THE HAKE HARDSHIP SCALE: A QUANTITATIVE SYSTEM FOR ASSESSMENT OF HARDSHIP IN IMMIGRATION CASES BASED ON A STATISTICAL ANALYSIS OF AAO DECISIONS*

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"Empiricism!" howls Guildenstern to Rosencrantz. "Is that all you have to offer?"
--Tom Stoppard, *Rosencrantz and Guildenstern are Dead*

INTRODUCTION

One way to obtain a waiver of the J-1 foreign residence requirement is to prove that one's U.S. citizen or permanent resident family members would suffer exceptional hardship. I have concentrated on J-1 hardship waivers for over 10 years and have written several articles on the topic, which someday may be combined to make a book. This article is the most original part of that project. In principal, the scope of this work extends beyond J-1 hardship waivers, because the quantitative system proposed in this article should be useful in all immigration contexts that require proof of hardship, although modifications would be needed for other contexts.

A complete discussion of hardship waivers under U.S. immigration law would best be divided into three parts: (1) standards (law and history); (2) procedure; and (3) grounds (the facts; what works and what does not). My 1994 article[1] covered all these parts in preliminary fashion.

Hardship Standards

In 2001, I refined my work on hardship standards. A first version was published by the American Immigration Lawyers Association (AILA).[2] A more developed version was later published by Matthew Bender.[3] These articles on hardship standards demonstrated that the "extreme hardship" standard for suspension of deportation/cancellation of removal is exactly the same as the "exceptional hardship" standard for J-1 hardship waivers (leaving aside the issue of whether hardship to the applicant is supposed to count). In addition, they demonstrated that all hardship standards in U.S. immigration law are essentially identical (with the one exception of the "exceptional and extremely unusual" standard for suspension/removal).

Those two articles also proposed a novel interpretation of the concepts of "exceptional" and "extreme." Hardship that is serious enough to justify special consideration under the law involves two components: (1) it must be unusual in terms of probability of occurrence ("exceptional") and/or (2) it must be unusual in terms of gravity of harm ("extreme"). These concepts have a complementary and reciprocal relationship. At the end, these articles speculate about the development of an objective scale to measure legal hardship in immigration cases. This instant article gives life to that speculation.

My 2002 "Hardship Standards" article tried to describe all hardship standards in U.S. immigration law, but it missed one interesting example. I learned that in December 2003, when *Bender's Immigration Bulletin* published an extremely good article on J visa issues, which includes a deep review of the legislative history.[4] Among other things, that article is noteworthy for pointing out that the earliest statement of the standard for J-1 hardship waivers, a State Department regulation

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[1] Hake, *Hardship Waivers For J-1 Physicians*, 94-2 *Immigration Briefings* (Feb. 1994).

[2] Hake, *Hardship is Hardship: The Equivalency of Hardship Standards in U.S. Immigration Law*, 2 AILA Immigration & Nationality Law Handbook 384 (2001-02 ed.).

[3] Hake, *Hardship Standards*, 7 Bender's Immigr. Bull. 59 (Jan. 15, 2002). This version is clearer about the existence of a solitary exception (the "exceptional and extremely unusual" standard) and it contains a better analysis of the Board of Immigration Appeals's latest precedents.

[4] Naomi Schorr and Stephen Yale-Loehr, *The Odyssey of the J-2: Forty-Two Years of Trying Not to Go Home Again*, 8 Bender's Immigr. Bull. 1810 (Dec. 1, 2003). This landmark article was also published at 1 AILA, Immigration & Nationality Law Handbook 456 (2004-05 ed.); was subsequently published at AILA, Immigration Options for Physicians 191 (M. Catillaz, ed., 2d ed., 2004).

from 1958, referred to "undue hardship."[5] Moreover, the regulation permitted waiver of the residence requirement on account of hardship to the J-1 himself.

Hardship Procedure

Though J-1 hardship waiver procedure is adequately covered by my 1994 article, and is updated by the State Department's J-1 web pages,[6] a summary is useful here. All J-1 exchange visitors are not subject to the J-1 two-year foreign residence requirement. Under INA § 212(e), there are three ways to become "infected" with the residence requirement (government funding; training in a skill on the Skills List for one's country; or graduate medical education), and there are four ways to seek a "cure" (no objection statement from home country; recommendation from an Interested Government Agency (IGA); personal risk of persecution; or exceptional hardship to one's qualifying relatives, that is, one's U.S. citizen or lawful permanent resident spouse and/or children).

All J-1 waiver applications commence with filing of a Form DS-3035 Data Sheet with the State Department's Waiver Review Division (WRD). In response, one receives a WRD case number, which must be placed on subsequent application materials. After that, procedures are distinct for the four waiver categories. The next step for no objection waivers and IGA waivers is application to one's foreign government, or to a U.S. federal agency, respectively. In contrast, hardship or persecution waivers next require filing of Form I-612 with the USCIS (U.S. Citizenship and Immigration Services, formerly INS) regional service center having jurisdiction over the applicant's place of residence. A Form I-612 may be used for a hardship waiver application, or for a persecution waiver application, but not both.

This article sometimes uses the expression "Form I-612 application" as a shorthand for "J-1 exceptional hardship waiver application." When it does so, it is always referring to Form I-612 hardship waiver applications, unless otherwise specified.

Upon receipt of the Form I-612, the USCIS then conducts a review of the hardship claim and the supporting evidence. In analyzing a hardship application, the USCIS looks for evidence of hardship to the qualifying relatives if the exchange visitor alone returns to the country to which the residence obligation is owed, leaving the qualifying relatives in the United States, and also to evidence of hardship if the exchange visitor and the family depart the United States and reside abroad together.

To win a Form I-612 hardship waiver case, one must satisfy the USCIS that the applicant's U.S. citizen or LPR spouse and/or children would face a comparable combination of hardships whether or not they relocate with the applicant to the home country or stay by themselves in the United States. Ignorance of this so-called "two-step" rule is a major cause of denials. A related rule is that hardship to the applicant is not supposed to count (but, of course, extreme harm to the applicant necessarily will result in serious hardships to the family members). In presenting a hardship waiver case, one must give systematic attention to how all the various identifiable hardship factors will or will not affect the family members under all the travel alternatives. One must prove that an "exceptional" level of hardship exists under all the alternatives. There is no short-cut for making this proof.

Hardship Grounds

This article addresses the third part of my planned book on J-1 hardship waivers: hardship waiver grounds. A preliminary version was published in 2002.[7] Instead of a boring review of case law, this article includes insights from my more than 10 years of concentration in this area. It also describes the Hake Hardship Scale, an attempt to rationalize the decisionmaking in this area.

My articles have attempted to prove that all hardship standards in U.S. immigration law are identical (with just one exception involving the standard for cancellation of removal). Therefore, the Hake Hardship Scale should be generally applicable to all applications for immigration relief that require proof of hardship. As presented here, however, the scale is designed for Form I-612 hardship cases. Other contexts would require some adjustments, because the threshold eligibility requirements vary from category to category.

State Department Adjudications Policy

The role of the Waiver Review Division of the Department of State in J-1 hardship waiver proceedings is fundamental in J-1 waiver cases. For a J-1 waiver

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[5] *Id.* at 1817, citing 22 CFR § 63.6 (1958) ("The application [for a waiver of the two-year residence requirement] must be supported by documentary evidence that ineligibility for permanent residence would (a) impose undue hardship *upon the exchange visitor* that could not have been anticipated at the time exchange visitor status or the last extension of stay as an exchange visitor was granted ....") (emphasis added).

[6] <http://travel.state.gov/visa/temp/types/types_1267.html>.

[7] Hake, *The Hake Hardship Scale (Beta Version)*, 1 AILA, Immigration & Nationality Law Handbook 237 (2002-03 ed.).

based on hardship or persecution to be granted, a Form I-612 waiver application must be approved by both the USCIS and the State Department. (As noted above, the other two kinds of J-1 waivers, as set forth in INA § 212(e), do not start with the filing of a form with the USCIS.)

In general, in Form I-612 hardship cases, the USCIS review concentrates on the question of the existence of exceptional hardship. If the USCIS determines that exceptional hardship exists, the subsequent State Department review involves a balancing of that hardship against J-1 program and policy considerations. The "program and policy" considerations examined by the State Department have never been formally published.

This article focuses on the relatively more concrete assessment of hardship by the USCIS, not on the program and policy review by the State Department. Under current practice, a solid case that is recommended for approval by the USCIS probably has a good chance of being recommended for approval by the State Department as well. The State Department is most likely to disagree with a USCIS waiver recommendation if the applicant's J-1 program was funded by the U.S. government. Note well that both USCIS and State Department adjudications practices are always subject to change without notice.

