EOIR-27 courtesy copies on newly filed appeals
- Subject Line Convention: Item – A# - Detained/Non-Detained (e.g. Brief – 123456789 – Non-Detained)
- Rejection notices will still be by mail. Be sure to follow [guidelines](#) to avoid rejection.
  - [BIA.Detained.Briefs@usdoj.gov](mailto:BIA.Detained.Briefs@usdoj.gov)
  - [BIA.Nondetained.Briefs@usdoj.gov](mailto:BIA.Nondetained.Briefs@usdoj.gov)

# USCIS

## RFE, NOID Deadlines Extended

- For applicants and petitioners who receive an RFE or NOID **dated between March 1 and July 1, 2020**, any responses submitted within **60 calendar days** after the response deadline set forth in the RFE or NOID will be considered by USCIS before any action is taken.

## AAO Appeals Deadlines Extended

- USCIS will consider as timely filed any I-290Bs received with **60 calendar days** of decisions **dated between March 1, 2020 July 1, 2020**, inclusive..

# *COVID-related litigation*

## **Cases seeking release from detention**

- Individual successes;
- Modest results in system-wide cases, mostly rulings requiring compliance with CDC guidance rather than release

## **Cases challenging COVID policies**

- Ongoing against EOIR, USCIS
- No major rulings yet
- Litigation contemplated re: border closure

# Latest Updates in Immigration Law & Policy

# *Supreme Court Update*

## **United States v. Sineneng-Smith (No. 19-67, May 7, 2020)**

- Regarding federal statute that makes it a crime to “encourag[e] or induc[e] an alien to come to, enter, or reside in the United States...” in violation of the law.
- Held that Ninth Circuit’s analysis (which concluded that the statute is overly broad in violation of the First Amendment) went too far beyond the issues presented by the parties, and it unanimously vacates the opinion on that ground.



# *Circuit Courts of Appeals*

## ***De Pena-Paniagua v. Barr* (No. 18-2100, 1st Cir. April 24, 2020)**

- *Matter of A-B* does not categorically hold that an "inability to leave" PSG categorically fails particularity or social *distinction* requirements
- A-B- reading that failure to leave PSG is categorically circular is arbitrary conclusion
- Requires BIA to assess PSG on case-by-case basis

## ***Scarlett v. Barr* (No. 16-940, 2nd Cir., April 28, 2020)**

- Issued its first decision substantively addressing *Matter of A-B*
- Holds that the BIA failed to give reasoned consideration to the facts relevant to that issue.
- However, that the "complete helplessness" standard from A-B is not arbitrary and deserves Chevron deference.

# *Circuit Courts of Appeals*

## ***Maria Juan Antonio v. Barr*, 6th Cir. No. 18-3500 (May 19, 2020)**

- Holds that asylum seeker is a member of PSG "married (indigenous) women in Guatemala who are unable to leave their relationship." Holds that physical separation not necessarily enough to show relationship ended, that membership in these PSGs is a fact-intensive inquiry
- Says that *A-B-* abrogated by *Grace* and that *A-R-C-G-* still good law
- Holds that must consider what government did *not* do and harms that were *not* prevented in unable or unwilling analysis
- Vacates ruling on internal relocation based on country conditions and specific actions of the abuser



# *Circuit Courts of Appeals*

## ***Tovar v. Zuchowski*, No. 18-35072, 2019 U.S. App. LEXIS 20916 (9th Cir. May 7, 2020)**

- Petition for rehearing en banc granted
- Panel decision deferred to USCIS's view that the relationship between a U principal and derivative must exist from the time the petition is filed through the time the derivative's application is adjudicated.

## **Presidential Proclamation on Health Insurance**

- On May 4, 2020, the Ninth Circuit declined to stay the preliminary injunction against the health insurance proclamation.
- The requirement for immigrant visa applicants abroad to have acceptable health insurance remains blocked for now.

# *Circuit Courts of Appeals*

## ***Guzman Orellana v. AG* (3d Cir. No. 19-1793, Apr. 17, 2020)**

- Holds that "persons who publicly provide assistance to law enforcement against major Salvadoran gangs" is a cognizable PSG.
- Reverses finding re: future torture, says BIA ignored the relevant evidence.
- Salvadoran program to help witnesses not sufficient to show ability to control gangs.

## ***Guzman-Vazquez v. Barr* (6th Cir. No. 19-3417, May 18, 2020)**

- One central reason standard for nexus applies to withholding of removal.
- IJ must give asylum seeker an opportunity to explain why corroborating evidence is not reasonably available.
- Affidavits not reasonably available from family who (i) are effectively unreachable because of distance from a phone or (ii) cannot write and suffered from the same kind of abuse as gives rise to the asylum claim.

