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Extreme Hardship & Discretion: Adjudicating Form I-601



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I-601 Centralization Project [SCOPS], April 2012

Overview

Purpose

To provide specific training for Adjudicating Form I-601

- Extreme hardship analysis for certain waivers
- Discretionary analysis for all waivers



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Overview (cont.)

Content

Training includes guidance on the following issues:

- Is Extreme Hardship Required?
- Is there a Qualifying Relative?
- Would the Qualifying Relative Experience Extreme Hardship?
- Is Favorable Discretion Warranted?
- How should the adjudicator document and articulate their decision for the record?



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Is Extreme Hardship Required?



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Many Types of Waivers

- Form I-601 is used by individuals to apply for many types of waivers.
- The waiver requirements depend on the statute authorizing the waiver.



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Which of These Waivers Require Extreme Hardship?

Inadmissibility

Waiver Authority

Totalitarian party membership	INA 212(a)(3)(D)
Unlawful presence	INA 212(a)(9)(B)(v)
Illegal entry after prior violations	INA 212(a)(9)(C)(iii)
Alien smuggling	INA 212(d)(11)
Subject to civil penalty	INA 212(d)(12)
Medical grounds	INA 212(g)
Criminal grounds	INA 212(h)
Fraud or misrepresentation	INA 212(i)
General – TPS applicants	INA 244(c)(2)



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Waivers Requiring a Showing of Extreme Hardship

Only 3 types of waivers require a showing of extreme hardship to a qualifying relative:

1. Unlawful presence waivers – INA 212(a)(9)(B)(v)
2. Certain Criminal waivers – INA 212(h)(1)(B)
 - Not for criminal waivers based on rehabilitation – INA 212(h)(1)(A)
 - Not for criminal waivers filed by a VAWA self-petitioner – INA 212(h)(1)(C)
3. Fraud/Misrepresentation Waivers – INA 212(i)



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Is There a Qualifying Relative?



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Who is a Qualifying Relative?

- A qualifying relative must be a U.S. citizen (USC) or a lawful permanent resident (LPR),
 - with the exception of 212(i) waivers for VAWA self-petitioners, who may also show extreme hardship to themselves or to a qualified alien.
- The applicant must show that a qualifying relative would experience extreme hardship if the applicant were refused admission to the United States.
- An officer may consider hardship to another individual, but only to the extent that the claimed hardship would lead to extreme hardship to the qualifying relative.



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The Qualifying Relationship is Determined by the Waiver Authority

WAIVER PROVISION	EXTREME HARDSHIP MAY BE CLAIMED TO:					
	ALIEN	USC/LPR SPOUSE	USC/LPR PARENT	USC/LPR CHILD	USC/LPR SON OR DAUGHTER	ALIEN'S ^{VAWA} QUALIFIED PARENT OR CHILD IF A QUALIFIED ALIEN
INA 212(a)(9)(B)(v)		X	X			
INA 212(h)(1)(B)		X	X	X	X	
INA 212(i) [Non-VAWA]		X	X			
INA 212(i) [VAWA]	X		X	X		X



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Evidence of Relationship and USC/LPR Status

- An applicant may have more than one qualifying relative, but only needs to show extreme hardship to one.
- If the qualifying relative is the visa petitioner...
 - Verify the petition approval only
- If the qualifying relative is not the visa petitioner...
 - Verify the claimed relationship
 - Verify the USC/LPR status of the qualifying relative



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Surviving Relatives

- USCIS will consider the death of a qualifying family member to be the functional equivalent of extreme hardship for a waiver applicant if:

1. The applicant is
 - the beneficiary or derivative beneficiary of an approved visa petition filed by the QFM before he or she died; OR
 - the widow(er) of a USC who filed a Form I-130 that was converted to a Form I-360 on the USC's deathand,
2. The applicant resided in the United States at the time of the death of the QFM; and,



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Surviving Relatives

- The applicant continued to reside in the United States;
- 4. The deceased qualifying family member was the original petitioner or principal beneficiary.
- This “functional equivalent” provision does NOT apply to a widow(er) who filed his or her own I-360 only *after* the death of the USC.



