

# Strategies to Corroborate your Client's Claim

Pro Bono Network Webinar  
October 21, 2020



TAHIRIH  
JUSTICE  
CENTER®



# *Today's Presenters*

## **Tahirih National Office**

**Richard Caldarone**  
Litigation Counsel

## **Tahirih San Francisco Bay Area Office**

**Morgan Weibel**  
Executive Director

# *Agenda*

**Welcome** Introductions

**COVID-19 Updates** Agency updates, guidance, practice tips

**Other Legal Updates** Case law, administrative, litigation

**U visa, T visa, and VAWA Petition Evidence**

**Asylum Evidence**

**Questions**

# *Learning Objectives*

## **TODAY'S OBJECTIVES:**

- Informed of recent changes that may impact strategy
- Enhanced knowledge of evidentiary standards
- Ability to think creatively about evidence



# 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	Arlington, Atlanta, Baltimore, San Francisco <b>open</b> ; Houston <b>open for filings only</b>
USCIS	Open
ICE ERO	Mostly telephonic or suspended; varies by office
State	Phased re-opening by post

# OTHER LEGAL UPDATES

# *Final Asylum Bar Rule*

## **Categorical bar to asylum for those convicted of:**

- Any state or federal felony
- Person smuggling (8 U.S.C. 1324(a)(1)(A) & (a)(2))
- Illegal reentry
- Any crime involving "criminal street gang activity"
- Certain DUI offenses
- Many misdemeanors involving false IDs, drug possession, unlawful receipt of public benefits
- Any DV/child abuse offenses (except non-primary perpetrators under 8 U.S.C. 1227(a)(7)(A))
- Prospective only: Applications submitted after, and convictions incurred after, 11/20/2020



# *Final Asylum Bar Rule*

- Categorical bar on asylum if AO/IJ "knows or has reason to believe" the individual engaged in battery or extreme cruelty after November 20, 2020 (again with non-primary perpetrator exception)
- Convictions/sentences that are vacated/expunged/modified for rehabilitative or immigration purposes still count
  - Presumptively for immigration purposes if change made after removal proceedings start and/or more than 1 year after conviction
- No more automatic reconsideration of asylum denials made on discretionary grounds where applicant granted withholding of removal

# *Interim Final Rule on Translator*

- Through March 21, 2021, asylum applicants may not bring an in-person translator to affirmative asylum interviews with USCIS; must use telephonic translator
- Any specific requests would presumably have to be made to AO
- Note that must answer COVID-related questions to access USCIS offices for the interview

# *Another Proposed EOIR NPRM*

- Individuals in asylum-and-withholding only proceedings (which might include everyone who passes a CFI) must submit asylum application within 15 days after first hearing
- Would repeal regulation treating applications as complete if not returned within 30 days
- New 30-day deadline for resubmitting applications returned as incomplete
- Continuances not granted beyond 180 days after application filed absent battery/extreme cruelty, serious illness, or death of applicant or immediate family member
- Any fee must be paid in full when application submitted
- IJs may submit evidence into the record
- Only U.S. government reports presumed to be credible and persuasive
- Comments due this Friday, [October 23](#)

# *NPRM on Limited-Scope Representation*

- Would allow representation limited to individual documents/pleadings if disclosed on EOIR notice of appearance form
- Form would require, among other things, description of work done, fees charged, and certification that client understands limited scope
- Would *not* expand limited in-person representation; still only bond or custody hearings
- Would *not* expand access to the record of proceedings
- Comments due October 30

# *Status Updates*

- Expanded expedited removal is now in effect
- USCIS fee rule is currently enjoined by two different district courts

# Supreme Court Update

## Recent cert. grants

- *Wolf v. Innovation Law Lab*, No. 19-1212 (Remain in Mexico)
- *Trump v. Sierra Club*, No. 20-138 (border wall)
- *Barr v. Dai*, No. 19-1155, and *Barr v. Alcaraz-Enriquez*, No. 19-1156 (credibility)
- All to be argued in Q1 of 2021 with decisions by June (absent intervening events that moot the disputes)



