



# UNDERSTANDING EXTREME HARDSHIP IN WAIVERS

*What Extreme Hardship Is and How to Prove It*

By ILRC Attorneys

In Fall 2017 the ILRC held a free webinar on hardship in waivers—over 1,000 people registered for this webinar. Given the volume of questions received during the webinar and the overall strong interest in this topic, we created this practice advisory to cover the basics from that webinar and also to incorporate some of the frequently asked questions from the presentation. We hope this advisory will be useful both to those who attended the webinar, and also to those who may not have attended, but are preparing hardship waivers. Separately, the recording from this webinar is available on our website at [www.ilrc.org/webinars/hardship-waivers-%E2%80%93-free-webinar](http://www.ilrc.org/webinars/hardship-waivers-%E2%80%93-free-webinar). As with the presentation, this advisory provides an overview of hardship in waivers: when you need to prove hardship, whose hardship counts, and what is hardship. It also covers how to analyze and prove hardship in your case using USCIS guidance including the “Particularly Significant Factors” announced in December 2016, case law, and, most importantly, by working closely with your client to connect her particular story to the elements in order to present a winning waiver case.<sup>1</sup>

There are many different waivers in immigration law, and many different forms of relief in which some type of hardship showing is required. This advisory focuses exclusively on **waivers of inadmissibility** that require a showing of **extreme hardship**—what are the situations in which you must show extreme hardship, what is “extreme hardship,” and how to prove extreme hardship. One particular waiver of inadmissibility in which the applicant must establish extreme hardship is the provisional unlawful presence waiver, or “provisional waiver,” filed on Form I-601A. For a detailed discussion specifically on the provisional waiver, see the ILRC’s practice advisory, *I-601A Provisional Waiver Process: A Hardship Waiver for Unlawful Presence*, available on our website at [www.ilrc.org/i-601a-provisional-waiver-process-practice-advisory](http://www.ilrc.org/i-601a-provisional-waiver-process-practice-advisory).

## I. When Do You Need to Prove Hardship?

Hardship can be helpful to show when applying for many different forms of immigration relief. However, some forms of immigration relief statutorily require some level of hardship. For example, hardship is required for Suspension of Deportation under old INA § 244(a), Non-LPR Cancellation of Removal under INA § 240A(b)(1), VAWA Cancellation under INA § 240A(b)(2), and also for several inadmissibility waivers—the 212(h) waiver for certain criminal grounds, 212(i) waiver for fraud or misrepresentation, and the unlawful presence waiver for the three- and ten-year bars.

This advisory will focus on hardship in the context of waivers of inadmissibility, specifically:

- Waivers under INA § 212(i) for fraud or misrepresentation under INA § 212(a)(6)(C)(i);
- Waivers under INA § 212(h) for certain crimes under INA § 212(a)(2); and
- Waivers under INA § 212(a)(9)(B)(v) for unlawful presence under INA § 212(a)(9)(B)(i).

People who are subject to the grounds of inadmissibility, and therefore may need a waiver of inadmissibility that might require hardship, include nonimmigrant visa holders applying for admission at the border, applicants for adjustment of status or an immigrant visa abroad, and applicants for U visa, T visa, or TPS.<sup>2</sup> The most common situation in which you will likely seek a waiver of inadmissibility is in the context of adjustment of status, helping someone to apply for permanent residency from within the United States, or consular processing, helping someone to apply for residency from abroad.

It is important to be aware that some lawful permanent residents (LPRs) can also be subject to the grounds of inadmissibility. Specifically, certain LPRs who travel abroad and fall within the exceptions at INA § 101(a)(13)(C) may be regarded as applicants for admission when they attempt to return to the United States. Under INA § 101(a)(13)(C), an LPR returning from travel outside the United States is treated as seeking admission if she:

- Has abandoned or relinquished LPR status;
- Has been absent from the United States for a continuous period of more than 180 days;<sup>3</sup>
- Has engaged in illegal activity after departing the United States;
- Has left the United States while under removal or extradition proceedings;
- Has committed an offense identified in INA § 212(a)(2), the criminal inadmissibility grounds, unless the person was granted 212(h) relief or 240A(a) cancellation of removal to forgive the offense; or
- Is attempting to enter or has entered without inspection.

## II. Whose Hardship Counts?

When a hardship showing is required by statute, the statute also specifies *whose* hardship will be considered. Hardship waivers are generally not about hardship that the applicant, or immigrant, might face. Instead, hardship waivers focus on hardship that certain qualifying family members would suffer, if the applicant is denied a waiver. These family members are referred to as **Qualifying Relatives**, and the applicant must prove that the Qualifying Relative (QR) would experience hardship if the waiver is denied. If the would-be waiver applicant does not have any QRs, then they are not eligible to seek a waiver.

The type of waiver determines who the Qualifying Relative can be. For instance, 212(i) and 212(a)(9)(B)(v) waivers require that the waiver applicant be able to show hardship to a spouse or parent, who must be a U.S. citizen or lawful permanent resident. For these waivers USC or LPR children, regardless their age, do not count. The 212(h) waiver, in contrast, has a more expansive group of individuals who may serve as the Qualifying Relative: USC or LPR spouse, parent, son, or daughter.