# *Administrative Regulations*

## **SAFE THIRD COUNTRY REGULATIONS:**

- Agreement with Honduras published in Federal Register on May 1, may now take effect
- Likely no immediate impact because of COVID-19

# Declaration Drafting Strategies

# *Audience Poll*



- How many immigration client declarations have you drafted or helped to draft?
  - None yet, or I'm working on my first one
  - 5 or fewer
  - More than 5
  - More than 10
  - More than 15

# *Declaration Drafting Strategies*

**“Most lawyers will need to prepare an affidavit at some time; many will write dozens, if not hundreds. For most lawyers, writing an affidavit is strictly routine: drag out an old form, duplicate it, and change the details.”**

**Wayne Schiess, *Writing for the Legal Audience* 92 (Carolina Academic Press 2003)**

# *Declaration Drafting Strategies*

## **CLIENT DECLARATION GOALS**

- Provide comprehensible and credible testimony and facts supporting eligibility for relief, in your client's voice
- Provide context for client's story and experience
- Disclose and explain negative factors
- Provide a compelling document that humanizes your client



# *Process Overview*



**Understand the Audience and Purpose**

**Develop Outline** What do you already have? Eligibility elements

**Identify Questions** Broadly, then narrow down

**Incorporate notes between sessions**

**Review, revise, repeat**

**Polish, attest, and study**

# *How to tell a good story?*

- Understand the story, its context and its characters
- Understand your audience and what they need to know
- Know the purpose and objective of telling the story
- When possible, explain these themes, case strategies, and legal concepts to your client in language they understand

# *Telling a Good Story*

## **ASSESS WHAT YOU NEED**

- What is the purpose of my interviews and how will I explain it to my client?
- What background information/learning do I need to understand my client's story?
- How ready is my client to tell her story, and how can we establish trust and rapport?
- What accommodations or pivots am I ready to make?

# *Telling a Good Story*

## **UNDERSTAND YOUR AUDIENCE**

- Asylum Adjudicators
  - Affirmative: officer in non-adversarial interview, REAL ID Act credibility.
  - Defensive: judge with a trial attorney who will cross examine, REAL ID Act credibility.
- VAWA/T/U adjudicator of paper record, “any credible evidence” standard

# *Telling a Good Story*

## **UNDERSTAND YOUR AUDIENCE**

- What is most painful for client or relevant to their experience may have little or no relevance to their claim
- Understand your client's whole story, but focus declaration on key events and facts, and the context necessary to understand those key facts

# *Telling a Good Story*

## **KNOW YOUR PURPOSE OF INTERVIEW**

- Elicit information
- Observe your client in preparation of interview/hearing
- Interpret client's storytelling into written testimony that establishes eligibility and favors discretion.

# *Telling a Good Story*

## **SET UP THE INTERVIEWS**

- Offer options in the physical (virtual) space
- Use open body language
- Offer/take breaks, especially on video
- Make space for self-soothing and grounding
- Be thoughtful about note taking and eye contact
- Silence phones/cell phones
- Use headset for virtual meetings



# *How to Ask the Questions*

Ask concrete, simple, straight-forward questions to understand the story

## **TYPES OF QUESTIONS**

- Compound
- Yes/No; agree/disagree
- Leading

# *Make space for storytelling*



- Explain what you want to know and why.
- Let your client tell their story.
- Ask questions to fill in details.
- Your client may have more to share later if they
  - Remembers it later
  - Feels more comfortable with you
  - Feels more confident about themselves
- Make space for telling more later.
  - “If later on, you think of something more that you want to tell me about this, you can let me know at any time.”

# *Shape the Draft*

**REVIEW,  
REVISE,  
REPEAT**

- Take notes during interviewing
- Incorporate notes into your draft between meetings
- Put the puzzle pieces together, identify what's confusing or missing
- Identify goals for next interview session

