



Unaccompanied Alien Children: Role of CBP/ICE

- Upon apprehension, DHS determines whether or not a juvenile is subject to removal and unaccompanied.
- UACs are not subjected to expedited removal, but must be placed in removal proceedings. 8 U.S.C. § 1232(a)(2)(D)(i).
 - Exception: UACs from contiguous countries (Mexico/Canada) may be voluntarily returned to their countries if they pass a credible and trafficking screening conducted by DHS.
- Within 72 hours, DHS must transfer a UAC to the Department of Health and Human Services Office of Refugee Resettlement (ORR).



Unaccompanied Alien Children: Role of ORR

- ORR has exclusive authority over the care, custody, and placement of UACs. 8 U.S.C. § 1232(b)(1).
- ORR places the UAC in the least restrictive setting that is in the best interest of the child. ORR administers the program through a nationwide network of care-providers. 8 U.S.C. § 1232(c)(2).
- ORR is responsible for care and custody of children while case managers locate a family member or trusted adult, called a sponsor, to whom the child will be released. 8 U.S.C. § 1232(b)(1), (c)(3).
- Once released to a sponsor, the sponsor agrees to bring the UAC to immigration court.



Unaccompanied Alien Children: Removal Proceedings

- In Immigration Court, UACs are entitled to certain rights and benefits under the TVPRA:
 - Asylum Jurisdiction: UACs are entitled to a non-adversarial adjudication of their asylum claim before USCIS even if in removal proceedings. INA § 208(b)(3)(C).
 - Asylum One Year Bar: One year bar does not apply to asylum applications filed by UACs. INA § 208(a)(2)(E).
 - Asylum Safe-Third Country Limitation: Safe-third country limitation does not apply to asylum applications filed by UAC.
 - Voluntary Departure: TVPRA waives departure bond/financial means requirement for UACs. 8 USC § 1232(a)(2)(D)(ii).



Unaccompanied Alien Children: Role of the Immigration Judge

- M.R.M., a 17 year old from Guatemala, is apprehended at the border, designated as an “UAC” by DHS, and placed into removal proceedings. He turns 18 by his second master calendar hearing, but requests a continuance to file an asylum app with USCIS.
 - Do you grant the continuance?



Unaccompanied Alien Children: Role of the Immigration Judge

- Legal Opinion, EOIR Office of General Counsel (Sept. 19, 2017) (“Immigration Judges may exercise their independent role to determine whether a respondent qualifies as a UAC when that determination bears on issues arising during the course of removal proceedings.”)
- OCIJ, OPPM 17-03 Guidelines for Immigration Court Cases Involving Juveniles (“UAC status is not static, as both a UAC's age and his or her accompaniment status may change. Thus, judges should ensure that an alien claiming to be a UAC is, in fact, a UAC at the time his or her case is adjudicated.”)
- *Harmon v. Holder*, 758 F.3d 728 (6th Cir. 2014) (“TVPRA does not transfer initial jurisdiction over asylum applications filed by former unaccompanied alien children . . . The IJ therefore had jurisdiction to review asylum claim.”)
- *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018) (“An Immigration Judge has initial jurisdiction over an asylum application filed by a respondent who was previously determined to be an unaccompanied alien child but who turned 18 before filing the application.”)



Unaccompanied Alien Children: Role of the Immigration Judge

- J.M.B. is a UAC in HHS custody. J.M.B.'s mother lives in the United States. She requested J.M.B. be released to her care, but HHS denied the request. At his master calendar hearing, J.M.B. files a motion for a bond hearing.
 - Does an Immigration Judge have authority to conduct a bond hearing for a child in ORR custody?



Unaccompanied Alien Children: Role of the Immigration Judge

- *Flores* Agreement grew out of a class action lawsuit filed on behalf of unaccompanied alien children who had been detained by former INS challenging procedures regarding the detention, treatment, and release of unaccompanied children.
- Agreement was signed in 1997, and it continues to have nationwide effect and is binding on DOJ, DHS, and HHS.
- In July 2017, the Ninth Circuit issued an Order finding that all UAC in ORR custody have a right to request a bond hearing before an Immigration Judge, but ORR still has sole authority over the minor's release and placement with a sponsor. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).
- *Saravia v. Sessions*, 2017 WL 5569838 (N.D. Cal. 2017) (class-action: certain UACs released from ORR custody and re-arrested by ICE have a right to a hearing before an IJ on the basis for re-arrest).



Special Immigrant Juveniles

- (1) Under 21, unmarried, and present in the United States
- (2) Must obtain a juvenile court order with findings on:

Family Reunification: reunification with one or both of the child's parents in not viable to abuse, abandonment, neglect, or similar basis under state law;

Dependency or Custody: The child is dependent on the court, under the custody of a state agency or entity, or an individual or entity appointed by the court;

Best Interest: It would not be in the child's best interest to be returned to the child's (or his or her parent's) country of nationality or last habitual residence

INA § 101(a)(27)(J)



Special Immigrant Juveniles

Three Step Process:

- (1) Applicant must obtain state court dependency order;
- (2) Applicant may petition USCIS for SIJ status (I-360);
- (3) Applicant may seek adjustment of status.



Special Immigrant Juveniles: Role of the Immigration Judge

- SIJ status is pursued outside of immigration court in state court and before USCIS; however, issues relating to SIJ status may arise during the course of removal proceedings.
- Continuances: No precedent decision directly on point.
 - But see *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018); PM 19-13
- *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019) (en banc) (an IJ has a duty to advise about eligibility for SIJ when the facts before the IJ raise a “reasonably possibility that the juvenile could establish eligibility” for SIJ status).
- Adjustment of Status: If juvenile has obtained SIJ status and has pending removal proceedings, he or she must seek adjustment of status in Immigration Court. 8 C.F.R. § 1245.2(a)(1)-(2).



Select Legal Issues: Service of Charging Document (NTA)

- Minors under Fourteen Years of Age
 - Service of NTA on minors under fourteen years of age “shall be made upon the person with whom the . . . minor resides; whenever possible, service shall also be made on the near relative, guardian, committee . . .” 8 C.F.R. § 103.8(c)(2)(ii).
 - If the minor is residing with parents in U.S., regulations generally require service on minor’s parents. *Matter of Mejia-Andino*, 23 I&N Dec. 533 (BIA 2003).
- Juveniles Fourteen Years of Age
 - Personal service of the NTA on juveniles age fourteen or older at the time of service is effective. But see *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004) (extending regulations to all juveniles under 18).



