

## Part B – Extreme Hardship **DRAFT**

### **Purpose**

U.S. Citizenship and Immigration Services (USCIS) is issuing draft extreme hardship policy guidance for public comment. This guidance clarifies how USCIS would make extreme hardship determinations once the guidance is finalized.

### **Background**

Admissibility is generally a requirement for admission to the United States, adjustment of status, and other immigration benefits. Several INA provisions, however, authorize discretionary waivers of particular inadmissibility grounds for those who demonstrate “extreme hardship” to qualifying relatives, such as specified U.S. citizen or LPR family members.

### **Policy Highlights**

The draft guidance:

- Describes which waivers require a showing of extreme hardship.
- Explains that an applicant has established extreme hardship to a qualifying relative if he or she is able to show that it is reasonably foreseeable that the qualifying relative would either relocate or remain in the United States, and that it is more likely than not that the relocation or separation would result in extreme hardship.
- Explains that the hardship must be of great suffering or loss, and that such hardship has to be greater than that usually encountered as a result of denial of admission or removal.
- Clarifies that extreme hardship is dependent on the individual circumstances of each particular case.
- Lists factors that may be considered when making an extreme hardship determination.
- Explains special circumstances that would often weigh heavily in favor of a finding of extreme hardship to a qualifying relative.
- Clarifies that factors, individually or in the aggregate, can be sufficient to meet the extreme hardship standard.
- Clarifies that hardship to two or more qualifying relatives may be considered “extreme” in the aggregate, if there is no single qualifying relative whose hardship alone is severe enough to be found “extreme.”

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Draft for Comment

## **Chapter 1. Purpose and Background**

This Part offers guidance concerning the adjudication of applications for those discretionary waivers of inadmissibility that require showings of “extreme hardship” to certain U.S. citizen or lawful permanent resident (LPR) family members of the applicant.<sup>1</sup>

Admissibility is generally a requirement for admission to the United States, adjustment of status, and other immigration benefits.<sup>2</sup> Several provisions of the Immigration and Nationality Act (INA),<sup>3</sup> however, authorize discretionary waivers of particular inadmissibility grounds for those who demonstrate “extreme hardship” to specified U.S. citizen or LPR family members (referred to here as “qualifying relatives”). Each of these provisions conditions a waiver on both a finding of extreme hardship to a qualifying relative and the more general favorable exercise of discretion. All of these waiver applications are adjudicated by U.S. Citizenship and Immigration Services (and in some cases by the Department of Justice’s Executive Office for Immigration Review).<sup>4</sup>

The various statutory provisions specify different sets of qualifying relatives and permit waivers of different inadmissibility grounds. They include:

- [INA 212\(a\)\(9\)\(B\)\(v\)](#) – This provision can waive the three-year and ten-year inadmissibility bars for unlawful presence.<sup>5</sup> Eligible qualifying relatives include the applicant’s U.S. citizen or LPR spouse or parent.<sup>6</sup>
- [INA 212\(h\)\(1\)\(B\)](#) – This provision can waive inadmissibility for crimes involving moral turpitude, multiple criminal convictions, prostitution and commercialized vice, and

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<sup>1</sup> Several other discretionary waivers and other forms of discretionary relief are available upon showings of extreme hardship to the applicants themselves. These include waivers of inadmissibility under [INA 212\(i\)\(1\)](#) (waiver of fraud-related inadmissibility for VAWA self-petitioners), [INA 216\(c\)\(4\)\(A\)](#) (waiver of requirements for removing conditions on lawful permanent resident status), and suspension of removal and cancellation of removal under Section 203 of Nicaraguan Adjustment and Central America Relief Act (NACARA), Title II of [Pub. L. 105-100](#), 111 Stat. 2160, 2196 (November 19, 1997). See [8 CFR 240.64\(c\)](#) and [8 CFR 1240.64\(c\)](#). This Part does not address the adjudication of applications for those remedies to the extent that they relate to extreme hardship to the applicant himself or herself. It also does not address those discretionary relief provisions that require a showing of greater hardship. See [INA 212\(e\)](#) (“exceptional hardship” waiver of two-year foreign residence requirement for certain exchange visitors) and [INA 240A\(b\)\(1\)\(D\)](#) (“exceptional and extremely unusual hardship” generally required for cancellation of removal Part B).

<sup>2</sup> See [INA 212\(a\)](#) and [INA 245\(a\)](#).

<sup>3</sup> See Immigration and Nationality Act, [Pub. L. 82-414](#), 66 Stat. 163 (June 27, 1952), as amended.

<sup>4</sup> See [6 U.S.C. 271\(b\)](#). See Delegation No. 0150.1, “Delegation to the Bureau of Citizenship and Immigration Services” II, Z (June 5, 2003).

<sup>5</sup> See [INA 212\(a\)\(9\)\(B\)\(i\)](#).

<sup>6</sup> Applicants for provisional waivers of unlawful presence should check the form instructions, as the process may be limited to applicants with certain qualifying relatives.

certain serious criminal offenses for which the foreign national received immunity from prosecution.<sup>7</sup> It can also waive inadmissibility for controlled substance convictions, but only when the conviction was for a single offense of simple possession of 30 grams or less of marijuana.<sup>8</sup> Eligible qualifying relatives include the applicant's U.S. citizen or LPR spouse, parent, son, or daughter.

- [INA 212\(i\)\(1\)](#) – This provision can waive inadmissibility for certain types of immigration fraud.<sup>9</sup> Eligible qualifying relatives include the applicant's U.S. citizen or LPR spouse or parent.

## **Chapter 2. General Considerations, Interpretations, and Adjudicative Steps**

### **A. General Considerations**

The purpose of the various statutory waiver provisions is to enable the relevant agencies (in this case USCIS) to balance the competing policy considerations that affect whether a given foreign national should be admitted to the United States. On the one hand, the fact situations to which these waivers apply involve misconduct that Congress has found serious enough to render a person inadmissible. On the other hand, by authorizing extreme hardship waivers Congress created a specific exception for those cases in which the refusal of admission would result in more than the usual level of hardship for specified U.S. citizen or lawful permanent resident family members. Congress clearly intended the waiver to be applied with those sorts of family unity and other humanitarian concerns in mind.

In deciding applications for any of these waivers, the officer exercises discretion at two stages of the process. First, the determination of whether the alleged hardships are “extreme” is itself a discretionary judgment.<sup>10</sup> Second, a finding of extreme hardship to a qualifying relative does not guarantee approval of the waiver; the officer must still make a more general decision as to whether the favorable exercise of discretion is merited.<sup>11</sup> At each of these two stages, the

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<sup>7</sup> See [INA 212\(a\)\(2\)\(A\)\(i\)](#), [INA 212\(a\)\(2\)\(B\)](#), [INA 212\(a\)\(2\)\(D\)](#), and [INA 212\(a\)\(2\)\(E\)](#).

<sup>8</sup> See [INA 212\(a\)\(2\)\(A\)\(iii\)](#).

<sup>9</sup> See [INA 212\(a\)\(6\)\(C\)\(i\)](#).