# *The Courts of Appeals*

## ***Velasquez-Gaspar v. Barr* (9th Cir. No. 17-71964)**

- Upholds denial on unable/unwilling grounds
- Panel defers to issuance of restraining orders, existence of shelters, despite huge problems
- Suggests that DOS reports trump all else

## ***Hernandez-Cartagena v. Barr* (4th Cir. No. 19-1823)**

- Family PSG, reverses finding of no nexus to gang violence
- BIA held that individual, rather than family, targeted
- But BIA ignored repeated statements that extortion was of parents' money, asylum seeker contacted to communicate threats to parents

# *Attorney General Opinion*

## ***Matter of A-C-A-A-, 28 I. & N. Dec. 84 (AG 2020)***

- Treats nexus as subject to special scrutiny where PSGs large
- Likely to be read as imposing requirement that persecutor have targeted others in the PSG
- Casts doubt on gender + nationality PSGs
- Before granting relief, BIA must consider every element of a claim, even those not contested
- But BIA should confine itself to dispositive elements where denying relief



## ***Matter of J-G-T*, 28 I. & N. Dec. 97 (BIA 2020)**

- Governs expert testimony in immigration court
- *Daubert*-lite
  - Admissibility and weight two-step
  - Almost everything goes to weight (whether probative and persuasive)
  - Expert must attach CV
  - Must be given opportunity to cross-examine expert on qualifications
- DOS reports again treated as "especially important"

# **STRATEGIES TO CORROBORATE YOUR CLIENT'S CLAIM**

# *Any Credible Evidence*

## **Applies to U visas, T visas, and VAWA petitions**

- Burden of proof is a preponderance of the evidence
- Standard of evidence is “any credible evidence,” an intentionally lower threshold that USCIS must consider any credible evidence.
- Promulgated by Congress with the knowledge that survivors of domestic and sexual violence, among other trauma survivors, may not have access to traditional sources of primary evidence

# *U Visa Evidence*

## **Elements:**

- Qualifying criminal activity in US
- Helpful to law enforcement official
- Suffered substantial physical or mental abuse
- Admissible or obtain waiver



# *Client Declaration*

- Purpose = humanize your client and allow her to tell her story to an adjudicator in her own words
- Capture the client's voice, this should not be a “lawyered” document
- Details = Credibility
- Create an emotional document; Elicit how she “felt” not just what happened
- Ensure that all elements of the form of relief are addressed and that all corroborating evidence discussed in the declaration is provided for in the application (or its unavailability is explained)
- Use the declaration to explain adverse factors

# *Qualifying Crime & Helpfulness*

## **Reports/Records:**

- Police report
- Arrest warrant
- Court disposition
- Copy of criminal statute

## **Certification:**

- Signed by head of agency or designated certifier
- Expires six months after date of signature.

# *Substantial Abuse*

- Medical records
- Photographs of injuries
- Protective order
- Supporting letters, affidavits or declarations from:
  - Witnesses
  - Counselors or therapists
  - Shelter workers or victim advocates
  - Friends and relatives
  - Clergy
- Text messages, voicemails, emails
- Hospital/medical records

# *T Visa Evidence*

## **Elements:**

- Human Trafficking survivor
- Helpful to law enforcement official  
\*(trauma exception)
- Will suffer extreme hardship if removed from U.S.
- Admissible or obtain waiver





# Evidence of Trafficking

## Federal Definition of Human Trafficking



Credit: Polaris Project available at <https://humantraffickinghotline.org/sites/default/files/HT%20Power%20Control%20Wheel%20NEW.pdf>.