Select Legal Issues: Pleadings and Removability Determinations

- An IJ “shall not accept an admission of removability from an unrepresented respondent who is . . . under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend.” 8 C.F.R. § 1240.10(c).
- An Immigration Judge may base a finding of removability on an unaccompanied and unrepresented minor’s factual admissions. See *Matter of Amaya-Castro*, 21 I&N Dec. 583 (BIA 1996).
- But the Judge must ensure that the minor’s testimony is reliable and the minor understands facts admitted and consequences of those admissions. See *id.* at 588.
- The Form I-213 is presumptively reliable to meet DHS’s burden to establish alienage, but care should be taken in cases involving pro se minors. *Matter of Amaya-Castro, supra.*



Select Legal Issues: Pleadings and Removability Determinations

Today is the juvenile docket day. You encounter a case where a UAC is not present. As you review the papers you notice the following:

- Respondent was under fourteen at the time of service of the NTA.
- Respondent was in ORR custody when the NTA was served and it is stamped with a notation “Served on Conservator.”
- There is ORR paperwork in the file that states that ORR released respondent to his mother.
- When reviewing the Form I-213, it states that respondent is being charged with unlawful entry based on information respondent provided to an ICE officer.
- Do you enter an in absentia order?



Select Legal Issues: Pro se Juveniles

- *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2018), and on reh'g en banc sub nom. *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019).
- Panel held that there is no categorical statutory or Due Process right to counsel at government expense for alien minors and that the IJ provided C.J.L.G. with a “full and fair hearing” that “accounted for [his] age and pro se status.”
- En Banc Court declined to address C.J.L.G.’s contention that Due Process requires appointment of counsel at government expense and vacated removal order on the basis that the IJ failed to advise C.J.L.G. that he might be eligible to obtain SIJ status.
- Although no longer good law, panel opinion still provides guidance for ensuring that an IJ provides a pro se juvenile with a “full and fair hearing” consistent with law.



Select Legal Issues: Pro se Juveniles

The *C.J.L.G.* panel highlighted the following factors in its due process analysis:

- IJ granted continuances to afford C.J. opportunities to retain counsel. OPPM 17-01.
- IJ asked C.J. and his mother questions to determine potential avenues of relief, including AOS, asylum, withholding, derivative citizenship.
- IJ ascertained that C.J. desired to apply for asylum, provided application, explained standard for asylum relief, and provided parties with country conditions report.
- IJ fulfilled her duty to develop a factual record sufficient to determine if C.J. satisfies the legal requirements for asylum.
 - IJ allowed C.J. and his mother to testify in narrative form about C.J.'s asylum claim.
 - IJ asked plain language questions designed to elicit answers relevant to the legal requirements for asylum.
- IJ explained appeal rights and provided copy of appeal form.



Select Legal Issues: Removal Proceedings

- OPPM 17-03: Guidelines for Cases Involving Juveniles
 - Applies to all unmarried respondents under the age of 18.
 - Requires every IJ to employ age-appropriate procedures whenever a juvenile respondent or witness is present in the courtroom while still maintaining impartiality and adjudicating cases in accordance with law.
 - Provides guidance on a variety of matters including:
 - Familiarizing juveniles with the courtroom setting and explaining procedures.
 - Scheduling juvenile dockets to facilitate pro bono representation and keep juvenile cases separate from adult cases.
 - Using child appropriate language, tone, and questioning techniques and making proper credibility assessments.
 - Being vigilant in cases involving UACs about misrepresentation or fraud to obtain benefits under the TVPRA.
 - Reminds IJs to be impartial and respect due process for both parties.



Resources: Friend of Court

- A model currently being used in a number of immigration courts with dedicated juvenile dockets.
- Individuals serving in role of Friend of Court do not provide legal representation
- Friend of Court can help the Court manage juvenile cases, enhance child's comprehension of proceedings, and connect the child with pro bono resources.
- LOPC service providers appear on juvenile docket days in some courts and serve as Friend of Court.
- See PM 20-03 “Child Advocates in Immigration Proceedings” and PM 20-05 “Legal Advocacy by Non-Representatives in Immigration Court”



Resources: Legal Orientation Program for Custodians (LOPC)

- Program administered by EOIR's Office of Legal Access Programs (OLAP)
- LOPC providers offer legal orientation presentations for adult custodians of unaccompanied children (and often the children themselves).
- LOPC is currently in 15 cities and many LOPC providers appear in immigration courts in their areas and serve as Friend of Court and/or offer in court LOPC presentations.
- LOPC providers also administer pro bono referral programs and help facilitate pro bono representation for unaccompanied children where resources are available.



Hypothetical: Child Abuse Protocols

- M.J.A. is 16 years old. She appears in your courtroom with her uncle, who is her HHS/ORR appointed custodian. During her master calendar hearing she asks her interpreter if she can speak with you privately. What do you do?
- When you speak with M.J.A. she tells you that she is 8 weeks pregnant and afraid of her uncle. She, also, tells you that her uncle has threatened to return her to her home country because he found out she was pregnant. She lets you know that she does not want to return to her home country and would rather live with another relative.
- What next steps do you take?



Child Abuse and Trafficking Protocols

- EOIR personnel, including Immigration Judges, are required to report instances of child abuse and/or neglect and suspected human trafficking in accordance with the guidance outlined in Identification and Referral of Potential Trafficking Victims or Traffickers before the Executive Office for Immigration Review (April 27, 2015) and Identification and Referral of Potential Child Abuse and/or Neglect Victims before the Executive Office for Immigration Review (May 23, 2017).
- For assistance with reporting a child abuse/neglect or human trafficking case, please contact the Office of General Counsel.



Domestic Violence, Human Trafficking, and Collateral Visas

Presented by: Sirce E. Owen
Assistant Chief Immigration Judge

May 6 - 21, 2020



Human Trafficking Definition

Trafficking Victims Protection Act 2000 (TVPA)

- Sex trafficking in which a commercial sex act is induced by **force, fraud, or coercion**, or in which the person induced to perform such act has not attained 18 years of age; or
- The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of **force, fraud or coercion** for the purpose of subjection to **involuntary servitude, peonage, debt bondage, or slavery**.

Source: Department of Justice: Human Trafficking Prosecution Unit (HTPU)



Domestic Violence Definition

- A pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person.