Although the focus of the hardship waiver will be on the Qualifying Relative, this does not mean that you cannot discuss how other family members who are not Qualifying Relatives will be affected, just that you must address it through the lens of how it will affect the Qualifying Relative's level of hardship. For example, even though U.S. citizen children, of any age, are not Qualifying Relatives for a fraud waiver under 212(i), the advocate could discuss how the children's permanent resident parent, who is also the applicant's spouse, would suffer extreme hardship by witnessing the children's devastation at being separated from one of their parents, or the negative effects on the children's health or educational opportunities if they were to relocate to the foreign country with the waiver applicant parent, etc. In other words, you cannot submit a 212(i) or unlawful presence waiver application saying “This waiver must be granted because the U.S. citizen children will suffer extreme hardship,” but you *can* submit one saying “This waiver must be granted because the *U.S. citizen spouse* will suffer extreme hardship by witnessing how their children will be detrimentally affected.” In Section V. we discuss in greater detail how to frame hardship arguments.

### III. What Is Hardship?

There are a few different hardship standards in immigration law—the two main ones are “extreme hardship” and “exceptional and extremely unusual hardship.”<sup>4</sup> When we say that these are different standards, what we mean is that “extreme hardship” and “exceptional and extremely unusual hardship” are variations on the standard of proof required when an individual must show hardship, i.e. the *level* of hardship they must demonstrate. The difference is simply one of degree—“exceptional and extremely unusual” is a higher standard than “extreme hardship.” “Extreme hardship” is required for most waivers of inadmissibility.<sup>5</sup> As previously mentioned, this advisory is solely on the “extreme hardship” standard.

#### A. Where Does the Extreme Hardship Standard Come From?

The hardship standard is the level of proof required to establish the requisite hardship—for most waivers of inadmissibility, as we have already mentioned, the standard is “extreme.” This term, “extreme hardship,” is from the Immigration and Nationality Act (INA). However, there is no definition of “extreme hardship” in the INA, so we must look to many sources to figure out what the term means, including USCIS guidance, case law, and regulations (although there are no extreme hardship regulations for waivers, the regulations at 8 CFR § 1240.58 provide an explanation of extreme hardship in the Suspension of Deportation context, so this is often a helpful starting point).

#### B. How Extreme Is Extreme Hardship?

Almost every person applying for a form of immigration relief will suffer some hardship if the application is not granted. However, by requiring “extreme hardship” for certain forms of relief, the government is asking for a showing of how certain family members would suffer more than what could be expected. The regulations at 8 CFR § 1240.58(b)—in the Suspension of Deportation context—state that the hardship must be “beyond that typically associated with deportation.” Cases have also explained that the hardship must exceed what is usual or expected. See, e.g., *Hassan v. INS*, 927 F.2d 465 (9th Cir. 1991); *Matter of Cervantes-Gonzalez v. INS*, 244 F.3d 1001 (9th Cir. 2001). Although “extreme hardship” must be beyond what is “to be expected,” it does not need to be unique. *Matter of L-O-G-*, 21 I&N Dec. 413, 418 (BIA 1996). A 2002 BIA case, *Matter of Andazola*,

clarified that “extreme hardship” is not as demanding as the “exceptional and extremely unusual” hardship standard. *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002).

We now also have USCIS guidance on hardship in waivers, effective December 5, 2016, which is very helpful in providing case law and examples, including examples of factual scenarios that, if present, will be viewed by USCIS as strong indicators of a finding of extreme hardship. These are called “Particularly Significant Factors.” USCIS’ policy guidance on extreme hardship is available at [www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB.html](http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB.html), part of the online USCIS Policy Manual, which will eventually replace the Adjudicator’s Field Manual.

*It seems like family separation should always amount to “extreme hardship.” What is generally understood as being “ordinary,” “usual,” or “to be expected” hardship from family separation, that does not rise to the level of “extreme hardship”?*

*Some old cases have found that families that were separated but still able to visit and financially support each other did not rise to the level of extreme hardship. But if you can show the separation will cause any number of other problems such as medical hardship, loss of educational/job opportunities, discrimination, etc., it could be seen as extreme. You must look at the case as a whole, and there is no set combination of facts that will or will not be held to be “extreme hardship”; even the Particularly Significant Factors (discussed in Section E.2., infra) are simply “strong indicators,” not guarantees, of a finding of extreme hardship.*

### C. Burden of Proof & Standard of Proof

The waiver applicant has the *burden* of proof. In other words, the applicant bears the burden, or responsibility, of proving extreme hardship to the Qualifying Relative. They must establish that a Qualifying Relative would suffer extreme hardship by a preponderance of the evidence (the *standard* of proof), which means the probability that extreme hardship would result is more likely than not. The standard of proof refers to the degree to which the applicant must convince the adjudicator that extreme hardship will result if the waiver is denied. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