This wheel was adapted from the Domestic Abuse Intervention Project's Duluth Model Power and Control Wheel, available at [www.theduluthmodel.org](http://www.theduluthmodel.org)

# *Evidence of LE Assistance*

## Primary Evidence:

- Signed Form I-914, Supplement B, Declaration of Law Enforcement Officer from federal law enforcement (DOJ, FBI, ICE)
- Continuous Presence

## Secondary Evidence:

- Applicant's statement explaining efforts to cooperate
- Letters or other correspondence detailing efforts to obtain I-914B or client's cooperation
- letter from local law enforcement

**\*Applicants under 18 and those unable to cooperate due to physical or psychological trauma are exempt from this requirement**

# *Evidence of Extreme Hardship*

Focus on the victim's age and personal circumstances, including:

- Services she receives in the US (mental health, medical) that would not be available in the home country
- Likelihood that trafficker would retaliate
- Need for access to justice in US courts
- Likelihood of re-victimization or penalization of victim in home country

Corroborate with evidence of country conditions

NOT economic harm/lack of opportunity

# *Waivers Evidence*

## **Elements:**

- Grounds of inadmissibility are found at INA § 212 (a)
- Waiver authorized under INA § 212(d)(14) and is discretionary if USCIS determines it is in the public or national interest



# *Waiver Evidence*

- Explain the “bad” facts in client declaration
- Provide any primary evidence related to the acts, such as arrest reports, court dispositions
- Address mitigating factors in declaration
- Provide evidence of positive equities

USC children’s birth certificates, school records

Tax returns

# *VAWA Evidence*

## **Elements:**

- Abuser = US Citizen or LPR
- Good Faith Marriage
- Shared Residence
- Battery or Extreme Cruelty
- Good Moral Character





# *Establishing Abuser Status*

- Birth certificate
- US passport
- Other immigration documentation (I-94 card, green card, naturalization certificate)
- Other official documents (Social Security card, voting reg., check stubs with SS#, etc.)
- Voter records
- Financial, medical, insurance, court, or other records that show status or place of birth
- As last resort, a detailed affidavit of petitioner and request verification by DHS
  - In cover letter, cite to 8 CFR §103.2(b)(17)(ii)

# *Good Faith Marriage Evidence*

- Marriage certificate
- Wedding invitation and photos
- Children-in-common's birth certificates
- Affidavits or letters from friends and family about courtship and marriage
- Correspondence jointly addressed to couple
- Letters, cards, emails, texts sent from one spouse to the other
- Joint mortgage or lease
- Joint insurance policies
- Joint bills
- Joint tax returns



# *Establishing Shared Residence*

- Much of the same evidence used to demonstrate a good faith marriage can establish shared residence
  - Rental leases or titles to a home
  - Joint tax returns, bills, bank accounts, etc.
  - Letters, cards, emails, showing a joint residence
  - Affidavit of petitioner
  - Affidavits of neighbors and others who visited the couple in the shared home

