AMERICAN IMMIGRATION LAWYERS ASSOCIATION

November 23, 2015

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director, Mailstop 2000
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Washington, DC 20529-2000

Submitted via: ope.feedback@uscis.dhs.gov

Re: USCIS Draft Policy Manual – Volume 9, Part B: Extreme Hardship

The American Immigration Lawyers Association (AILA) submits the following comments in response to the October 7, 2015 USCIS Draft Policy Manual – Volume 9, Part B: Extreme Hardship (hereinafter "draft hardship guidance" or "draft guidance").

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this draft guidance and believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

Introduction

We thank USCIS for undertaking this effort to provide clarity to people applying for waivers of inadmissibility that require a showing of extreme hardship. Congress intended for these waivers to operate as a means to unite citizens and permanent residents with their close family members. Guidance that explains and clarifies the standards and factors used to evaluate extreme hardship will help to provide the transparency that is necessary to ensure that the goal of family unity is fostered.

While we commend USCIS for tackling the interpretation of extreme hardship through the issuance of this guidance, we strongly urge the agency to promulgate extreme hardship regulations through the rulemaking process. Formal rulemaking will create law that is binding on all adjudicators reviewing inadmissibility waivers, including federal courts and immigration judges, and would provide greater stability to both applicants and adjudicators over time. The draft guidance – with the revisions discussed below – would be a welcome interim step until final regulations are adopted.

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USCIS should also adopt true presumptions of hardship instead of the "special circumstances" outlined in the draft policy guidance. In his November 20, 2014 memorandum, DHS Secretary Jeh Johnson specifically directed USCIS to consider criteria by which a presumption of extreme hardship may be determined to exist.[1] Presumptions would ease the evidentiary burdens on applicants who meet the relevant criteria while providing adjudicators with clear guidelines for a subset of provisional waiver applicants, resulting in more consistent outcomes.[2]

An Administrative Interpretation of "Extreme Hardship" for Inadmissibility Waivers Should Be Adopted Through Notice and Comment Rulemaking

The provisional waiver program and its pending expansion is an excellent example of an agency using rulemaking to introduce modernity into the adjudication of inadmissibility waivers. Likewise, an ameliorative interpretation of "extreme hardship" should be promulgated by the agency through notice and comment rulemaking. Through this process, USCIS may adopt a broad interpretation of the relevant provisions of the Immigration and Nationality Act (INA) and provide binding rules on the adjudication of inadmissibility waivers that require a hardship evaluation. Rulemaking, rather than policy guidance and other informal sub-regulatory administrative mechanisms, will provide the agency with greater flexibility in fashioning a modern interpretation of extreme hardship, and will allow it to benefit from public input, create law, and provide a more sustainable outcome. The long-lasting effects of an extreme hardship regulation would be worth the expenditure of the time and resources that are inherent in the rulemaking process. In addition to formalizing the developments outlined in the draft guidance, notice and comment rulemaking would provide a better venue to address the following flaws that have undermined the agency's current approach to the extreme hardship analysis.

- ***Suspension of Deportation Case Law Does Not Provide A Useful Measure of "Extreme Hardship" for Inadmissibility Waivers***

Throughout the draft guidance, USCIS frames the extreme hardship analysis by reference to administrative decisions interpreting "extreme hardship" under the former suspension of deportation statute (former INA §244) and "exceptional and extremely unusual hardship" under the cancellation of removal statute (INA §240A(b)).[3] However, suspension of deportation and cancellation of removal are forms of relief that can only be granted outside of the visa allocation system, and the cases interpreting extreme hardship in this context reflect this fact. On the other hand, extreme hardship waivers of inadmissibility, which the draft guidance is intended to address, are used in conjunction with the immigrant visa allocation system to facilitate family

[1] DHS Memo on Expansion of the Provisional Waiver Program, AILA Doc. No. 14112007 (11/20/14), *available at* http://www.aila.org/infonet/dhs-expansion-of-the-provisional-waiver-program.

