

Understanding Waivers and Extreme Hardship in Humanitarian Cases

Pro Bono Network Webinar
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TAHIRIH
JUSTICE
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Today's Presenters

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Agenda

Welcome Introductions

Legal Updates Regulatory and Case Law Updates

COVID-19 Updates Agency updates

Understanding Waivers and Extreme Hardship

What waivers are available for VAWA, T, U? What are the standards and requirements? What are the mechanics for filing?

Questions

LEGAL UPDATES

Asylum EAD Regulations

As of August 21:

- 30-day deadline for considering EAD applications removed

As of August 25:

- New bars on EADs for EWI, missing 1-year deadline (except UACs), convictions
- 1-year wait, denied if applicant-caused delay when application submitted
- Effective no more than 2 years, terminate upon adverse BIA decision
- Biometrics, no recommended approvals, no return of incomplete applications
- Litigation ongoing

Proposed BIA Changes

Formal end of administrative closure

Restrictions on new evidence

- No new evidence on appeal
- No motions sua sponte reopening
- No remand for new evidence
- Limited-scope remands
- *But* admin notice of current events/gov't websites

Strict timelines

- Max 14-day extension
- Simultaneous briefing

New power to EOIR Director

- To decide cases flagged by IJs
- To decide cases not decided by BIA in 90/180 days

Comments due September 25

Proposed Biometrics Rule

- General rule: "any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with a benefit or other request, including U.S. citizens and without regard to age, must appear for biometrics collection"
- Includes children
- Biometrics = fingerprints, palm prints, photographs, signatures, voice prints, iris images, DNA tests to show familial relationships (including of citizens/LPRs who file family-based petitions)
- Alters "good moral character" test for VAWAs/Ts
- "Continuous vetting" = biometrics from those who have received benefits but are not yet citizens & from those with prior applications that have been reopened or are relevant to new request
- Comments due October 12

Other Regulatory Updates

- Public charge rule cleared to go into effect nationwide
- Final CDC rule: Director has authority to prevent the entry of people from designated countries and parts of countries “for such period of time as the Director deems necessary to avert the serious danger of the introduction of a quarantinable communicable disease”

TPS

***Ramos v. Wolf*, 9th Cir. No. 18-16981**

- Allows termination of TPS for Sudan, Nicaragua, Haiti, El Salvador
- Holds review of APA claim barred by statute, that EP claim does not raise serious questions



ICE Detainers

***Gonzalez v. ICE*, 9th Cir. Nos. 20-55175 & 20-55252**

- Opens door to Fourth Amendment challenges to ICE detainers
- Holds that, as in other contexts, probable cause determinations underlying detainers must be promptly reviewed by independent, neutral official
- "Detaining persons for more than 48 hours" implicates this requirement



Asylum Law Update

***J.R. v. Barr*, 9th Cir. No. 18-72812**

- JR testified against gang who shot him seven times and killed his son
- Salvadoran government protected him through trial but withdrew protection thereafter; gang placed bounty on him, and JR fled
- IJ, BIA held government not unable/unwilling to protect JR
- Ninth Circuit reverses: “[e]ven if the government *could* protect JR and his family, it is undisputed that, after JR finished testifying, it no longer *would* do so.”
- Brief time between withdrawal of protection and flight doesn’t mean claim failed, given evidence of gang's actions more generally

Tahirih Litigation News

A.B.B. v. Morgan (D.D.C.)

- Preliminary injunction issued against use of CBP agents to conduct credible fear interviews
- Violates INA's training requirements
- CBP agents might be categorically unable to act as non-adversarial interviewers

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 October 2. Arlington & Baltimore open San Francisco opening September 28
USCIS	Open
ICE ERO	Telephonic or postponed check ins
State	Post-by-post phased reopening

USCIS Filing Deadlines

60 days for response to notices dated 3/1/2020-1/1/2021

- Request for Evidence;
- Continuation to Request Evidence (N-14);
- Notice of Intent to Deny;
- Notice of Intent to Revoke;
- Notice of Intent to Rescind;
- Notice of Intent to Terminate; and
- Motion to Reopen an N-400 Pursuant to 8 CFR 335.5, Receipt of Derogatory Information After Grant.

