



PROGRAM MATERIALS

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Adam Walsh Act Immigration Bar: Mitigation Strategies in Family-Based Petitions

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Adam Walsh Act Immigration Bar: Mitigation Strategies in Family-Based Petitions

Books

Handbook of Mitigation in Criminal and Immigration Forensics: Humanizing the Client Towards a Better Legal Outcome. Seventh Edition. 2021

Psychosocial Evaluations and Consultation in Civil Litigation: Strategies to Understand and Humanize the Client. 2021.

Handbook of Mitigation in Criminal and Immigration Forensics

Humanizing the Client
Towards a Better Legal
Outcome

SEVENTH EDITION

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**PSYCHOSOCIAL
EVALUATIONS AND
CONSULTATION IN
CIVIL LITIGATION:**

*Strategies to Understand
and Humanize the Client*

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OUTLINE

SECTION I: ROLE of FORENSIC EXPERT & TYPES of CASES

SECTION II: ADAM WALSH FACTORS and BIASES

SECTION III: MITIGATION STRATEGIES

SECTION IV: OBSTACLES TO THE EVALUATION

SECTION I
ROLE of FORENSIC EXPERT & TYPES of
CASES

Forensic Consultant

- Role as forensic consultant
- Types of Cases
 - VAWA (spousal abuse)
 - Asylum (one-year deadlines issues, eg - FGM)
 - Waivers of Inadmissibility (ie, 601 petitions)
 - U and T Visas (victims of criminal harm & trafficking)
 - Criminal Immigration (both hardships and criminal matters)
 - Criminal Mitigation: (eg, AWA)
 - Competency (Matter of M-A-M)

When to Consider a Forensic / Mitigation Evaluation

- Any immigration petition or case with a crime, fraud, or CIMT (crime involving moral turpitude) and especially when it is considered serious, deviant, or (all but EWI and overstays)
- where the circumstances are less than clear (ie, disposition alone is available) criminal mitigation should be considered.
- This is especially true in those cases in which criminal mitigation is the essential part of the case and other aspects of the petition, such as proving extreme hardships, may actually be secondary.

Mitigation is Not Just for Criminal Lawyers

- Criminal mitigation is not Just for criminal lawyers although made law by Wiggins v. Smith (2003).
- Absolutely essential resource b/c it explains peoples actions, behaviors, thoughts and feelings
- It redirects lawyers and adjudicators from a black letter legal analysis to one informed by the human element

Purpose of Mitigation

- Criminal mitigation serves to humanize the client through a sympathetic narrative and induce empathy for the adjudicator by documenting the client's life history and contextualizing the client's conduct.
- The adjudicator will identify with and feel empathy for humanistic background issue and will be inclined toward compassion or mercy.
- Professional Expression can Replace Self Expression

Disabuse Adjudicator of Biases & Assumptions

- Disabuse the adjudicator of bias and prejudice and eliminate non-existent patterns that the adjudicator may assume are true (or self-evident) in the assessment of the case, especially given the client's criminal history, arrests, and / or CIMTs.
- IT IS THE CORE OF AN AWA PETITION

SECTION II

ADAM WALSH FACTORS and BIASES

Legal Background

- On July 27, 2006, President George W. Bush signed into law H.R. 4772, the Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. No. 109-248, codified in large part of 42 USC S16911 et seq).
- John Walsh (father) of “America’s Most Wanted”
- The Adam Walsh Act (AWA) is meant to (1) protect children from sexual exploitation in violent crimes, (2) prevent child abuse and (3) child pornography, and (4) to promote Internet safety.

INA §204 Amended

- The AWA §402 also amended §204 of the Immigration and Nationality Act (INA) and effectively prohibited U.S. citizens and lawful permanent resident aliens who have been convicted of any specified offense against a minor from filing any family-based immigrant petition on behalf of any beneficiary, unless the Secretary of Homeland Security determines, in his or her sole and unreviewable discretion, that the petitioner poses no risk to the beneficiary.
- Clients (USC) petitioning for wives (for LPR status).