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Would the Qualifying Relative Experience Extreme Hardship?



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Making the Determination if QR Would Experience Extreme Hardship?

- What is Extreme Hardship?
- Consider the Severity of the Claimed Hardship
- Consider the Totality of Facts and Circumstances
- Assess Claimed Hardships Individually and Cumulatively
- Consider Actual or Prospective Claims of Extreme Hardship
- Consider Extreme Hardship Due to Relocation or Remaining in the United States



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What is Extreme Hardship?

- The term “extreme hardship” is not defined in the INA.
- Case law and USCIS policy provide guiding principles for adjudicators.



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Guidance Provided Through Case Law and USCIS Policy

- Case law: precedent decisions include case law from,
 - the Attorney General,
 - the Board of Immigration Appeals (BIA),
 - Administrative Appeals Office (AAO),
 - the Supreme Court and other Federal courts

- Policy: USCIS Policy Manual under development



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Consider the Severity of the Claimed Hardship

Extreme hardship is hardship that is greater than common consequences of inadmissibility.

See, *Matter of Ngai*, 19 I&N Dec. 245 (BIA 1984); referring to *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968); *Matter of W-*, 9 I&N Dec. 1 (BIA 1960); see also *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999).

Appellate authorities have been consistent in requiring that extreme hardship must be different and more severe than that suffered by the relatives of any individual who is removed from the United States or refused admission to the United States.

Perez v INS, 96 F.3d 390 (9th Cir. 1996) and *Matter of Monreal*, 23 I. & N. Dec. 56 (BIA 2001)

However, extreme hardship does not need to be unique or unusual and should not be confused with the higher standard of “exceptional and extremely unusual hardship” used in cancellation of removal proceedings.

See, INA 240A(b)(1)(D); *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 322 (BIA 2002); *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996).



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Consider the Totality of Facts and Circumstances

USCIS adjudicators must make extreme hardship determinations based on the factors, arguments, and evidence submitted by the applicant.

- See *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996); *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978). See also *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999).



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Assess Claimed Hardships Individually and Cumulatively

- USCIS adjudicators must assess claimed hardships individually and collectively.
- Hardship that is a common consequence of inadmissibility, by itself, will not generally lead to a finding of extreme hardship.
- However, when assessed cumulatively, common consequences may lead to a finding of extreme hardship.
 - See *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996).



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Consider Actual or Prospective Claims of Extreme Hardship

- Extreme hardship can be based on actual or prospective injury.
- If the applicant claims extreme hardship that the qualifying relative may experience in the future, it must be realistic and foreseeable.

See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999); *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996); *Matter of Ngai*, 19 I&N Dec. 245 (BIA 1984); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1960).



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Consider Extreme Hardship Due to Relocation or Remaining in the United States

Question?

In addition to considering Extreme Hardship that the QR might incur if the QR remains in the United States...

When, if ever, should the adjudicator consider possible Extreme Hardship to the QR if they were to relocate with the alien in the foreign country?



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EH based on the QR Relocating

Because claims of prospective injury must be realistic and foreseeable, if the qualifying relative is currently residing in the United States, the applicant must show that it is more likely than not that the qualifying relative would attempt to relocate if the extreme hardship claim is based on relocation.



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Analyzing Extreme Hardship Claims

When analyzing extreme hardship claims, USCIS adjudicators should become familiar with:

- *The common consequences of inadmissibility; and*
- *Factors to consider when determining whether the claimed hardships are more severe than the common consequences of inadmissibility.*



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Common Consequences

Courts have held that common consequences of an applicant's inadmissibility or removal include the following:

- Family separation
- Economic detriment
- Difficulties of readjusting to life in the new country
- The quality and availability of educational opportunities abroad
- Inferior quality of medical services and/or facilities



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Factors to Consider

The adjudicator should consider how other factors of the case impact and might exacerbate any claimed hardships in order to determine whether the claimed hardships are more severe than the common consequences of inadmissibility.