# *Organizational Structures*

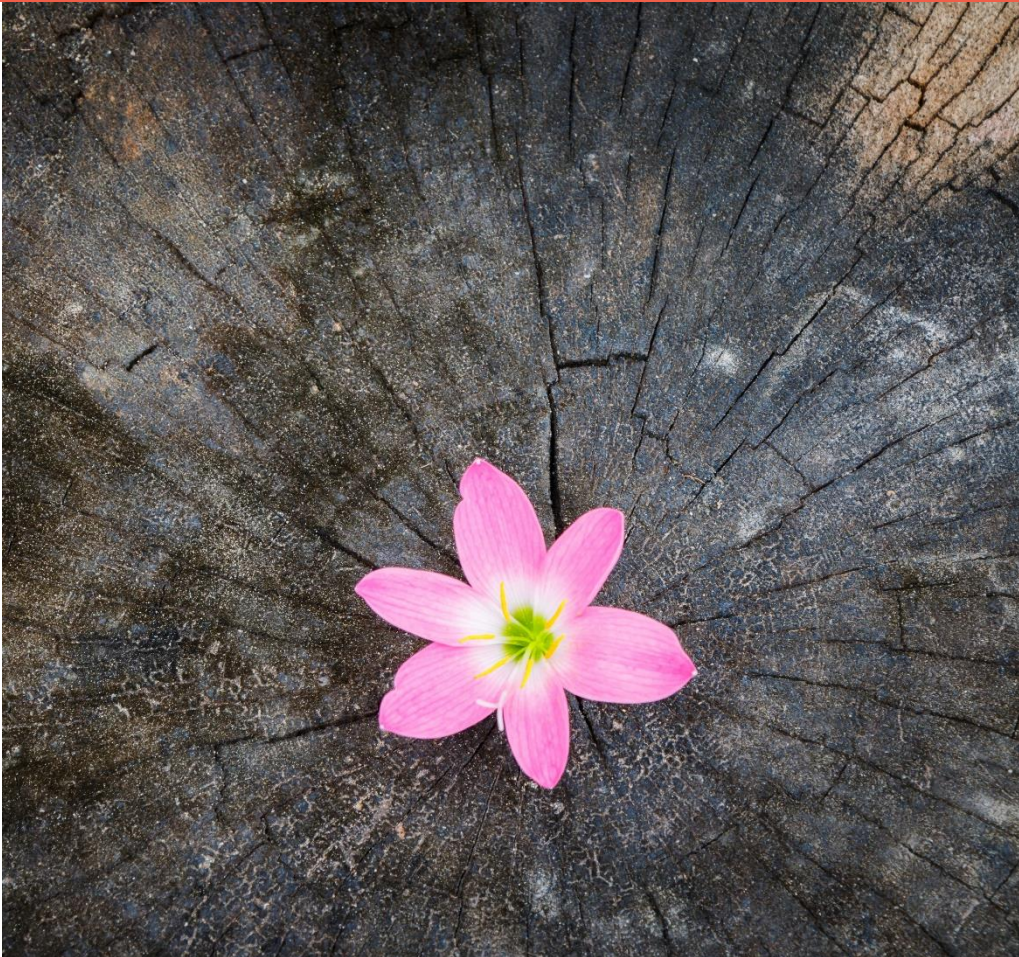
## **CHRONOLOGICAL**

- Introductory Summary
- Linear story including
  - Relevant background, such as PSG acquisition
  - Relevant events (persecution, abuse, qualifying crime)
  - Life in the U.S. (fear of future persecution, discretionary factors)

## **THEMATIC**

- By eligibility element
- For asylum, may organize around themes in persecution

# *Common Challenges*



- Gaps in critical information
- Inconsistencies in declaration
- Finding the right detail level
- “Flat affect” in client voice

# *Challenge: Gaps, Inconsistency*

## **START BROAD, GO NARROW**

- Let your client tell the story initially as it makes sense to them
- Narrow in on questions to refine and fill gaps
- Visual story maps, timelines can help
- Chain in questions (“and then what?”)
- Use milestones to place events (time of year, weather, holidays, pregnancies)
- Interviewing and drafting is the central fact-gathering process.

## **COUCHING LANGUAGE**

- Talk early and often with your client about the importance of being honest, and of acknowledging what is not known or remembered.
- Couch any critical statements in the declaration if the client is not 100% certain. For example: “It’s hard to remember which time because he hit me so often, they blur together in my mind.”



# *Challenge: Detail Level*

## **TOO LITTLE**

Joe beat me many times when he was angry. One time, he came home, called me names and threw hot food at me and burned me.

## **TOO MUCH**

Joe drank and did a lot of drugs. I suspect he smoked marijuana and took cocaine every week. On May 18, 2016, at 6:30 p.m., he came home and entered through the front door. It was a warm day and the dogs were barking outside. I was wearing a green dress and he was wearing jeans and a black T-shirt. I was cooking soup and he came in smelling like whiskey. My stomach knotted as I saw him, and I felt the sweat drip on my brow. He got angry that the soup wasn't ready, called me a stupid lazy b@#%\$, grabbed the pot of chicken soup and threw it at me. I heard the sizzle as it caused third degree burns. I think the alcohol made him angry.