111(7) Criteria

- INA §§ 204(a)(1)(A)(viii) and 204(a)(1)(B)(i)(II) prohibit any USC or LPR who has been convicted of an offense against a minor that is included in section 111(7) of the AWA from filing an immigrant petition for a family member. It is important to note that the prohibition affects *any* family-based immigrant petition, not only family-based petitions for minors. This section also applies to K-visa petitions for fiancées of USCs or LPRs. The specified offenses against a minor are:
 - (A) *Offenses involving kidnapping [unless committed by a parent or guardian]*
 - (B) *Offenses involving false imprisonment [unless committed by a parent or guardian].*
 - (C) *Solicitation to engage in sexual conduct.*
 - (D) *Use in a sexual performance.*
 - (E) *Solicitation to practice prostitution.*
 - (F) *Video voyeurism as described in 18 U.S.C. § 1801.*
 - (G) *Possession, production, or distribution of child pornography.*
 - (H) *Criminal sexual conduct involving a minor, or the use of the internet to facilitate or attempt such conduct.*
 - (I) *Any conduct that by its nature is a sex offense against a minor.*

111(7) Con't

- Point I of AWA § 111(7) includes crimes listed in section 111(5)(A) of the AWA. These provisions define «sex offense» by the statute and include:
- *(i) a criminal offense that has an element involving a sexual act or sexual contact with another;*
- *(ii) a criminal offense that is a specified offense against a minor;*
- *(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18, United States Code) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18, United States Code;*
- *(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or*
- *(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).*

Results

- AWA §402 also amended §101(a)(15) of the INA 9Pub L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC SS 1101 et seq) to remove spouses and fiancés of U.S. citizens convicted of these offenses from eligibility to be petitioners for K nonimmigrant status. The AWA became effective on the date of its enactment (July 27, 2006) and is applicable to all petitioners pending on or after that date.
- USCIS requires an AWA petitioner to submit evidence that demonstrates, beyond a reasonable doubt, that he or she poses no risk to the beneficiary family member(s).

Overview of Factors

USCIS considers all known factors that are relevant to determining whether the petitioner poses any risk to the safety and well-being of the beneficiary. Here is the non-exclusive list:

In other words, anything and everything that can reasonably mitigate the criminal history must mandatorily be included.

This section will also examine the implicit biases on the part of the adjudicator

Factors Con't

1. The nature and severity of the petitioner's specified offense against a minor, including all facts and circumstances underlying the offense.

Bias: It must have been a horrible offense. There are no minor sex offenses.

Comment: This factor considers whether the offense resulted in contact versus no contact, and the level of physical and/or sexual touching.

Case Example : Internet sting operation vs. repeated offenses

Factors Con't

2. The petitioner's criminal history. Violent, criminal, or abusive behaviors in the submission of the petition.

Bias: This is only the tip of the iceberg.

Comment:

- It is important to investigate whether or not the crime involved violence in addition to obvious abusive behavior.
- Criminal matters unrelated to the present issue at hand must also be explored and mitigated fully b/c bias may attach.

Case example continued – clean record.

Factors Con't

3. The nature, severity, and mitigating circumstances of any arrests, convictions, or history of alcohol or substance abuse, sexual or child abuse, domestic violence, or other violent or criminal behavior that may pose a risk to the safety or well-being of the principal beneficiary or any derivative beneficiary.

Bias: There is no excuse. There is always a risk.

Comment: Alcohol and drugs are a red flag and must be considered!

Case example continued – healthy lifestyle.

Factor's Con't

4. The relationship of the petitioner to the principal beneficiary and any derivative beneficiary.

Bias: The beneficiary cannot protect herself.

Comment:

- How well do the individuals know one another
- How long have the individuals known one another
- What is the quality and scope of the relationship

Case example continued – spouses have long term relationship.

Factors Con't

5. The age and, if relevant, the gender of the beneficiary.

Bias: Young girls are always targets of this petitioner.

Comment:

- There is a natural bias by adjudicators to err on the side of caution for minor females, especially if it was a minor female who was the victim in the crime.
- Age is also a major consideration, especially if the beneficiary child is quite young and less capable of independent decision-making and self advocacy.

Case example continued - young children from first marriage with un-cooperative biological mother.

Factor's Con't

6. Whether the petitioner and beneficiary will be residing either in the same household or within close proximity to one another.

Bias: Where there is accessibility there is danger.

Comment:

- It is very important to look at household makeup and who resides in the home and/or will be visiting the home.
- It is also important to consider if a derivative beneficiary will simply be out of the picture altogether because of geography.

Case example Continued – derivative children will remain far away

Factor's Con't

7. The degree of rehabilitation or behavior modification that may alleviate any risk posed by the petitioner to the beneficiary, evidenced by the successful completion of appropriate counseling or rehabilitation programs and the significant passage of time between incidence of violent, criminal, or abusive behavior in the submission of the petition.

