CHAPTER 1

INTRODUCTION TO HARDSHIP AND THE MANUAL

This chapter includes:

§ 1.1 Introduction

Many immigrants living in the United States wish to stay at least in part due to the hardship that they or their families would suffer if they had to return to their country of origin. The hardship an immigrant may face upon removal comes in many forms—economic, social, medical, psychological, and educational, to name a few. Each type of hardship rarely exists in isolation, and one type of hardship may create, amplify, or complicate others. The hardship that each individual or family faces on a daily basis, or especially following a deportation, will vary a great deal in degree, breadth, and duration. Rarely, however, will you find an individual fighting deportation from the United States who would not face *any* personal or familial hardship if she were deported.

While this hardship is often a reality for many immigrants in removal proceedings, proving hardship is a specific eligibility requirement for certain forms of immigration relief and waivers of inadmissibility. In these contexts, our laws have determined a specific degree of hardship required, and specific relatives who must face the hardship for a person to qualify for relief. Proving that a certain person or people will suffer hardship plays a crucial role in these applications for discretionary relief and often presents the greatest challenge to winning the case. As legal advocates, our job is thus not only to identify a possible immigration benefit or relief from removal a client might qualify for, but also to work tirelessly with the client and her family and friends to explore and document the many ways her deportation would cause hardship.

Because hardship plays such a large role in determining whether immigrants can qualify for certain discretionary forms of immigration relief and waivers, this manual will discuss what the hardship standard entails in each context, what factors have been successfully used to meet the hardship standards, ideas for creative hardship strategies, and how to prepare a winning hardship case.

§ 1.2 How Does Hardship Come into Play?

There are two standards of hardship that clients may encounter and be required to prove in order to win a case, one more stringent than the other: “extreme hardship” or the stricter “exceptional and extremely unusual hardship.” The technicalities of these standards will be discussed in

greater detail in **Chapter 2**. However, to understand better the hardship standards and how to apply them, it is helpful to look at where they appear in immigration law and how they evolved.

The requirement to prove hardship has historically appeared in various contexts in the Immigration and Nationality Act (INA). Proving "extreme hardship" was (and still is) required for several waivers of inadmissibility. The former INA § 244(a) also provided a form of discretionary relief called suspension of deportation for a noncitizen who, among other criteria, could show that her deportation would result in "extreme hardship" to herself and/or to her U.S. citizen or Lawful Permanent Resident (LPR) spouse, parent(s), or child(ren). There has never been a definition of what "extreme hardship" entailed for the waivers or for suspension of deportation. Until recently, our understanding of the term was primarily developed through case law, as the BIA and federal courts have developed a long list of factors that are relevant to a showing of extreme hardship. In November of 2014, former President Obama directed the U.S. Citizenship and Immigration Services (USCIS) to issue guidance clarifying the "extreme hardship" standard.[1] Two years later, USCIS issued seven chapters of guidance on extreme hardship, providing information and examples on hardship factors and considerations.[2]

The INA also has a stricter standard, "exceptional and extremely unusual hardship," which was required for suspension of deportation applicants who had committed certain crimes. See old INA § 244(a)(2). This stricter standard became more widespread after Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996. IIRIRA effectively replaced suspension of deportation with "Cancellation of Removal for Certain Nonpermanent Residents" (non-LPR cancellation) under INA § 240A(b). One important difference, however, was the application of this heightened hardship standard to all cancellation applicants, not just those who have committed certain crimes. In addition to demanding a higher showing of hardship, non-LPR cancellation also narrowed *whose* hardship matters. An applicant for this form of relief must establish that her removal would result in exceptional and extremely unusual hardship to her U.S. citizen or LPR spouse, child(ren), or parent(s). Hardship to the applicant herself is technically irrelevant, although, as we will discuss in **Chapter 3**, a creative advocate will explore how hardship to the applicant would, by proxy, cause hardship to her qualifying relative(s).

Nevertheless, the more generous "extreme hardship" standard still exists for many forms of relief. Extreme hardship is the standard applied to several waivers of inadmissibility, including those made under INA §§ 212(h), 212(i), and 212(a)(9)(B)(v) (the much-used waiver for unlawful presence), and in applications for the extreme hardship waiver to remove the conditional basis of permanent residence under INA § 216(c)(4). In waivers for inadmissibility, we only see a stricter standard of hardship in one context: waivers for crimes. Where the applicant is asking to waive violent or dangerous crimes, the courts have required the stricter exceptional and extremely unusual hardship standard.[3] The hardship standards as applied to waiver applications will be discussed further in **Chapter 4**.