<sup>10</sup> See *Hamilton v. Holder*, 680 F.3d 1024, 1027 (8th Cir. 2012) (holding extreme hardship determination discretionary and therefore not subject to judicial review). See *Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003) (same). See *Gonzalez-Oropeza v. U.S. Att’y Gen.*, 321 F.3d 1331, 1332-33 (11th Cir. 2003) (same). The courts retain jurisdiction to review “the purely legal and hence non-discretionary question” of whether a person qualifies as a qualifying relative, *Romero-Torres*, 327 F. 3d at 890, and “whether ... the correct discretionary waiver standard [was applied] in the first instance,” *Cervantes-Gonzales v. INS*, 244 F.3d 1001, 1005 (9th Cir. 2001). See *Hamilton*, 680 F.3d 1024, 1026 (8th Cir. 2012) (holding courts “retain jurisdiction over any ‘constitutional claims or questions of law’”).

<sup>11</sup> See Chapter 6, Discretion [9 USCIS-PM B.6].

officer bases his or her discretionary determination on the totality of the relevant evidence in the individual case.<sup>12</sup>

The burden of proof lies with the applicant to demonstrate both that he or she meets the statutory requirements, including extreme hardship, and that he or she merits a favorable exercise of discretion.<sup>13</sup> The applicant must prove the requisite extreme hardship by a preponderance of the evidence. This means the applicant must prove that it is more likely than not that a denial of admission would result in extreme hardship to the qualifying relative.<sup>14</sup> The applicant also has the burden of demonstrating that he or she merits a favorable exercise of discretion.

USCIS recognizes that at least some degree of hardship to the qualifying relative exists in most, if not all, cases in which the principal immigrant is denied admission. Thus, to be considered “extreme,” the hardship must exceed that which is usual or expected.<sup>15</sup> At the same time, the hardship need not be unique;<sup>16</sup> nor is “extreme hardship” as demanding as the “exceptional and extremely unusual hardship” standard generally applicable to cancellation of removal Part B.<sup>17</sup>

## B. Interpretations

The phrase “extreme hardship” is not defined in the INA or in any decisions of the Board of Immigration Appeals (BIA) or the federal courts. Rather, as the U.S. Supreme Court held in *INS v. Jong Ha Wang*, “[t]hese words are not self-explanatory, and reasonable men could easily differ as to their construction. But the [INA] commits their definition in the first instance to the

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<sup>12</sup> See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 566 (BIA 1999), *aff’d*, *Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001). See *Matter of Ngai*, 19 I&N Dec. 245 (BIA 1984). See *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968).

<sup>13</sup> See [INA 291](#) (providing that burden is on applicant for admission to prove he or she is “not inadmissible”). See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996) (holding that applicant for [INA 212\(h\)\(1\)\(B\)](#) waiver has burden of showing that favorable exercise of discretion is warranted, “as is true for other discretionary forms of relief”). See [8 CFR 212.7\(e\)\(7\)](#) (provisional [INA 212\(a\)\(9\)\(B\)\(v\)](#) waivers) and [INA 240\(c\)\(4\)\(A\)](#) (in removal proceedings, the applicant for relief has the burden of proving that he or she is statutorily eligible and merits a favorable exercise of discretion).

<sup>14</sup> See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). See *Fisher v. Vassar College*, 114 F.3d 1332, 1333-34 (2d Cir. 1997) (holding that in other contexts “preponderance of the evidence” means more likely than not).

<sup>15</sup> See [8 CFR 1240.58\(b\)](#) (for purposes of the former suspension of deportation provision, the hardship must go “beyond that typically associated with deportation”).

<sup>16</sup> See *Matter of L-O-G-*, 21 I&N Dec. 413, 418 (BIA 1996).

<sup>17</sup> See *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 322, 324 (BIA 2002) (holding the “exceptional and extremely unusual hardship” standard to be “significantly more burdensome than the ‘extreme hardship’ standard” and intimating that the applicant “might well” have prevailed under the latter standard even though she failed the former standard). See *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 59-64 (BIA 2001) (same).

Attorney General [and the Secretary of Homeland Security] and [their] delegates ...”<sup>18</sup> Thus, “[t]he Attorney General [and the Secretary of Homeland Security] and [their] delegates have the authority to construe ‘extreme hardship’ narrowly should they deem it wise to do so.”<sup>19</sup> Conversely, “[a] restrictive view of extreme hardship is not mandated either by the Supreme Court or by [the BIA] case law.”<sup>20</sup>

## 1. Separation versus Relocation

With respect to the requirement that the refusal of the applicant’s admission “would result in” extreme hardship to a qualifying relative, there are two factual scenarios to consider. The qualifying relative might either relocate overseas with the applicant or remain in the United States separated from the applicant. In either scenario, depending on all the facts of the particular case, the refusal of admission might or might not result in the qualifying relative experiencing extreme hardship.

Interpreting the phrase “would result in,” and applying the preponderance of the evidence standard,<sup>21</sup> USCIS has determined that the applicant may satisfy the extreme hardship requirement by showing that either:

- It is reasonably foreseeable that the qualifying relative would relocate and more likely than not that the relocation would result in extreme hardship; or
- 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.

An applicant may also satisfy the extreme hardship requirement by showing that both the relocation and separation scenarios could be reasonably foreseeable and would more likely than not result in extreme hardship.

Importantly, 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. U.S. citizens and lawful permanent residents typically have much at stake in continuing to live in the United States; whether to do so at the cost of separation from a close family member is a highly personal decision.

The statutory language “would result in” makes the relevant inquiry predictive, not normative. Thus, if the officer finds, based on the totality of the evidence, that relocation is reasonably

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<sup>18</sup> See 450 U.S. 139, 144 (1981) (per curiam).

<sup>19</sup> See *INS v. Jong Ha Wang*, 450 U.S. 139, 145 (1981) (per curiam).

<sup>20</sup> See *Matter of Pilch*, 21 I&N Dec. 627, 630 (BIA 1996). See *Matter of L-O-G-*, 21 I&N Dec. 413, 418 (BIA 1996).

<sup>21</sup> See Section A, General Considerations [9 USCIS-PM B.2(A)].

foreseeable, then the next inquiry is whether the relocation would result in the qualifying relative suffering extreme hardship. If instead the officer finds, based on the totality of the evidence, that separation is reasonably foreseeable, then the next inquiry is whether the separation would result in his or her suffering extreme hardship.<sup>22</sup>

Special considerations might arise if the qualifying relative is a child.<sup>23</sup> In that particular context, a parent who asserts that his or her child will remain in the United States should generally be expected to explain the arrangements for the child's care and support. The failure to provide a credible plan for the care and support of the child might indicate that in actuality the child remaining behind in the United States is not a realistic scenario.<sup>24</sup> Moreover, if the parent represents that the child will be left behind, the officer might require the parent to state that understanding in an affidavit.<sup>25</sup> An affidavit is not required, however, if the parent represents that the child will be left behind in the care of the other parent, even if that other parent is unlawfully present.<sup>26</sup> Being left in the care of the other parent might still result in extreme hardship, depending on the totality of the circumstances.

## 2. Aggregating Hardships

To establish extreme hardship, it is not necessary to demonstrate that a single hardship, taken in isolation, rises to the level of "extreme." Rather, any relevant hardship factors "must be considered in the aggregate, not in isolation."<sup>27</sup> Thus, even if no one factor individually constitutes extreme hardship, the officer "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation" (or, in this case, the refusal of admission).<sup>28</sup> Even "those hardships ordinarily associated with deportation, ... while not alone

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<sup>22</sup> For guidance on the evidence that may be relevant to the assessment of reasonable foreseeability, see Chapter 5, Extreme Hardship Determinations, Section B, Burden of Proof and Standard of Proof [9 USCIS-PM B.5(B)].