Bias: Skeptical that rehabilitation is effective.

Bias: Passage of time does nothing to alleviate sexually deviant impulsive or obsessional thoughts, feelings, and behaviors.

Factor's Con't

Comment:

- This includes any and all therapeutic interventions at any point which may in any way reduce the risk posed to the beneficiary.
- This cannot be anecdotal, but rather concrete documentation from mental health professionals and/or programs must be submitted as evidence preferably with *ongoing* documentation.
- The “passage of time” can be quite helpful or quite harmful. It can be quite helpful if the crime occurred over a decade ago and consistent good behavior is evident. It can be quite harmful if in the passage of time other crimes have been committed or there is a dearth of documentation
- There is sometimes a presumption that true rehabilitation requires the “passage of time” and cannot be undertaken in a just a matter of months.

Conclusion

An AWA analysis necessarily requires and triggers criminal mitigation as a starting point and it should remain the central focus for the immigration lawyer in examining the case.

As such, the AWA petition should be approached as one would approach any criminal matter that requires mitigation with a complete psychosocial background history informed by a clinical analysis.

SECTION III
MITIGATION STRATEGIES

Unity is Safety

- Clearly, if the USCIS is primarily interested in the safety of the beneficiary and derivative then the petitioner's stability and security in their home and community environment is probably what would most effectuate this.

Protective Factors

- Supports in family and community
- Non-similar situations / persons
- Protective factors for potential victims
- Structured Assessment of Protective Factors (SAPROF)

10 R's

It is important to carefully consider the petitioner's crime(s) and understand them with regard to the 10 R's of mitigation:

- Reality - facing a full narrative
- Rhea- mens rea / intent / volition
- Recency- when did the crime occur
- Repetition - examine client's overall record
- Rung - what level of seriousness is involved
- Restorative - has the client righted the wrong
- Rehabilitation - client has, can, or will change
- Remorse / Regret - does the client understand and accept his actions
- Roles – community role and behavior in crime
- Recommendations - what can be fixed and who can be helped

THESE LARGELY MATCH UP TO THE CRITERIA NOTED ABOVE

Overall Picture of Remorse & Rehabilitation

The client's perspective on his behavior, remorse, regret, the client's rehabilitation, and his overall life experiences in the intervening years can demonstrate good moral character in and of itself.

It is important to show that the client has accepted full responsibility for his wrongdoing and the ways in which he has redirected his focus towards praiseworthy behaviors on a personal level, on behalf of his family, through consistent employment, education, and in the community.

Strategic Thinking

- Aberrant decision
- Misguided behavior
- Error in judgment
- Foolish conduct (dumb mistake, no animus)
- Unthinking moment
- Life stressors
- Poor judgment, but not evil, ie, not bad

Strategic Thinking Con't

Diminished Capacity:

The client may have suffered from a diminished capacity due to an overwhelming life stressor that precipitated the criminal behavior or cumulative life stressors over many years that may even have caused the individual to suffer clinical depression, anxiety, and other psychiatric issues.

Psychopathology Bias

In AWA cases there is an implicit bias on the part of the adjudicator that the petitioner has mental health issues if not outright psychopathology due to his criminal behavioral. Thus, it can be helpful to include a section on the petitioner's mental health history and the presence and/or absence of psychopathology to explicate issues such as impulsivity, psychopathy, personality disorders, erratic moods, unstable behaviors, psychosis, addictive conduct, and drug use.

If the petitioner benefits from ongoing psychotherapy and/or psychopharmacology interventions a brief summary of the therapy should be included as part of the packet.

No Risk Standard

AWA cases are considered particularly difficult because of the “no risk” standard, which is seemingly impossible to garner from any expert given the highly difficult task of predicting future behavior of a felon regardless of his apparent rehabilitation.

Is it Possible there is “no” Risk?

This analysis is important because the petitioner’s criminal behavior and the victim(s) involved may stand in stark contrast to his current home environment with the beneficiary.

Case Example: In several cases I have consulted on the petitioner’s crimes involved adolescent girls and yet the petitioner was petitioning for his wife to relocate to the United States. In two of these cases neither the petitioner nor his wife could have children because of their age and / or for medical reasons, such that the beneficiary would be at no immediate risk as compared to the circumstances of the petitioner’s original crime.