[2] As explained in the February 12, 1999, Virtue Memorandum, "Limited Presumption of Extreme Hardship under Section 203 of NACARA," USCIS has the authority to establish such presumptions and in fact did so in the NACARA implementing regulations. 8 CFR §1240.64(d)(1) sets forth a rebuttable presumption of extreme hardship for certain Salvadorans and Guatemalans who apply for NACARA benefits.

[3] For example, the agency cites to decisions such as *Matter of L-O-G*, 21 I&N Dec. 413 (BIA 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994); *Matter of Calderon-Hernandez*, 25 I&N Dec. 885 (BIA 2012); *Matter of O-J-O-*, 21 I&N Dec. 381 (BIA 1996); and *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).

unity. Importantly, Congress understood that certain family relationships are categorically more important and therefore created these inadmissibility waivers to facilitate the admission of close family members of U.S. citizens and permanent residents. As a result, in the interest of family unity, it makes sense for the agency to interpret extreme hardship more broadly in the context of inadmissibility waivers than the suspension and cancellation cases have done in the past. Therefore, USCIS should not be constrained by this case law in guidance or rulemaking.

- ***Common Consequences of Inadmissibility Can Warrant a Finding of Extreme Hardship***

Similarly, USCIS should not be constrained by the concept that the common consequences of the denial of admission cannot be considered in the extreme hardship analysis. This "common consequences rationale" has no statutory basis and should be discarded as the agency seeks to promulgate regulations.

First, the plain language of the statute does not support the exclusion of the so-called "common consequences" of the denial of admission such as family separation, economic detriment, the difficulties of adjusting to life in a new country, the quality and availability of educational opportunities abroad, the inferior quality of medical services and facilities, and the ability to pursue a chosen employment abroad from consideration. A better statutory interpretation is that, by limiting waivers of inadmissibility to particular qualifying relatives, Congress intended the agency to consider every consequence that the denial of admission would have on those relatives in determining whether they would suffer extreme hardship.

Second, the cases that are commonly cited for the proposition that the "common consequences" of the denial of admission cannot satisfy the extreme hardship element do not actually support that proposition. On page 13, the draft guidance cites *Matter of Ngai* and *Matter of Shaughnessy* in its "common consequences" analysis.[4]

In *Ngai*, the applicant sought to immigrate to the United States but was inadmissible for having been convicted of a crime involving moral turpitude. She sought a waiver of inadmissibility by asserting that her husband would suffer extreme hardship. Critically, the Commissioner did *not* deny the waiver because the factors identified in the hardship analysis – family separation, inferior medical care, economic detriment, and emotional hardship – were not relevant or were "common consequences." Instead, the Commissioner explained that the respondent's claims as a factual matter were "refuted by the record."[5] Moreover, rather than proffering an independent interpretation of the statute, the Commissioner referenced *Matter of Shaughnessy* and *Matter of W-* in support of a purported rule that "[c]ommon results of the bar, such as separation, financial difficulties, etc. in themselves are insufficient to warrant approval of an application unless combined with much more extreme impacts."[6] However, neither *Shaughnessy* nor *W-* stand for such a rule.

[4] *Matter of Ngai*, 19 I&N Dec. 245 (Comm. 1984); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968).
[5] 19 I&N Dec. at 246.
[6] *Id*. at 246-47.

In *Shaughnessy*, the respondent sought relief in the form of a waiver under INA §212(h) as a result of several convictions for crimes involving moral turpitude.[7] The relevant *legal* questions were: (1) whether an applicant for a 212(h) waiver could prove the extreme hardship element by showing extreme hardship only to himself; and (2) how far in the future could an adjudicator look when adjudicating the hardship element. The BIA held that hardship only to the applicant is not statutorily cognizable and that an adjudicator could look to the "foreseeable future" in adjudicating the hardship element.[8] Citing *Matter of W-* for the proposition that "extreme hardship" for purposes of a 212(h) waiver means "more than the existence of mere hardship caused by family separation," the BIA denied the waiver. In so holding, the BIA noted that the respondent's parents were "self-supporting," that the "respondent has *never* contributed to their support," and that both parents were in good or reasonably good health.[9] Thus, like *Ngai*, *Matter of Shaughnessy* is not the source for the "common consequences" theory.