Source: Office on Violence Against Women <http://www.justice.gov/ovw/areas-focus>



Identifying Human Trafficking

- Does the victim owe money to an employer or does the employer hold wages?
- Did the employer instruct the victim on what to say to law enforcement or immigration officials?
- Can the victim freely leave employment or the situation?
- Are there guards at work/harboring site or video cameras to monitor and ensure no one escapes?
- Does the victim have freedom of movement? Can they freely contact family and friends? Can they socialize or attend religious services?
- Are they in possession of their legal documents?
- Have you been hurt or threatened if you tried to leave?
- Has your family been threatened?



Power and Control Wheel ~Human Trafficking



Source: Duluth Model Power and Control Wheel www.theduluthmodel.org

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Identifying Domestic Violence Victims

- Accuse you of cheating and being disloyal?
- Make you feel worthless?
- Hurt you by hitting, choking or kicking you?
- Intimidate and threaten to hurt you or someone you love?
- Threaten to hurt themselves if they don't get what they want?
- Try to control what you do and who you see?
- Isolate you?
- Pressure or force you into unwanted sex?
- Control your access to money?
- Stalk you, including calling you constantly or following you?

Source: Safe Horizons <http://www.safehorizon.org/page/10-signs-of-domestic-violence--abuse-291.html>

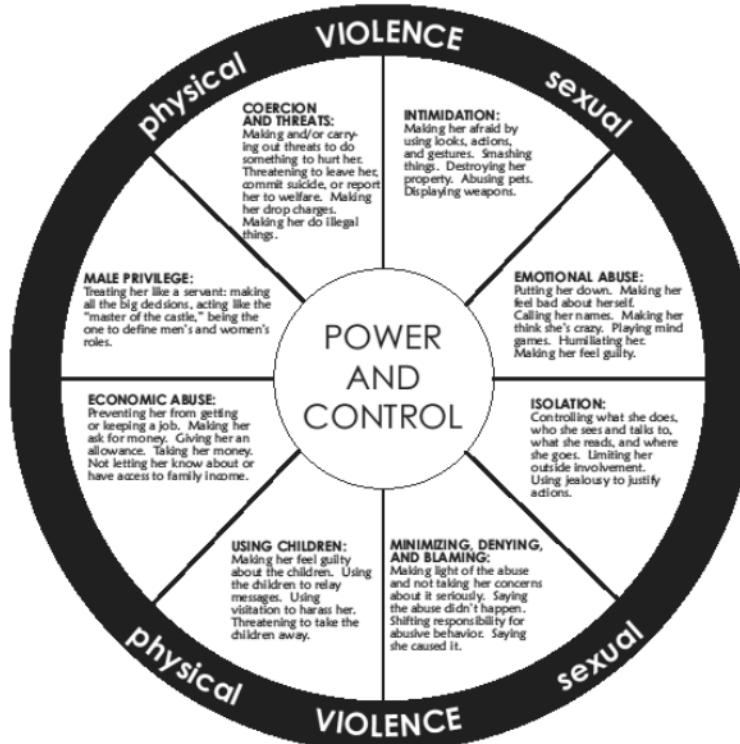


Power and Control Wheel ~ Domestic Violence

POWER AND CONTROL WHEEL

Physical and sexual assaults, or threats to commit them, are the most apparent forms of domestic violence and are usually the actions that allow others to become aware of the problem. However, regular use of other abusive behaviors by the batterer, when reinforced by one or more acts of physical violence, make up a larger system of abuse. Although physical assaults may occur only once or occasionally, they instill threat of future violent attacks and allow the abuser to take control of the woman's life and circumstances.

The Power & Control diagram is a particularly helpful tool in understanding the overall pattern of abusive and violent behaviors, which are used by a batterer to establish and maintain control over his partner. Very often, one or more violent incidents are accompanied by an array of these other types of abuse. They are less easily identified, yet firmly establish a pattern of intimidation and control in the relationship.



Developed by:
Domestic Abuse Intervention Project
202 Butte Square Street
Duluth, MN 55802
218.722.4134

Produced and distributed by:

NATIONAL CENTER
on Domestic and Sexual Violence
Training • Consulting • Advocacy
4612 Shoal Creek Blvd. • Austin, Texas 78756
512.467.8000 (phone and fax) • www.ncds.org



Sensitivity Towards Victims

- (b)(5) [Redacted]
- Talk to victims in safe, confidential and trusting environment
- Limited number of officers and/or staff members coming in contact with suspected victim
- Indirectly and sensitively probing to determine if a person is a victim
 - They may deny that they are a victim of trafficking or domestic violence
 - The phrase “trafficking victim” or “domestic violence victim” will have no meaning



Sensitivity Towards Victims (Cont.)

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-
-

(b)(5)



Sensitivity Towards Victims (Cont.)

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-
-

(b)(5)



Sensitivity Towards Victims (Cont.)

- If the alleged victim is a child, please use appropriate child interviewing techniques. See OPPM 07-01.
- Contact the Assistant Chief Immigration Judge for Vulnerable Populations for questions or resources.



Trafficking Victims Protection Act of 2000 (TVPA)

- Passed on October 28, 2000
- Prior to the TVPA, there were no comprehensive Federal law existed to prevent human trafficking, to protect victims of trafficking, or to prosecute their traffickers.
- Established immigration relief for victims, including: Continued Presence, the T visa, and the U visa.



TVPA Goals

- Prevent human trafficking domestically and overseas
- Protect victims and help them rebuild their lives in the U.S. with Federal and state support
- Prosecute traffickers of persons under stiff Federal penalties



T - Visa

- Jurisdiction for adjudication lies with DHS/USCIS
- Four-year visa that gives the holder the right to live and work in the United States.
- T-visa holders are eligible to apply for lawful permanent residence ("green-card") after three years with the visa, or sooner if the related investigation or prosecution is complete.



T- Visa Requirements

T-Visa applicant must demonstrate the following:

- Is or has been a victim of a serve form of trafficking in persons;
- Is physically present in the U.S. on account of such trafficking, including those who have been allowed entry into the U.S. for participation in an investigation or judicial process associated with trafficking;
- Has complied (with some expectations) with any reasonable request for assistance in Federal, State, or local investigation or prosecutions of acts of trafficking related crimes (or that the victim has not attained 18 years of age);
- Would suffer extreme hardship involving unusual and severe harm in the event of removal.



T- Visa Derivative Status

The statute also provides for derivative status for certain family members.

- If the primary T-visa applicant (trafficking victim) is an adult over 21, any spouse or children under 21 of that applicant can apply as derivatives.
- If the primary T-visa applicant (trafficking victim) is under 21, their spouse, children, unmarried siblings under age 18 (at the time of application) and parents can apply for a T-visa as derivatives.
- In 2013, TVPRA expanded the derivative status designations to include grandchildren, stepchildren, nieces and nephews who “face a present danger of retaliation as a result of the ...principal’s escape from...trafficking or cooperation with law enforcement.”