Some factors to consider include:

- Health considerations
- Financial considerations
- Educational considerations
- Personal considerations
- Special factors



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Health Considerations

Health Considerations might include:

- Ongoing or specialized treatment required for a physical or mental condition
- Availability and quality of such treatment in the foreign country
- Anticipated duration of the treatment
- Chronic vs. acute vs. long or short-term care



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Financial Considerations

Financial Considerations might include:

- Future employability
- Loss due to sale of home or business or termination of a professional practice
- Decline in standard of living
- Ability to recoup short-term losses
- Cost of extraordinary needs such as special education or training for children with special needs
- Cost of care for family members (elderly and sick parents)



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Educational Considerations

Educational Considerations might include:

- Loss of opportunity for higher education
- Lower quality or limited scope of education options
- Disruption of current program
- Requirement to be educated in a foreign language or culture with ensuing loss of time or grade
- Availability of special requirements, such as training programs or internships in specific fields



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Personal Considerations

- Close relatives in the United States and country of birth or citizenship
- Separation from spouse/children
- Ages of involved parties
- Length of residence and community ties in the United States



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Special Factors

- Cultural, language, religious, and ethnic obstacles
- Credible fears of persecution, physical harm, or injury
- Social ostracism or stigma
- Access (or lack of access) to social institutions or structures (official or unofficial) for support, guidance, or protection



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Reviewing the Evidence

The adjudicator should consider all claimed hardships and evidence submitted to support any claims.

Evidence may include, but is not limited to:

- Affidavits from the qualifying relative or other individuals with personal knowledge of the claimed hardships;
- Expert opinions;
- Evidence of employment or business ties, such as payroll records or tax statements;
- Evidence of monthly expenditures such as mortgage, rental agreement, bills and invoices, etc.;



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Reviewing the Evidence [cont.]

Evidence might also include:

- Other financial records supporting any claimed financial hardships;
- Medical documentation and/or evaluations by medical professionals supporting any claimed medical hardships;
- Records of membership in community organizations, volunteer confirmation, and evidence of cultural affiliations;
- Birth/marriage/adoption certificates supporting any claimed family ties;
- Country condition reports; and
- Any other evidence the applicant believes supports the claimed hardships.



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Standard of Proof

- The applicant must meet the “preponderance of evidence” standard of proof.
- This means that the applicant must show that it is “probably true” or that it is “more likely than not” that the qualifying relative would experience extreme hardship if the applicant were refused admission.
 - See INA 291; *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010); *Matter of Arthur*, 16 I&N Dec. 558 (BIA 1978).



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Standard of Proof [cont.]

- The adjudicator should consider:
 - The quality of the evidence provided;
 - The connection between the evidence and the hardship assertion; and
 - The degree to which the evidence supports the truth of a hardship assertion.

- There is no specific amount of evidence required to support any hardship claim.

- The adjudicator must use sound judgment when deciding whether the applicant provided sufficient evidence.

- The adjudicator may request additional evidence, if necessary, to support any claimed hardship.



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The EH Standard is not variable

The analysis / application of the extreme hardship standard does not change according to the inadmissibility. The standard is applied in the same manner for all waivers requiring EH (e.g. unlawful presence, misrepresentation or a criminal ground waiver)

Do not confuse the extreme hardship with discretion. There may be negative factors to consider in analyzing discretion (e.g. for criminal activity or misrepresentation) but these may not be part of the extreme hardship analysis



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EH alone does not equal eligibility

I-601 application approval is a discretionary benefit.

Adjudicators need to evaluate whether a waiver is warranted as a matter of discretion even when the applicant establishes extreme hardship or, in the case of criminal inadmissibility, rehabilitation.

EH and rehabilitation are important determinations but only threshold determinations.



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Is Favorable Discretion Warranted?



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Consider ALL Known Factors

When analyzing whether favorable discretion is warranted, the adjudicator should review all known factors, evidence and circumstances, both favorable and unfavorable before making a final determination.



