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# IMMIGRATION LAW CONFERENCE

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## Off the Beaten Path: When Us, Ts & VAWAs Go Off Course

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#ImmigrationLaw #FBA

# Goals

By participating in this session, you will be better able to:

- ❑ Identify current challenges in presenting and preserving Us, Ts & VAWA applications
- ❑ Fashion strategies for meeting those challenges
- ❑ Explore best practices for overcoming RFEs, NOIDs, Denials



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# Poll

Have you represented a client in a VAWA, U or T case?

➤ Yes

➤ No



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# Overview: Burden & Standard of Proof

- Burden is on the applicant to establish eligibility
  - Use “any credible evidence” to meet burden
- A Preponderance of the Evidence is necessary
  - More than 50% (or at least 51%)



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# 8 USC 1367 Confidentiality

➤ Allows victims to confidentially file for immigration relief

➤ Applies to

- VAWA Self-Petitions
- Battered Spouse Waivers
- VAWA Cancellation/Suspension
- Other VAWA Categories
  - VAWA Cuban Adjustment Applicants
  - VAWA HRIFA Protections
  - VAWA NACARA Protections
  - VAWA EAD Protections for A, E-3, G & H Visa Holders
- T Visas
- U Visas



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# RFEs & NOIDs



# RFE and NOID Guidance

- ❑ Issued July 13, 2018, went into effect Sept. 11, 2018
- ❑ Adjudicators: full discretion to deny application without RFE or NOID if:
  - ❑ Lack of sufficient initial evidence
  - ❑ When applicant has no basis for benefit sought
- ❑ Intended to discourage frivolous or placeholder filings, but has had chilling effect



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# Preventing Outright Denials

- Present a road map
  - Credible evidence included meets eligibility burden
  - Evidence has met preponderance standard
- Explain lack of primary evidence
- Address negative factors upfront
  - Link to victimization if appropriate
- Lay out positive factors and 3 Rs
  - Responsibility, Remorse, Rehabilitation



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# Practice Pointer

- Always read form instructions and check statute & regulations (“initial evidence” in regs)
- Review checklists ([USCIS website - form page](#))
  - Checklists do not supplant instructions, regs, or statutes



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# Discussion

- What was the most recent RFE, NOID or NOIR you received?
- How did you respond?
- What was the outcome?



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# VAWA RFE & NOID Examples

- Extreme cruelty –the abuse is simply “marital disagreements” or witness affidavits are insufficient to meet burden
- Good Faith marriage – requests “progression of the relationship”
- Abuse or GFM – contradictory info in USCIS file from abuser’s social media posts



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# U Visa RFE & NOID Examples

- For client with prior arrest, request for Police report and NOID if no police report provided
- Erroneous allegation of gang affiliation or criminal history (e.g. same name or wrong info on FBI check)
- Petitioner is not a "victim"
- No qualifying crime
  - aggravated robbery
  - protective order violation



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# T Visa RFE & NOID Examples

- Presence “on account of the trafficking”
- Victim of smuggling, sexual assault or violence, not trafficking
- Applicant placed herself in a dangerous situation & not a victim of trafficking



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# How to Respond

- Always respond timely to RFE or NOID
  - ❑ Even if you feel request is clearly erroneous
  
- Ask for Supervisory Review
  
- Supply additional credible evidence
  - ❑ Or explain why no additional evidence available



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# How to Respond

- Clarify USCIS misinterpretation of facts or alleged inconsistencies
- Resubmit evidence not considered by adjudicator and explain relevance
- Review legal standard applied by USCIS – is it accurate?
  - ☐ Has USCIS followed its regs/policies?
  - ☐ Is there relevant case law (or unpublished AAO decision)?