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[1] DHS, *Expansion of the Provisional Waiver Program* (Nov. 20, 2014), available at www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf.
[2] 9 USCIS-PM B.
[3] See *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

Extreme hardship is also the standard used in certain other forms of relief from removal involving hardship, including Cancellation of Removal for Battered Spouses or Children under the Violence Against Women Act (VAWA) (INA § 240A(b)(2)). In VAWA cancellation, the applicant must show extreme hardship to herself, her child, or a parent. Like suspension of deportation and waivers, Cancellation of Removal under the Nicaraguan Adjustment and Central American Relief Act (NACARA) for Guatemalans, Salvadorans, and nationals of former Soviet Bloc countries has two different hardship standards: Extreme hardship is the standard for general NACARA cancellation and suspension cases, but where the applicant has committed certain crimes, the stricter exceptional and extremely unusual hardship standard applies. In NACARA cancellation, the court can consider hardship to the applicant or her U.S. citizen or LPR spouse, child, or parent. VAWA cancellation and NACARA cancellation will be discussed further in **Chapter 3**.

Finally, a few suspension of deportation cases remain pending for individuals who were placed in deportation proceedings before April 1, 1997. In these cases, the original extreme hardship standard still applies.

Note that the T nonimmigrant visa for victims of human trafficking and the U nonimmigrant process for petitioning for certain qualifying relatives are additional benefits in the INA that require a showing of hardship. An applicant for a T visa is required to show that he or she "would suffer extreme hardship involving unusual and severe harm upon removal."[4] Hardship for purposes of the T visa is a unique analysis involving specific factors outlined in the regulations pertaining to T visas and falls outside the scope of this manual. If you are handling a T visa case or are interested in learning more about this benefit, please see ILRC's manual, *Representing Survivors of Human Trafficking*.

A U nonimmigrant holder who has adjusted status can petition for certain qualifying family members to obtain lawful permanent residence if she can prove, among other criteria, that either the qualifying family member or the principal U nonimmigrant would suffer extreme hardship if the qualifying family member is not allowed to remain in or join the principal in the United States.[5] Hardship for purposes of this process is outlined in the U nonimmigrant status regulations, which list specific factors to consider. Because these factors are unique to the U nonimmigrant status process, a discussion of extreme hardship in this context is beyond the scope of this manual. For more information on applying for certain qualifying members at the U adjustment stage, please see ILRC's manual, *The U Visa: Obtaining Status for Immigrant Victims of Crime*.

As a quick reference, please see the chart below on what hardship standard applies, and to whom, for most types of relief and waivers requiring hardship:

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[4] 8 CFR § 214.11(i)(1).
[5] INA § 245(m)(3); 8 CFR § 245.24(h)(1)(iv); USCIS, Form I-929 Instructions, p. 3, available at www.uscis.gov/sites/default/files/files/form/i-929instr.pdf.

Form of Relief	**Source**	**Hardship Standard**	**Whose Hardship Qualifies?**
Suspension of Deportation	Old INA § 244(a)	Extreme	Applicant or USC or LPR Spouse, Parent, or Child of Applicant
Suspension of Deportation for cases involving certain crimes	Old INA § 244(a)(2)	Exceptional and Extremely Unusual	Applicant or USC or LPR Spouse, Parent, or Child of Applicant
Non-LPR Cancellation	INA § 240A(b)	Exceptional and Extremely Unusual	USC or LPR Spouse, Parent, or Child of Applicant
VAWA Cancellation	INA § 240A(b)(2)	Extreme	Applicant or Parent or Child of Applicant
NACARA Cancellation / NACARA Suspension	NACARA;[6] 8 CFR §§ 240.61-240.66	Extreme	Applicant or USC or LPR Spouse, Parent, or Child of Applicant
NACARA Cancellation / NACARA Suspension in cases involving certain crimes	NACARA; 8 CFR § 240.66(c)	Exceptional and Extremely Unusual	Applicant or USC or LPR Spouse, Parent, or Child of Applicant
212(h) waiver	INA § 212(h)	Extreme	USC or LPR Spouse, Parent, Son or Daughter of Applicant
Waivers in cases involving violent or dangerous crimes	INA § 212(h); 8 CFR § 212.7(d); INA § 209(c); 8 CFR § 212.17(b)(2); *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002)	Exceptional and Extremely Unusual	USC or LPR Spouse, Parent, Son or Daughter of Applicant
212(i)	INA § 212(i)	Extreme	USC or LPR Spouse or Parent
212(i) for VAWA self-petitioners	INA § 212(i)	Extreme	Applicant or LPR, USC or "qualified alien" parent or child[7]
212(a)(9)(B)(v)	INA § 212(a)(9)(B)(v)	Extreme	USC or LPR Spouse or Parent
Waiver to remove conditions on residence	INA § 216(c)(4)	Extreme	Applicant