### D. Separation Versus Relocation

The waiver applicant must establish extreme hardship in at least one of two scenarios: (1) if the waiver is not granted and the Qualifying Relative remains in the United States, facing *separation* from the applicant, who must return or remain in their home country, or (2) the waiver is denied and the Qualifying Relative *relocates* abroad with the applicant. The new USCIS guidance, at Vol. 9, Part B, Ch. 4(B), clarifies that the applicant need not demonstrate hardship in *both* scenarios, only one. However, it is still a good idea to look at the family impact in both scenarios and argue, if possible, extreme hardship in both situations, separation and relocation. The USCIS guidance also makes it clear that adjudicating officers must make determinations based on the evidence and arguments presented, not on the officer’s personal view as to whether the Qualifying Relative “ought” to relocate or separate in an individual case.<sup>6</sup> Generally, in the absence of inconsistent evidence a credible, sworn statement from the Qualifying Relative stating his or her intent to relocate or separate generally suffices to demonstrate what the Qualifying Relative plans to do if the waiver is denied.

*What are scenarios where you would want to argue separation and/or relocation?*

Generally, you want to argue both scenarios unless the clients are absolutely certain only one of the scenarios is truly an option. In Non-LPR Cancellation or other contexts, the courts often make you choose either separation or relocation when addressing hardship, but luckily USCIS extreme hardship guidance authorizes arguing both if both are plausible.

*Is a Qualifying Relative's declaration the only document needed to prove whether the Qualifying Relative is relocating or staying in the United States?*

USCIS says that generally a declaration is sufficient, but if there is any additional evidence you can provide then you would want to include that. See more details in the USCIS Policy Guidance: [www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB-Chapter4.html#S-B](http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB-Chapter4.html#S-B).

*Does the Qualifying Relative have to state whether she will separate or relocate?*

You must shape your hardship arguments based on at least one of the two scenarios, if not both. It is a good idea to argue both scenarios, unless the clients are absolutely certain they would only pursue one of the two scenarios. Ideally you can demonstrate that no matter the scenario—separation or relocation—the Qualifying Relative will suffer extreme hardship.

## E. Hardship Considerations & Factors

### 1. General Hardship Factors

USCIS, through policy guidance and case law, has identified five broad hardship factors,<sup>7</sup> or categories, that may support a finding of hardship:

- Family ties and impact;
- Social and cultural impact;
- Economic impact;
- Health conditions and care; and
- Country conditions.

This is a non-exhaustive list, but can be a helpful framework for organizing your hardship case. These factors may be present in relocation or separation scenarios, or both. The factors may also be overlapping. You may not have facts in your particular case to support hardship in every one of these categories, such as health conditions, or some factors may be much stronger than others.

Family ties and impact may include the Qualifying Relative's family in the United States (and possibly lack of family in the foreign country where the applicant would have to relocate if the waiver were denied), caregiver responsibilities, including possibly an elderly parent or other family member that is dependent financially or emotionally on the applicant or Qualifying Relative, the nature of the relationship between the applicant and Qualifying Relative, the Qualifying Relative's age and length of residence in the United States, and the Qualifying Relative's prior or current military service.

Social and cultural impact takes into account the Qualifying Relative's ties in the United States and also in the country of relocation, the Qualifying Relative's integration into U.S. culture, ability to

integrate into the culture of the country of relocation, ability to communicate and maintain their U.S. ties, language ability, educational opportunities, and job training. If the QR has a very different social or cultural background from the applicant, this factor may be more pronounced as part of the hardship showing.

Economic impact encompasses financial hardship due to reduced employment opportunities for the Qualifying Relative in the country of relocation; impact of sale of home, business, or other assets; impact of termination of business practice; decline in standard of living; ability to recoup losses or repay student loans; cost of extraordinary needs, such as special education for children; and cost of care for family members.

*If the applicant is not supposed to be working but nonetheless she is the breadwinner of the family, paid under the table, should she include this information in her waiver application?*

*It is still helpful to show that the USC/LPR Qualifying Relative, and possibly USC children as well, depend upon the applicant's income and therefore would be negatively affected if the applicant had to return to her home country—even if you have no other proof, such as paychecks, you can mention this in the Qualifying Relative's declaration.*

Health conditions and care pertains to the availability and quality of medical treatment for family members, especially the Qualifying Relative, with health problems. It also includes the psychological impact on the Qualifying Relative, which may include the toll of worrying about the applicant if the Qualifying Relative does not relocate with the applicant, or worrying about other close family members left behind if the QR does relocate, or witnessing the suffering of the applicant. In addition, prior trauma suffered by the Qualifying Relative may aggravate the psychological impact of separation or relocation, making it all the more acute compared to the average person, dealing with the distress of being separated from their soulmate or elderly parent, for example.

