

## **Current Trends in J-1 Waivers Based on Exceptional Hardship to a U.S. Citizen or Lawful Permanent Resident Spouse or Child**

*by Dan Berger, Kimberley Best Robidoux and Sheila Starkey Hahn*

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### **INTRODUCTION**

This advisory reviews the procedure and standards for J-1 waivers based on exceptional hardship to a U.S. citizen (USC) or lawful permanent resident (LPR) spouse or child, and examines current trends in waiver decisions by the Administrative Appeals Office (AAO).

Note that it is always best practice to be sure an Exchange Visitor is indeed subject to the two-year foreign residence rule – a notation on a visa stamp or a DS-2019 is not always accurate. The attorney can request a free Advisory Opinion from the U.S. Department of State (DOS) to confirm.<sup>1</sup>

If the Exchange Visitor is subject to the two year rule and requires a waiver, it is not the easiest process and initially preparing a strong case via strategy and documentation is essential. We have examined eighteen exceptional hardship cases decided by the AAO and published at the [uscis.gov](http://uscis.gov) website between the beginning of 2012 and the end of 2014, summarizing each case and identifying common themes and practice pointers for attorneys preparing waiver requests based on exceptional hardship.

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<sup>1</sup> The DOS Advisory Opinion instructions are at <http://travel.state.gov/content/visas/english/general/advisory-opinions.html>. For more general information on INA 212(e), the J-1 two year home residence requirement, see A. Chehrizi, "About INA 212e – A Surprisingly Complex Subject," *AILA Immigration Options for Academics and Researchers*, Berger & Sostrin Eds. (2<sup>nd</sup> Ed, 2011) at 91–94.

## PROCEDURE FOR APPLYING FOR A J-1 WAIVER (EXCEPTIONAL HARDSHIP)

Exceptional hardship waivers require the initial filing of Form I-612 with U.S. Citizenship and Immigration Services (USCIS).<sup>2</sup> If USCIS denies an I-612 waiver before seeking a DOS Advisory Opinion, the denial may be appealed. However, if USCIS denies an I-612 waiver based on an unfavorable DOS recommendation, there is no right of administrative or judicial appeal. Nonetheless, a judicial appeal may sometimes be a sound strategy if the negative decision came from USCIS.<sup>3</sup> When the AAO overturns an I-612 waiver application denial, it remands the matter to USCIS to complete a transmittal form to DOS recommending approval, and to forward the application to DOS for its advisory review for “program and policy” considerations.<sup>4</sup>

A waiver under §212(e) of the Immigration and Nationality Act (INA)<sup>5</sup> may not be approved without the favorable recommendation of the DOS.<sup>6</sup> If the DOS recommends that the application be approved, then the U.S. Department of Homeland Security (DHS) may waive the two-year foreign residence requirement if admission of the applicant to the United States is found to be in the public interest. However, if DOS recommends that the application not be approved, the application will be re-denied with no right to appeal.

### *The Law Relating to J-1 Waivers based on Exceptional Hardship*

Section 212(e) of the Immigration and Nationality Act (INA) sets out the two-year home residence requirement. In *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965), the Board of Immigration Appeals (BIA) sets out a two-part test to evaluate hardship if the J-1 individual spends two years abroad, or if the J-1 and U.S. or LPR relative go abroad together for two years.<sup>7</sup>

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<sup>2</sup> 8 CFR §212.7(c)(5).

<sup>3</sup> S. Yale-Loehr, *et al.*, “Administrative Appeals Office Practice Pointers,” *Immigration Practice Pointers* (AILA 2010–11 Ed.) at 404.

<sup>4</sup> When the AAO makes a favorable decision on an Appeal, they remand the matter to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State (DOS), Waiver Review Division (WRD) under 22 CFR §514.

<sup>5</sup> Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).