Two Evaluations to Show no Risk

The first evaluation consists of a detailed psychosocial history with clinical considerations, specifically with regard to the home environment and persons who could be affected by this case. That is, the first evaluation would primarily consist of a criminal mitigation report and home study.

The second evaluation is a risk assessment based on a well-researched test so that an empirical picture can be captured for the adjudicator.

These two evaluations should complement and balance one another.

Risk Assessment Tests

- SVR-20
- WILSON SEX FANTASY QUESTIONNAIRE

Investigates the frequency of sexual thoughts and fantasies to 40 different types of sexual behaviors

- STABLE-2007 – 13 risk factors
- HANSON SEX ATTITUDE QUESTIONNAIRE

Part 1: assesses individual's sense of entitlement to have his / her sexual urges fulfilled

Part 2: assesses individual's perception of children as sexually attractive and sexually motivated

- LOOK Sexual Preference Assessment - is a **viewing time measure used to assess sexual interest**. The measure is based on the assumption that sexual interest can be assessed by the amount of time a participant spends looking at an image
- Statistic 99R

SECTION IV
OBSTACLES TO THE EVALUATION

USCIS goal: punishment or adjudication?

- USCIS is trying to punish the petitioner for their crime a second time rather than adjudicating it for the purposes of the present criteria

Embarrassment

- Embarrassment
- Humiliation
- Shame
- Client may fear that examining this arrest will scare off his spouse or fiancé.

Family members may be completely unaware of the clients past arrest(s) and discussing it in detail can be embarrassing and shocking.

Case Example: The client backed out of the AWA petition because it would have involved bringing in several immediate family members and reviving terribly shameful and humiliating point in that person's life.

Case Example: In another case a client declined to continue the petition, however after speaking with a mental health counselor he was persuaded to overcome his shame over past behavior and to pursue bringing his wife to the United States.

Uncooperative Client

This may indicate that the client is not rehabilitated and he may simply pull away from the petition.

Case Example: during an evaluation the client was repeatedly defensive and argumentative concerning providing documentation and the history of his criminal behavior. The client's anger reflected that he was not ashamed of his previous conduct, but rather wanted to remain secretive because it was an important part of his identity.

Financial Burden

- The client should be aware of the costs up front, which may be substantial
- This may include traveling costs and multiple visits.

Comment: Some of these clients may use the excuse of cost rather than dredge up painful memories of embarrassing conduct from years before. This could be explored with a forensic expert.

Case Example: The client had multiple arrests over several years and the review of documentation, interview family members, and preliminary consultation was itself simply too expensive for the client to continue.

Direct Interviews

- Direct interviews are crucial because in many cases the family members may be unaware of the client's crime(s) or arrests, or the crime(s) may have occurred many years before the client married.
- USCIS may deem face-to-face interviews with greater seriousness in their decision-making process.
- The client's personal narrative is mandatory.
- Nothing replaces a face-to-face clinical interview. Often, two or even three interviews are required for a full understanding of the individual's psychosocial background.
- It may be a physical and financial, and even emotional, challenge to get everybody together for these cases.

Direct Interviews Con't

Case Example:

In a criminal immigration case a wife was petitioning to bring her husband to the United States, however in addition to proving extreme hardship I also had to consider any mitigating issues regarding his past arrest for a sexual assault.

I traveled to Jamaica to interview the client and the face-to-face interview provided a wealth of information regarding his background and the circumstances of the case, which his wife could not provide because the arrest occurred years before they met.

Direct Interviews Con't

Case Example:

The client was petitioning for his wife. The wife was an accomplished registered nurse in the area of surgical nursing having been employed in major hospitals in the Northeast. Her feedback was crucial as an educated and intelligent individual who provided enormously helpful input regarding her husband's health and well-being.

Derivatives – Home Study

When the beneficiary does not appear to be at primary risk for any reason, but there is concern for secondary individuals, such as current or future children of the beneficiary or the petitioner's children, then it is important to gain an understanding of the overall health and well-being of the children through direct interviews and a home study.

A home study is undertaken by social workers to determine that the home is safe for children who presently reside in the home, reside in the home part-time, and even for children who may reside in the home in the future.

Personal Statements

- Personal statements from the petitioner, beneficiary, and close family members and community contacts are also crucial as character reference letters.
- Balance and complement the evaluation and petition in general

Thank You !