60 days to file I-290B

- Motion to reopen, reconsider or appeal of a decision dated between 3/1/2020 and 1/1/2021

UNDERSTANDING WAIVERS AND EXTREME HARDSHIP

Learning Objectives

TODAY'S OBJECTIVES:

- Know how to determine if a waiver is available.
- Identify the requirements for the waiver and the role of discretion.
- Be equipped to prepare a form, cover letter, and supporting evidence for a successful waiver application in your VAWA, T, or U visa case.



Waiver — What is it?

Inadmissibility

- Reason(s) a person otherwise eligible for particular status or relief can be denied status, a visa, or admission.
- Mostly found at INA 212(a)
- Inadmissibility requires an analysis of whether:
 - Conduct triggers inadmissibility ground
 - Any exception or exemption applies
 - Whether a waiver is available

Waiver

- “Forgiveness” for the inadmissibility ground
- Concedes that the inadmissibility ground applies, that there is no applicable exemption or exception, but that the person meets the standard necessary and merits favorable discretion to have the inadmissibility issue “waived” (forgiven).

Is a Waiver Available?

READ THE STATUTE:

- Waivers will be referenced in INA section related to the inadmissibility ground, or refer you to another section
- Remember there may be exception/exemption or waiver.
- There are some general waivers – available to anyone who meets the requirements – and some that are specific, such as those specific to VAWA, T, or U petitioners



Hypothetical - Jane



- You are representing Jane in a VAWA self-petition based on the long-term abuse by her US citizen husband.
- Jane entered the US without inspection 10 years ago. She met her husband after arriving in the US and they had two children together who hold dual citizenship in the US and in Jane's home country.
- Jane's husband coerced Jane into engaging in prostitution during their marriage by engaging in severe economic abuse and pressuring her to bring more money into the home for food for the children.

Hypothetical - Jane



- After six years and a particularly severe incident of abuse, Jane fled to her home country for safety and to plan how to safely leave the relationship with her children.
- While she was away, her husband sued for custody and pressured her to return without inspection and reconcile if she wanted to keep her kids.
- Fearing for her children and her safety, she eventually complied. She was apprehended at the border, order deported via expedited removal. Under pressure and threats from her husband, she continued to attempt to re-enter the US, and successfully entered without inspection or apprehension on the second attempt.

Poll



- Is Jane inadmissible?
- Under what grounds?
- Is Jane eligible for any waivers? Of which grounds?

VAWA Waivers

Ground	VAWA Waiver	Requirement
Communicable Disease	INA §212(g)(1)(C)	Positive discretion
CIMT, Multiple Convictions, Prostitution, Commercialized Vice, Simple Possession <30 g Marijuana	INA §212(h)(1)(C)	Positive Discretion
Material Misrepresentation	INA § 212(i)(1)	Hardship to qualifying relative or self-petitioner
Permanent Bar	INA 212(a)(9)(C)(iii)	connection between the abuse and deportation, departure, reentry, or attempted reentry.

Communicable Disease

General Waiver

- Discretionary for an individual who is the parent, spouse, or unmarried son or daughter of a US citizen, lawful permanent residence or immigrant visa recipient.

VAWA-Specific Waiver

- Applicant is a VAWA self-petitioner
- No qualifying relative requirement

Certain Criminal Grounds

General Waivers

- If only prostitution or commercialized vice because of activities >15 years ago, and if the admission would not be contrary to US welfare or security and person has been rehabilitated OR
- Extreme hardship to the USC or LPR spouse, child or parent **PLUS**
- USCIS or IJ “consent” to apply for visa or admission and
- Has not been convicted or admitted committing murder, torture, or attempt/conspiracy of either and
- LPRs ineligible if aggravated felony or <7 years continuous presence

VAWA-Specific Waiver

- Applicant is a VAWA self-petitioner and
- Has not been convicted or admitted committing murder, torture, or attempt/conspiracy of either and

Fraud or Misrepresentation

General Waiver

- Extreme hardship to USC or LPR spouse or parent

VAWA-Specific Waiver

- Extreme hardship to themselves or to parent or child who is a USC, LPR, or “qualified alien”:
 - Asylee or refugee
 - Paroled into US for at least 1 year
 - Granted withholding of removal
 - Granted conditional entry under former INA 203(a)(7) as it existed before April 1, 1980 or
 - Cuban and Haitian entrants under 8 USC 1641(b)