<sup>6</sup> 22 CFR §41.63(b)(2)(ii) and (b)(2)(iii). Arguably, the only role for DOS is to review program and policy considerations, including consulting with the funding or sponsoring agency. However, as a practical matter, DOS will review the underlying hardship claim - at times with more scrutiny than USCIS. At least one case supports the proposition that failure to comply with its own internal guidelines is abuse of discretion by USCIS. *Chong v. USIA*, 821 F.2d 171 (1987). For example, if DOS did not share the evidence of hardship with the funding agency, but failed to recommend based on opposition by the funding agency, that might be subject to judicial challenge.

<sup>7</sup> “[I]t must first be determined whether or not such hardship would occur as the consequence of her accompanying him abroad, which would be the normal course of action to avoid separation. The mere election by the spouse to remain in the United States, absent such determination, is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed. Further, even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and, in and of itself, does not represent exceptional hardship as contemplated by section 212(e), *supra*.”

The first step required to obtain an exceptional hardship waiver is to establish that the applicant's USC/LPR spouse or child would experience exceptional hardship if he or she resided in the home country for two years with the applicant. The second step is to establish that the applicant's USC/LPR spouse or child would suffer exceptional hardship if he or she remained in the United States during the period the applicant resides abroad. The AAO has confirmed in at least one decision that the standard for proof of exceptional hardship in I-612 waivers is a lesser standard than the "exceptional and extremely unusual" hardship standard in cancellation of removal cases.<sup>8</sup>

At least one AAO case has confirmed that INA §204(1) applies to I-612 hardship cases - so that the death of the U.S. citizen spouse is no longer fatal to the waiver case. (See case #8 below). It also is important to note that hardship waiver applications must include evidence of the relationship with the anchor relative - either a birth certificate or marriage certificate.<sup>9</sup>

The AAO routinely references the standard set forth in the following case in their deliberations: in *Keh Tong Chen v. Attorney General of the United States*, 546 F. Supp. 1060, 1064 (D.D.C. 1982), the U.S. District Court, District of Columbia stated that:

Courts deciding [section] 212(e) cases have consistently emphasized the Congressional determination that it is detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from his country would cause personal hardship. Courts have effectuated Congressional intent by declining to find exceptional hardship unless the degree of hardship expected was greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad." [Quotations and citations omitted.]

The burden of proving eligibility for a waiver under section 212(e) of the Act rests with the applicant,<sup>10</sup> who must prove by a preponderance of the evidence that the beneficiary is fully qualified for the benefit sought.<sup>11</sup> A common thread in the AAO denials we encountered was a lack of supporting documentation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.<sup>12</sup> The AAO repeatedly asserted that the unsupported assertions of counsel do not constitute evidence.<sup>13</sup> Moreover, the AAO routinely noted in the

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<sup>8</sup> The exceptional and extremely unusual hardship standard is found at INA sec. 240(b)(1)(D).

<sup>9</sup> 8 CFR §212.7(c)(6).

<sup>10</sup> See INA §291, 8 USC §1361. In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. INA §291, 8 USC §1361.

<sup>11</sup> *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

<sup>12</sup> *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

<sup>13</sup> *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1998).

remanded cases that they were basing their decision on the totality of the circumstances, upholding the standard that cases should be decided based on the totality of the circumstances, not any one particular factor.<sup>14</sup>

Following are summaries of 18 AAO cases of appeals of I-612 denials, representing a wide range of countries and personal situations. A review of these cases provides a sense of the types of cases that can succeed.