<sup>23</sup> This is possible in cases of waivers of criminal grounds under [INA 212\(h\)\(1\)\(B\)](#).

<sup>24</sup> See *Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (holding that, for purposes of the former suspension of deportation, neither the parent's "mere assertion" that the child will remain in the United States nor the mere "possibility" of the child remaining is entitled to "significant weight;" rather, the Board expects evidence that "reasonable provisions will be made for the child's care and support"). See *Iturribarria v. INS*, 321 F.3d 889, 902-03 (9th Cir. 2003) (finding that in suspension of deportation case, the petitioner could not claim extreme hardship from family separation without evidence of the family's intent to separate). See *Perez v. INS*, 96 F.3d 390, 393 (9th Cir. 1996) (holding that agency properly required, as means of reducing speculation in considering extreme hardship element in a suspension of deportation case, affidavits and other evidentiary material establishing that family members "will in fact separate").

<sup>25</sup> See *Matter of Ige*, 20 I&N Dec. 885, at 885 (BIA 1994) (requiring such an affidavit in suspension of deportation cases).

<sup>26</sup> See *Matter of Calderon-Hernandez*, 25 I&N Dec. 885 (BIA 2012).

<sup>27</sup> See *Bueno-Carrillo v. Landon*, 682 F.2d 143, 146 n.3 (7th Cir. 1982); accord *Ramos v. INS*, 695 F.2d 181, 186 n.12 (5th Cir. 1983).

<sup>28</sup> See *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996).

sufficient to constitute extreme hardship, are considered in the assessment of aggregate hardship.”<sup>29</sup>

The applicant need show extreme hardship to only one qualifying relative. But even if there is no single qualifying relative whose hardship alone is severe enough to be found “extreme,” it is also sufficient if the hardship to two or more qualifying relatives adds up to extreme hardship.<sup>30</sup> Thus, if the applicant presents evidence of hardship to multiple qualifying relatives, the officer should aggregate all of their hardships to decide whether the sum total adds up to extreme hardship.<sup>31</sup>

### C. Adjudication Steps

The officer should complete the following steps when adjudicating a waiver application that requires a showing of extreme hardship to a qualifying relative:<sup>32</sup>

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<sup>29</sup> See *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). See *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (“Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.”).

<sup>30</sup> See *Watkins v. INS*, 63 F.3d 844, 850 (9th Cir. 1995) (reversing BIA decision on ground it had failed to aggregate the “professional and social changes” of the petitioner, who was a qualifying relative under the particular statute, with the hardship to the applicant’s children, who were also qualifying relatives). See *Prapavat v. INS*, 638 F.2d 87, 89 (9th Cir. 1980) (holding that extreme hardship “may also be satisfied ... by showing that the aggregate hardship to two or more family members described in then 8 U.S.C. 1254(a)(1) is extreme, even if the hardship suffered by any one of them would be insufficient by itself”), *reheard*, , 662 F.2d 561, 562-63 (9th Cir. 1981) (per curiam) (again listing both hardships to the qualifying relative petitioners and hardships to their U.S. citizen child, holding that these hardships “must all be assessed in combination,” and finding that the Board had erred in failing to do so). See *Jong Ha Wang v. INS*, 622 F.2d 1341, 1347 (9th Cir. 1980) (“[T]he Board should consider the aggregate effect of deportation on all such persons when the alien alleges hardship to more than one.”), *rev’d on other grounds*, 450 U.S. 139 (1981) (per curiam). These decisions all interpreted the former suspension of deportation provision. The list of qualifying individuals (which included the petitioners themselves) whose extreme hardship sufficed under that provision differed from the lists of qualifying relatives in the waiver provisions discussed here, but the statutory language was identical in all other relevant respects (“result in extreme hardship to ...”). Consequently, the courts and the BIA have frequently relied on the suspension cases for aid in interpreting the similar language of the waiver cases. See *Hassan v. INS*, 927 F.2d 465, 467 (9th Cir. 1991). See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999), *aff’d*, *Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001).

<sup>31</sup> Even the aggregated hardships will not add up to extreme hardship if they include only those that the BIA has held to be “common consequences.” For a list of those common consequences, see Chapter 4, Extreme Hardship Factors, Section B, Common Consequences of Inadmissibility [9 USCIS-PM B.4(B)].

<sup>32</sup> In most cases, there will already have been a finding of inadmissibility, either by the consular officer adjudicating a visa application, or a USCIS officer adjudicating a related application, such as a [Form I-485](#), Application to Register Permanent Residence or Adjust Status. A formal finding of inadmissibility is not required in adjudicating a [Form I-601A](#), Application for Provisional Presence Waiver. The officer should identify all inadmissibility grounds and confirm that the ground(s) may be waived. This chart assumes that the inadmissibility grounds have been identified and that a waiver is available.

<b>Adjudication Steps for Waivers Requiring Extreme Hardship to a Qualifying Relative</b>		
<b>Adjudication Step</b>		<b>For More Information</b>
<b>Step 1</b>	Confirm the waiver provision requires a showing of extreme hardship to a qualifying relative.	See Chapter 1, Purpose and Background [9 USCIS-PM B.1] 
<b>Step 2</b>	Identify each qualifying relative whose hardship would be relevant under the applicable waiver provision, and determine whether the applicant has established the family relationship(s) to them.	See Chapter 3, Qualifying Relative [9 USCIS-PM B.3]
<b>Step 3</b>	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.	See Section B, Interpretations, Subsection 1, Separation versus Relocation [9 USCIS-PM B.2(B)(1)]
<b>Step 4</b>	Based on the determination in step 3 and the evidence submitted, evaluate the present and future hardships that each qualifying relative would more likely than not experience if the waiver request were denied.	See Chapter 4, Extreme Hardship Factors [9 USCIS-PM B.4] See Chapter 5, Extreme Hardship Determinations [9 USCIS-PM B.5]
<b>Step 5</b>	Determine whether it is more likely than not that, in the aggregate, the hardships to the qualifying relatives add up to extreme hardship.	See Chapter 4, Extreme Hardship Factors [9 USCIS-PM B.4] See Chapter 5, Extreme Hardship Determinations [9 USCIS-PM B.5]
<b>Step 6</b>	If extreme hardship is not found, deny the application. If extreme hardship is found, exercise further discretion to determine whether, based on the totality of the facts of the individual case, the	See Chapter 6, Discretion [9 USCIS-PM B.6]

Adjudication Steps for Waivers Requiring Extreme Hardship to a Qualifying Relative	
Adjudication Step	For More Information
waiver should be granted.	

### Chapter 3. Qualifying Relative

#### **A. Establishing the Relationship to the Qualifying Relative**

An officer must verify that the relationship to a qualifying relative exists. The qualifying relative need not be the visa petitioner, but if it is, an officer may use the approval of the Petition for Alien Relative ([Form I-130](#)) as proof that the qualifying relationship has been established.<sup>33</sup>

If the applicant's relationship to the qualifying relative has not already been established through a prior approved petition, the officer must otherwise verify that the relationship to the qualifying relative exists. Applicants should include in the waiver application primary evidence that supports the relationship, such as marriage certificates, birth certificates, adoption papers, or other court documents, such as paternity orders or orders of child support. If such primary evidence does not exist or is unavailable, the applicant should explain why and submit secondary evidence of the relationship, such as school records, records of religious or other community institutions, or affidavits from those with personal knowledge of the relevant facts.<sup>34</sup> If the initial submission does not include primary evidence of the relationship, and the applicant fails to explain why such evidence does not exist or is unavailable or does not include secondary evidence of the relationship, the officer should issue a Request for Evidence (RFE).