[6] Pub. L. No. 105-100, 111 Stat. 2160 (Nov. 19, 1997).

[7] The "qualified alien" listed under this section of INA § 212(i) also refers to someone who is: an asylee or refugee; a person paroled into the country for at least one year; an immigrant granted withholding of deportation or removal; an immigrant granted conditional entry under INA § 203(a)(7) as it existed prior to April 1, 1980; and Cuban and Haitian entrants. 8 USC § 1641(b).

Whether applying the "exceptional and extremely unusual hardship" standard or the "extreme hardship" standard, the factors to be considered in evaluating the case remain the same. This manual will focus on explaining the hardship standards and how they are applied to specific forms of immigration relief and waivers. Many waivers and forms of relief in the INA do not require a showing of hardship and fall outside the scope of this manual. For example, cancellation of removal for Lawful Permanent Residents (also known as "LPR cancellation") under INA § 240A(a) does not require a showing of hardship. Best practice, however, is to bring up hardship whenever it can help a case, even if it is not an explicit requirement. The factors that are discussed throughout the manual can thus be helpful in strengthening many additional types of discretionary immigration relief, such as LPR cancellation of removal, U visas, and requests for prosecutorial discretion.

§ 1.3 Hardship Is a Discretionary Determination

Showing that a client has met the requisite hardship standard is difficult not only because "hardship" is not defined, but also because the hardship determination is a discretionary one. This means that the adjudicator has a lot of freedom when deciding whether a particular situation constitutes hardship. Moreover, discretionary decisions are unreviewable by federal courts, meaning that the hardship determinations by the immigration court and Board of Immigration Appeals (BIA) cannot be appealed to the federal appellate courts.[8]

Because the hardship determination ultimately hinges on the individual opinion of the adjudicator when looking at the specific factors of a particular case, it is hard for practitioners to feel confident when assessing a client's case. Indeed, a level of caution is important. Representatives should be very careful when discussing hardship with their clients and make sure to emphasize that no matter how strong the case may appear, at the end of the day, the adjudicator will decide whether the factors in the case are sufficient. There is no bright line rule, and no particular outcome can be guaranteed.

§ 1.4 Distinguishing Hardship from Equities

Some forms of immigration relief require the adjudicator to balance positive equities against negative equities when deciding whether to grant a person relief, while other forms of immigration relief require the applicant to demonstrate hardship. It is important to understand the distinction between hardship and equities and not to confuse the two. Demonstrating hardship is a specific statutory requirement for certain forms of relief, which involves an evaluation of how certain family members would suffer if the applicant were removed. Equities are aspects of a person's life, such as the length of time living in the United States, employment records, criminal history, community involvement, and other positive or negative factors that the adjudicator can consider when making a discretionary determination.

Showing that a person has many positive equities will not satisfy a hardship requirement, and showing hardship may not be sufficient to outweigh negative equities. For instance, the courts have found that LPR cancellation requires a balancing of positive equities against negative equities. A representative preparing a client for a case like this that hinges on a positive balance

[8] 8 USC § 1252(a)(2)(B)(i).

of equities should not focus only on hardship per se, although that might be a part of the argument, but should instead emphasize any ties the person has to the United States and positive characteristics the person may have. Likewise, in a case requiring hardship, showing that the person is deserving and has substantial family ties in the United States will not meet the hardship standard.