U- Visa

- Jurisdiction for adjudication lies with DHS/USCIS
- U-visa allows the recipient to receive nonimmigrant status to live and work in the United States for no longer than 4 years.
- They may apply to adjust status to become a lawful permanent resident (green card) after three years of continuous presence in the U.S. while having a U visa.
- In addition to the eligibility requirements for a green card, they must show they did not unreasonably refuse to assist with the investigation or prosecution of the qualifying crime.



U - Visa Requirements

- Victim of a qualifying crime
- Suffered substantial physical or mental abuse as a result of having been a victim of the qualifying crime
- Has information about the criminal activity.
- Has been, is, or will be helpful to law enforcement in the investigation or prosecution of the crime.
- Crime occurred in the U.S. or violated U.S. laws
- Admissible to the U.S.
 - Please note: T and U visa applicants are eligible for a very liberal waiver of inadmissibility.



“Qualifying” Criminal activity for U-visa

Violation of Federal, State, or local criminal law:

- Rape; torture; [human]trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; stalking; fraud in foreign labor contracting; or attempt; conspiracy, or solicitation to commit any of the above-mentioned crimes.



U-Visa Derivative Status

- Immediate family members of U visa recipient may also be eligible to live and work in the United States as a derivative U visa recipients based of the relationship of the primary recipient.
- Unmarried children under the age of 21 of primary U visa recipients;
- Spouses of primary U visa recipients;
- Parents of primary U visa recipients under age 21; and
- Unmarried siblings under 18 years old of primary U visa recipients under the age 21.



U - Visa Availability

- U-visas are capped at 10,000 annually for principal petitioners
 - There is no cap for derivative family members
 - According to USCIS website, the processing time for a U-visa is currently 54 months (time from initial filing to waiting list determination)
- USCIS has reached the 10,000 visa cap every year since 2010



U - Visa Availability

Period	Victims of Criminal Activities ¹			
	Petitions Received ²	Approved ³	Denied ⁴	Pending ⁵
Fiscal Year - Total⁶				
2009	6,850	6,045	661	11,740
2010	9,657	10,015	3,995	7,480
2011	14,647	10,025	2,007	10,250
2012	21,141	10,031	1,684	19,824
2013	25,486	10,022	1,840	33,409
2014	26,089	10,077	3,662	45,814
2015	30,129	10,060	2,440	63,779
2016	34,797	10,019	1,761	87,290
2017	37,287	10,011	2,042	112,272
2018	34,967	10,009	2,317	134,714
Fiscal Year 2019 by Quarter				
Q1. October - December	7,968	4,056	501	139,254
Q2. January - March	6,920	2,972	715	142,513
Q3. April - June	7,367	2,960	683	146,358
Q4. July - September	6,109	22	834	151,758
Total	28,364	10,010	2,733	151,758

Source: https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2019_qtr4.pdf



Continued Presence (CP)

- Continued Presence (CP) is a temporary immigration status provided to individuals identified by law enforcement identified by law enforcement as victims of human trafficking.
- CP allows trafficking victims to remain in the United States temporarily during ongoing investigation into the human trafficking – crimes committed against them.
- CP is initially granted for one year and may be renewed in one-year increments.

Source: <http://www.ice.gov/doclib/human-trafficking/pdf/continued-presence.pdf>



How is Continued Presence requested it?

- ICE, Federal Bureau of Investigation (FBI) and federal prosecutors from United States Attorney's Office (USAO) within the Department of Justice are authorize to submit CP applications.
- CP applications should be initiated immediately upon identification of a victim of human trafficking.



Who approves Continued Presence ?

- Immigration and Customs Enforcement (ICE) Law Enforcement Parole Branch has the sole authority to approve or deny CP applications.
- Federal Law Enforcement official or assigned agency victim assistance coordinator can provide the victim or their representative updates on the statuses of pending CP applications.
- Individuals identified as victim of human trafficking who is potential witness in the investigation or prosecution of the trafficker.



Violence Against Women Act (VAWA)

- Passed in 1994. It marked the first comprehensive approach to violence against women.
- Applies to all victims of abuse regardless of gender.
- Among other things, VAWA created special provisions in immigration law to protect immigrant victims of abuse.
 - VAWA Self-Petition (Form I-360)
 - VAWA Cancellation (INA § 240A(b)(2))



VAWA Self-Petition (Form I-360)

- Jurisdiction for adjudication lies with DHS/USCIS
- Special evidentiary standard is “any credible evidence”
- Eligibility
 - Spouse: If (s)he is or was abused by a USC or LPR spouse. Abusive USC/LPR spouse abused his/her child.
 - Parent: Parent who has been or is abused by USC son or daughter.
 - Child: If child is under 21, unmarried and has been abused by USC or LPR parent.
 - Please note: you may file an application after the age of 21 but before the age of 25 if the abuse was the main reason for delaying filing.



VAWA Self-Petition Requirements

- Spouse
 - Status of and Relationship to USC/LPR
 - If a marriage bigamous or has terminated, or a spouse has lost USC/LPR status, the victim may still be eligible to file.
 - Suffered battery/extreme cruelty
 - Good Faith Marriage
 - Resided with spouse
 - Good Moral Character
- Parent
 - Status of and Relationship to USC/LPR
 - Suffered battery/extreme cruelty
 - Resided with son or daughter
 - Good Moral Character
- Child
 - Status of and Relationship to USC/LPR
 - Suffered battery/extreme cruelty
 - Resided with abusive parent
 - Good Moral Character



VAWA Confidentiality 8 U.S.C. § 1367

- All employees of the Department of Justice are generally prohibited from permitting use by or disclosure to anyone other a sworn officer or employee of DHS, DOS, or DOJ of any information relating to a beneficiary of a pending or approved application for a victim-based immigration benefits, including a battered spouse or child hardship waiver, VAWA self-petition, VAWA cancellation, or T or U visas, including the fact that they have applied such benefits.
 - There are certain exception to the general nondisclosure requirement.
 - Adverse determinations of admissibility or deportability against an alien can not be made using information solely by a prohibited source, regardless of whether the alien has applied for VAWA benefits, or a T or U visa.