If the applicant claims that all or part of the qualifying relative's hardship will result from the hardship to be suffered by that qualifying relative's non-qualifying family member, the officer should ensure that the evidence establishes the claimed relationships.<sup>35</sup> If such evidence is missing, the officer should issue an RFE.

#### **B. Effect on Extreme Hardship if Qualifying Relative Dies**

Ordinarily the qualifying relative who suffers the extreme hardship must be alive at the time the waiver application is filed and adjudicated. But there is one exception: Under [INA 204\(I\)](#), certain petitions are deemed to remain valid despite the death of the petitioning qualifying

<sup>33</sup> An officer who has concerns about the approved [Form I-130](#) should consult with a supervisor.

<sup>34</sup> See [8 CFR 103.2\(b\)\(2\)\(i\)](#).

<sup>35</sup> See Section C, Effect of Hardship Experienced by a Person who is not a Qualifying Relative [9 USCIS-PM B.3(C)].

relative (or the death of the principal beneficiary in the case of a derivative beneficiary). These petitions include those filed for:

- Immediate relatives;
- Family-sponsored immigrants; and
- Designated family members of family-sponsored immigrants, employment-based immigrants, refugees, asylees, VAWA self-petitioners, and T and U nonimmigrants.

For the petition to survive the death of the qualifying relative under INA 204(l), the petition has to have been pending or approved before the death of the qualifying relative, the beneficiary has to have resided in the United States at the time of that death, and the beneficiary has to continue to reside in the United States. Officers should review the INA 204(l) guidance, when applicable, for the precise requirements.<sup>36</sup>

If the above conditions are met, INA 204(l)(1) provides that “related applications” similarly survive the death of the qualifying relative. The USCIS position is that “related applications” include the corresponding applications for waivers of inadmissibility. Thus, a foreign national who meets the requirements of INA 204(l) may continue to apply for the waiver even though the qualifying relative has died. Further, if the waiver requires that the qualifying relative suffer extreme hardship, USCIS treats the petitioner’s or principal beneficiary’s death as the functional equivalent of a finding of extreme hardship to a qualifying relative – provided that the decedent is also one of the qualifying relatives covered by the applicable waiver provision. In such a case the death of the qualifying relative should be noted in the decision.<sup>37</sup>

The same is true for the widow(er)s of U.S. citizens. When a U.S. citizen files a Petition for Alien Relative ([Form I-130](#)) on behalf of his or her spouse, and the citizen dies while the petition is pending or after it has been approved (and certain other conditions are met), USCIS deems the I-130 to be automatically converted to a self-petition.<sup>38</sup> Nonetheless, if the widow(er) meets the residence requirements in INA 204(l), then INA 204(l) preserves the widow(er)'s ability to have a waiver application approved as if the now deceased citizen had not died. This is the case even if the petition later reverts to a Form I-130 because of the widow(er)'s remarriage.<sup>39</sup>

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<sup>36</sup> See USCIS Policy Memorandum, Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act, [PM-602-0017](#) (Dec. 16, 2010).

<sup>37</sup> See USCIS Policy Memorandum, Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act, [PM-602-0017](#) (Dec. 16, 2010), p. 9.

<sup>38</sup> Under [INA 201\(b\)\(2\)\(A\)\(i\)](#). See [Form I-360](#), Petition for Amerasian, Widow(er), or Special Immigrant.

<sup>39</sup> See *Williams v. DHS*, 741 F.3d 1228 (11th Cir. 2014). USCIS applies this ruling nationwide.

### C. Effect of Hardship Experienced by a Person who is not a Qualifying Relative

Hardship to a non-qualifying relative,<sup>40</sup> by itself, does not meet the extreme hardship requirement. In some cases, however, the hardship experienced by someone who is not a qualifying relative (including the applicant) can itself be the cause of hardship to a qualifying relative.<sup>41</sup>

As one example, an applicant with a mental disorder shows that he would be relegated to living in a psychiatric institution in his home country, where he would be unable to obtain the necessary medical treatment. The applicant provides medical documentation and State Department information on country conditions that corroborate his statements. The applicant's condition and prospective situation might show that denial of his admission would have a significant emotional or financial impact on his U.S. citizen or LPR qualifying relative in the United States. The officer may consider the impact of such medical and living conditions as a factor when determining whether the qualifying relative would experience extreme hardship upon separation from the applicant.

As another example, an officer should consider the emotional hardship that a parent would experience from knowing that either separation or other consequences are causing hardship to his or her non-qualifying child or other third party.<sup>42</sup> Such derivative hardship might or might not rise to the level of "extreme," but even if it does not, it is one of the hardship factors that the officer should consider in determining whether the qualifying relative's hardship, when considered in the aggregate, would be extreme.

## **Chapter 4. Extreme Hardship Factors**

### **A. Overview**

The officer should consider any factor that the applicant presents as a potential hardship, regardless of whether case law addresses the factor and regardless of whether the factor is included in the lists below. The officer may also consider other factors relevant to the extreme hardship determination that the applicant has not specifically presented, such as those

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<sup>40</sup> For example, hardship to the applicant's child when the particular waiver provision lists only the applicant's spouse and parents as qualifying relatives.

<sup>41</sup> See *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983) (hardship to non-qualifying relative could cause hardship to applicant, which would have sufficed under then-existing law). See *Antoine-Dorcelli v. INS*, 703 F.2d 19, 22 (1st Cir. 1983) (same). See *Matter of Gonzalez Recinas*, 23 I&N Dec. 467, 471 (BIA 2002) ("In addition to the hardship of the United States citizen children, factors that relate only to the respondent may also be considered to the extent that they affect the potential level of hardship to her qualifying relatives.").

<sup>42</sup> See *Zamora-Garcia v. INS*, 737 F.2d 488, 494 (5th Cir. 1984) (requiring, in suspension of deportation case, "consideration of the hardship to the [qualifying applicant] posed by the possibility of separation from the [non-qualifying third party children]").

addressed in Department of State (DOS) information on country conditions<sup>43</sup> or other U.S. Government determinations regarding country conditions, including a country's designation for Temporary Protected Status (TPS).

Some of the factors listed below apply when the qualifying relative would remain in the United States without the applicant. Other factors apply when the qualifying relative would relocate abroad. Some of the factors might apply in either scenario.

### **B. Common Consequences of Inadmissibility**

Common consequences of an applicant's refusal of admission, *in and of themselves*, do not warrant a finding of extreme hardship.<sup>44</sup> The BIA has held that these common consequences include, but are not limited to, 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 facilities; and
- Ability to pursue a chosen employment abroad.

Even though these common consequences *alone* would be an insufficient basis for a finding of extreme hardship, they are still factors that must be considered when aggregating the total hardships to the qualifying relative. When combined with other factors that might also have been insufficient when taken alone, even these common consequences might cause the sum of the hardships to reach the "extreme hardship" standard. For example, if a qualifying relative is gravely ill, elderly, or incapable of caring for himself or herself, the combination of that hardship and the common consequences of a refusal of the applicant's admission might well cause extreme emotional or financial hardship for the qualifying relative.

### **C. Examples of Factors that Might Support Finding of Extreme Hardship**

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<sup>43</sup> See [DOS Country Reports on Human Rights Practices](#) and [DOS Travel Warnings](#).

