

The following article is a supplement to the “Extreme Hardship” section in Chapter 7 of AILA’s *Immigration Law and the Family*, 4th Ed., edited by Charles Wheeler:

Final Guidance on Extreme Hardship

On October 21, 2016, USCIS finalized its guidance¹ interpreting the term “extreme hardship” and explaining how it should be applied to applications for waivers of inadmissibility. Three of the most common waivers require the applicant to establish extreme hardship to a qualifying relative: the INA §212(a)(9)(B)(v) waiver to overcome the three- and ten-year unlawful presence bars; the INA §212(i) waiver to overcome inadmissibility due to fraud or misrepresentation; and the INA §212(h)(1)(B) to overcome certain crime-based inadmissibility. For the first two waivers, the qualifying relative must be a U.S. citizen or LPR spouse or parent; if the waiver is for criminal conduct, eligible qualifying relatives also include the applicant’s U.S. citizen or LPR son or daughter. The final guidance sets forth, in greater detail, how adjudicators should weigh various hardship factors.

Background

On November 20, 2014, DHS Secretary Jeh Johnson issued a memo directing USCIS to expand eligibility for the provisional waiver program to include other family-based categories and provide additional guidance on the definition of extreme hardship. The intended purpose of the guidance is to “provide broader use of this legally permitted waiver program.” In addition to clarifying the factors to be considered, the Secretary directed the agency “to consider criteria by which a presumption of extreme hardship may be determined to exist.” On October 7, 2015, the agency issued draft guidance that proposed significant changes to the existing assessment of extreme hardship, but did not incorporate the presumption of hardship criteria. Following a public comment period, USCIS released the final guidance, which reflects some changes from the initial draft. Most of these changes, however, are in phrasing and explanatory language, rather than to the substance of the draft guidance.

Should I Stay or Should I Go?

Prior to the new guidance, adjudicators had been requiring waiver applicants to demonstrate that the qualifying relative would suffer extreme hardship in two scenarios: if he or she were to relocate to the applicant’s country, *and* if he or she were to remain in the United States separated from the applicant. This requirement is set forth in the adjudicator’s training manual (Standard Operating Procedures, or SOP) and is now boilerplate language in every written decision, even though it is not explained to the applicant in the instructions to the Form I-601 or I-601A. One of the most significant changes in the new guidance is the reduction in this burden of demonstrating extreme hardship to the qualifying relative. The final guidance allows the applicant to decide whether the qualifying relative would either relocate or remain in the United States. The applicant would then only have to establish extreme hardship in one of those scenarios. The guidance still allows the qualifying relative to show that extreme hardship would result from both separation and relocation.

¹ <https://www.uscis.gov/policymanual/Updates/20161021-ExtremeHardship.pdf>

The qualifying relative is required to submit a statement, certifying under penalty of perjury the decision either to relocate with or to separate from the waiver applicant, in the event the waiver is denied. The statement should be “sufficiently detailed” and “credible,” and should explain the reasons for the decision. The qualifying relative is encouraged to submit any documentation that would support the basis for the decision, although due to its subjective nature, the statement itself may be the best available evidence. In most cases, “in the absence of inconsistent evidence, a credible, sworn statement from the qualifying relative of his or her intent to relocate or separate would generally suffice to demonstrate what the qualifying relative plans to do.”

Written decisions on unlawful presence waivers reveal that it is easier to establish that the qualifying relative would suffer extreme hardship due to relocating to the applicant’s country. Decisions often cite the qualifying relative’s lack of foreign language skills, unfamiliarity with the foreign country, inability to find comparable employment, the stress in relocating to a different culture, and any health-related factors that would be exacerbated by such a move. In most cases, it is more difficult to establish that the qualifying relative would suffer extreme hardship due to separation from the waiver applicant. The final guidance may encourage applicants to show why it is reasonably foreseeable that the qualifying relative would accompany them to the foreign country in order to maintain family unity and why such a move would result in extreme hardship.

The qualifying relative for the waiver for certain criminal grounds of inadmissibility under INA §212(h) can include the applicant’s spouse, parent, or son or daughter. Where the qualifying son or daughter is a child, note that there is a general presumption that the child would relocate with the parents. For this reason, the parent would bear the burden of overcoming that presumption if claiming that the child would be left behind in the United States and suffer separation hardship. In that case, the waiver applicant would need to provide a credible plan for the care and support for the child. This affirmative statement and evidence would not apply if the child would be left behind in the care of the other parent.

In the Aggregate

Adjudicators are reminded that the hardship factors must be considered in the aggregate, and that no single hardship, taken in isolation, needs to rise to the level of extreme. This principle is already set forth in administrative appeal decisions and is codified in the SOP, but accentuating it in the guidance may encourage applicants to set forth all possible hardship factors in the event that, taken together, they add up to extreme hardship.

Similarly, the final guidance also underscores that extreme hardship means “more than the usual level of hardship that commonly results from family separation or relocation.” Common consequences of separation or relocation include the following: family separation, economic detriment, difficulties of readjusting to life in the foreign country, quality and availability of educational opportunities abroad, inferior quality of medical services and facilities, and the ability to pursue a chosen employment abroad. While none of these “common” results, taken alone, would be enough to satisfy the extreme hardship standard, their combination may be sufficient.