# *Challenge: Detail Level*

When reviewing your drafts and final version, ask yourself what purpose each line serves in establishing your client's eligibility (or favorable exercise of discretion, if applicable). If you can't answer it, it probably should be struck.

## **JUST RIGHT**

Joe was often angry and violent towards me when I didn't do something the way he demanded. I remember one time that was especially bad. I was cooking dinner one spring night, I think in May 2016. Joe came in and demanded dinner. I was worried, because he was very demanding and would get violent when I didn't follow his rules. I told him that I was still finishing the soup, and he blew up at me. I knew he was mad that I didn't do what he demanded because he screamed at me, grabbed the pot off the stove, and called me bad names, like a stupid lazy b\$%^&. The next thing I remember is that he was throwing it at me, and it burned my arm badly.

# Challenge: Flat Affect

## ASK FOLLOW UP QUESTIONS, ASSURE LANGUAGE COMPETENCE

- Trauma survivors may minimize or describe abuse or persecution in relatively “flat” affect – such as saying things like they “felt bad” or describe abuse as “mistreatment.”
- Ask questions different ways to elicit more detailed descriptions of impact of abuse or persecution, or fear
  - What were you thinking about while it was happening? What was going through your mind?
  - Did you feel anything anywhere in your body? What did you feel?
- Recognize interpretation issues. For example “*maltrato*” can mean “mistreatment” or “abuse.”

# *Practice Pointers*

## **DO:**

- Include as much relevant detail of confidence as possible, including dates.
- Include specific, detailed examples of incidents.
- Address adverse factors head on and contextualize.
- Write in client's voice, but with clarity.
- Use numbered paragraphs and bold-face subheadings.
- Include a certified translation.
- Read through finally draft carefully with client before signing.
- Include "sworn under penalty of perjury" language.





# *Practice Pointers*

## **DON'T:**

- Write in legalese or with a voice that isn't the client's.
- Use words the client wouldn't use.
- Include irrelevant information.
- Ignore bad facts.
- Include anything that's not true or doesn't make sense.
- Include detailed information that your client to which your client could not testify.
- Draw legal conclusions.
- Rush the process or underestimate time needed.



# Questions?

## After the webinar, contact

- Your Tahirih mentor attorney
- Kursten Phelps, [kurstenp@tahirih.org](mailto:kurstenp@tahirih.org)
- Richard Caldarone, [richardc@tahirih.org](mailto:richardc@tahirih.org)



# *Register Now*

## Upcoming Monthly Pro Bono Network Webinars

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[A Lawyer's Role in  
Supporting Client Safety](#)

June 17, 2020

[Understanding Waivers and Extreme  
Hardship in Humanitarian Cases](#)

September 16, 2020

[Strategies to Corroborate  
your Client's Testimony](#)

October 21, 2020

[BIA Appeals Fundamentals](#)

July 15, 2020

[Screening for Inadmissibility  
in your Client's Case](#)

August 1, 2020

[Immigrant Visa and  
Derivative Asylee Consular Processing](#)

November 18, 2020

All webinars scheduled  
for 1:30-3 p.m. EST.

[2020 in Review and  
Preparing for 2021](#)

December 16, 2020

# *How You Can Help*

Our work is amplified by the power of many. As Pro Bono Network members, there are many ways to contribute your time, resources, and expertise.

## **CO-COUNSEL**

[Directly represent](#), with Tahirih mentorship, an immigrant survivor in their asylum, VAWA, T, U visa, or Special Immigrant Juvenile Status immigration matters.

## **IMPACT LITIGATION**

[Work with Tahirih](#) on federal litigation, amicus briefs, and other impact litigation opportunities.

## **ADVOCATE**

Respond to our [advocacy alerts](#) to submit comments or engage in other advocacy on behalf of immigrant survivors.

## **RESEARCH**

Help Tahirih with [research](#) and analyze legal questions or research country conditions evidence to help immigrant survivors seeking asylum and other forms of relief.

## **DONATE**

Tahirih's [Client Fund](#) is a pool of money that we may use to provide immediate and critical support to survivors of gender-based violence who are currently in crisis.

## **SPREAD THE WORD**

Encourage a colleague to join Tahirih's [Pro Bono Network](#).



# Contact Us



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