<sup>44</sup> See *Matter of Ngai*, 19 I&N Dec. 245 (BIA 1984) and *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968).

Below is a list of factors that an applicant might present and that an officer would consider when making extreme hardship determinations. This list is not exhaustive; circumstances that are not on this list can also be the basis for finding extreme hardship. All hardship factors presented by the applicant should be considered in making the extreme hardship determination.

<b>FACTORS AND CONSIDERATIONS FOR EXTREME HARDSHIP</b>	
<b>Factors</b>	<b>Considerations</b>
<b>Family Ties and Impact</b>	Presence of qualifying relative's ties to family members living in the United States, including age, status, and length of residence of any children
	Responsibility for the care of any family members in the United States, in particular children and elderly or disabled adults
	Presence or absence of qualifying relative's ties outside of the United States, including to family members living abroad and how close the qualifying relative is to these family members
	Nature of relationship between the applicant and the qualifying relative, including any facts about the particular relationship that would either aggravate or lessen the hardship resulting from separation
	Qualifying relative's age
	Length of qualifying relative's residence in the United States
	Length of qualifying relative's prior residence in the country of relocation, if any
	Military service of qualifying relative, where the stresses and other demands of such service aggravate the hardship ordinarily resulting from family separation
	Impact on the cognitive, social, or emotional well-being of a qualifying relative who is left to replace the applicant as caregiver for someone else, or impact on the qualifying relative (for example, child or parent) for whom such care is required
	<b>Social and Cultural Impact</b>

<b>FACTORS AND CONSIDERATIONS FOR EXTREME HARDSHIP</b>	
<b>Factors</b>	<b>Considerations</b>
	Fear of persecution
	Existence of laws and social practices in home country that punish the qualifying relative because he or she has been in the United States or is perceived to have Western values
	Access or lack of access to social institutions and structures (official and unofficial) for support, guidance, or protection
	Social ostracism or stigma based on characteristics such as gender, gender identity, sexual orientation, religion, race, national origin, ethnicity, citizenship, age, political opinion, or disability
	Qualifying relative's community ties in the United States and in the country of relocation
	Extent to which the qualifying relative has assimilated to U.S. culture, including language, skills, and acculturation
	Difficulty and expense of travel/communication to maintain ties between qualifying relative and applicant, if the qualifying relative does not relocate
	Qualifying relative's present inability to communicate in the language of the country of relocation, taking into account the time and difficulty that learning that language would entail
	Availability and quality of educational opportunities for qualifying relative (and children, if any) in country of relocation
<b>Economic Impact</b>	Financial impact of applicant's departure on the qualifying relative(s), including the applicant's or the qualifying relative's ability to obtain employment in the country to which the applicant would be returned and how that would impact the qualifying relative
	Qualifying relative's need to be educated in a foreign language or culture
	Economic and financial loss due to the sale of a home or business
	Economic and financial loss due to termination of a professional practice
	Decline in the standard of living, including high levels of unemployment, underemployment, and lack of economic opportunity in country of nationality

FACTORS AND CONSIDERATIONS FOR EXTREME HARDSHIP	
Factors	Considerations
	Ability to recoup losses
	Cost of extraordinary needs such as special education or training for children
	Cost of care for family members, including children and elderly, sick, or disabled parents
<b>Health Conditions &amp; Care</b>	Significant health conditions and impact on the qualifying relative, particularly when tied to unavailability of suitable medical care in the country or countries to which the applicant might relocate
	Health conditions of the applicant's qualifying relative and the availability and quality of any required medical treatment in the country to which the applicant would be returned, including length and cost of treatment
	Psychological impact on the qualifying relative due to either separation from the applicant or departure from the United States, including separation from other family members living in the United States
	Psychological impact on the qualifying relative due to the suffering of the applicant, taking into account the nature of the relationship and any other relevant factors
<b>Country Conditions</b> <sup>45</sup>	Conditions in the country or countries to which the applicant would relocate, including civil unrest or generalized levels of violence, ability of country to address crime/high rates of murder/other violent crime, environmental catastrophes like flooding or earthquakes, and other socio-economic or political conditions that jeopardize safe repatriation or lead to reasonable fear of physical harm
	Temporary Protected Status (TPS) designation <sup>46</sup>
	Danger Pay for U.S. citizens stationed in the country of nationality <sup>47</sup>

<sup>45</sup> The officer should consider any submitted government or nongovernmental reports on country conditions specified in the hardship claim. In the absence of any evidence submitted on country conditions, the officer may refer to DOS information on country conditions, such as [DOS Country Reports on Human Rights Practices](#) and the most recent [DOS Travel Warnings](#), to corroborate the claim.

<sup>46</sup> For more information on TPS, see the [USCIS website](#).

FACTORS AND CONSIDERATIONS FOR EXTREME HARDSHIP	
Factors	Considerations
	Withdrawal of Peace Corps from the country of nationality for security reasons
	DOS Travel Warnings issued for the country of nationality

#### D. Special Circumstances that Strongly Suggest Extreme Hardship

The preceding list identifies factors that bear generally on whether a refusal of admission would result in extreme hardship to one or more qualifying relatives. USCIS has also determined that the circumstances below would often weigh heavily in favor of finding extreme hardship. These sorts of special circumstances are beyond the qualifying relative's control and ordinarily cause suffering or harm greater than the common consequences of separation or relocation. An applicant who is relying on one or more of these special circumstances must submit sufficient evidence that such circumstances exist. As always, even when these or other special circumstances are present, the ultimate determination of extreme hardship is based on the totality of the circumstances in the individual case.

It must be emphasized that the special circumstances listed below are singled out only because they are especially likely to result in findings of extreme hardship. Many other hardships will also be extreme, even if they are very different from, or less severe than, those listed below.<sup>48</sup> Further, even the factors discussed are not exclusive; they are merely examples of factors that can support findings of extreme hardship, depending on the totality of the evidence in the particular case. Other factors not discussed could support a finding of extreme hardship, under a totality of the circumstances.

Eligibility for an immigration benefit ordinarily must exist at the time of filing and at the time of adjudication.<sup>49</sup> Given the underlying purpose of considering special circumstances, a special circumstance does not need to exist at the time of filing the waiver request. As long as the qualifying relative was related to the applicant at the time of filing, a special circumstance arising after the filing of the waiver request also would often weigh heavily in favor of finding extreme hardship.

<sup>47</sup> See [5 U.S.C. 5928](#). See the Danger Pay Regulations implemented by the Department of State in its [Standardized Regulations \(DSSR\)](#).

<sup>48</sup> See Section C, Examples of Factors that Might Support Finding of Extreme Hardship [9 USCIS-PM B.4(C)].

<sup>49</sup> [8 CFR 103.2\(b\)\(1\)](#).

### 1. Qualifying Relative Previously Granted Asylum or Refugee Status

If a qualifying relative was previously granted asylum or refugee status in the United States from the country of relocation and the qualifying relative's status has not been revoked, those factors would often weigh heavily in favor of a finding that relocation would result in extreme hardship.

As the family member of a foreign national who has been granted asylum or refugee status, the applicant might also face dangers similar to those that gave rise to the qualifying relative's grant of asylum or refugee status. In such a case, the qualifying relative could suffer psychological trauma in knowing the potential for harm if the applicant returns to the country of nationality, particularly if the qualifying relative fears returning to that country even to visit the applicant, and could thereby suffer extreme hardship.