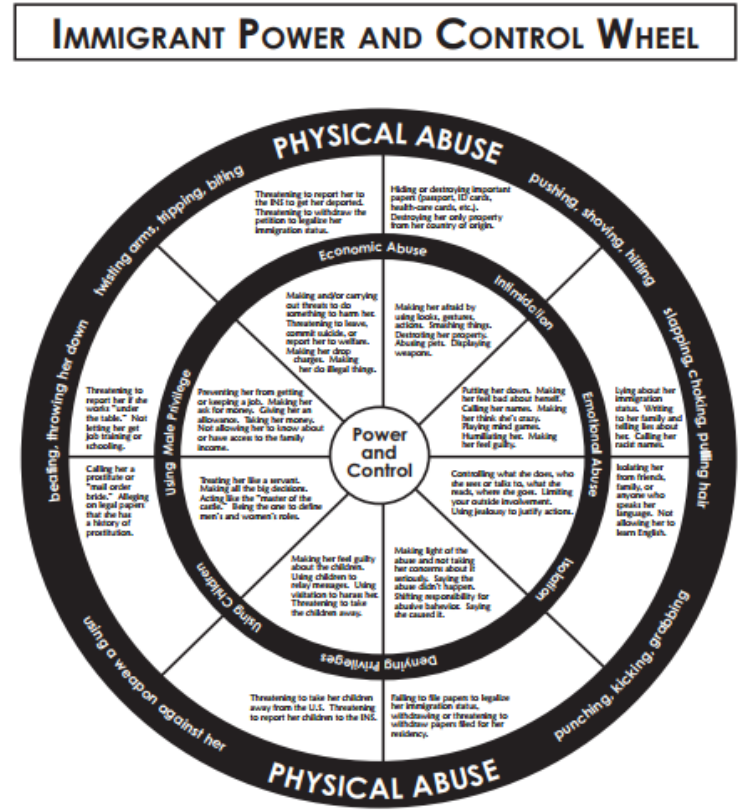
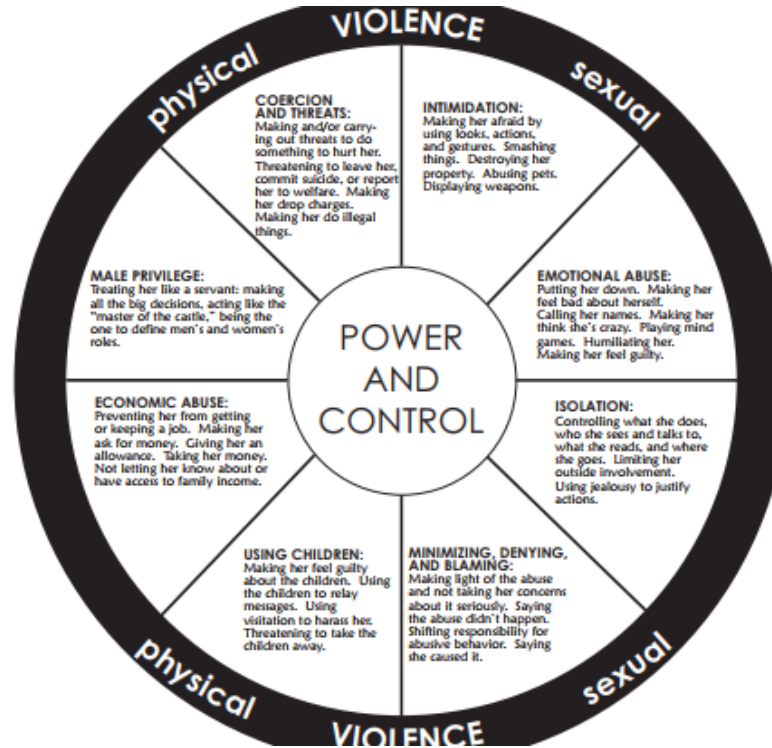
# *Battery/Cruelty Evidence*

- Declaration of applicant
- Photographs of injuries or damaged property
- Affidavit of others who saw/heard abuse
- Criminal court records if abuser was arrested or convicted
- Restraining, stay away, or exclusion orders, plus accompanying documents
- Domestic violence shelter record or affidavit
- Police reports/affidavit of police officer(s)
- Medical records, even if self-petitioner's behavior is related to abuse
- Letter/notes from abuser and/or abuser's history of drug/alcohol abuse

# Battery/Cruelty Evidence

## Tips:

- Don't overthink it, look to 8 CFR 204.2(c)
- Use the Domestic Violence Power and Control Wheel to unpack dynamics and tactics in affidavits



# *Good Moral Character Evidence*

- Tax returns
- Employer letters
- School records
- Letters from faith community, friends, neighbors, community members

# *GMC: What to focus on*

If you were describing why your friend was a person of good moral character, what would you point to?