Country conditions refers to the general country conditions in the country of origin/relocation, and also specific conditions in the exact area where the applicant, and possibly her family, would have to relocate. Conditions include civil unrest, U.S. military operations, U.S. economic sanctions, ability to handle environmental catastrophes, and also certain U.S. government designations that indicate the country is unsafe or unstable, such as: TPS designation, Danger Pay for U.S. government works stationed in the country, withdrawal of Peace Corps from the country due to security reasons, and State Department Travel Advisories (formerly, Travel Warnings and Travel Alerts). You can find country conditions by looking at official reports from the U.S. Department of State and NGOs, such as Amnesty International or Human Rights Watch, as well as news articles about conditions in the country or region. Examples of how country conditions might contribute to a finding of hardship would be if the applicant and Qualifying Relative are a same-sex couple, and the country of relocation stigmatizes—and perhaps even makes illegal—same-sex relationships, or if the State Department warns against all non-essential travel to the country or region of relocation.

*When addressing country conditions as one of the extreme hardship factors, would you make it more specific to a particular state or region instead of the country as a whole?*

*If you can point to a specific area where the applicant would have to return if his waiver were denied that is especially dangerous or poverty-stricken or otherwise adds to the hardship argument, you*

*should include information on that. You should also discuss the country more broadly, however, as overall country conditions are also important. It is a good idea to also include arguments about why the person cannot simply relocate to a safer place within the foreign country.*

## 2. Particularly Significant Factors

In the December 2016 hardship guidance, USCIS identified certain “Particularly Significant Factors” that “weigh heavily” in favor of a finding of extreme hardship.<sup>8</sup> The Particularly Significant Factors are more specific than the more general hardship factors discussed in the previous section, and carry more weight.

This does not mean, however, that the advocate does not need to provide any other evidence of hardship if a Particularly Significant Factor is present in a case, and similarly even if a case does not have any Particularly Significant Factors, that does not mean the applicant cannot meet the hardship standard. If a Particularly Significant Factor was not present at time of filing the waiver application package, but develops later on, USCIS is still supposed to consider the factor at time of adjudication.<sup>9</sup>

The Particularly Significant Factors are as follows:

- Qualifying Relative previously granted Iraqi or Afghan Special Immigrant Status, T nonimmigrant status ("T visa"), or asylum or refugee status;
- Family member's disability (Qualifying Relative or other family member);
- Qualifying Relative's military service;
- DOS Travel Warnings or Alerts advise against travel to foreign country of relocation; and
- Substantial displacement of care of applicant's children.

Qualifying Relative previously granted Iraqi or Afghan Special Immigrant Status, T nonimmigrant status ("T visa"), or asylum or refugee status requires that the asylum/refugee/other special immigrant status be from the country of relocation, rather than from another country not implicated in the waiver request, and that the status has not been subsequently revoked. Essentially, this Particularly Significant Factor acknowledges that relocation in such a situation presents a heightened risk to the Qualifying Relative, or should the Qualifying Relative remain in the United States, it would still mean that the Qualifying Relative would likely be unable to visit, and the applicant might also be at similar risk or targeted for their relationship to the Qualifying Relative.

Family member's disability includes both the Qualifying Relative's disability, or a related family member's disability if they are dependent on the Qualifying Relative or applicant for care. A government agency must have made a formal disability determination. Nonetheless, even if you do not have a formal disability determination, document and describe as best you can any claimed disability facts in your case because while it might not fall under this Particularly Significant Factor, such facts would still contribute to the overall hardship showing. If the disabled family member were to relocate, this may mean that services for disabled individual are unavailable or significantly inferior; if instead the disabled family member were to remain in the United States, separate from the Qualifying Relative or applicant who provides care to the disabled individual, replacement care may not be realistically available.

*For the Particularly Significant Factor concerning a family member's disability, does the disabled family member's immigration status matter?*

*No, a disabled family member's immigration status does not matter assuming they are not also the Qualifying Relative. If the person with the disability is the Qualifying Relative, then they would need to be a U.S. citizen or permanent resident.*

Qualifying Relative's military service recognizes that the Qualifying Relative may be stationed abroad, that separation may be the only option, and that a denial of the waiver could exacerbate the stresses, anxieties, and other hardships inherent in military service.

DOS Travel Warnings or Alerts reflects the general hardship factor related to country conditions, but gives greater weight where the U.S. government, through the State Department, has specifically issued a warning or other alert about travel to the country of relocation. Department of State travel warnings indicate that the U.S. government has identified increased risk in a country or region. Note that in January 2018 the State Department revamped its information on foreign travel, consolidating Travel Warnings and Travel Alerts into "Travel Advisories," in which a given country is assigned a level that describes the risk of travel due to safety and security concerns. The levels range from Level 1, the lowest level, which suggests that U.S. citizens exercise normal precautions when traveling to the country in question, to Level 4, the highest level, which recommends that U.S. citizens do not travel to the country. The presence of Level 3 or 4 Travel Advisories for the country of relocation can lead to increased risk if the Qualifying Relative chooses to relocate with the applicant, or increased psychological trauma if the Qualifying Relative stays in the United States, due to heightened fear for the applicant's safety.

Go to <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html> to access the DOS Travel Advisories.