### **SUMMARY AND ANALYSIS OF RECENT AAO WAIVER DECISIONS BASED ON EXCEPTIONAL HARDSHIP**

#### ***Case #1: April 3, 2012, Appeal Dismissed (Egypt, USC spouse)***

The USC spouse in this case was born in Mexico, suffers from numerous medical conditions including kidney stones and a pre-cancer problem that both require medical follow-up. The couple claimed emotional and financial hardship, and that the spouse needs her husband to help care for her and her child when she is in pain. Also she asserted that she fears for her husband's safety in Egypt due to instability in the country. AAO dismissed owing to lack of supporting documentation, asserting that the record fails to establish applicant's spouse's current medical diagnosis, short and long term treatment plan, severity of situation, and most notably what specific hardships she will experience were the applicant to relocate abroad for two years. No documentation was submitted establishing that the child would be unable to obtain emotional and/or financial assistance from her biological father while the applicant is physically in Egypt. As for the applicant's safety in Egypt, AAO found that the country condition information provided was general in nature and does not establish that the applicant specifically will be in danger were he to relocate to Egypt, thereby causing hardship to his USC spouse and child. No current financial documentation was provided outlining the applicant's and his spouse's expenses and assets and liabilities, to establish that without the applicant's physical presence in the US, the applicant's spouse will experience financial hardship. No documentation has been provided that establishes that the applicant would be unable to obtain gainful employment in Egypt, thereby not being able to assist in the U.S. household's finances.

#### ***Case #2: October 11, 2012, Appeal dismissed (Indonesia, USC spouse)***

Basis of claim emotional and financial hardship. Applicant and spouse run small businesses and have a home and two pets. The applicant is in a high risk pregnancy but no documentation was provided from the applicant's treating physician establishing the hardships the applicant's spouse and/or the unborn child may experience in Indonesia. The two articles provided by counsel are general in nature and do not establish that the applicant's spouse specifically will experience hardship. AAO denied for failure to provide documentary evidence to support the claim, including failure to provide any financial documentation outlining the applicant and her spouse's current income and

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<sup>14</sup> *Younghee Na Huck v. AG*, 676 F. Supp. 10 (D.D.C. 1987) (government must evaluate medical and emotional problems together).

expenses and assets and liabilities to establish that without the applicant's physical presence in the US, the applicant's spouse will experience financial hardship.

***Case #3: December 31, 2012, Case Remanded (Dominican Republic, USC spouse)***

Documentation submitted included a psychological evaluation pertaining to applicant's spouse; support letters from family and friends; medical and mental health documentation in regards to applicant's spouse; confirmation of employment; financial documentation; information about country conditions in the DR. Country conditions include high unemployment and crime. Applicant's spouse had surgery in 2010 and receives physical therapy but he would not be able to obtain affordable and effective medical treatment in DR. Evidence presented showing ties to siblings, employment and church. US DOS confirmed that crime is a problem and medical care unreliable in DR. Based on totality of circumstances, AAO concurs with director that applicant's US citizen spouse would experience exceptional hardship were he to accompany the applicant to the DR for a two-year period. The second step is to establish that the applicant's USC spouse would suffer exceptional hardship if he remained in the US during the period the applicant resides in the DR. He declares that he would suffer emotional and financial hardship. He has become distressed with the idea of being separated from his wife and consequently sought psychological help. He is taking an antidepressant. He had surgery on his back in 2010 and has numbness, pain and a limited range of motion. His wife assists in his day to day care and financially contributes to the household. He would lose their home if she left. A psychological evaluation was provided, confirming that he suffers from clinical depression and was a drug addict. If he relocates abroad, he may resort back to old behaviors to cope with the depression. Numerous letters were provided from his siblings, pastor, coworkers and friends establishing the hardships he would suffer. Evidence of their financial obligations was provided. AAO decided that the evidence in the record establishes the hardship that the applicant's spouse would suffer if the applicant temporarily departed the U.S. would go significantly beyond that normally suffered by the temporary separation of families.

**Practice Pointer:** AAO bases decisions on totality of the circumstances. This case highlights the importance of providing extensive documentation, including psychological evaluations and financial documentation.

