Proposed Guidance on Extreme Hardship

By Charles Wheeler

The USCIS circulated draft guidance on October 7th interpreting the term “extreme hardship” and explaining how it should be applied to waiver applications. Three of the most common waivers currently require the applicant to establish extreme hardship to a qualifying relative: the three- and ten-year bars due to unlawful presence; fraud or misrepresentation; and criminal conduct. For the first two waivers the qualifying relative must be a U.S. citizen or LPR spouse or parent; if the waiver is for criminal conduct, the qualifying relative could be a U.S. citizen or LPR spouse, parent, or child. The guidance sets forth in greater detail and specificity how adjudicators should weigh various hardship factors. The following is a summary.

Background

On November 20, 2014 DHS Secretary Jeh Johnson issued a memo directing the USCIS to expand eligibility for the provisional waiver program to include other family-based categories and provide additional guidance on the definition of extreme hardship. The intended purpose of the guidance is to “provide broader use of this legally permitted waiver program.” In addition to clarifying the factors to be considered, the Secretary directed the agency “to consider criteria by which a presumption of extreme hardship may be determined to exist.”

Should I Stay or Should I Go?

Adjudicators currently require waiver applicants to demonstrate that the qualifying relative would suffer extreme hardship in two scenarios: if he or she were to relocate to the applicant’s country, and if he or she were to remain in the United States separated from the applicant. This requirement is set forth in the adjudicator’s training manual (Standard Operating Procedures, or SOP) and is now boilerplate language in every written decision, even though it is not explained to the applicant in the instructions to the Form I-601 or I-601A. One of the most significant proposed changes is to reduce the burden of demonstrating extreme hardship to the qualifying relative. The guidance would allow the applicant to decide whether the qualifying relative would either relocate or remain in the United States, depending on what is “reasonably foreseeable.” The applicant would then only have to establish extreme hardship in one of those scenarios rather than both.

Written decisions on unlawful presence waivers reveal that it is easier to establish that the qualifying relative would suffer extreme hardship due to relocating to the applicant’s country. Decisions often cite the qualifying relative’s lack of foreign language skills, unfamiliarity with the foreign country, inability to find comparable employment, the stress in relocating to a different culture, and any health-related factors that would be exacerbated by such a move. In most cases it is more difficult to establish that the qualifying relative would suffer extreme hardship due to separation from the waiver applicant. The proposed change would likely encourage applicants to show why it is reasonably foreseeable that the qualifying relative would accompany them to the foreign country in order to maintain family unity and why such a move would result in extreme hardship.
In the Aggregate

Adjudicators are reminded that the hardship factors must be considered in the aggregate and that no single hardship, taken in isolation, needs to rise to the level of extreme. This principle is already set forth in administrative appeal decisions and is codified in the SOP. But emphasizing it in the guidance may encourage applicants to set forth all of possible hardship factors in the event that, taken together, they add up to extreme hardship.

Surviving Relatives

The guidance also explains that widow(er)s whose U.S. citizen spouse had filed an I-130 petition before dying qualify to file a waiver if they were residing in the United States at the time of the death and continue to reside here. The same is true under INA § 204(l) for other family members where the petitioner or principal beneficiary has died after filing an I-130 petition and where they meet the residency requirements. In those cases, the agency will presume extreme hardship and will allow eligibility for the waiver even though the qualifying relative has died.

Hardship to a Non-Qualifying Relative

Children cannot be qualifying relatives under the requirements for waivers for fraud or unlawful presence. Nevertheless, “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.” The guidance encourages applicants to describe the emotional hardship that the qualifying relative parent would experience due to the suffering of a child who must either relocate to a foreign country or remain separated from the applicant. This “derivative hardship” is one of the factors that adjudicators must consider in weighing the totality of the circumstances.

The Hardship Factors

The guidance points out that any factor that the applicant presents should be considered, in addition to the five most common ones: family ties, social and cultural impact, economic impact, health-related issues, and country conditions. It then spells out examples of what hardships might fall within each of the five categories. For example, social and cultural impact could be evidenced by loss of access to U.S. courts, our criminal justice system, and the protection of family law proceedings (protection orders, child support, visitation). It could also be demonstrated by fear of social ostracism and lack of access to social institutions and support networks. Other examples include the more obvious: lack of language skills, quality of educational opportunities, assimilation into U.S. culture, and community ties here versus in the foreign country. The country conditions category could include the designation of TPS, civil unrest or generalized level of crime and violence, and State Department Travel Warnings.

Presumption of Extreme Hardship

Probably the most significant part of the guidance is the last section where the agency identifies five circumstances that “are especially likely to result in findings of extreme hardship.” It is not
the same as presumption, but it is edging close to that. Obviously, we will need to pressure the agency to follow the Secretary’s mandate and use that term. According to the draft guidelines, if any of these circumstances exist at the time of filing and at the time of adjudication, or at least at the latter stage, the agency would give them great weight:

1. If the qualifying relative is an asylee or a refugee from the country of possible relocation
2. If either the qualifying relative, their spouse, or a member of the household that the qualifying relative is legally responsible for is disabled or suffers from a medical/physical condition that makes travel to the foreign country detrimental to their health or safety
3. If the qualifying relative is on active duty with any branch of the U.S. Armed Forces
4. If the Department of State has issued either a country-wide travel warning or one for a region of the country where the applicant or the qualifying relative would likely relocate
5. If separation would result in the qualifying relative becoming the primary caretaker for the couple’s children or otherwise take on significant parental or other caregiving responsibilities.

The fourth circumstance is particularly significant for applicants from Mexico, Honduras, and El Salvador where the State Department has recently issued country-wide or region-specific travel warnings. The fifth circumstance would benefit any applicant or qualifying relative who is responsible for the welfare of a child, regardless of the child’s citizenship or immigration status.

Comments on the draft guidance are due on November 23, 2015. CLINIC will be preparing model comments and circulating them. Please click here to access the text of the draft guidance: ___ . Contact us at advocacy@cliniclegal.org if you have any specific questions or comments.