Unlawful Presence

General Waiver

- Extreme hardship to USC or LPR spouse or parent

No VAWA-Specific Waiver

- But, there is an exception and the 3 and 10 year ULP bar grounds will not apply if
 - Self-petitioner entered before April 1, 1997 or
 - There was a substantial connection between abuse suffered and violation

Permanent Bar

General Waiver

- No general waiver of inadmissibility for re-entering the US without authorization after 1 year of unlawful presence or after being removed

VAWA-Specific Waiver

- VAWA self-petitioner and
- Connection between the abuse self-petitioner experienced and their removal, departure, re-entry, or attempted re-entry

Understanding Hardship

Extreme Hardship

- Generally, no fixed definition, but more than ordinary hardship of separation from loved ones or disruption/separation from the life to which you're accustomed.
- Cumulative assessment, be sure to identify:
 - Medical hardships
 - Loss of special educational opportunities
 - Inability to provide for oneself or family in home country

Extreme Hardship in VAWA cases

- [Virtue 1998 October Memo](#) identifies more specific hardship factors for VAWA cases:
 - Nature and extent of the physical or psychological consequences of abuse
 - Impact of loss of access to US courts and criminal justice system
 - Likelihood that abuser's family, friends or others acting on their behalf would physically or psychologically harm survivor or their child(ren) in home country
 - Needs for social, medical, mental health, or other supportive services in US or applicant (or children)
 - Laws and practices in home country that would punish applicant for experiencing abuse or attempting to leave relationship
 - Abuser's ability to travel to home country and home country's ability and willingness to protect applicant (or children)

All Waivers are Discretionary

Discretion

The authority of USCIS (or immigration judge) to approve or deny a waiver based on whether they deem the applicant to merit or “deserve” the favorable exercise of discretion. Waivers are not guaranteed, even when eligible.

Understanding Discretion

Positive Equities

- Family ties with the U.S.
- Long-term residence in the U.S.
- Hardship if denied
- U.S. military service
- Employment history
- Property or business ties
- Value and service to community
- Genuine rehabilitation
- Good moral character

Adverse Factors

- Underlying circumstances of inadmissibility (or deportability ground)
- Additional significant violations of immigration laws
- Criminal record
- “Bad character” or “undesirability”

VAWA Specific Waivers

Filing to Vermont Service Center:

- G-28 Form
- Fee or Fee Waiver (I-912)
- I-601 Form
- I-212 Form if permanent bar issue
- Evidence addressing inadmissibility ground
- Evidence in support of discretion and any other requirements (such as extreme hardship or connection to abuse)
- Cover letter with legal arguments



Supporting Evidence

Connection to abuse

- Client affidavit
- Supporting affidavits
- Primary evidence where it helps connect the dots
- Dynamics of abuse – think beyond coercion under immediate threat of violence. Was there coercion related to:
 - Access to children
 - Psychological violence
 - Verbal abuse
 - Isolation and minimization

Extreme Hardship

- Client affidavit
- DV advocate, other service provider letters
- Country conditions reports and evidence
 - Treatment of survivors
 - Lack of laws or enforcement of laws related to intimate partner violence
 - Availability of advocacy, shelter, mental health, other supportive services
- Affidavits from children, family members, other relevant persons
- Affidavits and evidence relevant to your client's particular circumstances

Supporting Evidence

Positive Equities

- Birth certificates, other proof of family ties in U.S.
- Proof U.S. military service
- Proof of employment, paid taxes
- Home ownership records
- PTA, church, community group or volunteer services
- Completion of rehabilitation programs
- Clear criminal background checks
- Affidavit of applicant
- Letters of support

Adverse Factors

- Address “bad facts,” mitigating and rehabilitative factors in client affidavit
- Affidavits or letters of support
- Criminal dispositions or records if inadmissibility is related to criminal acts
- If inadmissibility is connected to abuse (for example, due to coercion, pressure, or economic need related to abuse, connect the dots in the affidavit.