Resources and Contacts

- **Child Exploitation & Obscenity Section (CEOS)**
 - Direct Number: (202) 514-5780
- **U.S. Department of Homeland Security** at
 - 1-866-347-2423 24 hours/ 7 days week
- **U.S. Department of Labor, Wage and Hour Division**
 - 1-866-487-9243 for cases where labor exploitation may be present but does not rise to the threshold of trafficking.
- **Melissa Milam, Victim-Witness Coordinator**
 - Civil Rights Division, Criminal Section

(b)(6)



Resources and Contacts (Cont.)

- **The National Human Trafficking Resource Center (NHTRC)** is a national, toll-free hotline available to answer calls from anywhere in the country, 24 hours a day, 7 days a week, every day of the year. The NHTRC is not a law enforcement or immigration authority and is operated by a nongovernmental organization funded by the Federal government. 1-888-373-7888



Determining Mental Competence & Safeguards & Protections

Presented by: Jack H. Weil
Immigration Judge



Four Main Elements of Procedural Due Process



Neutrality

Decision makers who are honest, impartial & base decisions in fact & law.

Interpersonal Respect

Being treated with dignity and respect & having one's rights protected.

Participation

The opportunity to express one's views.

Understanding

Understanding the process & the decision.



Competence Cases: Categories of Coverage

- Franco
- Nationwide Policy
- M-A-M-



Nationwide Policy to Provide Enhanced Procedural Protections



U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

April 22, 2013

MEMORANDUM TO: All Immigration Judges

FROM: Brian M. O'Leary Brian M. O'Leary
Chief Immigration Judge

SUBJECT: Nationwide Policy to Provide Enhanced Procedural Protections
to Unrepresented Detained Aliens with Serious Mental Disorders
or Conditions

For those of you who have had unrepresented detained aliens with serious mental disorders or conditions appear in your courtrooms, you are more than aware of the many unique challenges encountered in conducting removal proceedings involving such individuals. Accordingly, in order to enable Immigration Judges to more efficiently and effectively carry out their adjudicatory duties when confronted with such cases and to enhance procedural protections for mentally incompetent individuals appearing in our courts, today we are announcing, together with the Department of Homeland Security (DHS), a number of enhancements throughout the immigration removal and detention system.

Specifically, we will today begin implementation of a system that will accomplish the following:

- **Competency Hearings.** When it comes to your attention through documentation, medical records, or other evidence that an unrepresented detained alien appearing before you may have a serious mental disorder or condition that may render him or her incompetent to represent him- or herself in removal proceedings, you will conduct a competency hearing.
- **Mental Competency Examinations.** If, at the conclusion of competency hearing(s), you are unable to make a determination of whether the alien is competent to represent him- or herself in removal proceedings based on the evidence presented, you will now be able to order an independent mental competency examination and the production of a psychiatric or psychological report. EOIR will be administering a system that works with DHS to



Dusky Distinguished: Competence in an Immigration Proceeding

Criminal	Immigration
Ability to stand trial (proceed)	Ability to meaningfully participate & represent oneself
Two prongs <ul style="list-style-type: none">• Factual & rational understanding of the proceedings• Capacity to consult with counsel	Three prongs <ul style="list-style-type: none">• Nature & object of proceeding• Understand, exercise & waive rights• Perform functions necessary for self-representation<ul style="list-style-type: none">◦ Respond to allegations and charges◦ Present information and evidence on relief eligibility◦ Follow instructions
Generally, no judicial duty to identify defense or assist in developing record	Judicial duty to identify relief and develop record
Guarantee of counsel	Limited privilege of representation



Closer Look at Competence in an Immigration Proceeding

A respondent is competent to represent him- or herself in a removal or custody redetermination proceeding if he or she has a rational and factual understanding of:

- a. the nature and object of the proceeding;
- b. the privilege of representation by counsel;
- c. the right to present, examine, and object to evidence;
- d. the right to cross-examine witnesses; and
- e. the right to appeal.



Closer Look at Competence in an Immigration Proceeding (Cont.)

A respondent is competent to represent him- or herself in a removal or custody redetermination proceeding if he or she has a sufficient present ability to:

- a. exercise the rights listed above;
- b. make informed decisions about whether to waive the rights listed above;
- c. respond to the allegations and charges in the proceeding;
- d. present information and evidence relevant to eligibility for relief; and
- e. act upon instructions and information presented by the Immigration Judge and government counsel.



Competence to Represent Oneself: Two Categories of Abilities

- **Things you must know**
(Adjudicative competencies)
- **Things you must be able to do**
(Decisional competencies)



Closer Look at Competence in an Immigration Proceeding

A respondent is competent to represent him/herself in an immigration proceeding if he or she has a:

1. rational and factual understanding of:
 - a. the nature and object of the proceeding;
 - b. the privilege of representation by counsel;
 - c. the right to present, examine, and object to evidence;
 - d. the right to cross-examine witnesses; and
 - e. the right to appeal.

2. sufficient present ability to:
 - a. exercise the rights listed above;
 - b. make informed decisions about whether to waive the rights listed above;
 - c. respond to the allegations and charges in the proceeding;
 - d. present information and evidence relevant to eligibility for relief; and
 - e. act upon instructions and information presented by the Immigration Judge and government counsel.



Incompetence to Represent Oneself

A respondent is incompetent to represent him- or herself in an immigration proceeding if he or she, because of a mental disorder, is unable to satisfy any of the provisions above (i.e., unable to perform any of the functions listed in the definition of competence to represent oneself).