- Lack of criminal history
- Employment
- Caretaker and involvement in children's schools
- Faith community involvement
- Volunteer service
- Paying taxes
- Helping friends and family

# *Asylum Evidence*



## **Elements:**

- Persecution (Past or subjective/objective future fear)
- Nexus to a Protected Ground
- Failure of State Protection
- No bars to eligibility apply & discretion warranted

# *Burdens of Proof*

- Applicant bears the burden of proof to establish asylum eligibility.
- Asylum officer has an affirmative duty to elicit sufficient information and research country conditions to evaluate eligibility.
- Applicant must establish by a preponderance of the evidence that the ground for mandatory denial does not apply.
- There are shifting burdens of proof:
  - Past Persecution Established then burden shifts to DHS to prove changed circumstances or reasonable internal relocation alternative
  - If persecutor is government, then burden shifts to DHS to prove by preponderance of evidence that internal relocation is reasonable

# *Standards of Proof*

## **Preponderance of the Evidence:**

- More than 50% chance
- Quality over quantity
- Ex: Well Founded Fear = reasonable possibility of persecution

## **Clear and Convincing Evidence:**

- Higher than Preponderance
- Lower than beyond a reasonable doubt
- Ex: Application filed within 1 year of last entry into U.S.



# *REAL ID Act of 2005*

- Testimony that is “credible, persuasive, and ... specific” can satisfy applicant’s burden of proof without corroboration. Sub-section 208(b)(1)(B)(iii) of the INA added by the REAL ID Act addresses only the first prong of this test.
- Supporting evidence, (general country conditions and of the specific facts) must be presented or it’s unavailability explained.
- Applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant.

# *Evidence of Past Persecution*

- Hospital Records
- Death threats
- Photos of injuries
- Forensic/Psychological evaluation
- Letters from eyewitnesses (friends, family, neighbors)
- Newspaper articles
- Police reports (be ready to explain this in terms of failure of state protection)

# *Proving Subjective Fear*

- Your client's written declaration
- Your client's live testimony in the asylum office or on direct examination in court
- Letters/affidavits from friends, family, etc, relating that your client expressed fear/manifests fear to that person
- Psychological evaluation
- Letter from therapists or other service providers

# *Proving Objective Fear*

- Country conditions research:
  - Reports show that other similarly situated individuals have been persecuted and have not received protection from country of origin
- Expert – anthropologist, sociologist, or someone who has spent significant time in that country/culture.

# *Nexus (Motivation) Evidence*

## **Motivation:**

- Persecutor's own words
- Consider chronology (cause and effect)

## **Use of an expert witness to address nexus:**

- Help explain patterns and dynamics in a specialized area
- Ex: Nancy Lemmon's affidavit on domestic violence

# *Protected Ground: PSG Evidence*

## **Country Conditions & Expert Witnesses should address:**

- Amidst generalized violence, must be disparate treatment of group
- Religious, social, economic, cultural, or legal barriers to changing characteristic (e.g. marital status)
- Cultural or societal views towards group (e.g. patriarchal norms viewing women as subordinate to men)
- Police refusal to intervene because of group status
- Laws/policies defining terms or other commonly accepted definitions of terms in society (e.g. domestic partner)\*
- Laws/policies/specialized units directed at group members (e.g. law against femicide)

# *Failure of State Protection*

- Failure to respond to requests for help
- Evidence of discrimination or adherence to prevailing cultural norms
- Failure to implement protective laws
- Inability/unwillingness to confront gangs, no real authority in gang territory
- Unenforceability of laws
- Low prosecution rates
- Low reporting rates (lack of confidence in system)
- Futility-consider applicant's access to state protection (rural areas, or gang-dominated regions)
  - Stories from similarly situated women as a deterrent (e.g. "my neighbor called the police, her husband was not arrested, and he then beat her worse)

# *Evidence for Discretion*

Only the most egregious factors should outweigh risk of persecution.  
*Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987)

Explore positive equities:

- Is your client volunteering?
- Does she have children – include their school records?
- Does your client have any medical condition? Do her children?
- In what other way is your client *deserving* of asylum?



# *Questions?*

## **After the webinar, contact**

- Your Tahirih mentor attorney
- [Justice@tahirih.org](mailto:Justice@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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