U Visa Waivers

Discretionary U visa waivers

- Available for all grounds except Nazi persecution, genocide, or torture or extrajudicial killing [INA § 212(a)(3)(E) under INA § 212(d)(14)]
- Standard = national or public interest



U Visa Waivers

Filing Mechanics for each applicant with inadmissibility:

- G-28 Form
- Fee or Fee Waiver (I-912)
- I-192 Form
- Evidence addressing inadmissibility ground
- Evidence in support of discretion and in the national interest
- Cover letter with legal arguments
- Filed concurrently with I-918 (or I-918A)



U Visa Waivers

Public or National Interest Standard

- Need for protection and services
- Likelihood applicant will be targeted in home country
- Humanitarian Considerations
- Cooperation with law enforcement or criminal system

Supporting Evidence

Positive Equities

- Birth certificates, other proof of family ties in U.S.
- Proof U.S. military service
- Proof of employment, paid taxes
- Home ownership records
- PTA, church, community group or volunteer services
- Completion of rehabilitation programs
- Clear criminal background checks
- Affidavit of applicant
- Letters of support

Adverse Factors

- Address “bad facts,” mitigating and rehabilitative factors in client affidavit
- Affidavits or letters of support
- Criminal dispositions or records if inadmissibility is related to criminal acts
- If inadmissibility is connected to abuse (for example, due to coercion, pressure, or economic need related to abuse, connect the dots in the affidavit.

U Visa Waivers

Practice Pointers

- List all grounds on the I-192. If it's not listed it won't be waived.
 - I-192 approval notices will now list grounds waived. Review carefully.
- Weight of evidentiary record depends on severity of the inadmissibility issues.
- No waivers at adjustment. Make sure to get it waived at the U visa stage.
 - If failed to disclose, file an amended I-192 while U is pending.
 - If new inadmissibility triggered while U is pending, file an amended I-192.
 - If new inadmissibility triggered after U granted but before adjustment, disclose on the adjustment application and argue discretion (with evidence).
- Make your cover letter brief and to the point unless it is a particularly complex legal issue.

T Visa Waivers

Discretionary T visa waivers

- All grounds except security related grounds [INA § 212(a)(3)], international child abduction [INA § 212(a)(10)(C)] and renunciation of citizenship for tax avoidance [INA § 212(a)(10)(E)] under INA § 212(d)(13)
- Standard = National interest plus connection to trafficking victimization (except health grounds)



T Visa Waivers

Filing Mechanics for each applicant with inadmissibility:

- G-28 Form
- Fee or Fee Waiver (I-912)
- I-192 Form
- Evidence addressing inadmissibility ground and connection to trafficking victimization
- Evidence in support of discretion and in the national interest
- Cover letter with legal arguments
- Filed concurrently with I-914 (or I-914A)



T Adjustment Waivers

Filing Mechanics at adjustment:

- G-28 Form
- Fee or Fee Waiver (I-912)
- I-601 Form
- Evidence addressing inadmissibility ground and connection to trafficking victimization
- Evidence in support of discretion and in the national interest
- Cover letter with legal arguments
- Filed concurrently with I-485



Supporting Evidence

National Interest

- Need for protection and services
- Likelihood applicant will be targeted in home
- country
- Humanitarian Considerations
- Cooperation with law enforcement or criminal system

Connection to Trafficking

- Coercion or threat by trafficker
- Activities directly related to trafficking
- Client affidavit
- Any affidavits of witnesses
- Police reports or statements
- Therapists or advocate reports

Supporting Evidence

Positive Equities

- Birth certificates, other proof of family ties in U.S.
- Proof U.S. military service
- Proof of employment, paid taxes
- Home ownership records
- PTA, church, community group or volunteer services
- Completion of rehabilitation programs
- Clear criminal background checks
- Affidavit of applicant
- Letters of support

Adverse Factors

- Address “bad facts,” mitigating and rehabilitative factors in client affidavit
- Affidavits or letters of support
- Criminal dispositions or records if inadmissibility is related to criminal acts
- If inadmissibility is connected to abuse (for example, due to coercion, pressure, or economic need related to abuse, connect the dots in the affidavit.

T Visa Waivers

Practice Pointers

- Waive everything at the T visa stage. List all grounds on the I-192. If it's not listed it won't be waived.
 - I-192 approval notices will now list grounds waived. Review carefully.
- Weight of evidentiary record depends on severity of the inadmissibility issues.
- Waivers are available at the adjustment stage; do not need to “re-waive” grounds waived by the I-192.
- Make your cover letter brief and to the point unless it is a particularly complex legal issue.

Questions?

After the webinar, contact

- Your Tahirih mentor attorney
- Kursten Phelps, kurstenp@tahirih.org



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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