

Representing Survivors in EOIR & Federal Court

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Poll

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- I represent or have represented Us, VAWAs or Ts in EOIR
- I have never represented survivors in EOIR
- I have denied pleadings or otherwise challenged removability at a master calendar hearing

Getting OUT of Removal Proceedings



Termination or Admin Closure?

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- Not so much
 - *Matter of Castro-Tum*
 - *Matter of SOG and FDB*
- Beware of IJs attempts to delegitimize ICE internal guidance
- What's left if no termination or admin closure?

Challenging the NTA

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Look for defects in the NTA. Does it comply with INA 239 and 8 CFR 239?

□ Is the correct person named as the subject?

□ Are factual allegations correct?

□ Is the charge of removal correct?

Can the govt prove it?

□ Is the date and time of hearing included? (Pereira)

□ Was it signed by the right person – see 8 CFR §239.1(a)?

Immigration and Naturalization Service **Notice to Appear**

In removal proceedings under section 240 of the Immigration and Nationality Act:

File No: _____

In the Matter of: _____

Respondent: _____ currently residing at: _____
(Number, street, city, state and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☒ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that:

1) You are not a citizen or national of the United States.

2) You are a native of _____ and a citizen of _____.

3) You were admitted to the United States at _____ on or about _____ as a nonimmigrant _____ with authorization to remain in the United States for a temporary period not to exceed _____.

4) You remained in the United States beyond _____ without authorization.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237 (a) (1) (B) of the Immigration and Nationality Act (Act), as amended, in that after admission as a nonimmigrant under Section 101(a) (15) of the Act, you have remained in the United States for a time longer than permitted.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(c)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

(Complete Address of Immigration Court, including Room Number, if any)

on _____ at _____ to show why you should not be removed from the United States based on
(Date) (Time) the charge(s) set forth above.

(Signature and Title of Issuing Official)

Date: _____ (City and State)

See reverse for important information

Form I-462 (Rev. 3/22/94) [X]

Challenging the NTA

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Proper Service?

- ❑ In person to respondent or counsel OR by mail, if personal service “not practicable” INA §239(a)(1)
- ❑ Presumption that if mailed, then received (*Matter of M-D*, 12 I&N Dec. 540 (BIA 2002))
- ❑ Extra reqts for minors and respondents without legal capacity
 - ❑ *Matter of M-A-M-*
 - ❑ 8 CFR 103.5a(c)

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DNS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

Before: _____ (Signature of Respondent)

Date: _____

(Signature and Title of INS Officer)

Certificate of Service

This Notice To Appear was served on the respondent by me on _____, in the following manner and in compliance with section 239(a)(1)(F) of the Act:

(Date)

☐ in person ☐ by certified mail, return receipt requested ☒ by regular mail

☐ Attached is a credible fear worksheet.

☒ Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of Respondent if Personally Served)

(Signature and Title of Officer)

Suppression

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- No exclusionary rule, BUT egregious 4th Amendment violations = 5th Amendment Due Process violation
 - *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980)
- Regulatory and statutory violations that cause prejudice
- Analyze circumstances of arrest
- Suppression steps:
 - Deny factual allegations and charges
 - Put arguments in writing
 - Motion to Suppress Evidence and Terminate Removal Proceedings
 - Ask for a hearing on the issue

Location Prohibition – 239(e)

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ICE MUST certify for every NTA

- Did not violate 8 USC 1367 when arrests survivor at DV shelter, rape crisis center, supervised visitation center, family justice center, victim services provider, or community-based organization

8 USC 1367

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- No federal employee may rely solely on information from perpetrator or relatives to make decisions about admissibility/deportability
- Sanctions include \$5,000 penalty

8 USC 1367 Challenges to Removal

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- NTA is deficient if no certification- move to terminate
- Congressional intent - burden on ICE to show no 8 USC 1367 violation, i.e., didn't get info from perp
- Fruit of the poisonous tree argument re: "solely"
- IJ subject to sanctions if doesn't ensure evidence does not violate 8 USC 1367

Example

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- Picked up at courthouse while seeking protection order for DV against self and child
- NTA charges present without admission or parole
- Any more facts you need?
- 239(e) violation?
- Big 8 USC 1367 violation?
- That \$5,000 sanction. . .

Challenging Removability

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- NTA violates
 - 239(e)
 - 8 USC 1367
- Special VAWA argument
 - 212(a)(6)(A) exception
 - 101(a)(51) definition of VAWA self-petitioner

Special VAWA Challenge

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212(a)(6)(A) VAWA *exception*

- Is a “VAWA self-petitioner”
- Suffered battery/extreme cruelty or child suffered
- Substantial connection between B/EC and unlawful entry
- “VAWA self-petitioner” includes survivors presenting DV based Conditional Residency waivers

Helping Clients in Proceedings



Poll

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In the last 6 months I have requested case placement on the Status Docket?