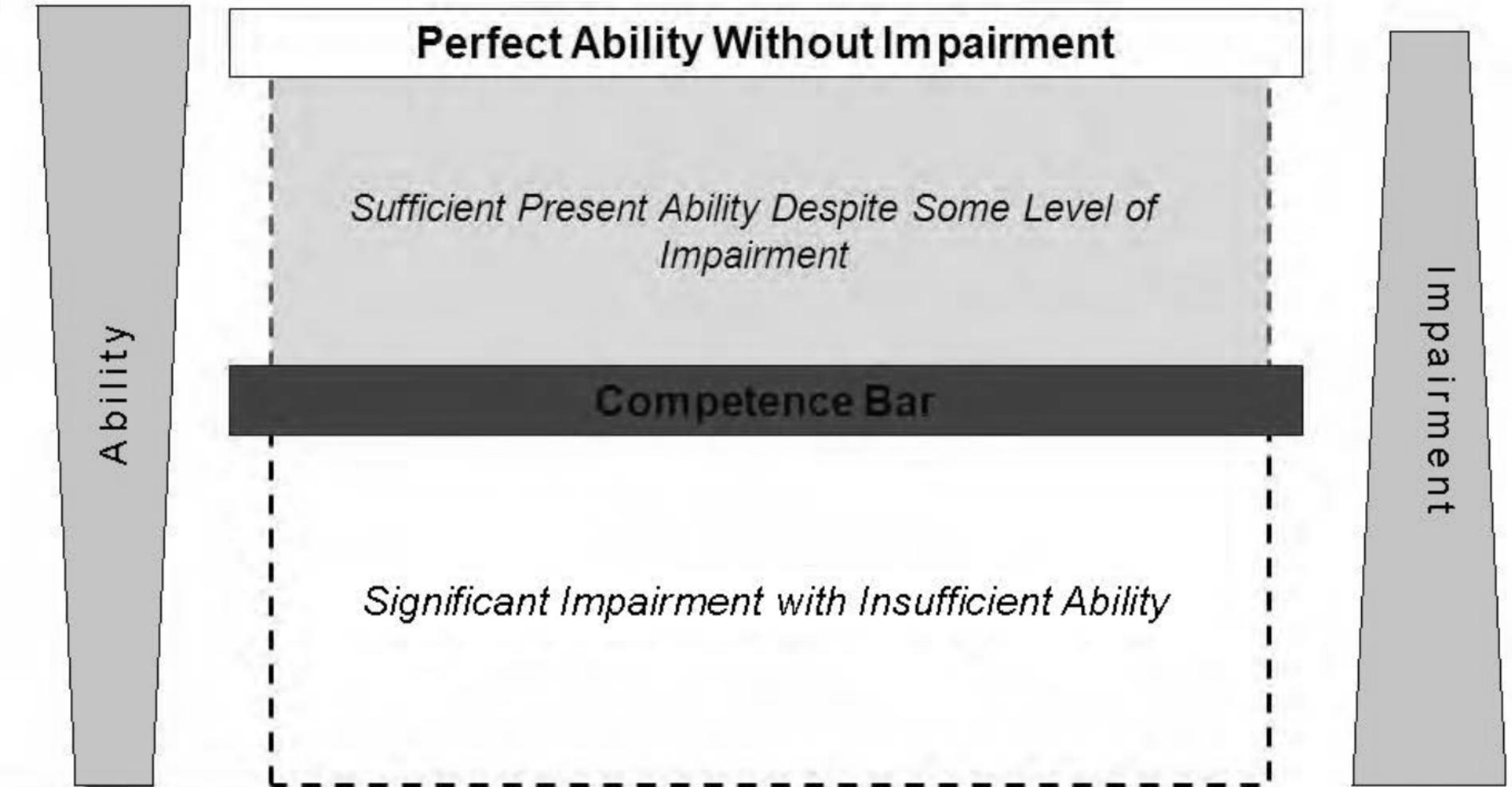


“Mental Disorder”

“Mental disorder” (including Intellectual Disability) is defined as a significant impairment of the cognitive, emotional, or behavioral functioning of a person.



Conceptualizing Competence





Burden of Establishing Competence or Incompetence

There is no presumption of competence or incompetence.

There is no burden of production or persuasion.



Process for a Judicial Determination of Competence – Three Stages

- 1. Detect indicia/bona fide doubt:**
 - of a mental disorder**
 - impairing functioning/ability to perform defined tasks**
- 2. Conduct a judicial inquiry.**
- 3. Conduct a competency review.**



Indicia of a Mental Disorder Impacting Ability

- **Examples of**
- **Sources of**
- **Forms of**
- **Timing of**
- **DHS intake process**



ICE Screening for Evidence of a Serious Mental Disorder or Condition

- Initial screening
- Further Screening
- Referral for a mental health assessment



Judicial Inquiry

Purpose of judicial inquiry is to gather information to decide:

- whether competence is at issue
- whether a more in-depth hearing is required

Two parts of judicial inquiry:

- advisals
- questions



Judicial Inquiry

Process for Conducting a Judicial Inquiry

I. Purpose of the Judicial Inquiry - The purpose of the judicial inquiry is to determine whether respondent's competence is in issue and a more in-depth competency review is warranted.

II. Mandatory Advisals – The judicial inquiry should generally occur after explaining to the respondent the nature and purpose of the proceeding and providing the advisals required in 8 C.F.R. § 1240.10(a).

III. Suggested Advisal - The judicial inquiry should begin by explaining to the respondent the purpose and process for conducting the judicial inquiry. A sample advisal follows:

I am an Immigration Judge. My job is to decide whether you will be allowed to stay in the United States. I am going to hold a hearing to gather information from you and the representative of the Government to help me decide whether you will be allowed to stay in the United States.

It is important that you understand what is happening in court. It is important that you understand what is being said about you. It is also important that you are able to tell your side of the story.

To make sure that you are able to understand and tell your story, I am going to ask some questions about you and your case. I will use this information to decide whether you will need any special help in the hearing.

Can you explain to me what I just said in your own words?

Do you have any questions before we begin today?

IV. Suggested Questions

A. Areas of Inquiry - When conducting the judicial inquiry, the Immigration Judge must ask questions to assess respondent's:

1. understanding of the nature and object of the proceeding,
2. understanding of and ability to exercise core rights and privileges,
3. ability to respond to the allegations and charges,
4. ability to present information and respond to questions relevant to eligibility for relief, and
5. cognitive, emotional, and behavioral functioning.



Judicial Competency Inquiry: Possible Outcomes

- **Competent** – no reasonable cause (*bona fide doubt*) to believe...
- **Incompetent** – preponderance establishes not competent
- **Insufficient evidence** – reasonable cause to believe but less than a preponderance



Forensic Competence Evaluation Referral

Purpose of the referral

- Provide information and inform decisions
- Not to treat or restore



Forensic Competence Evaluation Referral

U.S. Department of Justice
Executive Office for Immigration Review

Forensic Competency Evaluation Referral

Respondent: _____ Date: _____

Case No.: _____ Best Language: _____

Apparent Country of Origin: _____ Ethnicity (if known): _____

Judge: _____ Hearing Location: _____

Place of Detention: _____

Next Scheduled Hearing Date or Requested Due Date: _____

Type of Proceeding: _____ Estimated Length of Merits Hearing: _____

Likely Forms of Relief:

- Asylum Adjustment of status Temporary Protected Status
 Withholding of removal Cancellation of removal (LPR) Waiver(s)
 Convention Against Torture Cancellation of removal (non-LPR) Voluntary Departure
 Other: _____

Estimated Complexity of Issues (Circle one: 1 is least and 10 is most complex): 1 2 3 4 5 6 7 8 9 10

Indicia of a mental disorder (including Intellectual Disability):