***Case #4: (July 8, 2013), Case Remanded (Nigeria, USC spouse)***

Applicant's spouse was born in the US; no ties to Nigeria. Full-time student at Harvard Medical School in her final year, intends to apply for residency in Boston. If she relocated abroad, she would experience hardship as a result of academic and professional disruption. Applicant also references problematic country conditions in Nigeria, including high rate of poverty and crime. Decision based on totality of the circumstances. USC would experience exceptional hardship if she accompanied the applicant to Nigeria. Second step: establish that the USC spouse would suffer exceptional hardship if she remained in the US while the applicant resides in Nigeria. She is not employed because she is a full-time student. She is receiving psychotherapy as a result of her depression and her condition would worsen if the applicant relocated abroad. As a result of her academic

program, she would not be able to visit her husband in Nigeria. Documentation was submitted establishing that she has a history of depression and anxiety and has been receiving counseling and medication for Major Depressive Disorder. Travel Warning has been issued for Nigeria owing to high rate of crime and violence. The Board of Immigration Appeals (BIA) found that a USC spouse who was in pursuit of an advanced degree and was thus completely dependent on her spouse for support would encounter exceptional hardship if her spouse's waiver request was not granted.

***Case #5: (February 19, 2014) Case Remanded (Argentina USC spouse)***

The applicant's spouse is enrolled full-time in college and if he were to relocate abroad, he would suffer academic hardship as he would have to cease his studies. He would also risk defaulting on his numerous financial obligations and has no ties to Argentina. Based on a totality of the circumstances, the AAO found that the applicant's USC spouse would experience exceptional hardship were he to accompany the applicant to Argentina for two years. In evaluating whether the applicant's spouse would experience exceptional hardship if he remained in the US while the applicant resides in Argentina, he explained he quit his job to become a full-time student and needs his wife's financial contributions to continue the pursuit of his degree. He would not have the financial and emotional resources to complete his coursework without his spouse. Applicant's spouse is being seen for an evaluation of the emotional, psychological and financial distress he would experience if the applicant is unable to reside in the US. The distress has led to a diagnosis of Adjustment Disorder with Anxiety and long-term separation from the applicant would cause him significant long-term emotional psychological trauma which would likely cause him to lose his home, drop out of school and ultimately result in him suffering from a depressive disorder. Once again, the AAO cited the BIA *Matter of Chong* decision in finding that a disruption in his studies due to financial and emotional hardship at this stage of his education would be significant as to constitute exceptional hardship.

***Case #6: (April 2, 2014) Appeal Dismissed (Tanzania, USC spouse)***

Counsel submitted a Declaration in which applicant's spouse states that she has a full-time job in the United States and in his brief Counsel cites safety concerns in Tanzania. The AAO denied the appeal because Counsel did not provide any supporting documentation to establish that the applicant's spouse would be in danger in Tanzania, nor did the applicant provide current financial documentation outlining the applicant's income and the household's expenses and assets and liabilities to establish that without the applicant's physical presence in the United States, the applicant's spouse would experience financial or emotional hardship.

***Case #7 (April 2, 2014) Case Remanded (Belarus, USC spouse)***

The applicant also states that she has a well-founded fear of persecution were she to return to Belarus.

Applicant's USC spouse established that he would experience exceptional hardship if he relocated to Belarus owing to inability to obtain gainful employment, causing him shame, depression, loneliness and isolation and his long-term separation from family and friends and problematic country conditions in Belarus including censorship, substandard health care and high levels of radiation from Chernobyl. If the applicant's USC spouse remained in the US during the two-year period that the applicant resides in Belarus, he fears she would be imprisoned as a result of her political opinion. A letter was provided from the applicant, detailing arrests, interrogations, threats and bodily harm at the hands of the Belarusian government as a result of her support of the opposition. Supporting evidence included a letter from a fellow student corroborating the applicant's claims, medical documentation substantiating claim of injuries, and Country Reports on Human Rights Practices in Belarus published by the Department of State. Based on the fears and anxieties referenced by the applicant's spouse were his wife to return to Belarus, the applicant has established that her spouse would experience exceptional hardship.

**Practice Pointer:** fear of persecution can successfully be used to show anxiety that would be suffered by the applicant's USC spouse if he or she stays behind while the applicant returns to a country where he or she may be persecuted. By using it in this way, you no longer have to show that the applicant would be persecuted on account of one of the three grounds, since you are not requesting a waiver based on persecution.