THE TROUBLE WITH NORMAL

The trouble with normal is that it always gets worse.[8] Adjudicators frequently find ways to twist the law in the name of normality to justify the infliction of suffering. The task of the advocate is to prove the exception.

The first two of Buddha's Four Noble Truths are: (1) life is suffering; (2) suffering is desire. Reading hardship law, one may wonder whether many American officials did not stop at that point in their moral education, oblivious to other truths about duty and compassion. Decision after decision blithely recites that suffering is normal: everybody desires to stay with family and friends and neighbors and employers in the United States, and yes, it will rip out hearts to force this family apart, but that is okay because it is "normal." Again, the task of the advocate is to prove the exception. One tries to make the adjudicator see and feel the human realities of the persons in the case.

Although it has never been clearly articulated in any published decision, the underlying reasoning in all hardship waiver decisions (even beyond immigration law) is this: (1) hardship is normal (we all suffer); (2) the claimed hardship must be worse than that suffered by the hypothetical average person in analogous circumstances. In the J-1 hardship waiver context, this means showing that the hardship faced by the applicant's American (U.S. citizen and permanent resident) family members would be worse than that faced by the hypothetical American family of an average J-1 exchange visitor forced to return to his home country for two years, whether or not the family accompanies him. It is useful to treat that as a cardinal rule and organizing principle. One does not win a hardship waiver case by making a laundry list of hardship factors and then shoveling in the standard background documents. Instead, one should try to keep the focus on how all the factors, considered together, take the case outside the realm of the normal.

The USCIS Administrative Appeals Office understands this. Here is the AAO's summary of the facts in a successful appeal I handled:

> The record clearly establishes that the applicant's spouse would suffer exceptional hardship if he abandoned his present career in the United States to accompany his wife and child to Colombia where his life would be at risk as a United States citizen. The record also contains specific documents which reflect that the applicant's husband would be faced with certain additional problems and anxieties, such as fear for the safety of his wife and/or child if she returned to Colombia without him where her personal chance of being kidnapped, tortured or killed is greater than 25%. *These anxieties go beyond the normal.* It is concluded that the record now also contains evidence of hardships including separation, fear and anxiety which, in their totality, rise to the level of exceptional as envisioned by Congress if the applicant's husband remains in the United States while she returns to Colombia either with or without their child.[9]

The lawyer cover letter in that case had specified the following as the main hardships:

1. The risk of violent hardship to the applicant's American husband and child, in view of the indescribably dangerous situation in Colombia.

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[8] Bruce Cockburn, lyric from song "The Trouble with Normal," album "The Trouble with Normal" (1983).

[9] Matter of [name redacted], File No. A74-944-520, slip op. at 5 (AAO Feb. 7, 2001) (emphasis added) (copy on file with author).

2. The risk of long-term hardships for her American husband and child if Dr. X herself were kidnapped or physically injured.

3. The risk of disruption of the superlative career of the applicant's husband.

4. The special risk of permanent psychological damage to the applicant's newborn baby if he is exposed to the extreme chaos and violence of Colombia.

5. Risks of hardship to other Americans and to the public interest of the United States, in view of the exemplary quality of medical care provided to Americans by Dr. X and her husband.

One could have specified many other hardships. But those were the main ones. The AAO did a good job in its summary. Notice the AAO's emphasis on the fact that the application proved clearly, using specific documents, that the hardship to the applicant's American spouse and child were significantly beyond the normal hardships faced by the family of an average J-1 exchange visitor. The application took hundreds of pages to demonstrate that reality. The applicant, her supporters, and her lawyer spent hundreds of hours preparing the case. The USCIS service center probably spent less than 30 minutes reviewing it. Indeed, based on the text of the initial summary denial, it appears that the adjudicator could not have even read all of the five-page cover letter. Nonetheless, the elaborate preparation work was useful, because it built the foundation for a successful appeal.

Here are additional authorities for the cardinal rule that one must prove that the hardships are beyond the normal:[10]

> "The uprooting of family, the separation from friends, and other *normal processes of readjustment* to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances." *Shooshtary v. INS*, 39 F.3d 1049, 1051 (9th Cir. 1994) (citing *Matter of Chumpitazi*, 16 I&N Dec. 629 (BIA 1978)).

"[W]ere the children to remain in the United States with their mother, there was no evidence that the hardships they would suffer would be more than the *normal hardships* expected due to separation from a family member." *Onasanya v. INS*, No. 95-2943, slip op. at 7 (4th Cir. Mar. 31, 1997) (citing *Chiaramonte v. INS*, 626 F.2d 1093, 1101 (2d Cir. 1980)).

"Regarding her friendships, the IJ found that they fell within the general rule that *the severance of normal friendships does not rise to the level of extreme hardship*." *Parchamento v. INS*, No. 95-70491, slip op. at 6 (9th Cir. Jan. 24, 1997) (citing *Shooshtary v. INS*, 39 F.3d 1049, 1051 (9th Cir. 1994).

"'Extreme hardship' will not be found without a showing of significant actual or potential injury, in the sense that the petitioner will suffer hardship 'substantially different from and more severe than that suffered by the ordinary alien who is deported.'" *Kuciemba v. INS*, No. 95-3454, slip op. at 5-6 (citing *Palmer v. INS*, 4 F.3d 482, 487 (7th Cir. 1993)).

"The Salamedas, who have advanced degrees, are more able to make a transition than most. They have children accustomed to the United States, but that is normal rather than extreme. *Normal and extreme are legal antipodes.* Unless the word 'extreme' has lost all meaning, this is a routine case. The BIA is entitled to be hard-nosed, to take 'extreme' literally." *Salameda v. INS*, 70 F.3d 447, 453 (7th Cir. 1995) (Easterbrook, C.J., dissenting). This quotation from a dissenting judge accompanies an important decision in a case litigated by AILA member Royal F. Berg of Chicago. The majority opinion was written by famous judge Richard Posner. The decision vacated an order denying the Salamedas's application for suspension of deportation, finding that the BIA had disregarded the couple's community assistance and suggesting that the BIA also consider hardship to the couple's noncitizen child.

"The BIA denied the motion, concluding that Brice had failed to demonstrate a *prima facie* case of extreme hardship because he had not established that he would either suffer any more than an *average deportee* or that the new

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[10] See my first 2002 article, *supra* note 3, for demonstrations that (1) "exceptional" and "extreme" basically mean the same thing and (2) suspension cases are relevant in the Form I-612 context. Emphasis is added in the quotations below with underlines.

government would revert to repression." *Brice v. INS*, 806 F.2d 415, 418-19 (2d Cir. 1986).

"Exceptional hardship contemplates more than *normal personal hardship*." *Talavera v. Pederson*, 334 F.2d 52, 58 (6th Cir. 1964) (citing "Report No. 721 of the House of Representatives, dated July 17, 1961, prepared by Subcommittee No. 1 of the Committee on the Judiciary on the 'Immigration Aspects of the International Education Exchange Program'").

"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." *Keh Tong Chen v. Attorney General*, 546 F. Supp. 1060, 1063 (D.D.C. 1982) (citing *Mendez v. Major*, 340 F.2d 128, 132 (8th Cir. 1965); *Talavera v. Pederson*, 334 F.2d 52, 58 (6th Cir. 1964)).

This is last reference is the most important J-1 hardship waiver opinion. Anyone who practices in this area should study it carefully, especially because this is the case most often cited by the USCIS in Form I-612 denial decisions and they always cite it incorrectly. In fact, this case strongly favors the applicant in almost every context. The court granted summary judgment for the plaintiff on the ground that the USCIS failure to demonstrate explicit consideration of evidence in the record regarding the child's hardship claim was arbitrary and capricious. Moreover, the decision holds that where an applicant's spouse and children are U.S. citizens, exceptional hardship may be found based solely on the consequences of the spouse and children remaining in the United States. The decision strongly disparages the USCIS's conventional "two-step" analysis in these cases.

DIALECTICS

This section contains practice tips on preparing a successful hardship waiver case.

It takes great effort to provide adequate evidence for the argument that an applicant's family faces a constellation of hardships that are abnormal. At the same time, one cannot get lost in a trackless wilderness of marginal arguments, extraneous facts, and generic documents.