Substantial displacement of care of applicant's children recognizes that shifting household responsibilities may lead to extreme hardship because it may impair a person's ability to earn an income, if someone who previously did not have to provide childcare must suddenly do so in place of the other person, such as if the primary caregiver had been the applicant. It may also disrupt family, social, and cultural ties and hinder children's psychological, cognitive, or emotional development. Inability to provide a healthy, stable, and caring environment for children may create additional emotional, psychological, and/or economic stress for the QR beyond ordinary stress from family separation. The two main scenarios in which there may be a shifting of household responsibilities may be if the applicant is the primary income earner and the QR is the primary caregiver, or vice versa, and separation would make the QR responsible for both. It might also be that the QR's parents served as the primary caregivers while both parents worked, but that if the QR and applicant relocated, one of the two would have to become the caregiver and they would lose the dual incomes necessary to support the family, or suddenly have the added financial burden of having to pay for childcare. To prove this, you must provide evidence of substantial shifting of caregiving or income-earning responsibilities which would compromise their ability to care for their child. The children's U.S. immigration status does not matter.

See the USCIS Policy Manual Vol. 9, Part B, Ch. 5, Section E "Particularly Significant Factors" for more explanation of USCIS' Particularly Significant Factors.



*Does the fact that the Qualifying Relative has U nonimmigrant status ("U visa") count as a Particularly Significant Factor?*

*No, a Qualifying Relative's U nonimmigrant status is not a specific "Particularly Significant Factor." However, U nonimmigrant status is mentioned as a more general consideration, or factor, under social & cultural impact (see USCIS Policy Manual Vol. 9, Part B, Ch. 5, Section D "Examples of Factors That May Support a Finding of Extreme Hardship"), just not as a standalone "Particularly Significant Factor" in and of itself.*

*Regardless, a Qualifying Relative's U nonimmigrant status is definitely something to highlight. If a Qualifying Relative with U nonimmigrant status were to have to relocate with the applicant to a country without the same protections and support for crime victims, that would be pertinent to the hardship discussion.*

The presence of Particularly Significant Factors in your case does not guarantee it will be approved, so make sure to explore other areas of the case as well. Nor does the absence of Particularly Significant Factors mean that you will be unable to prove hardship in your case. Cases may present a mixture of common consequences,<sup>10</sup> which by themselves may not be viewed as compelling enough to result in a finding of hardship, as well as multiple general hardship factors, and Particularly Significant Factors. The key is to use the broad categories to start thinking about your client's specific circumstances, family dynamics, and unique life history, and highlight the presence of Particularly Significant Factors, if any. Also make sure to connect the dots as much as possible. It is not enough to say that the family will separate—why will that family separation cause hardship above and beyond what would be expected for anyone else facing a break-up of their family? Similarly, you must say more than simply that medical services in the foreign country are lacking—why does that matter for your client's family? Further, you must seek to provide documentation wherever possible, to bolster your claims so if the lack of medical services in the foreign country is a factor in your case, you should try to find a report or article that supports that. See Sections IV. and V. for more on how to analyze and prove hardship.

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**Example 1 – Identifying Particularly Significant Factors**

Rudy is applying for a fraud waiver through his USC spouse, Elena. Rudy has been the legal guardian of his younger brother, Leonardo, since their mother passed away from cancer five years ago. Leonardo is now 16 years old and has DACA. Rudy is from El Salvador and fearful of returning due to gang violence. Elena is from Mexico but has been in the U.S. since she was a young girl. Rudy and Elena have lived together in the same neighborhood as her parents and siblings for three years.

How would you frame hardship in this case?

**Answer:**

Start by identifying the QR: Elena.

Now, consider the two scenarios, relocation or separation. Consider what would happen if Elena relocated: If she relocated, she has no ties to El Salvador, she would have to be separated from all her family, and she would be in danger due to the high levels of violence in El Salvador.

Now consider what would happen if she remained in the U.S.: If Elena remained in the U.S., she would have to take responsibility for Leonardo's care and support on her own. This disruption of care and stability for Leonardo might have an increased psychological impact on him, being separated from his brother and surrogate parent, Rudy, having already faced the loss of his mother.

Any Particularly Significant Factors? Yes, substantial displacement of childcare.

General hardship factors? From the information provided: family ties, country conditions.

## IV. Hardship Analysis

In this section, we will go through some more examples and discuss strategies for analyzing hardship.

### A. Strategies for Approaching the Hardship Analysis

USCIS must consider all the factors cumulatively, and look at all evidence or factors submitted. While one hardship factor alone may not be sufficient, when taken together with other facts supporting hardship, the sum may meet the extreme hardship standard. Note that negative factors also weigh into the cumulative analysis.

Some aspects of a case that may contribute to the cumulative hardship showing are common consequences in addition to Particularly Significant Factors, aggregating factors, and the existence of multiple QRs (for example, LPR mother *and* USC spouse).

### Example 2 – Aggregating Factors & Multiple QRs

Josie is applying for a waiver based on her LPR husband, Matt. He has a chronic medical condition that requires regular hospital visits for treatment. Matt's family lives nearby and helps out with his care. They also have many friends in the area who provide support, as well. Josie's LPR parents live in the U.S. near the couple.

Matt plans to relocate with Josie if her waiver is denied, but her parents would remain in the U.S. Josie's parents are elderly and speak limited English. Josie helps with their medical care, translating at medical appointments, and provides emotional and financial support.