**Case #8: (May 5, 2014) Case Remanded (Jamaica, death of USC spouse)**

Counsel argued that deceased spouse should be deemed equivalent of a finding of exceptional hardship. Director determined that the applicant failed to establish that he had a qualifying relative. His USC children are older than 21. His USC spouse passed away in May 2011, resulting in automatic revocation of the approved Form I-130 filed on his behalf. On December 26, 2012, the USCIS reaffirmed the approval of the Form I-130 petition based on humanitarian reasons. Counsel asserts that section 204(1) of the Act renders the applicant eligible for an I-612 waiver as the death of his spouse should be deemed to be the equivalent of a finding of exceptional hardship. The AAO concurs with Counsel, finding that section 201(1) of the Act is not limited to visa petitions, but also applies to adjustment applications and "any related applications", including the instant I-612 application.<sup>15</sup> Pursuant to the Adjudicator's Field Manual, Chapter 10.21(c)(5), the

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<sup>15</sup> h (2), or an The new section 204(1) of the Act, which became effective on October 28, 2009, states as follows: 1) Surviving Relative Consideration for Certain Petitions and Applications – (1) IN GENERAL- An alien described in paragraph (2) who resided in the United States at the time of the death of the qualifying relative and who continues to reside in the United States shall have such petition described in paragraph (2), or an application for adjustment of status to that of a person admitted for lawful permanent residence based upon the family relationship described in paragraph (2), and any related applications, adjudicated notwithstanding the death of the qualifying relative, unless the Secretary of Homeland Security determines, in the unreviewable discretion of the Secretary, that approval would not be in the public interest. (2) ALIEN DESCRIBED- An alien described in this paragraph is an alien who, immediately prior to the death of his or her qualifying relative, was—(A) the beneficiary of a pending or approved petition for classification as an immediate relative (as described in section 201(b)(2)(A)(i)); (B) the beneficiary of a pending or approved petition for classification under section 203 (a) or (d); (C) a derivative beneficiary of a pending or approved petition for classification under section 203(b) (as described in section 203(d); (D) the

fact that the qualifying relative has died will be “deemed to be the functional equivalent of a finding of extreme hardship ....”

***Case #9: (May 12, 2014), Matter of X–, Case Remanded (Ukraine, U.S. citizen spouse)***

Counsel supplemented the record on February 26, 2014 with documentation relating to recent developments in Ukraine, including political unrest and violence. In this case the applicant’s spouse suffers from a rare genetic disease that requires constant monitoring and treatment that cannot be obtained in Ukraine. Documentation submitted established lack of family or employment ties to Ukraine, as well as a travel warning by the US DOS urging US citizens to defer non-essential travel to Ukraine due to political instability and the possibility of violence, as well as articles regarding political unrest and violent clashes between the government and protesters. US DOS also confirmed that ill or infirm individuals should not travel to Ukraine. Evidence submitted included a letter from the treating Physician detailing that applicant’s husband would be put under considerable mental distress and this could aggravate the symptoms of his illness. Also included is a letter from a licensed psychologist maintaining that applicant’s spouse would experience emotional distress so severe his day-to-day functioning could be impaired. Counsel included evidence of violence against journalists, declarations of applicant and spouse, and letters from family, friends and colleagues identifying the hardships the applicant’s spouse would experience as a result of a two-year separation from his wife.

**Practice Pointer:** this case demonstrates the importance of obtaining extensive supporting documentation. The AAO specifically referenced the multiple letters from friends, family and colleagues identifying the hardships the applicant’s spouse would suffer if separated from his wife for two years. Letters from medical professionals are also persuasive. Severe, documented medical conditions of the U.S. citizen spouse are obviously extremely persuasive, especially if you can demonstrate that the separation will exacerbate the condition. Always check the Department of State website for travel advisories to the country in question.