Some lawyers veer too far toward the superficial. They see only the forest, and all forests look alike from a distance. Not long ago a prospective associate commented that he "could not fathom" how anybody could spend 15 or more hours on a waiver case. He works for a charitable organization cranking out hundreds of cases a year. He proclaimed that he was always thoroughly prepared in a few hours, even in suspension or asylum cases. This poor soul did not have a clue about how to conduct factual development in a difficult case, although he thought he was an expert. For myself, I cannot fathom how anybody could expect, starting from scratch with no experience, to even begin to prepare a wise, truthful, complex, thoroughly documented, intelligently integrated and conveniently cross-referenced written description of a family's hardship waiver predicament, especially where so much is at stake, in anything less than 15 hours. When I started, I often spent over 60 hours on Form I-612 cases. I am now much more efficient, but my staff and I still never spend less than 20 hours on a case. The average is probably closer to 40 hours or more, all things included. These are labor-intensive cases.

Other lawyers, alas, get lost in murky depths. They get so lost in the trees that they forget the forest. I have reviewed unsuccessful hardship waiver applications that reflect extensive, diligent labor, combined with a hefty shoveling-in of generic background documents, but no coherent distillation, no cogent introduction and conclusion. It looks as if they imagine it best to shoot wildly in all directions, hoping some random shot may ring a bell. This approach is a mistake. One has to work hard, but working hard is not enough.

Pondering these observations, it seems to me that effective hardship waiver advocacy requires a kind of "dialectic." One must start with a quick, superficial (but hopefully informed) condensation of the major hardships. What are the two or three main hardships? Blam, blam, blam! That is the thesis.

Next one must go beyond that into the depths. One should give the clients homework. One should try to make sure that every chance has been taken to dig up all possible cognizable hardships. One must be comprehensive. One must interview the clients at length, often more than once. Mountains of documents may be assembled. Energetic clients will send hundreds of clippings. One has to deal with exhibits that reference sub-exhibits that reference sub-exhibits, and so forth. The sworn affidavits, which I believe must be drafted by the applicants themselves pursuant to very detailed instructions, must be carefully edited and rewritten in light of the law and the available evidence. I find it helpful during the most tedious aspects of this work to keep a picture of the clients near my computer. This is the antithesis.

Too many lawyers stop at the first step or somewhere during the second. To win consistently, I think you have to go through those two steps--and then forge on to a concise and focused summary of the main points, while drawing attention to the depths of evidence available in support. This is the synthesis.

There are an infinite number of ways to *truthfully* describe any situation. My playful description here of a "dialectic" in the analysis of a hardship case has puzzled some readers. To say it another way, in the interest of clarity, the "thesis" is an initial, rapid-fire proposition that the whole case comes down to one or two or maybe three main hardships; the "antithesis" is a very detailed assessment of all identifiable hardship factors in a case in combination with a very detailed assessment of available evidence; and the "synthesis" is a final, prioritized description of the main hardship factors in the context of all the identifiable hardships. The final synthesis is more nuanced than the initial impression, and at this stage the list of main hardship factors will sometimes vary from the initial impression. Of course, any complex intellectual project requires similar steps. Isolation of these steps in the hardship waiver preparation process is useful for helping to make sure that preparation has indeed been adequate.

This dialectic is reflected in the formal way that I organize a hardship waiver application. I believe the affidavits are the main documents. They should reflect this dialectical process: starting with a summary, going into the details in an intelligently structured way, and then synthesizing the main points in conclusion. The exhibits are all selected to support the affidavits. The evidence consists of affidavits and supporting documents and photographs, and that is all summarized in an annotated table of exhibits. In my cases the table of exhibits usually runs to more than 20 pages, and it often exceeds 50 pages. It took me years to realize that the lawyer cover letter should be the last step, not the first. The lawyer cover letter should be only a few pages long. It briefly summarizes the family's circumstances, briefly summarizes the key hardships, and points toward the table of exhibits, which points in turn to the affidavits.

The completed Form I-612 hardship waiver application, one might say, is a kind of fractal, in the sense that each component replicates the overall dialectical structure. Of course, one does not use fancy language like that in a real application. Instead, one should strive to make sure that everything is clear and that nothing is included that is redundant or not clearly relevant.

Prospective hardship cases are all over the map in terms of merit and in terms of the time required for preparation. Sometimes the main hardships are obvious. If a U.S. citizen child has just had heart surgery, it may not be necessary to venture very far into the hardships the family would also face because they are members of a persecuted religious minority. Cases like that obviously do not take as much time as others. On the other hand, sometimes it seems obvious that there is no exceptional hardship. In such cases, an interview will usually reveal fairly quickly whether there is a case to be made. I turn down the majority of people who request my help, because everything depends on the facts and often the facts are just not there. In a significant number of cases, however, it is not obvious, even after an interview or two, whether or not there is an approvable case to be made, and yet intuition tugs and conscience does not permit a quick dismissal. It may be difficult to develop a coherent way to describe the situation. Those are the cases a lawyer remembers. So far my record is five-and-a-half hours at an initial interview before the clients and I figured out a compelling way to argue a case.

A hardship waiver application must be complete. I have seen losing applications, for which lawyers charged steep fees, that comprised fewer than 15 pages, including the forms. But a hardship waiver application should not be unduly long. This is a big problem for me. Many of my applications have been over four inches thick. Over time, I've been trying to pare them down ruthlessly, with mixed success. Blaise Pascal once wrote to a friend, "I'm sorry this letter is so long, but I did not have time to shorten it." I have started to use a separate final step just to shorten an application, after everything is together.

CATALOGS AND CASES

A former immigration judge commented to me that what is going on at bottom in all hardship adjudications is a discrimination between people who are "really suffering" and people who are "really, really suffering." How does one even begin to draw bright lines to guide advocates and adjudicators?

Conventional legal training gets lawyers in trouble in the hardship area. Until this article, I do not believe there had been an attempt at a rigorous empirical study of hardship waiver factors. Instead, we have two things: (1) catalogs of grounds in legal writings, and (2) murky statements in legal opinions citing to other legal opinions. Most of the case law in this area is incoherent, and all of it is incomplete. There are a few thoughtful exceptions, such as the court's opinion in *Keh Tong Chen*. In sum, however, the case law in this area is a swamp. One can find authority for certain principles. From the case law, however, it is impossible to find a

cogent set of fundamental principles, and it is easy to be misled (for example, in my opinion, it is easy to overestimate the importance of amorphous sociocultural hardships). In addition, most of the case law in this area is quite dated by now, so its factual relevance is becoming increasingly attenuated, even though the underlying law has not changed.

Therefore, this article does not march through the typical summary of case law and regulations. My first 2002 article[11] recites all sections in immigration statutes and regulations, plus the most important case law, regarding the concept of "hardship." My 1994 article contains a list of all published federal judicial and administrative opinions regarding Form I-612 hardship cases, with annotations regarding the major hardship grounds mentioned by the opinions, and there have been no published opinions since then in this exact area of Form I-612 cases.[12] A practitioner should be familiar with those legal sources, especially *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978), which is still the closest thing we have to an authoritative list of important factors in any immigration hardship determination.[13] Not much light could be generated, however, from trying to reconcile the above sources using conventional tools of legal analysis and exposition. Moreover, although it would be interesting, not much light would be shed by using conventional tools of legal exposition to compare the *Anderson* factors with the hardship scale proposed in this article.

Thus, in view of the murky legal authorities and the absence of clear guidelines from the government (as one can find, for example, regarding other equally complex topics in the *Foreign Affairs Manual*), the only reliable guide is experience. As Oliver Wendell Holmes and the later Legal Realists taught, there is no such thing as a logically correct answer to the question of what is the law; finding the law means making a prediction of what courts will do. One cannot find the law of hardship waiver applications in a handful of published decisions. One has to find it in the results in many cases over time.

Several preliminary issues should be clarified before describing the Hake Hardship Scale.

PARTIES, GROUNDS, AND THE PUBLIC INTEREST

Three factors must coalesce for a J-1 hardship waiver to be approvable.

First, one must consider the people involved in the application. The applicant must show that hardship is faced by a U.S. citizen or lawful permanent resident spouse and/or child. If this threshold eligibility is established, one can also show (and the government will reckon) hardship to other third persons, such as a U.S. citizen father-in-law who is dying of cancer.

Second, one must show that the combination of hardships is "exceptional." One must consider the factual grounds of hardship.

Third, one must also show that it is in the public interest to grant the waiver. This is an express requirement of INA § 212(e), which is often overlooked by practitioners new to this area.

These three factors are entangled. None of these factors should ever be considered in isolation.