### 2. Qualifying Relative or Related Family Member's Disability

If the Social Security Administration or other qualified U.S. Government agency made a formal disability determination for the qualifying relative, the qualifying relative's spouse, or a member of the qualifying relative's household for whom the qualifying relative is legally responsible,<sup>50</sup> that factor would often weigh heavily in favor of a finding that relocation would result in extreme hardship.

Absent a formal disability determination, an applicant may provide other evidence that a qualifying relative or related family member suffers from a medical or physical condition that makes either travel to, or residence in, the relocation country detrimental to the qualifying relative or family member's health or safety.

In cases where the qualifying relative or related family member requires the applicant's assistance for care because of the medical or physical condition, that factor would often weigh heavily in favor of a finding that separation would result in extreme hardship to the qualifying relative.

### 3. Qualifying Relative's Active Duty Military Service

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<sup>50</sup> The law defines disability as the inability to engage in any substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. A child under age 18 will be considered disabled if he or she has a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations, and that can be expected to cause death or that has lasted or can be expected to last for a continuous period of not less than 12 months. For more on Social Security Disability Determinations, see the [Social Security Administration website](#).

If the qualifying relative (who might be a spouse or other qualifying relative) is on active duty with any branch of the U.S. Armed Forces,<sup>51</sup> relocation will generally be unrealistic, because the qualifying relative ordinarily will not be at liberty to relocate.<sup>52</sup> If the applicant and the qualifying relative have been living together – for example, on a military base that accommodates families or in a private facility off base – the removal of the applicant can therefore create separation. Under those circumstances, the qualifying relative might well suffer psychological and emotional harm associated with the separation. The resulting impairment of his or her ability to serve the U.S. military could exacerbate that hardship. In addition, even if the qualifying relative’s military service already separates him or her from the applicant, the applicant’s removal overseas might magnify the stress of military service to a level that would constitute extreme hardship.

#### 4. DOS Warnings Against Travel to or Residence in Certain Countries

DOS issues [travel warnings](#) to notify travelers of the risks of traveling to a foreign country.<sup>53</sup> Reasons for issuing a travel warning include, but are not limited to, unstable government, civil war, ongoing intense crime or violence, or frequent terrorist attacks. Travel warnings remain in place until the situation changes. In some of these warnings, DOS advises of travel risks to a specific region or specific regions of a country.

In other travel warnings, DOS does more than merely notify travelers of the risks; it affirmatively recommends against travel or residence and makes its recommendation country-wide. These travel warnings might contain language in which:

- DOS urges avoiding all travel to the country because of safety and security concerns;
- DOS warns against all but essential travel to the country;
- DOS advises deferring all non-essential travel to the country; and/or
- DOS advises U.S. citizens currently living in the country to depart.

Generally, the fact that a qualifying relative who is likely to relocate would face significantly increased danger in the country of relocation would often weigh heavily in favor of a finding of extreme hardship. If the country of relocation is currently subject to a DOS country-wide travel warning, this fact would tend to weigh heavily in favor of finding that such increased danger

<sup>51</sup> See [10 U.S.C. 101](#). The term “Armed Forces” means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

<sup>52</sup> Since [8 CFR 103.2\(b\)\(1\)](#) requires eligibility at the time of filing and at the time of adjudication, this special consideration assumes that the qualifying relative was on active duty at the time of filing and continues to be on active duty at the time of adjudication. See *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992).

<sup>53</sup> See [DOS Travel Warnings](#).

exists and, therefore, that relocation would result in extreme hardship. If the travel warning covers only part of the country of relocation, but the officer finds that that part is one to which the qualifying relative plans to return despite the increased danger (for example, because of family relationships or employment opportunities), then that fact would similarly tend to weigh heavily in favor of finding that relocation would result in extreme hardship. Alternatively, if it is more likely than not that the qualifying relative would relocate in a part of the country that is not subject to the travel warning (either because of the danger in the area covered by the travel warning or for any other reason), the officer should evaluate whether relocation in the chosen area would itself result in extreme hardship to that qualifying relative.

Conversely, if the applicant were to return to this particular country but the qualifying relative would be more likely than not to remain in the United States, the separation might well result in psychological trauma for the qualifying relative.

#### 5. Substantial Displacement of Care of Applicant's Children

USCIS recognizes the importance of family unity and the ability of parents and other caregivers to provide for the well-being of children. Moreover, depending on the particular facts, either the need to assume someone else's caregiving duties or the continuation of one's existing caregiving duties under new and difficult circumstances can be sufficiently burdensome to rise to the level of extreme hardship for the caregiver. The children do not need to be U.S. citizens or lawful permanent residents for that to be the case.<sup>54</sup>

At least two different scenarios can occur. In one scenario, the primary or sole breadwinner is refused admission, and the caregiver, who is a qualifying relative, remains behind to continue the caregiving. The fact that the breadwinner's refusal of admission would cause economic loss to the caregiver is not by itself sufficient for extreme hardship. Economic loss is a common consequence of a refusal of admission. But, depending on the facts of the particular case, economic loss can create other burdens that in turn are severe enough to amount to extreme hardship. For example, if the qualifying relative must now take on the combined burdens of breadwinner and ensuring continuing care of the children, and that dual responsibility would threaten the qualifying relative's ability to meet his or her own basic subsistence needs or those of the person(s) for whom the care is being provided, that dual burden would tend to weigh heavily in favor of finding extreme hardship. In addition, depending on the particular circumstances, the qualifying relative may suffer significant emotional and psychological impacts from being the sole caregiver of the child(ren) that exceed the common consequences of being left as a sole parent.

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<sup>54</sup> In this scenario, the children are assumed to be under age 21. See [INA 101\(b\)\(1\)](#) and [INA 101\(c\)\(1\)](#).

If the refusal of admission would result in a substantial shift of caregiving responsibility from the applicant to a qualifying relative, and that shift would disrupt family, social, and cultural ties, or hinder the child(ren)'s psychological, cognitive, or emotional development, or otherwise frustrate or complicate the qualifying relative's efforts to provide a healthy, stable, and caring environment for the child(ren), the additional psychological and economic stress for the qualifying relative could exceed the levels of hardship that ordinarily result from family separation – depending, again, on the totality of the evidence presented. If that is found to be the case, such a consequence would tend to weigh heavily in favor of a finding of extreme hardship to the qualifying relative, provided the applicant shows:

- The existence of a bona fide parental or other caregiving relationship between the applicant and the child(ren);
- The existence of a bona fide relationship between the qualifying relative and the child(ren); and
- The qualifying relative would become the primary caretaker<sup>55</sup> for the child(ren) or otherwise would take on significant parental or other caregiving responsibilities.

To prove a bona fide relationship to the child(ren), the applicant and qualifying relative should have emotional and/or financial ties or a genuine concern and interest for the child(ren)'s support, instruction, and general welfare.<sup>56</sup> Evidence that can establish such a relationship includes:

- Income tax returns;
- Medical or insurance records;
- School records;
- Correspondence between the parties; or
- Affidavits of friends, neighbors, school officials, or other associates knowledgeable about the relationship.

To prove the qualifying relative either would become the primary caretaker for the child(ren) or would otherwise take on significant parental or other caregiving responsibilities, the qualifying

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<sup>55</sup> A primary caretaker is someone who addresses most of the children's basic needs.