***Case #10: (July 25, 2014), Case Remanded (Jordan, pregnant USC spouse)***

Spouse would not be able to provide for herself and unborn child financially, he would not be able to support them from Jordan, spouse would suffer from exacerbated psychological difficulties given her history of anxiety, PTSD, and major depressive disorder. She could not move in with her parents and siblings owing to space constraints, financial issues, and inadequate emotional support. Documentation includes letters from family and friends; multiple psychological evaluations and articles on psychological conditions; letters and other documentation on country conditions in Jordan; financial and

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beneficiary of a pending or approved refugee/asylee relative petition under section 207 or 208; (E) an alien admitted in ‘T’ nonimmigrant status as described in section 101(a)(15)(T)(ii) or in ‘U’ nonimmigrant status as described in 101(a)(15)(U)(ii); (F) a child of an alien who filed a pending or approved petition for classification or application for adjustment of status or other benefit specified in section 101(a)(51); or (G) an asylee (as described in section 208(b)(3)).

medical records; documentation of the spouse's educational history; and photographs. Spouse is a USC born in Syria. She is pregnant and has a mass in her breast that requires constant monitoring. She is currently earning her associate's degree, which is fully funded by the applicant's income. Letter from medical doctor indicates that the applicant would have a difficult time finding employment in Jordan owing to the specialized nature of his field. AAO found that he demonstrated that his spouse would suffer from exacerbated psychological conditions and anxiety, as well as financial hardship and loss of insurance, without his presence. Also it was found that in light of her upbringing, background and cultural values, she will experience significant difficulties raising their child without the applicant present for two years. *Of note: the AAO did not reference the Matter of Chong academic disruption justification. Perhaps because the spouse is earning an associate's degree, rather than an advanced degree, or perhaps because the other considerations were so compelling that they did not need to reach that issue.*

***Case #11: (July 31, 2014), Case Remanded, Armenia (USC spouse and 2 USC children)***

Counsel submitted a brief contending that the applicant's spouse, who was granted asylum status based on her fear of persecution should she return to Armenia, suffers from psychological conditions which would be exacerbated if she and the applicant were to be separated, and that these psychological conditions would have a negative impact on their two young children. Record includes psychological evaluations and country condition information. She suffers from PTSD and has difficulty functioning. The applicant is the primary caretaker of the family. Expert opinion also opined that the applicant's life may be threatened as well, based on the fact that there is a history of threats against his family members. Based on the spouse's psychological conditions, the fears and anxieties referenced by the applicant's spouse were the applicant to return to Armenia, and the resulting impact on their young children, the applicant has established that his spouse and children would experience exceptional hardship were they to remain in the United States while the applicant relocates abroad to fulfill the two-year foreign residency requirement.

***Case #12: (August 13, 2014) Case Remanded (Brazil, USC spouse)***

In support of the appeal, counsel submitted a brief; articles on healthcare in Brazil; updated letters from an HIV specialist, the spouse's physician, and his psychologist; an article on HIV/AIDs treatment; documentation of employment; an updated statement from the applicant's spouse; medical records; a death certificate; documentation from the Centers for Disease Control website; articles on treatment of LGBT populations in Brazil; letters in support from the family, friends and community members; and documentation of the applicant's community involvement. The applicant's spouse is HIV positive. He was given ten years to live if he took care of himself. He sees a doctor every three months, takes medication, and the drug he is on, Atripla, is not available in Brazil. Switching medications would have adverse consequences and he may have difficulty accessing good health insurance in Brazil. He also has psychological difficulties, including anxiety, depression, panic disorder and dysthymic disorder that would be exacerbated if he is forced to relocate and if he is separated from his spouse. According

to an updated evaluation from his Licensed Clinical Social Worker, the recent death of his father, denial of the I-612 waiver application and his new job have aggravated the symptoms of his mental illness. He must assist his grandmother and step-mother, and the applicant is a significant source of psychological and other support. He may lose his job if his circumstances change. *Of note: We've come a long way since the not-so-distant past, when mental illness, homosexuality and HIV were grounds of exclusion from the United States and gay marriage would not have formed a basis for a waiver!*