Therefore, when I think about "hardship waiver grounds," in the sense of thinking about what kinds of cases are likely to be approved and which are not, I tend to think of these three factors as an undivided whole. In presenting the application, I always distinguish these three factors in order: (1) who is involved in the application; (2) what is their predicament; and (3) how does this affect the public interest? In assessing whether a case is approvable, however, I think of the facts regarding the persons involved, the facts regarding the kinds of hardship, and the facts regarding the public interest, as a connected set of "hardship factors." This way of viewing the problem is reflected in the structure of the Hake Hardship Scale that follows.

It is important to note here that the number of persons affected in a hardship waiver case has a direct impact on the likelihood of success, regardless of the specified hardship grounds. This has always been true in the law. In *Matter of Nassiri*, 12 I&N Dec. 756 (Dep. Assoc. Comm'r 1968), the INS granted an exchange visitor foreign residence requirement waiver on the ground of exceptional hardship to a citizen spouse and citizen children. The decision is noteworthy for its enunciation of this "general rule":

> As a general rule, where both the spouse and child(ren) of an exchange visitor alien are

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[11] *Supra* note 3.

[12] Hake 1994 article, *supra* note 1, Appendix 1 at 51-60. That appendix missed one case: Matter of DePerio, 13 I&N Dec. 273 (Dep. Assoc. Comm'r 1968) (Philippines; U.S. citizen child with allergic condition plus heart murmer and cardiac enlargement requiring follow-up; waiver granted).

[13] *See also* the list of hardship factors for special rule suspension under the Nicaraguan and Central American Relief Act (NACARA) that are set forth at 8 CFR § 240.58.

> United States citizens or lawful permanent residents, exceptional hardship within the meaning of section 212(e) of the [INA] exists as a result of the difficulty experienced by a family with children in parting from their relatives, friends and familiar surroundings and attempting to adjust to life in a foreign country where they are not familiar with the language, mores or culture; additionally, an alien who goes abroad without his family seldom commands sufficient salary to support his family in the United States, and care for the family generally precludes acceptance of employment by the wife.

Id. Congress has taken no action since 1968, the year the *Nassiri* case was decided, to indicate that it disagrees with that general rule, nor has any court or administrative authority repudiated it. Individual USCIS adjudicators, however, often seem oblivious of the rule.

The important *Keh Tong Chen* case has a lengthy analysis of this point, finding that the INS nearly always approves a waiver where there is both a U.S. citizen spouse and child. *See* 546 F. Supp. at 1065 ("It is highly unusual for the INS to refuse to waive the foreign residence requirement where the applicant has both a citizen-spouse and a citizen-child.") (citing cases).

In a case of mine, the AAO stated: "The government's interest in furthering the exchange program's goals remains constant regardless of the number of resident alien or citizen relatives the applicant has in this country. *But the more relatives the applicant has who are citizens, the more the balance tips in favor of granting the applicant a waiver.*"[14] This statement contrasts the public policy interests and the private personal interests. The opinion then proceeded immediately to a factual discussion of the hardships facing the applicant's wife and child (as quoted above). This is a good example of the blending in practice of the private personal interests, public interests, and factual hardship grounds.

TIME OF DECISION AND COUNTRY VARIABLES

J-1 hardship waiver law has not changed in substance for over 25 years. The patterns of facts that will win, however, fluctuate. Sometimes the fluctuations are dramatic. The most dramatic fluctuation occurred in a period of about 18 months from about January 1999 to June 2000, the time surrounding the abolition of the U.S. Information Agency (USIA), which went out of existence on October 1, 1999. J-1 hardship waivers had always been considered difficult to win, but during that period they became almost impossible to win. Since then, overall approval rates have apparently returned to approximately the same level as before that dark period. Now, however, more denials are apparently being issued by the USCIS at the outset, before a case has gone to the State Department, while fewer cases are apparently being denied by the State Department after a case has made it through the USCIS gauntlet. In addition, from time to time adjudication policies fluctuate at the USCIS service centers. At present, however, on balance, the combinations of factors that will win are essentially identical to those that have always been considered meritorious in this area, aside from that one dark period.

Overall approval rates for Form I-612 cases are unknown, because the USCIS does not report statistics in this area. (I confirmed this fact in 2002 through Freedom of Information Act requests to the four service centers and to the INS national office.) Some experienced lawyers believe the overall approval rate is only about 10 percent. My own informed guess is that the overall approval rate (cases recommended for approval by both the USCIS and the USIA or State Department) is now probably about 30 or 40 percent. Since I never accept a case unless it meets stringent criteria, my own success rate in over 150 cases is now approximately 88 percent. During the dark period from about January 1999 to June 2000, however, my success rate was only 30 percent (although some of those denials have by now been reversed), and I was told by other lawyers that their success rate during that period was zero. Subsequently, however, things have returned to where they were before: it is difficult to get a hardship waiver, but not impossible, if indeed there are exceptional hardships. I mention these facts as a matter of interesting history, and also because of the problem that that anomalous period poses for an attempt to conduct empirical analysis in this area. Decisions reached during that period are best disregarded.

Another important part of the hardship waiver process is the issue of "country variables." Does the likelihood of success depend not only on when the application is decided, and by what USCIS service center? Does it also depend on the applicant's home country? Do citizens of some countries consistently get the "short end of the stick" while those from other countries get an automatic pass? It is common for prospective clients to ask "which countries are getting waivers these days?" I have asked in the past at AILA-USIA liaison meetings whether the USIA kept per-country statistics for waiver cases, and the answer was negative. Over the years I have heard some lawyers say that they think citizens of

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[14] Matter of [name redacted], File No. A74-944-520, slip op. at 4-5 (AAO Feb. 7, 2001) (emphasis added) (copy on file with author).

some countries (such as India, Egypt or the Philippines) have an especially difficult time getting a hardship waiver approval, while those from other countries (such as Bosnia or Kuwait) obtained approvals without obstacles. For what it's worth, after years of concentrating in this area, I have come to the belief that the government is usually reasonably neutral about the country of origin. By far the major reason why per-country results vary dramatically is that extremely dangerous political conditions in certain countries at certain times are an objectively significant hardship factor. On balance I believe the government gives responsible weight to this factor, with some egregious exceptions.

THE HAKE HARDSHIP SCALE

Genesis of the Idea

I first started trying to invent a quantitative tool for the assessment of hardship in immigration cases in 1992, 12 years ago. The idea has finally matured.

I never accept a hardship waiver case unless it meets certain criteria: (1) I personally believe it involves serious hardship; (2) there is a very good chance that it is approvable under established law and practice; (3) I am free to take the case at the time; and (4) there is no special reason to decline, such as a conflict of interest. Applying these criteria, I turn down the majority of people who want to hire me.

Of those criteria, the most important is the estimation of approvability. For years my rule of thumb was not to accept a case unless I felt it had at least a 75 percent chance of success. Because I have so much experience in this narrow area, my own gut prediction about success is probably about as accurate as could be found anywhere. But it always bothered me that I did not have a stronger empirical basis.

Before I completed this article, in thinking generally over my work and about the thickets of reasoning in the case law, I had thought that a comprehensive listing of relevant hardship factors would need to be very complex. In April 2002, however, I had an inspiration one night and discovered to my delight that the opposite is true. In fact, one can put the entire structure of pertinent hardship waiver factors on a single page.

Original Version

The original 2002 version of the Hake Hardship Scale was based on a systematic analysis of the major hardship factors in my last 50 successful Form I-612 hardship cases. I discovered through this empirical analysis that *every single* important hardship factor fell within just six hardship categories, with no loose ends. Altogether, one needs just 10 categories for a complete and practical analysis of hardship waiver cases:

A. Three categories for persons involved in the case--

1. *U.S. citizen* spouse or child?
2. *LPR* spouse or child?
3. *Third persons* facing very serious hardships?

B. One category for the public interest--

4. Significant *public interest* factors?

C. And just six categories for specific hardship grounds--

5. *Medical hardships* to spouse or child?
6. *Psychological hardships* to spouse or child?
7. *Career or educational disruptions* to spouse or child?
8. Very serious *financial hardships*?
9. *Sociocultural hardships* upon relocation to the home country?
10. Significant risk of physical harm due to *political violence*?