<sup>56</sup> USCIS applies a similar principle when assessing whether there is a bona fide relationship between a father and his child born out of wedlock. See [INA 101\(b\)\(1\)\(D\)](#) and [8 CFR 204.2\(d\)\(2\)\(iii\)](#).

relative needs to show an intent to assume those responsibilities. Evidence of such an intent could include:

- Legal custody or guardianship of the child, such as a court order;
- Other legal obligation to take over parental responsibilities;
- Affidavit signed by qualifying relative to take over parental or other caregiving responsibilities; or
- Affidavits of friends, neighbors, school officials, or other associates knowledgeable about the qualifying relative's relationship with the children or intentions to assume parental or other caregiving responsibilities.

### E. Hypothetical Case Examples

**Scenario # 1:** AB has lived continuously in the United States since entering without inspection 7 years ago. He and his U.S. citizen wife have been married for 4 years. If AB is refused admission, it is reasonably foreseeable that his wife would relocate with him. His wife is a sales clerk. A similar job in the country of relocation would pay far less. In addition, she does not speak the language of the relocation country, lacks experience in the country, and lacks the ties that would facilitate social and cultural integration and opportunities for employment. AB himself is an unskilled laborer who similarly would command a much lower salary in the country of relocation. The couple has no children.

*Analysis:* These facts alone generally would not favor a finding of extreme hardship. The hardships to the qualifying relative, even when aggregated, include only common consequences of relocation – economic loss and the social and cultural difficulties arising mainly from her inability to speak the language.

**Scenario # 2:** The facts are the same as in Scenario # 1 except that now the couple has a 9-year-old U.S. citizen daughter who would relocate with them if AB is refused admission. The child was born in the United States and has lived here her entire life. AB's wife and daughter both have close relationships with AB's wife's U.S. citizen sister and brother-in-law, who are the child's aunt and uncle, and this couple's U.S. citizen children, who are the child's cousins, as well as other members of the family. They all live in close proximity with one another, have close emotional bonds, and visit each other frequently, and the aunt and uncle help care for the child. Neither AB's wife's family nor (for this particular waiver) the child are qualifying relatives, but AB's wife, who is a qualifying relative, would suffer significant emotional hardship from seeing the suffering of both her young child and her sister's family (the child's aunt, uncle and cousins), all separated from one another, as well as separated from other family members, and from losing the emotional bonds she and her child have with her sister's family and other family members, and financial benefit she receives from the care that her sister and brother-in-law

provide. In addition, the child (like her mother) does not speak the language of the relocation country.

*Analysis:* Depending on the totality of the evidence, these additional facts would generally support a finding of extreme hardship. The aggregate hardships to the U.S. citizen wife now include not only the economic losses, diminution of professional opportunities, and social, cultural, and linguistic difficulties – all common consequences – but also the extra emotional hardship she would experience as a result of seeing the suffering of her young child and also her sister and the sister’s family, and other members of the family because of the additional separation, the child’s inability to speak the language, as well as loss of emotional bonds between all these family members and financial benefit from their contribution to the care of the child. That is the case even though neither the child nor the aunt, uncle and cousins, or family members are qualifying relatives for the particular waiver, because their suffering will in turn cause significant emotional suffering for the U.S. citizen wife, who is a qualifying relative. Note that even though the common consequences are not alone sufficient to constitute extreme hardship, they must be added to the other hardships to determine whether the totality adds up to extreme hardship.

Scenario # 3: Again the facts are the same as in Scenario # 1, except this time AB himself has LPR parents who live in the United States and who would suffer significant emotional hardship as a result of separation from their son and their daughter-in-law, with whom they have close family relationships.

*Analysis:* Depending on the totality of the evidence, the addition of these facts would generally favor a finding of extreme hardship. There are now 3 qualifying relatives – AB’s wife and both his parents. Although the aggregated hardships to AB’s wife alone (under Scenario # 1) include only the common consequences of a refusal of admission, further aggregating them with the emotional hardships suffered by the two LPR parents would generally tip the balance in favor of a finding of extreme hardship, depending, again, on the totality of the evidence.

Scenario # 4: CD has lived continuously in the United States since entering without inspection 4 years ago. She has been married to her U.S. citizen husband for 2 years. It is reasonably foreseeable that he would choose to remain in the United States in the event she is refused admission. He has a moderate income, and she works as a housecleaner for low wages. Upon separating they would suffer substantial economic detriment; in addition to the loss of her income, he is committed to sending her remittances once she leaves, in whatever amounts he can afford. They have no children, and there are no extended family members in the United States.

*Analysis:* These facts alone generally would not favor a finding of extreme hardship. The qualifying relative, and the hardships to him, even when aggregated, include only common consequences – separation from his spouse and economic loss.

Scenario # 5: EF and GH, a married couple from Taiwan, entered the United States on student visas 19 and 17 years ago, respectively. They overstayed their visas and have lived here ever since. They have five U.S. citizen children, all of whom were born in the United States and have lived here their entire lives. In the event that the parents are removed to Taiwan, it is reasonably foreseeable that the children would relocate with them. The children range in age from 6 to 15 and are fully integrated into the American lifestyle. None of the children are fluent in Chinese, and they would have to attend Chinese language public schools if they relocate because the family would not be able to afford private school. The 15-year-old child in particular would experience significant disruption to her education in light of her current age and her inability to speak or understand Chinese. The family of seven would be able to afford only a one-bedroom apartment upon relocation.

*Analysis:* This is the fact situation of *Matter of Kao*, 23 I. & N. Dec. 45 (BIA en banc 2001). The Board in that case, sitting en banc, held that these facts constitute extreme hardship for the 15-year-old daughter, who was one of the qualifying relatives. The Board therefore did not need to decide whether the other qualifying individuals would also suffer extreme hardship upon relocation. A key factor in that decision was the daughter's age. In addition to the common consequences (integration into the American lifestyle, current inability to speak the language of the country of relocation, lesser educational opportunities, and economic loss), the Board found that because of her age and the time it would take to become fluent in the language of the country of relocation, the daughter's education would be significantly disrupted and she would experience extreme hardship as a result.

Scenario # 6: KL has lived continuously in the United States since entering without inspection six years ago. She married a U.S. citizen four years ago and seeks a waiver of the 10-year inadmissibility bar for unlawful presence based on extreme hardship to her husband. If she is refused, she would be removed to a country for which the U.S. State Department has issued travel warnings for specific regions, including the region where her family lives. It is reasonably foreseeable that her husband would relocate with her, and that because of the danger they would relocate in one of the areas for which no travel warnings have been issued. Unemployment throughout the country is extremely high, however, and without the family connections that they would forfeit by living outside the region of their family's residence, the job prospects for both spouses are dim and their basic subsistence needs would be threatened.

*Analysis:* The fact that parts of the country of relocation are dangerous does not, by itself, constitute extreme hardship. Similarly, economic loss alone is not extreme hardship. But economic detriment that is severe enough to threaten a person's basic subsistence can rise to the level of extreme hardship. Therefore, if the dangers in parts of the relocation country would induce the qualifying relative to relocate in other parts of the country where economic subsistence would be threatened (or if relocation in such parts is reasonably foreseeable for any other reason), the resulting economic distress would generally favor a finding of extreme hardship, depending on the totality of the evidence. Conversely, if it were reasonably foreseeable that because of the economic realities the qualifying relative, despite the danger,

would relocate in a region for which travel warnings have been issued, then that danger would weigh heavily in favor of finding extreme hardship.