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Favorable Factors

Positive Factors that might support a favorable exercise of discretion include:

- applicant established EH to a qualifying relative,
- community involvement,
- responsible provider to family,
- compliance with any court orders,
- has U.S. ties,
- amount of time that has passed since incident(s) that relate to inadmissibility.



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Unfavorable Factors

Negative factors that might support an unfavorable exercise of discretion include:

- the underlying basis for inadmissibility,
- nature of the criminal conduct,
- repeated criminal acts,
- evidence of lack of rehabilitation,
- other instances of fraud in U.S., etc.



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Discretion Requires Balancing

In analyzing discretion a balancing of positive and negative factors is required:

Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996), ["Upon review of the record as a whole, the Immigration Judge is required to balance the equities and adverse matters to determine whether discretion should be favorably exercised."]

In general, a favorable exercise of discretion is warranted when, looking at the full record, the positive factors outweigh the negative factors



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Discretion [cont.]

In evaluating whether relief is warranted in the exercise of discretion,

- the factors adverse to the applicant include:
 - the nature and underlying circumstances of the exclusion ground at issue,
 - the presence of additional significant violations of this country's immigration laws,
 - the existence of a criminal record and, if so, its nature, recency and seriousness, and,
 - the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country.

- The favorable considerations include:
 - family ties in the United States,
 - residence of long duration in this country (particularly where the alien began his residency at a young age),
 - evidence of hardship to the alien and his family if he is excluded and deported,
 - service in this country's Armed Forces,
 - a history of stable employment,
 - the existence of property or business ties,
 - evidence of value and service to the community,
 - evidence of genuine rehabilitation if a criminal record exists, and,
 - other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives)."

See, *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996)



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Violent or Dangerous Crimes

Except in extraordinary circumstances, USCIS will NOT approve a waiver when the applicant is inadmissible for an offense related to a violent or dangerous crime. 8 CFR 212.7(d)

Extraordinary circumstances include:

- National security or foreign policy considerations
- Exceptional and extremely unusual hardship

Approval requires HQSCOPS concurrence



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How Does the Adjudicator Document and Articulate the Decision for the Record?



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Approvals

Extreme Hardship Determination

- During the training period or when otherwise directed by a supervisor, the adjudicator should summarize all of the statements and documents submitted by the applicant and/or petitioner to support the extreme hardship claim.

Discretion Determination

- During the training period or when otherwise directed by a supervisor, the adjudicator should summarize both the favorable and the unfavorable factors the adjudicator considered to determine that favorable discretion is warranted.



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Denials

Denial Notices Should Include a Detailed Analysis

- If the applicant does not establish that the QR would experience extreme hardship or that favorable discretion is warranted, the denial notice must explain in detail why extreme hardship was not established or why favorable discretion was not warranted.
- If evidence presented was discounted or given less weight, the denial notice should explain how the adjudicator came to this conclusion.
- The denial notice should cite case law, if applicable, to support the adjudicator's analysis.



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Any Questions?



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Sample Fact Patterns

- Using sample fact patterns provided, identify any relevant information and appropriately analyze, including answering the following adjudication issues:
 - Is a showing of EH required? Why or Why Not?
 - Who is the QR, if any?
 - What evidence might supports a favorable EH determination?
 - What evidence might support an unfavorable EH determination?
 - Is there any additional evidence that you might request from the applicant?
 - In your analysis, do you think the applicant established EH?
 - Assume that EH is found. What relevant evidence should be analyzed regarding whether or not the applicant warrants a favorable grant of discretion?
 - Are there any other issues or concerns regarding this fact pattern?



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For additional information or if you have questions about the material covered in this training, please forward your inquiries to your supervisor, local OCC counsel, or to:

SCOPS HQ

- Jerry Rigdon, Branch Chief, Family & Status, SCOPS,
- Matthew Mumper, Project Manager, Family & Status, SCOPS, or
- Margaret "Peggy" O'Dowd, Project Manager, Family & Status, SCOPS



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