Usefulness of a Limited Number of Categories

It can take great effort to establish the gravity or probability of different kinds of harms. For instance, it may take many documents to prove that a family faces a risk of physical harm from political violence that is so serious that it must be given weight. Moreover, there may be much overlap between related categories. For instance, certain extreme sociocultural factors (such as the ongoing genocide being inflicted on the Shia religious minority in Pakistan) may cause (1) a significant risk of physical harm due to political violence, (2) serious psychological hardships, (3) serious medical hardships, and (4) profound career disruption, and they may defeat J-1 program and policy goals by making futile any effort by the applicant to employ his U.S. training in the home country. Nonetheless, it is useful to realize that the fact development can be channeled into such a small number of main categories in every single case.

The Hardship-Minimizing Travel Alternative

A major reason why people lose at J-1 hardship waiver

applications if they try on their own or with an inexperienced lawyer is due to ignorance of the USCIS "two-step" analysis, which is the central dogma of J-1 hardship waiver law. One has to prove that the U.S. qualifying relatives would face hardships in the home country if the entire family were to relocate together, but usually this is easy and in any event it is not sufficient. The core of the case is to show that the U.S. qualifying relatives would face comparably exceptional hardships if the family were to adopt the travel alternative that minimizes hardship to the qualifying relatives, which typically involves several of the family members staying in the United States. (If the applicant's spouse is not a U.S. citizen or LPR, then the analysis is somewhat simplified, but one still needs to prove that the children could not stay in the United States for two years.)

Therefore, in using the Hake Hardship Scale to assess the approvability of a case, the primary focus is on whether or not the situation scores a sufficient number of points under the hardship-minimizing travel alternative. In many cases (including most of the ones involving a U.S. citizen spouse), the hardships would be even more serious if the entire family relocated for two years or more to the applicant's home country. But the key is the hardship-minimizing travel alternative.

In practice, it is often difficult to maintain clarity about distinctions under the "two-step" analysis, especially where there are more than two hypothetical travel alternatives. I make a point to discover the most likely alternative that the family really would follow if forced to choose (one has to find out; real answers are all over the map), and I tend to emphasize this reality, while giving less attention to the merely hypothetical alternatives.

Scoring the Various Hardships

Once one has identified the major hardship factors in a case, one needs a way to score them to make an assessment as to whether the case is likely to be approved. The scoring perhaps may give a modicum of credit to the lawyer's belief about what the law "should" be, but to be useful in practice it should be based almost entirely on an objective and accurate reflection of the government's action in real cases.

It is crucial to emphasize that one must be extremely skeptical and conservative in assigning point totals for categories that permit a range. Only the most clearly serious facts justify the higher numbers, and only when those facts can be supported by authoritative evidence. For instance, the mere fact that one can articulate some kind of "medical hardship" does not necessarily get you even one point.

Details of the Scoring System

After much thought, one night of inspiration when years of fuzzy thinking seemed to snap into clarity,[15] and then two years of working with the scale, I propose that the factors should be weighted (scored) as follows:

1. *U.S. citizen* spouse or child? *Five points for a U.S. citizen spouse and/or five points for a U.S. citizen child. One point for each additional U.S. citizen child.* If I were the adjudicator, I would give five points for each U.S. citizen child, but in practice the government does not decide like that. If that were the actual rule of decision, a hardship finding would be made by the USCIS in every case involving two or three U.S. citizen children, and that is plainly not the reality (notwithstanding the authority cited above regarding the dependence of the probability of approval on the number of citizens involved). If a spouse or child obtained U.S. citizenship through naturalization, subtract one-half point. Under the law, all U.S. citizens are equally deserving of protection from their government. In practice, however, the government gives somewhat less weight to the suffering of naturalized citizens. In AAO decisions, for example, during terse summaries of the material facts, the AAO nearly always goes out of its way to mention that a spouse was naturalized where that is the case.

2. *LPR* spouse or child? *Four points for an LPR spouse or child. One point for each additional LPR child.* The scoring here is based on the bedrock principle of American immigration law, which has been consistently affirmed by the Supreme Court in many cases for over 100 years, that aliens's rights increase over time as their ties to the community increase. The fundamental American legal principle is equality before the law and morally all persons are equal, so I'm uncomfortable to give less weight to the suffering of a green card holder than to a citizen. Nonetheless, in practice the

[15] The factor analysis and contradiction-checking leading to the assignment of scoring weights for different categories is somewhat inspired by the mathematical field of "fuzzy logic," which has recently been influential in computer science, especially in the areas of artificial intelligence research and the development of so-called "expert systems." *See generally* McNeill and Freiberger, *Fuzzy Logic: The Discovery of a Revolutionary Computer Technology--and How It Is Changing Our World* (Simon & Schuster, New York, 1993).

government gives less weight. Indeed, as noted above, it sometimes seems to give less weight to naturalized citizens, and such discrimination sometimes appears to reflect ethnic biases.

3. *Third persons* facing very serious hardships? *One to five points (per person).* These situations are unusual and very fact-specific. In the great majority of cases one could not assign any points in this category. Even in cases involving significant suffering to third persons, such as extended family members, one usually could not accurately assign more than one or maybe two points. Nonetheless, in a few of my victories the only significant hardship has been extremely serious hardship to a third person, such as a grandparent of a qualifying relative dying of cancer. Such rare cases may merit four or five points.

4. Significant *public interest* factors? *One to three points.* The statute requires that all J-1 waiver approvals must be grounded on a finding by the Attorney General that it is in the public interest. All cases involve some degree of public interest in view of the ties of the applicant's family to the community. One or rarely two or three points should be assigned here in unusual cases where there is some special, strong public interest factor. My favorite example is a client who was asked to serve on a special project to develop an anthrax vaccine during the time of the anthrax terrorist attacks in 2001. My preference would be to permit higher scores in this category in certain cases, but my impression is that the government typically will not do so.

5. *Medical hardships* to spouse or child? *One to six points (per person as appropriate).* This is the big enchilada. One has to be very skeptical and honest in assessing the evidence. An assignment of five or six points requires a definite life-and-death risk. If there are several qualifying relatives with medical hardships, one adds up the points for each. Note that the State Department's Waiver Review Division routinely sends claims of medical hardship to a separate bureau for an opinion on whether the medical condition can be treated in the home country, so it is crucial to provide documentation from credible medical authorities in the home country.

6. *Psychological hardships* to spouse or child? *One to five points (per person as appropriate).* Again, one has to be very skeptical and honest in assessing the evidence. An assignment of four or five points requires an extremely serious risk of catastrophic mental breakdown or suffering that would be unconscionable to inflict. In practice, it is difficult to prove to the satisfaction of the government that a psychological hardship is exceptional. This topic alone could support an entire article. In brief, I rarely use psychiatric letters unless there is a pre-existing, substantial history of clinical psychiatric illness. Exceptional cases may require a report from a forensic psychologist. In the rare cases where there is no apparent outward hardship, but there is in fact very serious and unusual inward hardship (based, for instance, on past trauma such as torture in Bosnia or suicide of a brother), I have had success relying on legal authorities insisting that the government must look at the individual's actual circumstances, with analogies to the "thin-skinned plaintiff" rule in tort law (a tortfeasor is ordinarily liable for all the plaintiff's injuries, even if most persons would not have suffered injury from the same act). Reports from treating mental health professionals are often of little use in proving psychological hardship, but they are useful to prove the fact of treatment. In practice, the USCIS and the State Department are often more reluctant to tear asunder the bond of an existing, prior relationship with a mental health professional than with a spouse or child.

7. *Career or educational disruptions* to the spouse (or, in theory, child)? *One to two points.* This factor has strong support in the case law. There must be real proof of disruption.

8. Very serious *financial hardships*? *One point.* Only rare cases get even one point for this usually disparaged factor. In the 50 cases I analyzed for the first version of this article, only 13 identified this as a major hardship. My rule of thumb is whether there is a real risk that children may go without essential needs or that a mortgage could not be paid.

9. *Sociocultural hardships* upon relocation to the home country? *One point.* This factor includes things like mistreatment of women in Muslim societies, language problems, educational deficiencies, and the like. There is quite a bit of discussion of factors like this in

the case law, and some lawyers give great emphasis to this category. I personally assigned just one point in this category in only seven out of the 50 cases I analyzed for the first version of this article. Some lawyers will differ with me, but I just do not think this category is compelling or effective. When "sociocultural" hardships are sufficiently extreme to be counted on the hardship scale, I think it is usually better to treat them as psychological or occasionally medical hardships, or in terms of the risk of physical harm due to political violence.