***Case #13: (August 18, 2014), Appeal Dismissed (Nigeria, USC spouse)***

In the brief on appeal, Counsel contends that applicant's USC spouse would suffer extreme hardship were the applicant to return to Nigeria and that the applicant would face persecution in Nigeria on account of his prior employment as a senior broadcast engineer and his Christian religion. The record contains letters, affidavits, country condition information, a US Department of State travel warning and professional credentials. Applicant contends that his laptop was stolen on one occasion and he was attacked on another. The AAO pointed out that the applicant did not mention the attack until appeal and did not explain why he did not present this information sooner. The director found that the applicant's spouse would suffer exceptional hardship owing to Anti-American sentiment if she accompanied the applicant to Nigeria, but would not suffer exceptional hardship if she remained in the US while the applicant resided abroad. Counsel claims on appeal that the spouse would worry about the applicant's safety if they were separated. *Of note: Unlike an asylum interview or hearing before the immigration judge, the AAO does not have the opportunity to take testimony from the applicant, and therefore cannot make a credibility determination in order to rely on testimony without proof to back it up.*

***Case #14: (August 25, 2014) Appeal Dismissed (Tanzania, USC spouse and children)***

Counsel contends that the applicant's spouse and children would experience health-related hardships and the children would be taken away from necessary educational facilities if they relocated. Record includes articles on country conditions and medical conditions as well as letters from health care providers and school representatives and financial documents. The teenage children in this case spent most of their lives in Tanzania and both kids had difficulties adjusting to school in the US and were diagnosed with learning disorders. The USC spouse also filed for bankruptcy in 2011. The applicant has a history of hypertension and several other medical problems which require frequent monitoring, and his physician reported that his health may be jeopardized if he lives in Africa, where healthcare is substandard. The applicant did not provide sufficient financial evidence. Medical records indicate that the USC spouse and both children also require monitoring for a series of medical problems. The applicant also claims that the children will receive a substandard education in Tanzania. The AAO determined that while the applicant has demonstrated that his spouse and children may experience some difficulties if they temporarily relocate to Tanzania, he has submitted insufficient evidence to show that the claimed medical and financial difficulties rise to the level of exceptional hardship.

***Case #15 (November 10, 2014), Case Remanded (Morocco, US citizen spouse and four children (2 biological and 2 step-children))***

Applicant's spouse suffers from depression and fibromyalgia, and two of her children have been diagnosed with cystic fibrosis and would suffer medical hardship if they were to relocate abroad. The applicant's spouse has a shared custodial arrangement with her ex-husband that requires their two children to remain in the US. The applicant also references the problematic country conditions in Morocco, including poverty and substandard medical care. Supporting documentation was submitted. AAO concurs with Director that they would experience exceptional hardship if they accompanied the applicant to Morocco. Second step: if applicant were to relocate abroad, applicant's spouse would suffer emotional, medical and financial hardship. Because of spouse's major depression and nerve damage, she is limited in ability to keep a job and thus relies on applicant to support her and the children. Spouse does not drive and relies on the applicant to transport the children to school and to all of their medical appointments. Average income in Morocco is low, so applicant will not be able to send money home to support the family. Letter from applicant's spouse's ex-husband details the critical role the applicant has played in his children's well-being (health and safety) and that his daughter would experience exceptional hardship if the applicant were to relocate abroad. The applicant is the primary caregiver to his family. The record establishes that if the applicant were to relocate abroad, his wife would have to become primary caregiver and provider to four children, two with serious medical conditions, while suffering from her own medical and mental health issues. The evidence in the record establishes the hardship the applicant's spouse would suffer if the applicant temporarily departed the US would go significantly beyond that normally suffered upon the temporary separation of families. *Of note: it is a cause for concern that this case was denied to begin with.*

***Case #16: (November 12, 2014) Case Remanded (Dominican Republic, USC spouse and child)***

Documentation included academic enrollment and financial aid documentation relating to applicant's spouse. Spouse is unfamiliar with the culture and customs of the DR, has a history of mental health issues, and would be at risk of losing the financial aid she has secured for the coming school year. Based on a totality of the circumstances, AAO concludes that the applicant's USC spouse would experience exceptional hardship were she to accompany the applicant to the DR for a two year period. If applicant were to relocate abroad, spouse would be forced to become primary caregiver to her young child without the financial and emotional support of her spouse and would suffer significant academic disruption. Extensive documentation was submitted with respect to the applicant and his spouse's income and expenses, including a Monthly Household Budget, to establish the nature of the applicant's continued financial contributions. The AAO once again relies on *Matter of Chong*, where BIA found that a USC spouse who was in pursuit of an advanced degree and was thus completely dependent on her spouse for support would encounter exceptional hardship if her spouse's waiver request was not granted.