While the applicant needs to demonstrate extreme hardship only to one qualifying relative, in some cases, two qualifying relatives—for example, a spouse and a parent—may be present. The applicant can combine the hardships that both qualifying relatives might experience. This may be helpful if neither qualifying relative would be able to establish extreme hardship on his or her own, but taken together, the aggregate of their hardships would meet that standard. For instance, the qualifying relatives may each experience the common results of separation or relocation that, when taken alone, do not rise to the level of extreme hardship, yet the combination of these hardships or their cumulative impact, may meet the necessary standard.

Surviving Relatives

The guidance also explains that widow(er)s whose U.S. citizen spouse filed an I-130 petition before dying qualify to file a waiver if they were residing in the United States at the time of the death and continue to reside here. The same is true under INA §204(I) for other family members where the petitioner or principal beneficiary has died after the I-130 was filed and where they meet the residency requirements. In cases where the deceased relative would have been the qualifying relative for a waiver of inadmissibility, the agency will presume extreme hardship and will allow eligibility for the waiver even though the qualifying relative has died.

Hardship to a Non-Qualifying Relative

Children cannot be qualifying relatives under the requirements for waivers for fraud or unlawful presence, nor can hardship to the waiver applicant be considered. Nevertheless, “the hardship experienced by non-qualifying relatives can be considered as part of the extreme hardship determination, but only to the extent that such hardship affects one or more qualifying relatives.” For this reason, the guidance encourages applicants to describe the emotional or other hardship that the qualifying relative parent would experience due to the suffering of a child who must either relocate to a foreign country or remain separated from the applicant. This “derivative hardship” is one of the factors that adjudicators must consider in weighing the totality of the circumstances.

The Hardship Factors

The guidance points out that any factor that the applicant presents should be considered. It then sets forth the five most common factors and their impact: family ties, social and cultural issues, economic issues, health conditions and care, and country conditions. It then spells out examples of what hardships might fall within each of the five categories. For example, social and cultural impact could be evidenced by loss of access to U.S. courts, our criminal justice system, and the protection of family law proceedings (protection orders, child support, or visitation). It could also be demonstrated by fear of persecution or social ostracism and lack of access to social institutions and support networks. Other examples include the more obvious factors: lack of language skills, quality of educational opportunities, assimilation into U.S. culture, and community ties here versus in the foreign country. The country conditions category could include the designation of TPS, civil unrest or generalized level of crime and violence, and State Department Travel Warnings or Alerts.

No Presumption but “Likely to Support” Finding of Extreme Hardship

The final guidance also identifies five factors that “often weigh heavily in support of a finding of extreme hardship.” While the existence of one or more of these “particularly significant factors” at the time of adjudication would not create a presumption of extreme hardship, they are “often likely to support findings” of it. The five particularly significant factors are:

1. Qualifying relative was granted Iraqi or Afghan Special Immigrant Status, T nonimmigrant status, or asylee or refugee status from the waiver applicant’s country of relocation
2. The qualifying relative is on active duty with any branch of the U.S. Armed Forces
3. Either the qualifying relative or a member of the household who is dependent on the qualifying relative’s care is disabled or suffers from a medical/physical condition that makes travel to or residence in the foreign country detrimental to his or her health or safety
4. The Department of State has issued either a country-wide travel warning or one for a region of the country where the applicant or the qualifying relative would likely relocate
5. Separation would result in the qualifying relative becoming the primary caretaker—and possibly income-earner—for the couple’s children or otherwise taking on significant parental or other caregiving responsibilities.

The first two factors do not need further elaboration.

The third circumstance would apply if the qualifying relative is disabled and is going to either separate from the applicant or relocate to a foreign country where services are unavailable or significantly inferior to those in the United States. It would also apply if the disabled person is another household member who is going to relocate or remain in the United States. Regardless of whether the disabled person is the qualifying relative or another household member, if separation is alleged, he or she needs to establish the need for the applicant’s assistance due to the disability.

The fourth circumstance is particularly significant for applicants from Mexico, Honduras, and El Salvador, where the State Department has recently issued country-wide or region-specific travel warnings.

The fifth circumstance would apply in situations where the separation would result in a substantial shift in caregiving responsibilities from the applicant to the qualifying relative. It assumes that the qualifying relative is responsible for the welfare of a child. The applicant will need to establish a bona fide relationship between the child and either the applicant or the qualifying relative. For purposes of this hardship factor, the immigration status of dependent children is irrelevant—they may be U.S. citizens, LPRs, or undocumented.

Hypothetical Case Examples

The guidance includes case examples to illustrate circumstances that both satisfy and fail to satisfy the requisite level of hardship to be considered extreme.

Effective Date

The final guidance took effect on December 5, 2016, and applies to waiver applications adjudicated on or after that date. Given the current processing times at the National Benefits Center and the Nebraska Service Center, waiver applications submitted today would likely be judged by these new standards. Therefore, practitioners who are preparing waiver applications now should incorporate the final guidance into their theory as to why the applicant has established extreme hardship. If a waiver application is currently pending, it is possible to ask that the case be held in abeyance until after December 5, 2016, although it is doubtful that the agency would comply. Hopefully, the agency will issue instructions for how it plans to deal with waiver applications that would be granted under the final guidance but denied under the current standards. Practitioners with clients who were denied waivers in the past should consider re-applying if, by applying the new guidance, it indicates they might be successful.