10. Significant risk of physical harm due to *political or sectarian violence*? *One to three points*. No matter how white-hot the danger, such risk is always inherently attenuated. If the applicant has been specifically singled out for harm, a better option may be to file on Form I-612 for a waiver based on risk of persecution. My preference would be to sometimes permit up to five points in this category. In practice, the government usually does not give that much weight. I assigned the full three points in this category to only 10 of the 50 cases I analyzed for the first version of this article. Proof of the danger in this category can require extensive documentation, organized into numerous subcategories. In Pakistan, for example, an applicant's family may face significant risks (1) due to the danger of kidnapping, (2) due to their religious affiliation, (3) due to their American ties, (4) due to past political affiliations, and so forth. Nonetheless, this all falls under one core category, where the key concept is risk of physical harm due to political (or sectarian) violence.

11. *Adverse factors*. U.S. immigration law has many kinds of applications for relief where the government performs a balancing process, weighing positive factors ("equities") against adverse factors. In my latest work on the Hake Hardship Scale, I have started to use an additional column to record adverse factors, which cause a reduction in the total points scored for a case. As noted above, I deduct one-half point for a naturalized spouse. I deduct one point for each specific problem, of the kinds likely to be articulated by the AAO as negative factors. Examples include absence of documentary evidence for specific points, recency of marriage of a J-1 exchange visitor to an American, and so forth. In addition, I deduct FIVE points if the J-1's program was supported by U.S. government funding.

Enough to Win

What does one do with those scores? It might appear that an exceptional hardship finding should require just 10 points, but in practice one needs 11 or more. A score significantly above 11 should be approved quickly and smoothly. A case scoring less than 10 points is not even in the ballpark and should not be accepted by a lawyer.

In my view, a case involving a U.S. citizen child and a U.S. citizen spouse (10 points), and nothing more, should always be enough. Clearly the government does not agree. One also needs at least one substantial articulable hardship in one of the six hardship categories. Therefore, one needs at least 11 points.

My final hypothesis is that a winnable case requires (1) at least 11 points, plus (2) at least one clearly exceptional and provable hardship (or, one might say, 11 points and a good story), plus (3) if the J-1 program was funded by the U.S. government, then substantial special additional factors must exist, such as spectacular levels of hardship to qualifying relatives or spectacularly high-level political help.

What about a case involving one U.S. citizen child with a very serious medical hardship, and no other hardships? If it really is a very serious medical problem, that application will almost always be approved. That is why I have the medical hardship category weighted up to six, because five for the child plus five for a serious medical hardship would only total 10, not enough compared to the previous example involving a citizen spouse and child. Five for the child plus six for the very serious medical condition would total 11, which is sufficient. If one clearly scores 11 points, one does not need to go extensively into all the other hardships that may exist for the family.

In reviewing cases to compile the scoring ranges for the Hake Hardship Scale, I posed many such comparisons. I tried my best to give accurate numbers. So, for instance, childhood asthma without a history of hospitalization might get a 1 or maybe a 2, but not more. Scoring each case as accurately as possible, in the preliminary version of this article I found that all 50 approved cases did in fact score 11 or more. Moreover, the range of scores that significantly exceed 11 accurately reflects my subjective impression of the seriousness of the cases, and in most of them the government's response time was appropriate. The highest score on the list was 27, in a case where a permanent resident spouse, a wonderful woman, died in

childbirth giving birth to the applicant's fifth child. On my emphatic urging, that case was approved by the State Department's Waiver Review Division 40 minutes after its arrival from the USCIS service center.

Usefulness of Case Law

I have always tried in each case to identify and emphasize a small set of "main hardship factors." My main tools are intuition and empathy. Over the years I have been as confused as anybody by the case law in this area. As discussed above, I have a low opinion of most of the case law in this area. But knowledge of the case law does prevent certain mistakes. For example, the average man on the street, faced with the prospect of being forcibly separated from his wife and children for two years or more, would probably regard the pains of spousal separation, and the emotional and developmental hardships of parent-child separation, as the dominant hardships. The USCIS, however, has always followed the cruel rule that such hardships do not count in the Form I-612 context, because they are imagined to be normal. Similarly, people are often greatly traumatized by things like worries over the decreasing chance of having children that could result from a two-year interruption of infertility treatments. But this argument has nearly always fallen on deaf ears. There is no point beating these dead horses. Aware of the case law and actual administrative practice, one must simply state the truth about these kinds of hardships (for these kinds of real suffering must be treated with dignity), but these factors must not be emphasized. Instead, one focuses on the factors that will "work," ever mindful of the need for absolute fidelity to the truth of the family's situation.

Latest Supporting Data

As noted above, the first version of the Hake Hardship Scale was based on an analysis of my 50 previous approved J-1 hardship waiver cases. The first published article included a spreadsheet summarizing the hardship factors in those 50 cases. This analysis was useful. Among other things, it confirmed that 11 points did appear to be the accurate breakpoint between likely success and likely failure. None of the 50 successful cases scored less than 11 points, and the overall range was from 11 to 27.

But there are problems with that data set. First, one needs to review comparable numbers of approvals and denials in order to speak with scientific authority. Second, since all 50 cases were prepared by me, it is impossible to know whether the result is biased by my personal reputation or skills. For instance, it is conceivable that other lawyers, not knowing my manner of presenting a case, might not also consistently win cases that score 11 or 12 points. Third, this data set is inescapably biased toward my own impressions as to what are the most important factors in hardship waiver cases. It is conceivable that other lawyers might win cases by looking at very different kinds of factors that I tend to ignore.

Accordingly, over the past two years I have thought about ways to base the Hake Hardship Scale on better data. I could not rely on my own cases. First of all, I did not have enough comparable denials, because I've had only 19 denials in 11 years, and 12 of those came during the anomalous year of 1999. Further, even if I had sufficient denials to compare, I could not avoid the other possible biases caused by using only my own cases.

The best alternative data set I have been able to assemble consists of 140 decisions of the AAO spanning the years from 1985 to 2002. Of those 140 decisions, 85 are denials and 55 are approvals. All are decisions on the merits on Form I-612 hardship waiver applications. I coded all 140 decisions using a 30-line coding sheet. The data were analyzed in several ways by statisticians at the Institute of Statistics and Decision Sciences at Duke University. This article focuses on the results from fitting a logistic regression model to the data.

This data set is far from perfect. First, it only includes cases that were initially denied by the INS. Therefore, it does not include cases initially approved by the INS. This significantly skews the varieties of major hardship factors identified in the decisions. I am certain from my own experience that the most significant kind of hardship is serious medical problems of a spouse or child. Such cases are often approved comparatively quickly, and they almost never require an appeal to the AAO. Therefore, this most important kind of hardship factor rarely appears in the 140 AAO decisions I analyzed. My initial data set of 50 of my own cases contains a more accurate distribution of the most important hardship factors.

Second, this AAO data set is silent on the question whether the cases were ultimately approved after favorable recommendation of the USIA or State Department.[16] It is certain that many of the 55 cases

[16] If a case is denied by the Immigration Service without its being sent to the State Department for a State Department advisory opinion, one has a right of administrative appeal to the AAO. 8 CFR § 103.1(f)(3)(iii)(G). On such an appeal, the AAO may order the Service to recommend approval and transmit the application to the State Department, but the AAO may not grant a final approval. In contrast, if the Service

approved at the AAO level had to be subsequently denied by the INS after negative recommendations from USIA or DOS, especially those cases that involved U.S. government funding of the exchange program. My initial data set of 50 of my own cases was also superior in this respect, since it only included cases that were finally approved after favorable recommendation of both the INS and the USIA or State Department.

Third, many of the 85 denials were of very poor quality. Some involved waiver applications that never should have been filed in the first place, because there were no qualifying relatives and thus the government did not have statutory power to approve. Many were filed in ignorance of the "two-step" rule described above and thus actually did not identify even one exceptional hardship under the hardship-minimizing travel alternative. Such cases have little value in assessing the significance of different kinds of hardship claims.

Nonetheless, this AAO data set is probably the best and most neutral data available on the question of which factors are important in Form I-612 hardship waiver cases.

Using an established technique called logistic regression, the statistical analysis found that the Hake Hardship Scale is a significant predictor of approving or denying cases. Specifically, when regressing the log odds of P[granted] and P[denied] (*logit(P[granted])* = ln{P[granted]/(1-P[granted])} over the score on the Hake Hardship Scale, the following model was fit:

> logit(P[granted]) = -9.2127 + 0.8938 x (Total Score).

The p-value for the coefficient on the explanatory variable "Total Score" is (using scientific notation) 2.07 E-06. The interpretation is that the results are highly significant. If the Hake Hardship Scale were not related to the probability of success, then there are only approximately two chances in a million of obtaining a result that supported its value so strongly as does this data. This is so notwithstanding the potential problems with the AAO data set identified above. Results in all cases may very well match the Hake Hardship Scale even more closely.