**Case #17: (November 25, 2014) Case Remanded (Georgia, USC spouse)**

Applicant's USC spouse suffers from depression and anxiety. She suffers from dependent personality disorder, making it difficult for her to make decisions and making her fearful of being left alone. Her fear of separation and abandonment are causing intensive panic attacks, dizzy spells, crying spells and phobia. Documentation included a psychiatric evaluation, a letter from their spiritual leader and financial documentation. She had to stop working at one of her jobs due to her physical condition and the applicant had permission to have his wife accompany him to his worksite.

**Case #18: (December 23, 2014) Case Remanded (India, USC spouse)**

Director determined that due to problematic security and economic situation and poor sanitation and health infrastructure in India, and the applicant's spouse's education interruption, the applicant had established that his USC spouse would experience exceptional hardship were she to relocate to India to reside with applicant for two years. In support of contention that spouse will suffer exceptional hardship if she remained in the US while applicant resides in India, declaration maintains that long-term separation will cause her emotional, academic and financial hardship. She is experiencing depression and stress. Applicant was residing abroad when their child was born. She is dependent on her parents and reliant on Medicaid and WIC for health services and nutrition because of the loss of her husband's income, and her savings has decreased from \$21,000 to \$6,000 in less than a year and a half. She has become primary caregiver to their baby and cannot pursue her academic studies or expand her educational services business. The applicant's mother-in-law submitted a letter outlining the hardships her daughter is experiencing as a result of separation from the applicant.

To show exceptional hardship, the factors considered are economic, physical and emotional hardship; as well as loss of employment, educational and health opportunities. But how do these factors lay out in real-life situations and how are they viewed by USCIS and the AAO? Based on an evaluation of the eighteen cases we analyzed for this article, we would like to provide the following practice pointers:

1. **Documentary evidence is key.**<sup>16</sup> The AAO remanded a surprising number of cases after explicitly stating that there was sufficient evidence to support hardship.

2. **Interruption of the spouse's career is a key factor,<sup>17</sup> as is interruption of their pursuit of graduate studies.<sup>18</sup>**

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<sup>16</sup> *Matter of De Perio*, 13 I&N Dec. 273 (BIA 1968) (medical grounds are relevant if the usual hardship of relocating to the exchange visitor's home country would be exacerbated by the US citizen's medical condition); *Matter of \_\_\_\_\_* (AAO CSC Jan. 14, 2009), as reported in *Bender's Immigration Bulletin* 469 (April 15, 2011).

<sup>17</sup> See *Matter of Chong*, 12 I&N Dec. 793, Interim Decision (BIA 1968) (exceptional hardship resulted from interruption to spouse's career); *Matter of Vicedo*, 13 I & N Dec. 33 (BIA 1968) (exchange visitor has minor U.S. citizen or LPR children, and would have trouble working if the children accompanied him/her to the home country for two years while caring for the children); *Matter of Savetamal*, 12 I&N Dec. 249

3. *Persecution waiver arguments can be adapted for use in a hardship waiver case*, which is useful in light of the serious limitations of the persecution category.

4. *A detailed monthly budget with supporting documentation is vital* to show financial hardship.

5. *Well-documented medical conditions can be persuasive*, including psychological conditions exacerbated by the foreign spouse's prospective departure.

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(RC 1969) (LPR spouse would have to give up medical career to join exchange visitor abroad, effect on US child also noted).

<sup>18</sup> See Case Numbers 4, 5 and 16, *supra*.