- History of outpatient mental health treatment Poor memory Severe depression or anxiety
 History of psychiatric hospitalization Poor attention/concentration Poor intellectual functioning
 History of self-injurious behavior Confused or disorganized thinking Irrational behavior or speech in court
 History of suicide attempts Paranoid thinking Lack of responsiveness in court
 History of limited academic achievement Grandiose thinking Previous adjudications of incompetence (criminal or civil)
 Being treated for mental disorder at the detention center Hearing or seeing things not present (i.e., auditory or visual hallucinations) Other: _____

Other Relevant Documents or Health Information: _____

Persons with Information about Respondent's Health (with contact information): _____

Attachments:

- Notice to Appear (Form I-862) or other charging document Record of Deportable/Inadmissible Alien (Form I-213)
 Additional Charges of Deportability/Inadmissibility Other: _____



Report Content

- **In the written report, the examiner must:**
 - identify the specific matters referred for evaluation,
 - list any evaluation procedures, techniques, and tests used in the examination,
 - list the sources of information considered by the examiner,
 - describe the relevant aspects of the respondent's social, educational, vocational, medical, and mental health histories, and other factors as necessary, and





Reporting to the Court

- Describe **relevant** aspects of the respondent's social, educational, vocational, medical, and mental health histories and other factors.
- List any evaluation procedures, techniques, or tests used in the examination.
- Briefly explain the acceptance in the field of the method used.
- Explain how you conducted the evaluation, test, or used the technique identified.



Reporting to the Court

- Explain any cultural, spiritual, educational, language, etc. concerns and how they were accommodated for in the assessment.
- Provide the results of any evaluation, test, or technique and clearly explain your interpretation in plain language.
- Describe the respondent's presentation during the evaluation (including any signs or symptoms of mental disorder if indicated).



Report Content

- In the written report, the examiner must:
 - describe the respondent's presentation and behavior during the evaluation , including reports or exhibition of signs or symptoms of mental disorder,
 - describe the examinee's response style,
 - provide opinions on each issue referred for evaluation and identify any issues on which the examiner could not give an opinion,
 - provide a factual basis for any opinions offered in the report, and
 - identify the mental disorder that is the cause of the incompetence (if indicated).





Competency Review

- More in-depth evidentiary hearing
- Judge considers report of evaluation
(if at end of inquiry was unable to determine by a preponderance whether competent or not)
- Consider totality of evidence of record



Competency Review

- Findings:
 - Competent
 - Incompetent
 - Franco/NP - Provide QR
 - Safeguards & Protections
 - Ability to move forward



Decision of the Immigration Judge

The judge shall state on the record the reasoning supporting his or her competence finding.



Franco & NP Bond

Bond hearing must be held after 180 days
of detention.



Questions

?



Fraud and Abuse Prevention Program

Paul Monsky, Acting Fraud and Abuse Prevention Counsel

Office of the General Counsel • May 6 - 21, 2020



Fraud and Abuse Prevention Program

- Serves as a centralized point for referral for all fraud concerns
- Provides training for EOIR personnel (and others) on fraud issues
- Supports investigation and prosecution of fraud by federal, state, and local law enforcement and/or disciplinary authorities



- Paul Monsky

Fraud and Abuse Prevention Counsel

- John Sanders

Investigator

- Sheila Williams

Program Specialist



Referral Sources:

- Immigration Judges
- Court Administrators
- OCIJ staff
- Board Members
- Board staff
- USCIS/ICE
- Attorneys/Accredited Reps
- Respondents
- Non-profits
- Public
- Law Enforcement
- Prosecutors



Types of Fraud:

- Fraud against the government
- Fraud against the respondent
(Includes UPIL)





Fraud Schemes:

- Document Fraud
- Venue fraud (MCV)
 - i.e., forum shopping
- Bond sponsor fraud

State of TEXAS
County of BEXAR

AFFIDAVIT OF SUPPORT
BY IMMIGRATION SPONSOR

Before me, on this day appeared the person named as [REDACTED] who after duly identified and sworn stated the following:

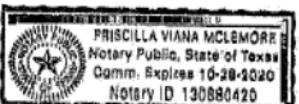
1. That [REDACTED] herein referred to as "Respondent," is a [X] friend [] relative.
2. Respondent is a citizen and national of: HONDURAS
3. That Respondent is currently in detained by and is currently in the custody of the United States Immigration and Customs Enforcement/Department of Homeland Security at LASALLE DETENTION FACILITY located at 830 PINE HILL ROAD, JENA, LOUISIANA 71342
4. I make this Affidavit for the purpose of assuring the United States Government that the Respondent will not become a public charge to the United States. I am willing and able to receive, maintain, and support the Respondent, and to provide him with housing, food, and money as long as necessary.
5. If Respondent is released from custody and is allowed to travel, he will be living with [REDACTED] at [REDACTED], SAN ANTONIO, TEXAS 78218 TEL: [REDACTED]
6. I am gainfully employed and that I am a [X] United States Citizen [] Legal Permanent Resident. My Social Security number is: [REDACTED]
7. I will make every effort to ensure the Respondent's appearance at each and every future hearing scheduled for him before the Immigration Judge, and any appointment by the United States Immigration Service.

I, Affiant, [REDACTED] swear that I know the contents of this Affidavit and that the statements made herein are true and correct to the best of my ability.

Signature [REDACTED]

State of TEXAS
County of BEXAR
SWORN to and subscribed before me on February 27, 2017.

P. McLean
Notary Public, State of TEXAS



3

State of TEXAS
County of BEXAR

AFFIDAVIT OF SUPPORT
BY IMMIGRATION SPONSOR

Before me, on this day appeared the person named as [REDACTED] who after duly identified and sworn stated the following:

1. That [REDACTED] herein referred to as "Respondent," is a [X] friend [] relative.
2. Respondent is a citizen and national of: COLOMBIA
3. That Respondent is currently in detained by and is currently in the custody of the United States Immigration and Customs Enforcement/Department of Homeland Security at LASALL DETENTION FACILITY located at 830 PINE HILL ROAD, JENA, LOUISIANA 71342.
4. I make this Affidavit for the purpose of assuring the United States Government that the Respondent will not become a public charge to the United States. I am willing and able to receive, maintain, and support the Respondent, and to provide him with housing, food, and money as long as necessary.
5. If Respondent is released from custody and is allowed to travel, he will be living with [REDACTED] GARCIA at [REDACTED]
6. I am gainfully employed and that I am a [X] United States Citizen [] Legal Permanent Resident. My Social Security number is: [REDACTED]
7. I will make every effort to ensure the Respondent's appearance at each and every future hearing scheduled for him before the Immigration Judge, and any appointment by the United States Immigration Service.