How do you frame the hardship analysis?

#### Answer:

Start by identifying the QR: Matt and Josie's parents.

Now, consider the two scenarios, relocation or separation. Here, Matt is clear he would relocate with Josie. Meanwhile, Josie's parents would remain in the U.S., and therefore face separation from their daughter.

Any Particularly Significant Factors? Potentially, family member disability (Matt's condition).

General hardship factors? From the information provided: family ties, health conditions and care (Matt). Even if the country of relocation has comparable medical treatment for Matt, the disruption

in treatment and his inability to communicate with his new doctors without an interpreter, and the loss of their support network, would cause extreme hardship for Matt. Josie's parents' inability to navigate their surroundings and medical care without Josie, and emotional and financial hardship due to the loss of her support, would add to the hardship that they would face. While none of these pieces or facts on their own may rise to the level of "extreme," in the aggregate these facts taken together may lead to a finding of extreme hardship.

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Another strategy is what is called "bootstrapping," linking hardship of non-QRs to QRs. A good advocate will look at ways that hardship of non-QRs (including the applicant) affect the QR. See *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); USCIS Policy Guidance, Vol. 9, Part B, Ch. 4(D).

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### Example 3 - Bootstrapping

Kelda is applying to waive the 10-year bar for unlawful presence with her U.S. citizen husband, Adam, as a Qualifying Relative. She must prove that if the waiver is not granted, Adam will suffer extreme hardship. Kelda and Adam have a seven-year-old daughter, Mia, who has been diagnosed with autism and receives special services at her school; these same services would not be available in Kelda's country of origin.

How would you frame hardship in this case?

#### Answer:

Start by identifying the QR: Adam. Children are not QRs for the unlawful presence waiver.

Now, consider the two scenarios, relocation or separation. Consider what would happen if Adam relocated: If he relocated, and so the couple's daughter, Mia, relocates with them, she might not have the same access to special services that she receives in the United States, and this could have a severe effect on her development and overall well-being.

Now consider what would happen if he remained in the U.S., without Kelda: The couple would have to decide in such a situation whether Mia would stay with Adam in the U.S., or relocate with Kelda.

Any Particularly Significant Factors? Potentially, family member's disability, for Mia's autism, even though she is not a QR, depending on the severity and her mobility and care needs.

In any case, even though Mia is not a Qualifying Relative, her hardship is relevant because she will suffer hardship if her mother's waiver is not granted and this, in turn, will affect her father, Adam, the QR. He would have to choose between living apart from Kelda in order to remain in the U.S. so that Mia can continue to receive proper medical and educational attention, or moving the entire family to Kelda's country of origin, where Mia would not receive the same assistance in school and medical care.

General hardship factors? From the information provided: health conditions and care (for Mia), potentially economic impact if they qualify for Mia's special services for free or low cost in the United States, but might have to pay for them in the country of relocation.

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### Example 4 – Putting It All Together

Rashid Zadran is applying for an I-601A waiver based on hardship to his USC spouse and LPR mother. Rashid is from Afghanistan and his spouse was born in the U.S. They have three U.S. citizen daughters, ages 1, 3, and 7. His mother entered the U.S. as a refugee ten years ago. She suffers from a serious heart condition that does not allow her to travel long distances. Rashid is the main economic provider for his family. His wife is a teacher but has not worked outside of the home since the birth of their second child.

How do you frame the hardship analysis?

#### Answer:

Start by identifying the QR: Rashid’s USC spouse and LPR mother.

Now, consider the two scenarios, relocation or separation. Consider what would happen if Rashid’s wife and mother relocated: If Rashid’s wife relocated, she would be moving to an entirely foreign country, and leaving all her family behind. She does not have any family ties in Afghanistan. Rashid’s mother could not go back to Afghanistan without it being very risky for her, as she fled the country as a refugee a decade ago. Her health condition also does not allow her to travel long distances.

Now consider what would happen if they remained in the U.S. (you can break up this analysis, should one stay and one go): Rashid’s wife might have to go back to work, to help support the family, displacing their childcare. She would also probably worry a lot about her husband’s safety in Afghanistan.

Any Particularly Significant Factors? Qualifying Relative (mother) previously granted refugee status, substantial displacement of childcare, travel advisories for the country of relocation (Afghanistan is currently designated Level 4, Do not travel, by the DOS), family member disability.

General hardship factors? From the information provided: family ties (assuming Rashid’s mother cannot relocate due to her heart condition), health conditions and care (lack of adequate medical care, especially for Rashid’s mother), social and cultural impact (treatment of wife and daughters in Afghanistan, and access to education and employment), economic impact (could Rashid support himself and his family in Afghanistan? would his wife need to support him?), and country conditions (civil strife, gender discrimination).

## V. How Do You Prove Hardship?

### A. Enlist Your Client as an Equal Partner in This Process

Some aspects of a waiver case, for example arguing whether a crime is a “crime involving moral turpitude” that requires a waiver in the first place, is a legal question the advocate must craft. The hardship showing, in contrast, must be a joint effort—the client is the expert on her life and the key to identifying hardship and securing evidence. Advocates guide this process, frame the information, and connect it to the legal requirements. Consequently, the advocate-client partnership is crucial to proving a winning hardship case.