In short, the structure of the Hake Hardship Scale, and its assignment of weights to different factors, is highly accurate from a statistical perspective, at least insofar as it predicts the results in the analyzed cases.

One can plot the predicted probability of granting an application versus the Total Score. *See* Appendix A *infra*. That chart is a graph of the statistical model that best represents the AAO data. It shows that the chance of success is low until one reaches a score of 11 points, after which the chance of success rises sharply. By other, less sophisticated measures, the accuracy of the Hake Hardship Scale may seem even more remarkable.

Of the 140 cases analyzed, 16 scored exactly 11 points. Of those, 15 were approved, representing a 94 percent success rate. That is an even higher success rate than indicated by the chart above.

Of the 140 cases analyzed, 55 scored 11 or more points. Of those, 50 were approved, representing a 91 percent success rate.

Moreover, of the 140 cases analyzed, 129 turned out to have results that are consistent with the predictions of the Hake Hardship Scale. Only 11 decisions had contrary results. In particular, six cases were actually granted for which the Hake Hardship Scale would have predicted denials. Those cases scored 9, 10, 10, 10, 9, and 10 points, respectively.

Five cases were actually denied for which the Hake Hardship Scale would have predicted approvals. Those cases scored 15, 13, 12.5, 11.5, and 11 points, respectively.

Of these 11 "outlier" decisions, all are close in score to the predictions of the Hake Hardship Scale, except only for the denials that scored 15, 13, and 12.5 points. In my opinion, those three cases are clearly anomalous and wrongly decided.

As described above, there are three main components to a score on the Hake Hardship Scale: the total for the persons involved, a possible score for special public interest factors, and a total for the exceptional hardships involved in the hardship-minimizing travel alternative. As noted above, statistical analysis showed that the total score on the Hake Hardship Score is highly significant statistically. An additional statistical analysis that regressed the logit(P[granted]) over the three main components showed that the total for persons, as well as the total for hardships, are also highly significant statistically. In other words, not only is the Hake Hardship Scale's overall score highly statistically significant, but the balance among the two main

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denies a hardship waiver application based on a negative State Department opinion, there is no right of administrative appeal and courts have held (improperly in my opinion) that there is no right of judicial appeal. In such circumstances, one can sometimes still prevail by filing a de novo application, which I term a "renewed" application. *See* Hake 1994 article, *supra* note 1, at 22-24.

components of the score also is statistically accurate.

The score for public interest, in this data set, was not found to be statistically significant. However, this factor should not be overlooked. Of the 140 decisions, a special public interest factor or factors was recognized by the AAO in only 10 decisions. Of these, 6 cases were denied and 4 were approved. Of the 4 that were approved, 3 of them needed the public interest points in order to reach 11 points on the Hake Hardship Scale. Sometimes this one detail means the difference between victory and defeat. This fact, incidentally, is also supported by many of the published precedent decisions in this area.

Unfortunately, the AAO data set did not permit much in the way of intelligent nuancing of the originally proposed Hake Hardship Scale, because the range of hardships represented in these decisions turned out not to be particularly representative of what one observes in practice. Additional statistical analysis found that only three specific hardship categories--psychological hardship to a spouse, psychological hardship to a child, and financial hardship to the qualifying relatives--were statistically significant. Moreover, the data set was too small to permit refinement of the range of scores that are permitted within particular categories on the hardship scale. Nonetheless, the statistical analysis showed very clearly that the overall system is highly accurate at predicting success.

Role of U.S. government funding. Of the 140 AAO cases that were analyzed, 72 (or approximately 50 percent) involved U.S. government funding of the exchange program, according to the AAO. Some of these specifications of U.S. government funding, especially from the earlier cases, may be inaccurate, but the overall total is probably fairly close to accurate. Of the 72 that were said to involve U.S. government funding, 53 were denied and only 19 were granted. Note further that of these 19 that were successful at the AAO level, many or most were probably ultimately denied after USIA or State Department review, because it is the latter agencies that are primarily concerned with the so-called "program and policy" considerations, unlike the Immigration Service, which is primarily concerned with the existence or not of exceptional hardship to qualifying relatives. These totals clearly confirm the almost overwhelming problems posed by U.S. government funding. My estimate that the existence of U.S. government funding should be assigned an adverse weight of five points appears to be remarkably accurate, at least in terms of predicting the chance of a case being recommended for approval by the Immigration Service. It is unknown whether that number accurately reflects the final results after State Department review.

Role of pro se applications. In my 1994 article on J-1 hardship waivers, based on review of a set of AAO decisions, I commented that I was struck by the fact that pro se applicants often prevailed, whereas persons with similar cases lost when represented by lawyers: "Although the sample was not large enough to support a general conclusion, this apparent contrast seems to stand on its head the conventional wisdom that immigration law is so complicated that unrepresented applicants are like lambs to the slaughter."[17] For idealistic reasons, I would like to think that worthy foreigners fare well when they argue their cases on their own. Unfortunately, the larger set of AAO decisions that I just finished analyzing belies such notions. Of the 140 decisions, 44 involved pro se applicants. Of these, 28 cases were denied and just 16 were approved. This represents a 36 percent success rate. In contrast, the other 96 cases involved persons represented by a lawyer. Of these, 39 were approved and 57 were denied (representing a 41 percent success rate). On balance, I now think the role of skilled legal counsel is more important than I had been assuming.

ADDENDUM: QUESTIONS AND ANSWERS

Following are responses to some questions posed by AILA members.

1. *Why didn't you include defeats, to show that losing cases score less than the 11 points claimed to be necessary for approval?* This question was raised regarding the first version of this article, which was based on analysis of my last 50 approved cases. At the time I responded:

   > One could do this from the published case law, and I invite the reader to go through the exercise. I do not think that would be genuinely useful. One could do this by analyzing unpublished AAO decisions supporting a USCIS denial, and I intend to do that in a later version of this paper. One could also do this by surveying other lawyers' cases, but I have attempted to gather denials from other lawyers, so far without success. I cannot do this from my own decisions. So far my record of getting Form I-612 cases through the USCIS at the outset (that is, prior to review by the USIA or the State Department) is 100 percent (including cases that had to be appealed to the AAO). I am sure I have never

[17] Hake, *supra* note 1, at 17.

filed a Form I-612 case that scored less than 11 on the above scale, and I have never had a case denied at the outset by the USCIS, so I have no way to prove from my own cases what causes defeat at the USCIS level. This is a study of what works, not a study of what does not work. Of the approximately 15 percent of my cases that were denied by the USIA or the State Department, all scored at least 11 points on the scale, and I believe that all were wrongly decided. I have made arrangements to have these results reviewed by a statistician, who tells me I should be able to use a technique called logistical regression to refine my analysis, but doing so rigorously will require a control group of 50 denials.

As discussed above, the present version of the Hake Hardship Scale is based on an analysis of AAO cases, both approvals and denials.

2. *How do you know that the cases were not won by good lawyering rather than on the facts?* In the first version of this article, I responded as follows:

I think lawyers tend to overestimate the importance of their own contributions in many cases. Of the cases above, there are a few, especially those involving proof of unusual psychological hardship, that may have been denied if handled by a less skillful lawyer. On balance, however, I like to believe that while cases may be lost by bad lawyers, good lawyers do not so much achieve victory as preserve it. In hardship cases, everything really does depend on the facts (and perhaps to some degree on the lawyer's reputation for honesty). A good lawyer will take the time to discover, appreciate and develop the important facts, while a bad lawyer will not. In doing so, however, the lawyer is bound by the facts. The greatest lawyering in the world will not win a hardship case if the facts do not justify a waiver. As a practical measure, that means the best lawyering in the world should not win a case that scores less than 11 points on the scale. As an ethical matter, that means that a lawyer should not accept a case that seems to be an objective loser from the outset, that is, a "frivolous" case, absent a well understood, good faith basis for an extension, modification, or reversal of existing law.

For the record, after two years of trying to use the hardship scale in practice, and after my recent analysis of AAO cases, I have changed my mind on this. I'm now inclined to think that having a good lawyer is indispensable in all but the rare cases that involve an indisputably exceptional level of hardship.