- Yes
- No
- What is a Status Docket?

Status Docket?

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- What is it?
 - Court tracks cases where Respondent pursuing relief not before the court (VAWA, U, T, etc)
 - Counted differently towards case completion metrics so IJs feel less pressure to resolve
- Why ask for it?
 - For non-U applicants, L-A-B-R- makes continuances more difficult
 - IJ's feeling great pressure to move cases forward
- Talk to local practitioners
 - only works in a court that actually has a status docket

Continuances for collateral relief post *Matter of L-A-B-R*

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- L-A-B-R specifies factors an IJ must consider when evaluating whether “good cause” exists to continue
- Two primary factors
 1. likelihood the respondent will receive the collateral relief sought
 2. whether relief will materially affect the outcome of the proceedings
- Other factors
 1. R’s diligence in seeking relief
 2. DHS’s position on the motion – but not dispositive!
 3. administrative efficiency
 4. the length of continuance requested
 5. the number of hearings held and continuances granted previously
 6. the timing of the continuance motion.

Continuance Practice Tips

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- Make the request even when you don't think you'll get it
- Don't do this orally, put your arguments in writing
- File it on time (10-days out)
- Attach receipt notice and excerpts of relief application
 - But do so thoughtfully
- Create solid basis for appeal
- See sample motions and CLINIC practice advisory in materials

T visas in proceedings

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- Bona Fide determination automatically stays final order of removal – 8 CFR 214.11(e)(3)
- Administrative closure remains viable post Castro-Tum – 8 CFR 1214.2(a).
- Push back on DHS argument that a respondent can take voluntary departure and wait it out in Mexico
 - T requires presence on account of trafficking
 - stress irreparable harm if removed due to physical presence requirement

POLL



- I have successfully argued Sanchez-Sosa to obtain a continuance from IJ
- I have successfully argued S-S at the BIA
- The IJ denied my continuance despite my S-S argument
- The BIA denied my continuance despite S-S
- I have not yet argued S-S

ICE prima facie memos: POLL

- ICE has asked VSC for prima facie for my Us in proceedings
- ICE has refused to ask VSC for a PF determination
- I haven't asked ICE because I haven't needed PF
- I haven't asked ICE but I will from now on

The “Protective Web”

- ICE memoranda plus Sanchez-Sosa
 - Prima facie system for stays, detention, cases in removal
 - ICE asks VSC
 - VSC is part of DHS/DOJ best equipped to determine eligibility
 - Prima facie system in EOIR = Sanchez-Sosa
 - 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 PF system to deter U removals by ICE
- The web ensures Congressional goals
 - Encourage those who fear removal to access our criminal system
 - And help LEOs work with those who fear contacting them
 - Deporting those who help LEOs thwarts these goals

S-S 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
- PF 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 PF or
 - Make offer of proof for PF (next slide)
- Reason for continuance = delay is caused by USCIS not client
 - Some IJs are denying despite lack of client control; avoid client-generated delays
 - aggressively challenge/appeal these denials

Proffering PF factors

- Harm resulting from qualifying crime?
 - Certification; client declaration; corroboration by crime victim counsellors
- 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

Litigating Sanchez-Sosa

- Cases in several circuits
- Amicus briefs articulating history and context of the law
 - U visa is part of a larger Congressional scheme =
 - Holding crime perpetrators accountable by
 - Ensuring everyone feels safe seeking justice
 - Reason for protective web against removal
 - Deporting crime victims before USCIS has decided their cases =
 - Discourages crime survivors and provides weapon of control to abusers and perpetrators

VAWA Motions to Reopen

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Normal restrictions on motions do not apply if:

- Supply self-petition (for adjustment)
 - AWA cancellation/suspension 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

Federal Court Issue?

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- How many of you would like to litigate
 - Swifter work authorization?
 - Draconian fee waiver denials?
 - Possible NTAs if/when they start issuing?
 - OPEN ENDED: What else needs litigating for Us and VAWAs?

Hot Topics in U/VAWA Litigation

- Ensuring swift work authorization
 - Bona fide language never implemented
 - General delay arguments
 - Current, multiple efforts
- Fee waiver denials = heightened standard despite Congressional mandate for fee waivers and “any credible evidence” standard
- Prospective NTAs = designed to discourage crime victims applicants?

BRAD & LAUREN

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- How did you decide what to file where?
- What did you learn from this?
- Tips from you as experienced litigator?

Work with ASISTA to litigate change!

- U/VAWA litigation list serve
 - Share strategies, issues needing litigating, find mentors
- Sejal Zota = ASISTA Impact Litigation Campaign consultant
 - Coordinating your work with national advocacy and grassroots efforts
- Amicus briefs featuring DV/SA, LEOs
- Litigation mentoring and training for those new to federal court

Q & A