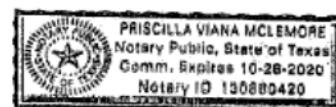
I, Affiant, [REDACTED] swear that I know the contents of this Affidavit and that the statements made herein are true and correct to the best of my ability.

Signature [REDACTED]

GARCIA

State of TEXAS
County of BEXAR
SWORN to and subscribed before me on December 20, 2016.

P. McLean
Notary Public, State of TEXAS



3





Examples of immigration-related scams:

- Impersonating EOIR employees
- Mail and phone scams
- Other cases of impersonating USCIS or IRS employees



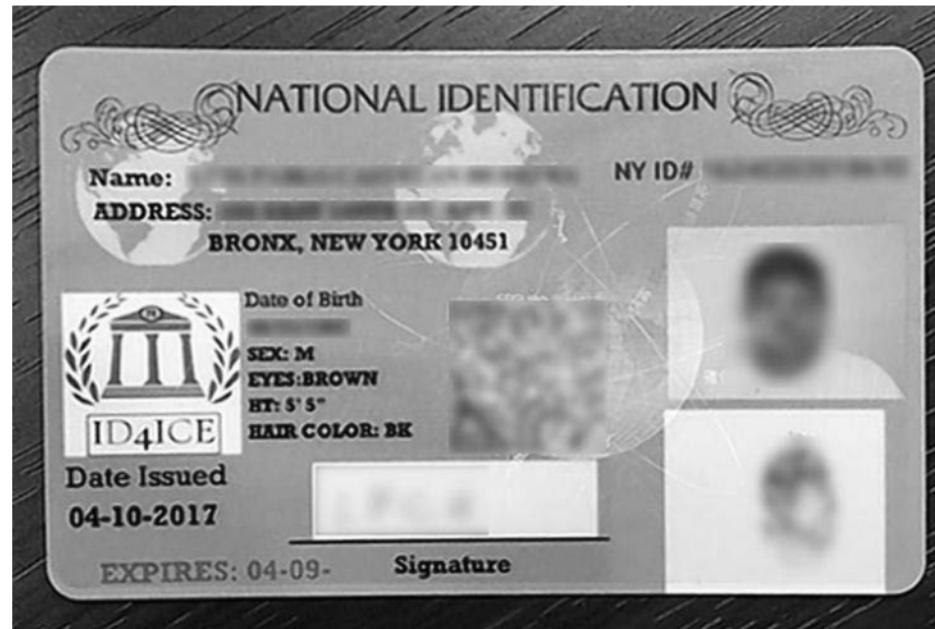
Examples of immigration-related scams:

- Taking money for services that are not provided
- Convincing respondent to apply for relief for which they are not eligible
 - Ex: 10-year green card scam



Examples of immigration-related scams:

- Predatory scams: Carlos Davila





Examples of immigration-related scams:

- Selling USCIS or EOIR Forms





Unauthorized Practice of Immigration Law (UPIL)

- Also called “*Notario Fraud*”





Notary Public vs. *Notario Publico*

- Qualifications (TX v. Mexico DF):

A candidate to be a Texas Notary Public must

- fill out an application
- be at least 18 years of age
- be a legal resident of the State of Texas
- be a legal resident of the United States or a permanent resident alien
- pay applicable fees and post a \$2,500* dollar bond.ⁱⁱⁱ

A candidate to be a *Notario Publico* in the Federal District of Mexico must

- be Mexican by birth
- be older than 25 but younger than 60
- be in good health
- have a good reputation
- not be the leader of a church
- not have a criminal record
- have studied under a notary for at least 6 months prior
- take a written exam
- be a legal professional with the title of lawyer.^{iv}



Notary Public vs. *Notario Publico*

- Powers and Duties (TX v. Mexico DF):

A Texas Notary Public may

- take acknowledgements
- protest instruments
- administer oaths
- take depositions
- certify copies of documents not recordable in the public records
- show that a disinterested party duly notifies the validity of a document
- show that the signer is indeed who s/he says s/he is and that his/her reasons for signing are genuine^x

A *Notario Publico* in Mexico City may

- be an arbitrator
- be a mediator
- issue judicial opinions
- intervene in judicial proceedings^{xii}
- ensure that documents such as bylaws of companies, wills, deeds, powers of attorney, real estate purchases and establishments of trusts do not include any legal inconsistencies^{xiii}
- ensure payment of taxes
- protocolize public deeds



Helpful Links for Identifying UPIL :

- Check to see if attorney is validly licensed:

<https://www.justice.gov/eoir/can-someone-represent-you-eoir>

- Check list of EOIR suspended/disbarred attorneys:

<https://www.justice.gov/eoir/list-of-currently-disciplined-practitioners>

- Check R&A list: <https://www.justice.gov/eoir/recognition-accreditation-roster-reports>

- The two EOIR lists are especially important for e-Registry!

ATTORNEYS

Attorneys must be members “in good standing” of the bar of the highest court of any State, the District of Columbia (D.C.), a U.S. possession, U.S. territory, or U.S. commonwealth. A list of all of the locations where an attorney can be validly licensed and practice before EOIR is below.

You can contact the entity that provides the attorney’s license to ask if the attorney is a member of their bar and if the attorney is in good standing, meaning the attorney has maintained an active license and has not been suspended or disbarred. Most locations maintain databases on the internet where you can look up lawyers, but a few states require that you call. If you call, ask if the attorney is licensed in that location and is in good standing.

Below, you will find links to each U.S. state, the District of Columbia, and the U.S. possessions, territories, or Commonwealths that license attorneys. Please read all of the information provided by the licensing authority, as each one provides different information about their attorneys on their website. This information is provided as a courtesy, and the Department of Justice does not certify its accuracy.

Click on the picture or name of the U.S. state, territory, possession, or Commonwealth below for information about contacting the location’s licensing authority.





Please report if you see:

- From the same address:
 - Multiple unrelated respondents
 - Documents filed by pro se respondents
- Altered or suspect documents, including EOIR documents



Hotline:
(877) 388-3840

Fraud Inbox:
EOIR.Fraud.Program@usdoj.gov



Fraud Program: Submitting a complaint

- Each court should have its own process for submitting complaints to the Fraud Program.
- Complaints can be sent to Fraud Counsel or the Fraud inbox:

EOIR.Fraud.Program@usdoj.gov
877-388-3840