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# Police Reports





# Poll

When USCIS requests a police report for my client, I will:

Submit it

Withhold it

Depends

USCIS has not asked for a police report



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# The Problem

- ❑ USCIS is requesting police reports if client was ever arrested or charged with crime, regardless of whether convicted
- ❑ Purpose: affects discretionary analysis
- ❑ Darned if you do, darned if you don't

# Arguments for Withholding

- Uncorroborated police reports inherently unreliable  
If withholding, don't provide corroboration
- Outside Record of Conviction
- Can be very prejudicial
- But, USCIS may consider withholding of police report as negative discretionary factor

# Arguments for Submitting

- Some police reports not that bad, may be consistent with your client's version of events
- Stronger argument for exercise of discretion  
Client can show 3 Rs: Responsibility, Remorse, Rehabilitation



# Discretionary Issues at Adjustment

# Poll

In the last year, VSC has RFE'd a U visa adjustment on discretion where all negative discretionary factors were disclosed and addressed prior to the U visa grant.

➤ Yes

➤ No



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# The Problem

- VSC issuing RFEs for criminal history docs and positive equities at U AOS even where prior arrest/conviction previously disclosed, addressed, and waived on I-192
- U AOS is discretionary
  - “Justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest”



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# Best Practices

- Argue waiver standard for 212(d)(14) (“public or national interest”) is stricter than 245(m)(1)(B) standard
  - Arbitrary and capricious to grant discretionary waiver under stricter standard and then deny under more generous standard
- Congressional purpose behind U visa was to provide safety and security to cooperating victims
- Provide evidence of rehabilitation, positive contributions to community
  - Long term employment, helpfulness to neighbors, civic engagement



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# NOIR & Revocations



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# Automatic Revocation

- VAWA, 8 CFR205.1(a)(3)(i)(E) – remarriage
- U visa, 8 CFR 214.14(h)(1) – will not use the petition/apply for admission
- T visa, 8 CFR 214.11(m) - will not use the petition/apply for admission



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# Revocation on Notice - VAWA

## 8 CFR 205.2

- For any reason other than automatic revocation grounds
- Must be given time to rebut
- Examples – invalid marriage; statutory bar to GMC discovered at AOS; fraud



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# Revocation on Notice – U Visa

8 CFR 214.14(h)(2)

- Certifier withdraws the certification or disavows the contents in writing
- Approval of the petition was in error
- There was fraud in the petition
- For derivative cases – the relationship to the principal was terminated or the U-1 status was revoked.



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# Revocation on Notice – T Visa

8 CFR 214.11(m)(2)

- Application violated T statute or regs
- Application involved error in preparation, procedure, or adjudication
- For derivative spouse (T-2), if there is a final divorce
- LEA reports T-1 has refused to cooperate
- LEA withdraws or disavows contents of certification



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# Responding to NOIR

- Does the evidence you have support your claim to oppose revocation?
- Are allegations of fraud or non-cooperation wrong? Is there a way to rebut these allegations? For T case, can you cite an exception to the cooperation – was the request unreasonable? Are there trauma issues from the trafficking?
- Is the NOIR legally incorrect? Is it factually incorrect?



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# Overcoming a Denial



# Administrative Appeals & Motions

- Motion to Reopen with new facts or evidence, 8 CFR 103.5(a)(2)
- Motion to Reconsider because denial based on incorrect application of law or policy, 8 CFR 103.5(a)(3)
- Appeal to the AAO based on erroneous conclusion of law, or application of facts to the law. It is *de novo* review, 8 CFR 103.3

All Filed on I-290B with filing fee or fee waiver

Brief: clearly lay out arguments for reconsideration/reopening, or the error in law or application of facts to the law.



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# Federal Court Relief

Administrative Appeals Act - 5 USC § 701 et. seq.

- Agency decision is contrary to statute and/or regulation
- Administrative remedies exhausted and agency decision is final

Ensure APA is not barred by statute in your case

Statute of limitations generally 6 years, 28 USC § 2401(a)



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# NTA Memo

## NTA memo aligns with Trump's Enforcement Priorities:

- × Conviction or unresolved criminal charge;
- × Committed acts that may be chargeable offense;
- × Engaged in fraud/misrepresentation in government matter;
- × Abused public benefits program;
- × Subject to final order of removal; or
- × Otherwise poses risk to public safety or national security.

Guidance does not apply to use of discretion



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**Thank You!**