3. *What is this scale good for?* The Hake Hardship Scale might have many salutary uses. It should help lawyers organize approvable cases. It should help build a bulwark against arbitrary and capricious denials by the USCIS. It should help establish the importance of certain hardship factors, such as unusual psychological hardships, that currently are given insufficient weight by the USCIS. It should improve efficiency both in law offices and government offices by sparing time wasted on ineffective arguments and exhibits. It should generally make it easier for persons facing exceptional hardships to obtain relief by giving coherent, empirical weight to consistency of grants of relief in similar cases. It should make it harder for USCIS officers to rely on certain irrelevant objections that appear frequently in boilerplate denials. In many cases it would dramatically clarify the important issues (for instance, whether a claimed psychological hardship should be scored two points or four points, which might well be the difference between victory and defeat). It should reduce anxiety by making the likelihood of success or failure more certain for aliens contemplating applying for a waiver. Of these benefits, the most important should be the possibility that this approach may help build a bulwark against arbitrary and capricious denials by the USCIS. The strength of such a bulwark, of course, will depend on the extent to which this approach is considered and discussed within the USCIS and within the immigration bar. It is possible that an even greater benefit of this approach might be to limit the number of frivolous cases accepted by lawyers who have not carefully studied the law and the facts. Such a limitation would be of general benefit to worthy aliens and their lawyers, who would not have to compete against mountains of frivolous cases, the existence of which poisons the mood of adjudicators and makes it harder for the worthy cases to receive requisite attention.

4. *Doesn't a fixed scale like this make it harder for lawyers to win unusual cases?* Nobody likes restraints on his discretion and creativity. One of the great trends in American law over the past century has been toward increasing rationalization of the law. More and more law is thought through and written down. In general, administrative discretion has been steadily curtailed and replaced by fact-specific regulations. As any immigration

lawyer knows, pressures on administrative discretion may have evil consequences. Mechanical rules are no substitute for a wise heart. All things considered, however, the objectivication of the law is a good thing. Beyond these short comments, this deep jurisprudential theme is outside the scope of this article. With regard to the question whether the fixed scale makes it harder to win unusual cases, my answer is that in general the opposite is probably true, and to the extent the objection may be true it is probably a good thing. If something like the Hake Hardship Scale were ever implemented formally in the law, there would definitely need to be a general catchall category for other kinds of hardship grounds not clearly covered in the scale, as mentioned above. The catchall category should probably permit a score of up to six, so that a rare case involving one U.S. citizen spouse or child plus one very serious special hardship could justify a waiver. Special claims, of course, require a special level of proof. The catchall category would make sure that every single case that really does involve "exceptional hardship" could be approved. In addition, however, the ordered structure of the rest of the scale would increase certainty, efficiency, and the likelihood of approval for the majority of meritorious cases. In over 150 Form I-612 cases, I have never encountered a hardship that could not be covered on the scale described above. But perhaps such a thing exists.

5. *Lawyers deal with words, not numbers. Only a "computer guy" would come up with something ridiculous like this.* This was the initial response of one famous AILA member, who knows better if he will pause to think about it. I would suggest he remind himself of the litigation career of Louis Brandeis and the social science data employed in the "Brandeis brief" prepared by Thurgood Marshall for *Brown v. Board of Education*. Of course, the proposed Hake Hardship Scale is light-years from that. But it is, in fact, a respectable form of legal analysis that has practical value.

6. *Shouldn't a hardship scale be based on a societal consensus, rather than on the history of USCIS decisions?* Yes, of course it should. But that is a much higher mountain than this comparatively modest proposal. In theory, if the USCIS were to aim for greater accuracy in its hardship determinations, it should commission survey research to determine how the American public actually would weight the various hardships faced by aliens and their families. Guidelines for adjudicators should generally be weighted to match the societal consensus, and where the USCIS policy deviated dramatically from that societal consensus (for instance, with regard to the risk of infertility caused by spousal separations) then the USCIS should be required to give a public explanation and hold that explanation open for public comment. Since the likelihood of this actually happening is zero, I would suggest that advocates attempt to move the pattern of hardship waiver adjudications more closely toward the actual social values (which arguably the USCIS has a duty to uphold) by incorporating social science data into arguments as to why certain hardships should be assigned certain weights. For example, a particular USCIS adjudicator might not have the wisdom or experience to understand why witnessing the suicide of a brother could make a person vulnerable to exceptionally serious psychiatric distress in the future, even though superficially the person might appear to be very successful in his professional life. The adjudicator might make a snap judgment that the person's psychological sufferings deserved about one point, while the advocate might judge it to be a rare case deserving of five points. Victory or defeat would hang on this one assessment. In such a situation, it would probably not be sufficient to rely on statements of the applicant supported merely by one psychiatric letter. Instead, it might be useful to present empirical data about Post Traumatic Stress Disorder and the ways that disorder has become recognized and respected by American science and by the American public in general. Such proof would help shape the decision to the real social values at stake. Note that the existence of the hardship scale would make it easier to understand why this was the core issue, thereby helping the lawyer to know what information to gather, and helping the adjudicator to understand why that information is important. Thus, the scale would increase the chance of an accurate and wise decision consistent with humane values.

7. *When considering the weight to be given to the hardships suffered by U.S. citizen or permanent resident children, do all such children count?* No, technically speaking they do not. INA § 212(e) addresses hardship to a U.S. citizen or permanent resident spouse or "child." "Child" is a defined term in the INA. INA § 101(b)(1) defines "child" generally as an unmarried person under 21, for purposes of Titles I and II of the INA, which includes Section 212(e). Therefore, there is a potential for "ageout" problems in J-1 hardship waiver practice. If the only putative qualifying family member is a 21-year-old U.S. citizen, or if the son or daughter has married, then the son or

daughter is not a "child," and the applicant would be barred from filing due to a lack of any qualifying relative. However, as noted above, if there does exist one qualifying relative, the Immigration Service will give weight to the hardships of other closely affected persons. Thus, for instance, if an applicant had two lawful permanent resident children, both unmarried, one age 18 and the other age 21, I think it would be proper to list them both on the Form I-612 and to discuss the hardship to both.

8. *Which issue is still most uncertain*? The approach here has been refined for years, and by now I feel confident about predicting the result in most cases. But there is one issue that is still shrouded in mystery: the precise role of U.S. Government funding. As discussed above, by estimating the negative effect of U.S. Government funding at "5 points" on the Hake Hardship Scale, one can come close to predicting the influence of this factor on adjudications by the USCIS, based on available AAO decisions. But it has never been the role of the Immigration Service to discount the approvability of J-1 waiver cases based on the existence of U.S. Government funding or other "program and policy" factors. Instead, in J-1 hardship cases, it has traditionally been the Immigration Service's role to assess legal eligibility (for instance, whether or not there exists a qualifying relative) and to weigh the gravity of hardship, issues that are well within the agency's institutional experience and competence, while "program and policy" considerations have typically been reserved to the USIA or State Department. Thus, it is arguably improper for this factor to have had any negative influence on Immigration Service adjudications, while at the same time it seems clear from experience that the factor has historically had a very strong negative influence on State Department adjudications.

The Immigration Service does not keep statistics on how many Form I-612 cases are filed or approved, much less on the underlying facts. As I have confirmed from discussions with officials of the Waiver Review Division, the State Department does not keep statistics on how many Form I-612 cases involve specific factors, including the existence of U.S. Government funding. Therefore, nobody knows exactly how important the issue is, nor exactly how it is addressed within the deliberations at the State Department.

All that is known for certain is that U.S. Government funding is a serious disability that will usually lead to defeat unless there is some special positive factor. Such factors may include spectacular levels of hardship, a spectacular risk of persecution (for a persecution waiver case), spectacularly high-level political influence, or strong national security factors. However, it may also be true that some U.S. Government funding cases can be won, in the absence of spectacular facts, if the applicant can do a persuasive job of demonstrating that approval of the waiver would fulfill the statutory purposes, as set forth at 22 CFR § 62.1(a). It does seem that the Waiver Review Division is giving more thoughtful attention to the balancing of program and policy factors in U.S. Government funding cases than may have been true for the USIA. Readers are encouraged to send the author any anecdotes or insight you may have on this issue.

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 This article is the culmination of 12 years of work. It was first published at 1 AILA, *Immigration & Nationality Law Handbook* 490 (2004-05 ed.); was subsequently published at AILA, *Immigration Options for Physicians* 49 (M. Catillaz, ed., 2d ed., 2004); and will soon be published as an appendix to G. Siskind, W. Stock & S. Yale-Loehr, *J Visa Guidebook* (LexisNexis 2005 ed.). The instant version, which will be the last published, contains an expanded addendum and some corrections.

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