We look, then, to *Matter of W-* for the basis of the "common consequences" rationale.[10] In *W-*, the respondent was in exclusion proceedings for having committed the crimes of second degree burglary and larceny. He sought a waiver of inadmissibility, asserting that his wife would suffer extreme hardship. The BIA concluded that the respondent had not demonstrated extreme hardship as a factual matter, given that the marriage was of short duration, there were no children, and the wife was financially independent.[11] The BIA summarized what it had decided in a prior unpublished opinion in the same matter: "that Congress intended, by use of the expression 'extreme hardship,' that there be established more than the existence of mere hardship caused by family separation."[12] The BIA explained that the "most recent oral argument before the Board, and also our last decision in this matter, went off primarily on a discussion of what constitutes 'extreme hardship' sufficient to satisfy the requirements of [the statute in question]."[13]The BIA did not elaborate on any of the reasoning elucidated at the oral argument or describe the reasoning in its "last decision." As a result, the sole *legal* rule that can be derived from *Matter of W-* is that "extreme hardship" is not "mere hardship."

Tracing the holdings from *W-* to *Shaughnessy* to *Ngai*, the legal rule that emerges is the uncontroversial and reasonable interpretation of the statute that the plain meaning of "extreme hardship" is not "mere hardship" and that only those consequences that are "reasonably foreseeable" from the denial of admission should factor into the adjudication. The "common consequences" rationale has no valid provenance in these decisions. Therefore, USCIS should not replicate this theory, which is based on an erroneous interpretation of administrative case law in any hardship regulations it promulgates.[14]

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[7] 12 I&N Dec. at 811-12.
[8] *Id*. at 813.
[9] *Id*. at 812-14.
[10] 9 I&N Dec. 1 (BIA 1960).
[11] *Id.* at 3.
[12] *Id* at 1.
[13] *Id*.
[14] The President has specifically instructed the agency to make a break from decades of dysfunction. *Matters of Ngai*, *Shaughnessy*, and *W-* are products of their time and do not reflect a modern sensibility of family life. If USCIS believes these decisions prevent a modern approach to waiver adjudication, it can also confine them to their facts or withdraw from the cases altogether.

The Draft Guidance Is a Good Interim Step on the Path to Regulations, But Needs Critical Revisions to Be Effective

AILA commends USCIS for recognizing the importance of family unity and for dedicating resources to the development of this draft guidance that once finalized, will apply to inadmissibility waivers under INA §212(a)(9)(B)(v), §212(h)(1)(B), and §212(i)(1). The guidance makes great strides in the interpretation of extreme hardship and offers much needed clarity that will ultimately enable more families to be reunited and will bring greater consistency to waiver adjudications. For example, the guidance explains that even if there is no single qualifying relative to whom the hardship suffered would be severe enough to be found extreme, hardship to two or more qualifying relatives can be considered in the aggregate and could add up to extreme. The guidance also notes that hardship experienced by a non-qualifying relative (including the applicant) can itself be the cause of hardship to a qualifying relative. These explanations, among other significant developments, will make a discernable difference in adjudications. However, the draft guidance would benefit from revisions in a number of critical areas for it to be truly effective.

- ***Clarify That Adjudicators Should Defer to the Qualifying Relative's Conclusion to Relocate or Remain in the United States***

In one of the most important and impactful sections of the memo, USCIS explains that an applicant can satisfy the extreme hardship requirement by showing ***either*** that it is reasonably foreseeable that the qualifying relative would relocate and more likely than not that the relocation would result in extreme hardship; ***or*** that it is reasonably foreseeable that the qualifying relative would remain in the United States and more likely than not that the separation would result in extreme hardship. We applaud USCIS for taking this straightforward approach to waiver adjudications, which better aligns with Congressional intent and will help applicants provide the most useful evidence for adjudicators.