“Hardship” is an abstract concept. Before you start asking your client how they will suffer “extreme hardship,” help your clients to understand the standard. Some tips:

- Start with the common understanding of family separation and hardship;
- Ask them and their families to describe their current life, their day-to-day activities, their livelihood, and their relationships;
- Ask them to imagine the two scenarios—remaining in the U.S. vs. returning to the applicant’s country of origin—and to list all the ways in which their lives would change;
- Also ask about past traumas that may make future hardship worse for your client than for the average person.

Often people will not bring up many of these considerations unless you expressly ask, especially the questions about past traumas. Identifying and developing these added layers of hardship in your case will be key to explaining how the hardship in your client’s case is beyond what is “to be expected,” that ordinary level of hardship that does not rise to the level of extreme. Examples of how past traumas might make future hardship worse for your client than for the average person might be that a parent’s separation from their child would be even worse if you learned that this client had faced challenges with infertility for many years before finally managing to have a child, or that your client grew up without having his father in his life so the idea that his child might also grow up fatherless might be even more heartbreaking to him. You may not be able to delve into deeply personal and sometimes difficult discussions like this until you have developed trust with your client, after multiple appointments and once you have started to talk about the hardship case with them on a few occasions so they feel comfortable sharing these details with you.

*Should advocates draft the client's statement, the narrative that links together the evidence and hardship factors, for the hardship waiver?*

*It is a good idea to include a declaration, or statement, from the QR that explains the hardship that will result if the waiver is denied, contextualizing the evidence. Different advocates do it differently—some have the clients write the first draft, others write the first draft based on an extensive interview with the clients. Regardless, it should be edited thoroughly before submitting.*

## **B. Document the Hardship**

Once you have identified the facts of the case that will establish eligibility for the benefit sought, work with your clients to brainstorm the evidence needed. Strive to have documentation, or evidence, for each claimed hardship fact and element of the case. For example, one element of the case is the existence of a Qualifying Relative. If the Qualifying Relative in your case is the U.S. citizen wife, then the evidence you would need to prove this would be the wife’s birth certificate or naturalization certificate to prove she is a U.S. citizen, and the couple’s marriage certificate. Another element might be medical hardship. Specifically, the facts might be that the wife has a heart condition. Then, the evidence needed to support this would be a letter from the wife’s physician and other medical records showing this type of care is necessary, including copies of prescriptions and documentation from hospital visits. Keep in mind the immigration officer reviewing your client’s hardship application most likely is no more of a medical professional than you are, so if you are highlighting medical hardship try to explain the medical condition in terms that anyone can understand, and do not inundate the officer with a thick pile of medical records—try to sift through and include only the ones that seem the most pertinent.

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### Example 5 – Documenting the Hardship Case

Assume same facts as Example 4, Rashid’s case. What documents would you want to collect in support of his hardship case?

**Answer:**

You would want to include his mother’s medical records, the U.S. Department of State travel advisories for Afghanistan, school records and work documents to show the disruption of child care, a copy of the refugee grant letter for his mother, human rights reports and other news articles to show the country conditions for Afghanistan, information about local wages and jobs in support of the economic issues, information about the health care system and services in support of the health care issues, etc.

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### C. Advocate Through Your Organization and Presentation of the Hardship Case

The evidence you have collected in support of the hardship case may not in and of itself communicate what you intend. Your presentation of the evidence helps the adjudicator connect the dots and follow your arguments. Most practitioners include a “letter brief,” or cover letter, that is also a roadmap to the case. Recognize adjudicators only have a few minutes to flip through a waiver case, so make it as simple as possible to grasp the information you are trying to convey, using bullet-points and headings, and clearly label indexes of evidence. Make it easy for the adjudicator to identify the evidence that relates to the main issues of the case, and help the adjudicator follow your arguments and train of thought. When you describe what is enclosed in the waiver package, do so in a persuasive manner that helps tell the story of why your client merits a waiver. Adjudicators see lots of cases, with little time to devote to each case, so you want to package your case so the official can easily understand and sympathize with the family’s situation.

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**Practice Tip:** Do not use tabs to organize your hardship case, as the first step in processing involves the lockbox receiving center disassembling the waiver package before scanning it. Tabs can get in the way, and are usually discarded before the waiver makes it to the adjudicating officer. Instead, number the pages and use an exhibits list or other index to direct the adjudicating officer to the numbered page where an exhibit starts. USCIS suggests annotating at the bottom of the page with the exhibit number and page number (for example, “Exhibit A, Page 1 of 4”).<sup>11</sup>

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While usually not a necessary piece of evidence in support of the waiver case, many practitioners also include photographs. Family photographs can humanize the case, and if you have photographs of large family celebrations or gatherings, it can illustrate claimed extensive family ties and bonds. Additionally, photographs may help explain a family member’s severe health condition, or portray the impoverished living situation that the applicant would be returning to in their country of origin, in a way that words cannot.