There is nevertheless a great deal of overlap between the factors and evidence a client would use to show hardship and to show positive equities. For instance, the fact that an applicant for non-LPR cancellation is the primary caretaker for his ill, elderly, LPR parents might be offered as evidence that his deportation would result in exceptional and extremely unusual *hardship* to his qualifying relatives. That same fact—his role as primary caretaker—should also be presented to the judge as a positive *equity* to go towards discretion.

> **Example:** Graciela is a native of Mexico applying for non-LPR cancellation of removal. She has an eight-year-old U.S. citizen daughter, Ana, who has severe asthma that requires trips to the emergency room several times per year. Fortunately, those visits are covered by the health insurance Graciela has through her job, where she has worked for almost 11 years. If Graciela were deported, she would lose her health insurance and have to pay Ana's medical costs out-of-pocket. It is also unlikely that Graciela would be able to earn as much in Mexico, and the hospital near her hometown does not have the type of equipment that Ana is treated with in the United States.
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> A creative advocate will present Graciela's situation as one in which her U.S. citizen daughter will clearly suffer economic and medical *hardship* if Graciela is deported, but will also highlight Graciela's steady employment, maintenance of health insurance, payment of taxes, and careful monitoring of her daughter's health condition as positive *equities* that are relevant to the judge's discretionary decision.

While this manual's focus is on hardship, we will endeavor to highlight opportunities when hardship factors might perform "double-duty" as positive equities, and we encourage you to always keep discretion in mind as you work with your client to develop her case.

§ 1.5 How to Use This Manual

This manual is designed as a toolbox to assist legal workers in (1) determining a client's eligibility for certain types of relief; (2) realistically assessing the strength of a client's claim; and (3) thinking creatively and strategically to develop and document the strongest possible hardship claim.

Chapter 1 introduces the concept of hardship and outlines what the rest of the book will entail.

Chapter 2 explains the different hardship standards and how to meet them. Drawing on case law, regulations, and the 2016 USCIS hardship guidance, Chapter 2 then discusses common hardship factors and what those factors may entail, with practice pointers and case examples.

Chapter 3 describes certain forms of relief from removal that require hardship, including non-LPR cancellation of removal, suspension of deportation, VAWA cancellation of removal, and NACARA suspension and cancellation of removal. Chapter 3 discusses what the hardship

requirement is for each form of relief and, referencing Chapter 2, what factors might be applicable for each one.

Chapter 4 describes the different waivers of inadmissibility and deportability that involve hardship. Chapter 4 also includes information about how to determine whether a client is subject to the grounds of inadmissibility or the grounds of deportability, what those grounds are, and what conduct will trigger some of the more common grounds.

Chapter 5 provides information and practical advice for working with clients to strengthen their cases, including tips on how to draft a declaration, pointers on presenting the case, and an introduction to evidentiary rules as applied to hardship cases.

Chapter 6 describes the application processes for the types of relief described in the manual, including the different filing procedures for immigration court and U.S. Citizenship and Immigration Services (USCIS) and the distinctions between the I-601 and I-601A waiver processes.

Finally, the **Appendix** at the end of this manual provide several sample waiver and cancellation applications along with documents that may be helpful in the preparation of hardship cases, including document checklists, sample supporting letters, sample background check materials, and relevant legal memoranda.

This manual is not simply a discussion of legal requirements and procedures. Because the input and work of the client is so essential to the success of a hardship case, the manual, and in particular **Chapter 5**, is also filled with many ideas about how to work best with clients so that they may be active and informed participants in their own cases. Applicants, their families, and friends can help legal workers by doing much of the work while applying for most of the forms of relief discussed in this manual. Working with applicants is not just more efficient for a legal worker. The client's active and informed participation helps to build a stronger case. Additionally, it will be likely that she will be better prepared to cope with the stress of the application at issue, answer questions more accurately in court or an agency interview if need be, and have a higher possibility of success if she knows the legal requirements and what to expect.

Although we have thoroughly researched the legal and procedural requirements presented in this manual, we recommend that the reader use this manual as an addition to, and not as a substitute for, her own research and knowledge. Immigration law changes constantly and can be complex. Further research may be necessary on issues not discussed in this manual or on new developments in the law or practice. Additionally, because adjudicators are afforded so much discretion in hardship cases, it is important to reach out to experienced practitioners in the court or agency jurisdiction where your hardship case is to learn about current or geographical trends.

Chapter 1