Importantly, USCIS noted that "it is not appropriate for an officer to base this determination on his or her personal moral view as to whether a particular qualifying relative ought to relocate overseas."[15] To strengthen this point, USCIS should clarify on page 6 that the "reasonably foreseeable" requirement may be satisfied simply by the submission of a statement or affidavit by the qualifying relative indicating whether he or she would relocate or remain in the United States. While this information appears later in the draft guidance on page 26, it is worth repeating in this earlier section to ensure that adjudicators do not substitute their own judgement in evaluating the "separation vs. relocation" component. Furthermore, USCIS should clearly state that in order to refute such a statement by the qualifying relative, adjudicators must determine that either relocation or separation is not reasonably foreseeable by clear and convincing evidence.

[15] Draft Guidance at 6.

- ***Establish Presumptions of Extreme Hardship***

DHS Secretary Johnson's November 20, 2014 memorandum specifically directed "USCIS to consider criteria by which a presumption of extreme hardship may be determined to exist" and acknowledged that such a presumption was previously adopted by regulations implementing the 1997 Nicaraguan Adjustment and Central American Relief Act. Pub. L. No. 105-100.[16] Unfortunately, despite this directive, the draft guidance does not include any presumptions. Creating a presumption of hardship in select situations would not only answer Secretary Johnson's directive, it would also provide additional and much-needed clarity on the meaning of extreme hardship and encourage broader use of the provisional waiver program, a goal which was highlighted in Secretary Johnson's memorandum. For these reasons, we strongly urge USCIS to establish true presumptions of extreme hardship in its guidance and in any future hardship regulations that may be promulgated.

- ***USCIS Should Replace the Current "Special Circumstances" With Presumptions, and Expand the Circumstances That Qualify for a Presumption***

The hardship guidance delineates a number of "special circumstances" that would "often weigh heavily in favor of finding extreme hardship."[17] Though we applaud USCIS for taking steps to identify factors that are especially likely to result in extreme hardship, USCIS should take it one step further and create clear presumptions of extreme hardship, and include as presumptions, the factors currently delineated as "special circumstances" in the draft guidance. The conversion of these factors into presumptions will no doubt allow many deserving families to avoid lengthy, painful separations, and will increase public confidence in the provisional waiver program and the waiver process in general. In addition, we ask USCIS to consider adding additional factors as presumptions, such as:

- The qualifying relative is a U.S. citizen or permanent resident spouse and the couple has been married for a minimum of three years, or where the couple has at least one U.S. citizen child.
- The spouses are of the same sex, the country of relocation either does not permit or does not recognize same-sex marriage, and the country of relocation harbors an environment that is hostile toward LGBT individuals.

Additionally, we note that the draft guidance says that it is a "special circumstance" if the qualifying relative is on active duty with the military. This should be expanded to include reserve members and veterans. Furthermore, regardless of the criteria, the guidance should make it clear that if an applicant meets the requirements for a presumption, the adjudicating officer should skip the extreme hardship analysis and proceed directly to determining whether the applicant is eligible for a waiver as a matter of discretion.

[16] *See* 8 CFR 240.64(d).
[17] Draft Guidance at 17.

- ***USCIS Should Make it Clear That the Lack of a Presumption Does Not Give Rise to Any Negative Inference***

The guidance should also make it clear that applicants who do not meet the specified presumption criteria are not precluded from establishing extreme hardship based on the other factors that are present in their case. AILA recommends including the following language to make it abundantly clear that no negative inference can be drawn from the lack of a presumption of extreme hardship:

> *An applicant can be deemed to have established extreme hardship **either** by meeting the criteria for a presumption of extreme hardship, **or** by presenting any other factor, alone or in combination, that demonstrates extreme hardship.*

To make strengthen this point, the "Adjudication Steps" listed in the Chart on Page 9 of the draft guidance should be revised as follows:

- Step 1 should remain unchanged, and flow to Step 2.