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**Example 6 – Persuasive Introductory Sentence**

Referring again to the fact pattern in Example 4, Rashid’s case, and assuming Rashid’s wife and daughters would relocate with him, which of the options below is the strongest introductory sentence for a cover letter for this case?

A) Denying Mr. Zadran’s waiver would inevitably split up the family, as his disabled mother cannot relocate due to her medical condition.

B) Mr. Zadran’s daughters would suffer extreme hardship if they were to relocate due to the lack of educational opportunities and discrimination against women and girls in Afghanistan.

C) A denial of Mr. Zadran’s waiver would result in his U.S. citizen wife and daughters relocating to a country at war with few legal protections for women and his disabled permanent resident mother’s loss of vital support.

**Answer:**

C is the best of the options above, but there is no right answer. Be creative. Here, C is better than A or B because while A just talks about splitting up the family and Rashid’s mother’s health condition, and B just talks about how his daughters would suffer, C covers all those key points—the country conditions and how his wife and daughters would be affected by relocating to Afghanistan, in addition to splitting up the family and his mother’s health condition.

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**D. Prove Your Client Warrants a Favorable Exercise of Discretion**

Although this advisory focuses on the extreme hardship showing, in a waiver case you must also show that your client warrants a favorable exercise of discretion. USCIS is not required to grant these waivers, so you must show that the applicant deserves the waiver. Be upfront about the reason the waiver is needed, and do not hide bad facts. Instead, address them at the outset and mention any mitigating factors. While hardship focuses on the Qualifying Relative, the discussion of equities focuses on the applicant. Here, you want to address positive factors in the applicant’s life such as the length of time in the United States, family ties, employment history, community involvement, etc. Facts that may not be relevant to the hardship showing may be relevant for the discretionary element of the case. They may also overlap with the hardship factors, for instance the applicant’s being the primary childcare provider pertains to the disruption of childcare Particularly Significant Factor, but would also be a favorable factor you would want to mention as part of the applicant’s equities.

*Is it necessary to submit a letter from law enforcement in places where the client has lived, showing that they have no criminal record, to demonstrate that a favorable exercise of discretion is warranted?*

*No, unlike VAWA where a police clearance letter is required as part of the VAWA Self-Petition, no such letter is required as part of the hardship waiver process. Absent any strong negative factors, usually proof of family ties, letters of support from family and friends, etc. are enough to establish that a favorable exercise of discretion is warranted. Note that some foreign consulates require police*

*reports/record clearances as part of family-based immigrant visa consular processing, so people who are consular processing may need to get these, but they are not required for the hardship waiver.*

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### Example 7 – Equities

Referring again to the fact pattern in Example 4, Rashid’s case, what might be some equities in Rashid’s case that are not a part of the hardship analysis?

**Answer:**

Possible equities:

- Care and economic support Rashid provides for his mother;
  - Rashid’s involvement in his daughters’ educations such as PTA meeting attendance and helping daughters with homework;
  - Rashid’s involvement in his daughters’ activities such as coaching sports teams;
  - Community involvement, such as church attendance or volunteer programs; and
  - Anything else you can think of!
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**For a thorough discussion of hardship, please see our manual, *Hardship in Immigration Law: How to Prepare Winning Applications for Hardship Waivers and Cancellation of Removal*, available at [www.ilrc.org/publications](http://www.ilrc.org/publications).**

### End Notes

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<sup>1</sup> For questions about this advisory, please contact [abrown@ilrc.org](mailto:abrown@ilrc.org).

<sup>2</sup> While U and T nonimmigrant applicants are subject to some of the grounds of inadmissibility, they have their own, separate waivers of inadmissibility instead of the three general waivers of inadmissibility we are discussing here. The U- and T-specific waivers do not require a showing of “extreme hardship.” See INA § 212(d)(3), (13) & (14).

<sup>3</sup> There is an exception for brief, casual, and innocent departures. See *Vartelas v. Holder*, 566 U.S. 257 (2012).

<sup>4</sup> The T visa also has a different hardship standard, “extreme hardship involving unusual and severe harm.” 8 CFR § 214.11(b)(4).

<sup>5</sup> “Exceptional and extremely unusual hardship” is required for 212(h) waivers of inadmissibility for dangerous or violent offenses, in place of the lower “extreme hardship” standard.

<sup>6</sup> USCIS Policy Manual, Vol. 9, Part B, Ch. 4(B).

<sup>7</sup> USCIS Policy Manual, Vol. 9, Part B, Ch. 5(D).

<sup>8</sup> USCIS Policy Manual, Vol. 9, Part B, Ch. 5(E).

<sup>9</sup> *Id.*

<sup>10</sup> USCIS Policy Manual, Vol. 9, Part B, Ch. 5(B).

<sup>11</sup> AILA Doc. No. 13061150 “Lockbox Filing Tip: Annotated Exhibit Pages Preferred Over Tabs” (June 11, 2013); see also [www.uscis.gov/forms-filing-tips](http://www.uscis.gov/forms-filing-tips).





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**About the Immigrant Legal Resource Center**

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