## **Chapter 5. Extreme Hardship Determinations**

### **A. Evidence**

Most instructions that accompany USCIS forms list the types of supporting evidence that an applicant may submit.<sup>57</sup> The instructions to these forms list some of the relevant extreme hardship factors and some possible types of supporting evidence. USCIS accepts any form of probative evidence, including, but not limited to:

- Expert opinions;
- Medical or mental health documentation and evaluations by licensed professionals;
- Official documents, such as birth certificates, marriage certificates, adoption papers, or other court documents, such as paternity orders or orders of child support;
- Photographs;
- Evidence of employment or business ties, such as payroll records or tax statements;
- Bank records and other financial records;
- Membership records in community organizations, confirmation of volunteer activities, or cultural affiliations;
- Newspaper articles and reports;
- Country reports from official and private organizations;
- Personal oral testimony;<sup>58</sup> and
- Affidavits (including statements that are not notarized but are signed “under penalty of perjury” as permitted by 28 U.S.C. 1746) or letters from the applicant or any other

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<sup>57</sup> A waiver that requires a showing of extreme hardship to a qualifying relative is currently submitted on an Application for Waiver of Grounds of Inadmissibility ([Form I-601](#)) or an Application for Provisional Unlawful Presence Waiver ([Form I-601A](#)).

<sup>58</sup> An officer who relies on personal oral testimony must note in the record that the person was placed under oath. The officer should also take notes or record the testimony.

person.

If the applicant indicates that certain relevant evidence is not available, the applicant must provide a reasonable explanation and possible documentation that explains why the evidence is unavailable.<sup>59</sup> Depending on the country where the applicant is from, is being removed to, or resides, certain evidence may be unavailable. If the applicant alleges that documentary evidence such as a birth certificate is unavailable, the officer may consult the DOS Foreign Affairs Manual,<sup>60</sup> when appropriate, to verify whether these particular documents are ordinarily unavailable in the applicant's country.

## B. Burden of Proof and Standard of Proof

The applicant bears the burden of proving that the qualifying relative would suffer extreme hardship. He or she must establish eligibility for a waiver by a preponderance of the evidence.<sup>61</sup> If the applicant submits relevant, probative, and credible evidence that leads the officer to believe that reasonably foreseeable relocation or reasonably foreseeable separation would "more likely than not" result in extreme hardship to a qualifying relative, the applicant has satisfied the preponderance of the evidence standard of proof.<sup>62</sup>

To determine whether either relocation or separation is reasonably foreseeable, the officer should consider all the evidence presented. A mere assertion or possibility does not make relocation or separation (as the case may be) reasonably foreseeable. That evidence includes the applicant's explanation as to why a refusal of admission would result in extreme hardship to a qualifying relative.<sup>63</sup> The applicant's statement alone, made under penalty of perjury, will ordinarily suffice to establish that either relocation or separation (as the case may be) is reasonably foreseeable. An officer who nonetheless has reason to doubt that relocation or separation (as the case may be) is in fact reasonably foreseeable may issue an RFE requesting supporting evidence. Such evidence might include, for example, an affidavit from the applicant or an affidavit from an adult qualifying relative. If the record contains evidence of the qualifying relative's subjective intent to relocate or separate (as the case may be), such evidence is relevant to whether relocation or separation is reasonably foreseeable.

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<sup>59</sup> See [8 CFR 103.2\(b\)](#).

<sup>60</sup> See the [DOS website](#).

<sup>61</sup> See *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) (identifying preponderance of the evidence as the standard for immigration benefits generally, in that case naturalization).

<sup>62</sup> See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (preponderance of the evidence means more likely than not). See *Fisher v. Vassar College*, 114 F.3d 1332, 1333-34 (2nd Cir. 1997) (holding that in other contexts "preponderance of the evidence" means more likely than not).

<sup>63</sup> Required by both [Form I-601](#), Application for Waiver of Grounds of Inadmissibility, and [Form I-601A](#), Application for Provisional Unlawful Presence Waiver.

An applicant who claims that the qualifying relative has severe, ongoing medical problems will not likely be able to establish the existence of these problems without providing medical records documenting the qualifying relative's condition. Officers cannot substitute their medical opinion for a medical professional's opinion; instead the officer must rely on the expertise of reputable medical professionals. A credible, detailed statement from a doctor may be more meaningful in establishing a claim than dozens of test results that are difficult for the officer to decipher. However, nothing in this situation changes the requirement that all evidence submitted by applicants should be considered to evaluate the totality of the circumstances.

Similarly, if the applicant claims that the qualifying relative will experience severe financial difficulties, the applicant will not likely be able to establish these difficulties without submitting financial documentation. This could include, but is not limited to, bank account statements, employment and income records, tax records, mortgage statements, leases, and proof of any other financial liabilities or earnings.

If not all of the required initial evidence has been submitted or the officer determines that the totality of the evidence submitted does not meet the applicable standard of proof, the officer should issue an RFE unless he or she determines there is no possibility that additional evidence available to the person might cure the deficiency.

If evidence in the record leads the officer to reasonably believe that undocumented assertions of the extreme hardship claim are true, the officer may accept the assertion as sufficient to support the extreme hardship claim. The preponderance of the evidence standard does not require any specific form of evidence; it requires the applicant to demonstrate only that it is more likely than not that the refusal of admission will result in extreme hardship to the qualifying relative(s). Any evidence that satisfies that test will suffice.<sup>64</sup>

If the officer finds that the applicant has met the above burden, the officer should proceed to the discretionary determination.<sup>65</sup> If the officer ultimately finds that the applicant has not met the above burden, the application must be denied.

## **Chapter 6. Discretion**

A finding of extreme hardship permits but never compels a favorable exercise of discretion. If the officer finds the requisite extreme hardship, the officer must then determine whether USCIS should grant the waiver as a matter of discretion. The family relationships to U.S. citizens

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<sup>64</sup> For more detailed guidance on how to interpret the requirement that the refusal of admission "would result in" extreme hardship to the qualifying relative, see Chapter 2, General Considerations, Interpretations, and Adjudicative Steps, Section B, Interpretations, Subsection 1, Separation versus Relocation [9 USCIS-PM B.2(B)(1)].

<sup>65</sup> See Chapter 6, Discretion [9 USCIS-PM B.6].

or LPRs and a finding of extreme hardship to one or more of those family members are themselves significant positive factors to consider.<sup>66</sup> The conduct that triggered inadmissibility is a relevant negative factor to consider. The officer should weigh the family relationships, the finding of extreme hardship, and all other positive factors against all negative factors, such as the applicant's crimes<sup>67</sup> or underlying fraud.<sup>68</sup> Thus, for purposes of the discretionary determination, a finding of extreme hardship that is sufficient for waivers of unlawful presence might not be sufficient for waivers of the more serious crime-related or fraud-related inadmissibility grounds. Ultimately, if the positive factors outweigh the negative factors, the officer should approve the waiver; otherwise, it should be denied.

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<sup>66</sup> See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

<sup>67</sup> In cases where applicants who have been convicted of violent or dangerous crimes apply for waivers under INA 212(h)(1)(B) [formerly INA 212(h)(2)], discretion generally will not be favorably exercised unless either there are "extraordinary circumstances" (for example those relating to national security or foreign policy) or the applicant demonstrates "exceptional and extremely unusual hardship." Depending on the gravity of the offense, even a showing of extraordinary circumstances does not guarantee a favorable exercise of discretion. See [8 CFR 212.7\(d\)](#).

<sup>68</sup> See *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30-32 (1996). See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 568-69 (BIA 1999), *aff'd*, *Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001).