- Step 2 should remain unchanged, but instead of flowing to Step 3, it should branch off into 2 separate paths: Step 3.a and 3.b.

- Step 3 should be amended to read as follows to reflect both paths:

    - Step 3.a: Identify whether a presumption of extreme hardship exists. If the applicant meets the criteria for a presumption, determine whether, based on the totality of the facts of the individual case, the applicant merits a favorable exercise of discretion. If yes, the waiver should be granted. The adjudication steps ends at this point.

    - Step 3.b: If the applicant does not meet the criteria for a presumption of extreme hardship, determine whether, if the waiver application were denied, either relocation or separation (or both) is/are reasonably foreseeable for each of the qualifying relatives you have identified. Precede with Steps 4, 5, and 6.

The revised chart would make it clear to both USCIS adjudicators and applicants that there are two main ways of establishing extreme hardship and that failure to establish hardship based on one of the methods does not preclude a finding of extreme hardship based on the other method.

- ***USCIS Should Revise Select Hypotheticals***

The inclusion of case examples in the guidance will help stakeholders and adjudicators better understand the extreme hardship analysis. Case examples will also help adjudicators spot the relevant factors while also helping applicants highlight pertinent details more effectively. Unfortunately, Scenario #1 on page 22 departs drastically from the principles outlined in the guidance, as well as current interpretations of extreme hardship. In this example, the qualifying relative does not know the language of the applicant's home country, nor does she have

experience travelling or living in the country. The qualifying relative would suffer economic loss, and would have an extremely difficult time integrating if she were to relocate to the applicant's home country. Moreover, the couple has been married for four years and may have developed community ties in the U.S., have become financially dependent on each other, and/or be facing a decline in the their standard of living – all of which are factors that the draft guidance states might indicate extreme hardship.

Adjudicators could read this case example and think that anyone without children or a high-paying job can relocate to the applicant's home country without experiencing extreme hardship. USCIS should revise the analysis to conclude that either the fact pattern would favor a finding of extreme hardship or that the adjudicator should issue an RFE to determine what additional hardship factors are present.

Miscellaneous Feedback

- ***Correct Inaccuracy in Footnote 1***

Footnote one indicates that exceptional hardship under INA §212(e) (waiver of two-year foreign residence requirement for certain exchange visitors) requires a greater showing of hardship than extreme. While in practice AILA members find that the "extreme hardship" and "exceptional hardship" are adjudicated similarly, exceptional hardship has largely been understood to be a lower standard than extreme hardship. It is unclear on what authority USCIS is basing this assertion and we recommend that it be deleted.

- ***Enhance Training of Adjudicators to Ensure Fair and Consistent Outcomes***

In order for the hardship guidance to be effective, it must be accompanied by immediate, robust training for all USCIS adjudicators who are tasked with evaluating extreme hardship. USCIS should also closely monitor adjudication trends and utilize supervisory review to ensure that extreme hardship is adjudicated consistently across all product lines.

- ***Revise Footnote 31 to Be Consistent with the Draft Guidance***

Footnote 31 reads that "[e]ven the aggregated hardships will not add up to extreme hardship if they include only those that the BIA has held to be 'common consequences.'" This statement is inaccurate, and disregards current adjudication procedures and case law. It also contradicts the page 13 of the draft guidance, which states that "even these common consequences might cause the sum of the hardships to reach the 'extreme hardship' standard." Footnote 31 should be deleted or revised to reflect page 13 of the draft guidance.

Conclusion

The draft guidance, with the revisions above, is a good interim step that we hope will bring more clarity and consistency to hardship adjudications. Ultimately, the promulgation of regulations through the notice and comment process would provide greater stability to applicants and

adjudicators over time and would allow USCIS to better implement the broad, ameliorative interpretation of "extreme hardship" contemplated by the November 20, 2014 memorandum.

AILA appreciates the opportunity comment on this notice, and we look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION