Review of the Adjudication Climate for Form I-612 Hardship Waiver Appeals Since 2007

By Brian C. Schmitt and Aaron R. Pentheny

Introduction

The Administrative Appeals Office (AAO) is an administrative appellate body within the United States Citizenship and Immigration Services that conducts review of appeals from directors within the agency. These appeals seek administrative review of denials of specific categories of immigration benefits. In our analysis, we focused on non-precedent appellate decisions that were issued in response to denials of Form I-612 Applications for Waiver of the Two-Year Foreign Residence Requirement, specifically for claims of exceptional hardship to a qualifying relative or relatives. We established a sense of the adjudication climate and made statistical findings. We discovered that since 2008, the AAO has shown a gradual trend of deciding fewer appeals, which could be explained by (1) an increase in waiver approvals by the California Service Center (CSC), (2) fewer applicants deciding to appeal because of a perceived likelihood that the AAO will dismiss their appeal, or (3) other reasons like the length of time that it takes to appeal or the potential financial cost to the appellant. In our analysis of the factors in each decision, we found that (1) most cases will be successful when both parents of a U.S. citizen child have a temporary nonimmigration status, where the AAO will count that as sufficient to show exceptional hardship for separation as the child would not be able to remain in the United States without his/her parents; (2) the AAO prefers medical and psychological evidence over any other hardship category and will usually cite financial evidence deficiencies in dismissals; (3) applicants from Asia, Europe, and Africa statistically appeal the CSC's decisions more frequently, and applicants from Asia are more likely to get a favorable decision from the AAO than applicants from any other region; and (4) those with more than one qualifying relative generally have higher rates of success. We concluded first that between 2018 and early 2020, appellants experienced a very hostile adjudication climate at the AAO, and that it is currently too soon to determine whether this hostility persists. Secondarily, we concluded that because of the unpredictability of the current adjudication climate, an I-612 hardship waiver applicant's best option after a USCIS denial may be to seek resolution in the federal court system over appealing to the AAO.

I. Purpose

The purpose of this paper is to evaluate the United States Citizenship and Immigration Services' (USCIS) Administrative Appeals Office's (AAO) current adjudication climate for waivers of the two-year foreign residence requirement for J visa holders and analyze what a strong waiver application looks like for the AAO. We focused this analysis only on applicants applying for waivers based on hardship to qualifying relatives[1] from January 2007. Previous papers about the USCIS I-612 adjudications climate have focused on initial adjudications at the director-level and not at the appellate level.[2]

II. Methodology

We gathered the data for this paper from the AAO's publicly available database.[3] The materials we extracted consisted of non-precedent decisions regarding Form I-612's—the Application for Waiver of the Foreign Residence Requirement[4]—and only those decisions regarding waivers based on hardship.

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[1] The numbers for I-612 persecution waivers are too small to draw meaningful inferences. Additionally, the AAO applies a heightened standard compared to the well-founded fear standard for asylum cases. As such, we do not appeal such cases and instead opt for federal judicial review to bypass the application of the incorrect heightened standard. Specifically, Hake & Schmitt has overcome four USCIS denials of persecution cases in federal litigation.

[2] *See infra* notes 9, 13.

[3] USCIS, *AAO Non-Precedent Decisions*, https://www.uscis.gov/administrative-appeals/aao-decisions/aao-non-precedent-decisions?uri_1=60&items_per_page=10 (last visited Jun. 6, 2022).

[4] Under Immigration and Nationality Act Section 212(e), as amended. Immigration and Nationality Act, 8 U.S.C. § 1182(e).

We used a categorical search parameter to locate appeals specific to waiver applications. The AAO's non-precedent decisions database webpage includes a drop-down box titled *Select a topic* near the top of the webpage.[5] The topic we selected was H-3 Application for Waiver of the Foreign Residence Requirement. This category returned 1,894 waiver-based appellate decisions[6] referring to either two-year foreign residence requirement—both hardship and persecution—appeals, applicants' motions to reopen or reconsider, and appeals rejected for procedural issues such as untimely filing.

From the 1,894 decisions, we discovered approximately 400 hardship-based appeals as decisions of interest ranging from 2005 to present (June 6, 2022).[7] The decisions were hyperlinked to PDF documents titled *Application for Waiver of the Foreign Residence Requirement* followed by the date of the decision, an alphanumeric identifier, and file type and size.[8] When searching through the database for decisions of interest, we reviewed each linked PDF to identify whether the decision was related to a hardship waiver for the two-year foreign residence requirement and screened out appeals requests based on persecution, applicants' requests for motions, appeals rejected for procedural issues, and miscellaneous adjudicative determinations unrelated to I-612 hardship waivers. We entered the data from each decision into columns in a spreadsheet, including (1) case name; (2) decision date; (3) country where the requirement would be served; (4) whether the AAO remanded or dismissed the decision (i.e., favorable or unfavorable); (5) a hyperlink to the PDF of the decision; (6) the reason why the appellant was subject to the requirement; (7) the AAO's decision on whether the qualifying relative would suffer exceptional hardship if they relocated to the other country or (8) separated from their family; and (9) what hardship categories the appellant argued.[9]

After we finished identifying the decisions of interest from the initial search, we formatted the dates for each decision and used a sorting function to organize the spreadsheet into chronological order to begin analyzing trends in the adjudication climate over time. We highlighted each dismissed decision in red, and each remanded decision in green, to give them a simple visual identifier for spotting favorable and unfavorable periods. We moved the decisions from 2005 and 2006 to a separate sheet to focus on decisions made since 2007, bringing the total decisions of interest to 261.

Two periods of time had a lower count of decisions[10] compared to the average, so we tried a different search method to ensure that we had captured all the decisions during those periods. On the AAO's non-precedent decisions database webpage, below the drop-down box titled *Select a topic* near the top of the webpage, there is a search box titled *Enter a search term*. Within that box, we entered the phrase "section 212(e) of the Immigration and Nationality Act"—a phrase which the AAO uses in every I-612 decision—to see if we could capture more hardship waiver decisions in the database that the AAO did not code as I-612 appeal decisions. We then filtered the search by selecting the option to the right of the *Refine your search:* option at the top of the webpage to switch it from *Any time* to a custom range of *Jan 1, 2007 – Jun 6, 2022*. This search yielded 328 results, none of which contradicted the number of decisions in those two identified periods from the initial retrieval.

Having identified the data set of 261 decisions from 2007 to present, we examined each case in detail, looking for certain metrics—determined from shared characteristics throughout the data set—to find possible patterns or historic periods of favorability or hostility. The metrics we collected were (1) a tally of the appellants' countries, (2) whether the case was dismissed or remanded, (3) whether both spouses were required to abide by the two-year requirement, (4) the appellant's hardship arguments, (5) the evidentiary reasons why the AAO dismissed cases, (6) the number of qualifying relatives, and (7) the basis for the two-year requirement. We then conducted additional research of past publications on the topic and analyzed the results.

III. Historical Adjudication Climate

Around March 2016, the AAO became much less transparent in its I-612 appeal adjudications. Earlier decisions included a separate cover page, indicating the AAO Chief by name, the AAO's mailing address,

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[5] When filtered by topic, the dropdown filter presents five of the most recent appellate decisions followed by a random sequence of decisions from varying years.

[6] As of June 6, 2022.

[7] USCIS has not provided any decisions prior to 2005 in its publicly accessible database for I-612 decisions.

[8] E.g., Application for Waiver of the Foreign Residence Requirement - FEB252022_02H3212 (PDF, 508.2 KB).

[9] Bruce A. Hake & David L. Banks, *The Hake Hardship Scale: A Quantitative System for Assessment of Hardship in Immigration Cases Based on a Statistical Analysis of AAO Decisions*, 10 Bender's Immigr. Bull. 403, 411 (2005).

[10] The span between 2012 to 2013 had only four appellate decisions and 2015 to 2016 only had three decisions.

and occasionally instructions for appealing the AAO's decision with a Form I-290B.[11] Since its March 15, 2016, I-612 decision, the AAO eliminated this information from its publicly available decisions.[12]

The AAO's hostile adjudication periods are typically tied to leadership change. Robert Weimann—a Bush administration appointee—was Chief from early 2008 until October 2008 and oversaw 136 decisions covered in the timeframe of this paper and remanded 64 percent of that caseload. Weimann's I-612 appeal caseload was likely so large because after the California Service Center (CSC) assumed sole adjudication responsibilities for I-612's in late 2006, it unreasonably denied most hardship waiver applications between November 2006 and early 2008.[13] Weimann's tenure marked an over six-month period of favorable decisions from the AAO in overturning CSC denials. John Grissom replaced Weimann near the end of 2008 and served until the Obama administration replaced him with Perry Rhew in late 2009;[14] Grissom only issued 13 decisions with a much lower remand rate of 31 percent. This made Grissom's period relatively unfavorable to hardship waiver appellants. Rhew was Chief until late 2012 and issued 43 decisions with an 88 percent remand rate. Rhew's is the most favorable period covered in this paper. When Ron Rosenberg took over for Rhew during the remainder of the Obama administration's second term and overlapping into the Trump administration, he handled 24 I-612 decisions and remanded 71 percent of them.

The Trump administration laterally swapped Rosenberg for Barbara Velarde—who was Chief of the Potomac Service Center in Arlington, Virginia[15]—in February 2018. Following Velarde's transfer to the AAO, the AAO's adjudication climate became the most hostile it likely has ever been;[16] during this period, the AAO released 35 decisions, and remanded only 20 percent of them. Near the end of its time in office, the Trump administration appointed the acting AAO Chief Susan Dibbins to officially replace Velarde in December 2020—Dibbins was already in her 13th year in the AAO and had served as branch and division chief and Deputy AAO Chief to Velarde.[17] Dibbins is still Chief and has released only 10 I-612 decisions so far in her tenure, half of which she has remanded.

Because Dibbins has worked in the AAO through the whole period of this paper and for each of its chiefs, it is difficult to ascertain whether she has adopted any of the internal policies of her previous bosses. Besides the fact that she has made an equal number of dismissals and remands, it is likely that the global pandemic drove the number of hardship waiver applicants down, and hence the number of appeals to the AAO. Therefore, it remains unclear whether this current period is favorable or unfavorable to potential hardship waiver appellants by reviewing Dibbins' record alone.

IV. The Legal Basis of AAO Decisions

These historical changes in policy—despite being politically understandable—must have a legal basis. Considerable changes in the adjudication climate need to be explained under federal decisional law; for example, courts have held that an agency changing its course must give a reasoned analysis showing why it is deliberately changing its policies or standards and that it is not "casually ignor[ing]" precedent.[18] However, the AAO has never provided an explanation for its shifts in practice, arguably violating this decisional law.

The AAO's I-612 decisions are barebones in terms of citations to binding or persuasive authority. The typical decision will have a boilerplate section on

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[11] *See, e.g.*, *Matter of Redacted*, 1 (AAO Jan. 2, 2015) (containing a cover page).

[12] *See, e.g.*, *Matter of Redacted*, 1 (AAO Mar. 15, 2016) (lacking the information normally listed on a cover page).

[13] Bruce A. Hake, *No Rainbow Yet: Update on the I-612 Crisis, with Five AAO Victories*, 13 Bender's Immigr. Bull. 755, 756 (2008).

[14] USCIS, *USCIS Staffing Updates* (AILA InfoNet Doc. No. 09102967) (posted Oct. 29, 2009), https://www.aila.org/infonet/uscis-staffing-updates-10-20-09 (last visited Jun. 24, 2022).

[15] David North, *New Leader for USCIS Appeals Office Could Mean More Transparency*, Ctr. for Immigr. Stud. (Feb. 26, 2018), https://cis.org/North/New-Leader-USCIS-Appeals-Office-Could-Mean-More-Transparency (last visited Jun. 24, 2022).

[16] In comparison, the California Service Center has had periods of severe hostility in making initial adjudications on I-612 cases, but that has historically caused an opposite reaction from the AAO to balance out subordinate adjudicators making blatantly biased denials. Bruce A. Hake, Immigr. Options for Physicians 42-43 (Margaret A. Catillaz ed., 3rd ed. 2009).

[17] USCIS, *Susan Dibbins, Chief, Office of Administrative Appeals* (Dec. 21, 2020), https://www.uscis.gov/about-us/organization/leadership/susan-dibbins-chief-office-of-administrative-appeals (last visited Jun. 24, 2022).

[18] *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (concluding that the FCC met this standard by providing clear grounds for its changes within a "reasoned decision"). Note that this case is binding on the AAO, which resides within the jurisdiction of the District of Columbia Circuit.

legal authority and—besides Section 212(e) of the Immigration and Naturalization Act (INA)—will almost exclusively cite to *Matter of Mansour*[19] as the basis for the appellant to prove exceptional hardship for both relocation and separation—the "two-step" rule—and *Keh Tong Chen v. Attorney General of the United States*[20] to show that the fact of marriage or birth alone is not enough to show exceptional hardship and that the hardship must be "greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad."[21] Because the AAO almost always cites to *Keh Tong Chen*—despite it being a non-binding federal district court opinion—it likely considers it highly persuasive in its hardship waiver decisions. Infrequently, the AAO will include additional persuasive or binding authority in its analysis.[22]

The governing law behind I-612 waiver applications is grounded in several cases that interpreted INA § 212(e). Courts have generally construed the provision as requiring that the government should balance its interest in promoting the exchange program and enforcing the foreign residence requirement with the interests of the affected citizen or permanent resident relative of the applicant[23] ("qualifying relative"). For the applicant, they always have the burden of proving exceptional hardship to the qualifying relative.[24] In making its decisions in I-612 cases, the AAO must use the "totality of the circumstances" test because consideration of each factor in isolation is an error and constitutes an abuse of discretion.[25] When USCIS finds that the applicant has met his/her burden, it warrants favorable discretionary action.

USCIS precedent includes other rules that pertain to certain fact patterns, which the AAO may or may not use in its internal process. In *Matter of Nassiri*,[26] the Immigration and Naturalization Service (INS)[27] announced a general rule of adjudication that if both the applicant's spouse and children are citizens or lawful permanent residents then exceptional hardship exists for relocation (if sufficient evidence of hardship is provided);[28] neither Congress nor any administrative body has acted in opposition to this rule. Waivers for medical or psychiatric hardships to a qualifying relative are supported by numerous cases,[29] as well as waivers for harm to the qualifying relative's professional career or education.[30]

Appeals to the AAO are permissive and not mandatory.[31] Courts may not "require litigants to exhaust optional appeals as well,"[32] meaning that appellants may file suit against USCIS and other agencies without needing to first appeal an unfavorable

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[19] 11 I&N Dec. 306, 307 (BIA 1965).

[20] 546 F. Supp. 1060, 1064 (D.D.C. 1982).

[21] *Id.* at 1064. USCIS frequently uses this quote in I-612 decisions, even though it is dicta that is not in line with the conclusion of that case where the court not only ruled for the applicant but repudiated USCIS's two-step analysis—requiring hardship based both on relocation and separation—by holding that exceptional hardship may be found based only on the consequences of separation. Hake & Banks, *supra* note 9, at 407.

[22] *See, e.g.*, *In Re: 18582855*, 2 n.3 (AAO Jan. 10, 2022) (citing *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988), to state that "[a]ssertions of counsel do not constitute evidence"); *Matter of Redacted*, 7 (AAO Jan. 7, 2010) (citing Section 291 of the INA, 8 U.S.C. § 1361, to note that the applicant has the burden of proof to prove eligibility for a hardship waiver); *Matter of Redacted*, 9 (AAO Jul. 28, 2008) (citing *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001), to compare the facts of the case).

[23] This can include the interest of maintaining family unity and stability. *See, e.g.*, *Keh Tong Chen*, 546 F. Supp. at 1065.

[24] *See Keh Tong Chen*, 546 F. Supp. at 1064.

[25] *See Toumert v. United States*, No. 5:91 cv 1196 (N.D. Ohio Nov. 19, 1991) (finding that the immigration agency must review all factors when deciding whether exceptional hardship is present); *Slyper v. Attorney General*, 576 F. Supp. 559, 560 (D.D.C. 1983), *rev'd on other grounds*, 827 F.2d 821 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 941 (1988) (deciding that the immigration agency reviewing factors individually without examining them as a whole would be "in itself. . . [an] error" if the totality of the circumstances would show an exceptional hardship).

[26] 12 I&N Dec. 756 (Dep. Assoc. Comm'r 1968).

[27] The Homeland Security Act of 2002 abolished INS on March 1, 2003, and transferred its functions to USCIS, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection and housed them under DHS in response to the events of September 11, 2001. 6 U.S.C. § 291.

[28] 12 I &N Dec. 756, 757.

[29] Applicants have won waivers based on mental anguish to the qualifying relative on account of separation from the applicant. *See, e.g.*, *Younghee Na Huck v. Att'y Gen.*, 676 F. Supp. 10 (D.D.C. 1987); *Matter of Mansour*, 11 I&N Dec. 306; *Matter of Kawasaki*, 12 I&N Dec. 864 (Dep. Assoc. Comm'r 1968).

[30] *See, e.g.*, *Matter of Gross*, 13 I&N Dec. 322 (Reg. Comm'r 1969) (spouse's loss of educational opportunities); *Matter of Hersh*, 11 I&N Dec. 142 (Dist. Dir. 1965) (damage to husband's medical career); *Matter of Savetamal*, 13 I&N Dec. 249 (Reg. Comm'r 1969) (damage to husband's medical career).

[31] 8 C.F.R. § 103.3 sets forth the permissive nature of this appellate right.

[32] *Darby v. Cisneros*, 509 U.S. 137, 147 (1993). *See also Career Educ., Inc. v. Dep't of Educ.*, 6 F.3d 817, 820 (D.C. Cir. 1993).

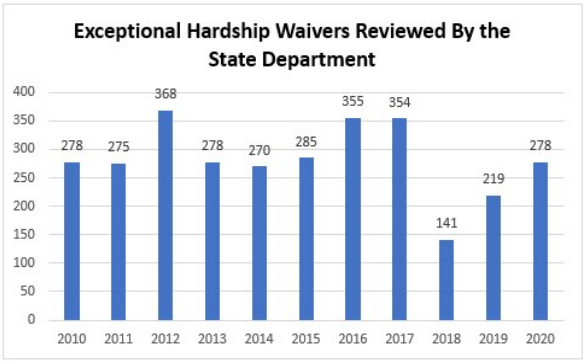
decision with the AAO. Additionally, the Department of Justice has also accepted the proposition that applicants are not required to file an appeal with the AAO before suing in federal district court.[33]

The AAO hears appeals under a de novo standard of review and may consider additional evidence. This makes it an attractive option, especially for applicants whose circumstances have changed since initially filing the application—e.g., when a couple has another child or a family that was previously separated for occupational reasons is living together again—in a way which makes their case much stronger. However, filing a suit in federal court often gives applicants more tools as plaintiffs to reach an adjudication faster; responsive pleadings are due in 60 days, and plaintiffs can file motions for preliminary injunction, temporary restraining orders, or request discovery if the agency's administrative record is missing critical information. Lastly, applicants can file a new administrative application, append the new evidence there, and then expedite it through litigation, circumventing the need to seek de novo review with the AAO.[34]

V. Analysis of the Data

A. Introduction

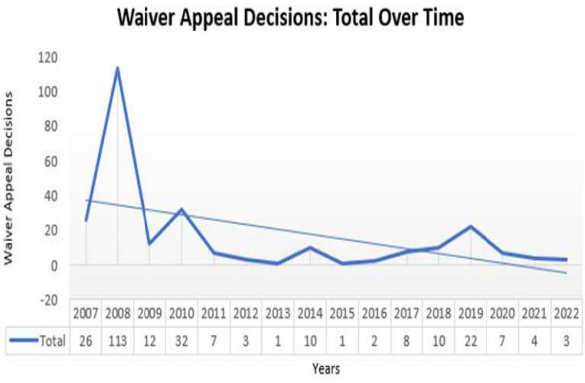
Between 2007 and 2021, the Department of State (DOS) issued 4,569,263 non-immigrants J-1 visas, averaging over 333,000 J-1's a year except for 2020 and 2021[35]—which averaged 119,000—due to the global COVID-19 pandemic.[36] From 2010 to 2020, DOS received, on average, 282 applications to waive the associated two-year foreign residence requirement based on claims of exceptional hardship to qualifying relatives.



Exceptional Hardship Waivers Reviewed by DOS, 2010 to 2020.

This depicts a nearly regular stream of waivers from the CSC.[37] A smaller number of these applications are remanded decisions from the AAO that were initially denied by the Director of the CSC.

B. Hardship Waivers and the AAO



AAO Waiver Appeal Decisions, 2007 to Present.

Since 2008, the Administrative Appeals Office has shown a gradual trend of deciding fewer appeals. Explanations could include (1) an increase in waiver

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[33] See *RCM Techs., Inc. v. United States Dep't of Homeland Sec.*, 614 F. Supp. 2d 39, 44-45 (D.D.C. 2009).

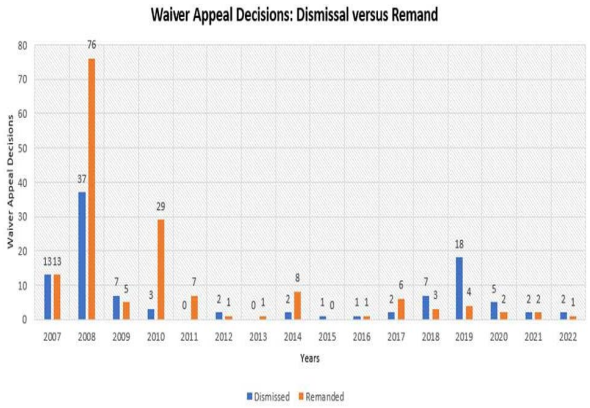
[34] We have used this technique in a number of litigations as DOJ lawyers and DHS counsel refuse to permit supplementation of the administrative record. One way to get such materials in without filing an AAO appeal is to simply file a de novo case. When the parties meet to confer on the litigation, we have disclosed same to DOJ counsel to float the idea of pushing the de novo case with new evidence through very quickly. In many such cases, DHS/DOS rapidly approve the case in exchange for voluntary dismissal. We believe that this is effective not only to get the new and decisive evidence into the record, but we also think that it permits DHS to save face on the case that is being litigated as they are not acquiescing to anything.

[35] U.S. Department of State Bureau of Consular Affairs, *Nonimmigrant Visa Issuances by Visa Class and by Nationality*, FY1997-2020 NIV Detail Table, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html (follow hyperlink, scroll down to download the most current spreadsheet under the heading) (last visited Jun. 23, 2022).

[36] In March 2020, DOS suspended routine visa services except for cases deemed mission critical or for emergency service. U.S. Department of State Bureau of Consular Affairs, *Table XV(B) Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards) Fiscal Years 2017-2021*, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21_TableXVB.pdf (last visited Jun. 23, 2022).

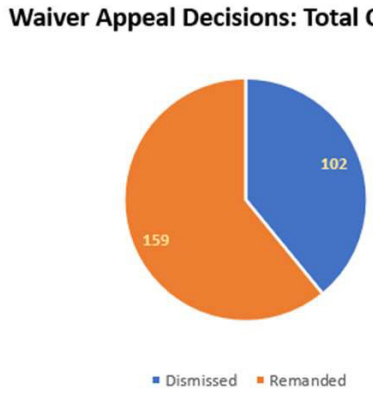
[37] The California Service Center has been the sole processor of Form I-612 applications since November 1, 2006. *See supra* note 16 and accompanying text.

approvals by the CSC,[38] (2) fewer applicants deciding to appeal because of a perceived likelihood that the AAO will dismiss their appeal, or (3) other reasons like the length of time that it takes to appeal or the potential financial cost to the appellant. In our practice, we have not seen any hardship waiver denials from USCIS at the first stage since 2018. If we do see a hardship waiver denial at the first stage in the future, we will strongly consider litigation due to more tools and faster relief for our clients, as set forth above.



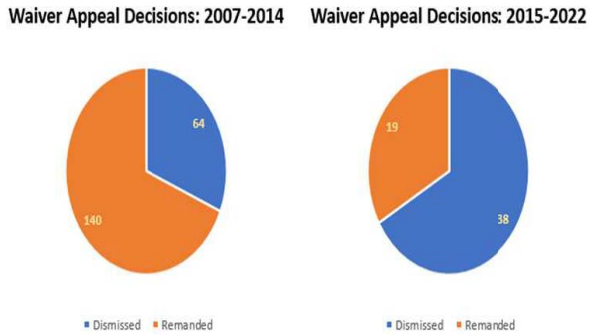
AAO Hardship Waiver Dismissals Compared to Remands, 2007 to Present.

In the last five years, the AAO has dismissed 34 appeals and remanded 12. This suggests that currently, the AAO may disfavor granting remands to applications denied by the CSC. The AAO has decided 261 hardship waiver appeals since 2007; out of that total, the AAO dismissed 102 and remanded 159. The greatest number of cases decided in one year was in 2008 with a total of 113 appeal decisions,[39] far more than the next highest in 2010 with a total of 32 decisions.



[38] We submitted a Freedom of Information Act request to USCIS on June 23, 2022 for this information, among other data points. To date, this information has not been received.

[39] *See supra* note 16 and accompanying text.



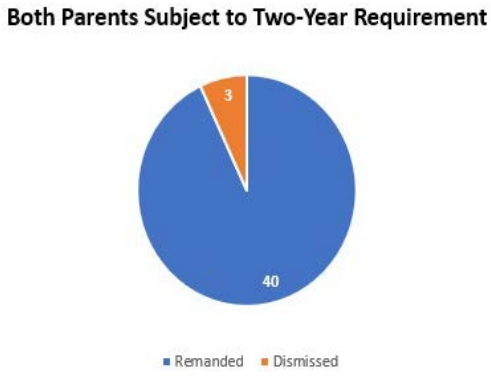
Waiver Appeal Decisions, 2007 to 2014 and 2015 to Present.

In the first half of the fifteen-and-a-half-year period covered in this paper, the AAO made 204 out of the eventual total of 261 decisions, and those decisions were overwhelmingly in favor of the appellant. But, in the second half of the covered period, the AAO only made 57 decisions with the majority being dismissals. It is possible that these numbers have created a chilling effect on the number of applicants that have sought an appeal in the last several years.

C. Influential Factors in AAO Decisions

Factors that may influence achieving a favorable outcome at the AAO include (1) both parents of a U.S. citizen child being subject to the two-year requirement or on a temporary visa (anything less than permanent resident status); (2) having strong evidentiary arguments for hardships faced by the qualifying relative; (3) a requirement to fulfill the foreign residence requirement in certain countries or regions; and (4) having multiple qualifying relatives.

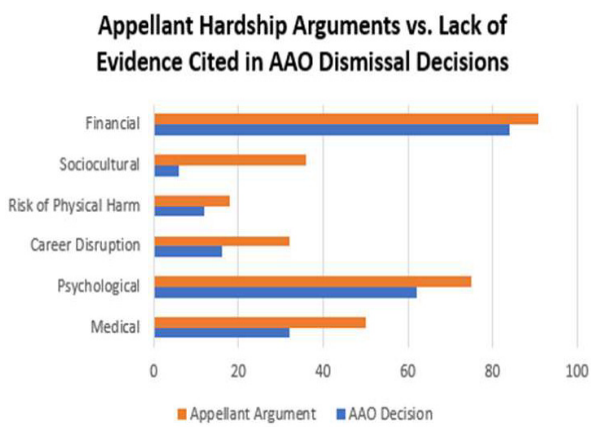
1. Both Parents Unable to Remain in the United States



AAO Decisions When Both Parents Subject to Two-Year Requirement, 2007 to Present.

When both parents of a U.S. citizen child are subject to the two-year requirement or on temporary visas, the AAO will almost always rule favorably so long as the appellant has met the standard of proof for exceptional hardship for relocation. Since 2007, the AAO has decided 43 cases where the applicant's spouse was either a J visa holder subject to the two-year foreign residence requirement or with a similarly temporary visa where both parents were likely to have to leave the country. In 40 of those cases, the AAO remanded the decision and found exceptional hardship for both relocation and separation—in all cases, the fact that both parents may have to leave the U.S. citizen child was treated as automatically exceptional hardship for the separation category. The AAO dismissed the remaining three cases as it found that relocation was not an exceptional hardship due to insufficient evidence.[40]

2. Hardship Arguments and Sufficient Evidence



Appellant Hardship Arguments vs. Lack of Evidence Cited in AAO Dismissal Decisions, 2007 to present.

The AAO places more importance on psychological and medical documentation than any other type of hardship evidence, and is most likely to dismiss an appeal for lack of sufficient evidence in medical, psychological, and financial evidence. In dismissals, the AAO cites lack of evidence for any of six categories of specific hardship grounds—medical, psychological, career disruption, risk of physical harm, sociocultural, and financial[41]—and finds most often that the appellant lacks evidence of medical, psychological, and financial hardships when compared to the hardship arguments that the appellants made in their appeals. Out of the 102 dismissals since 2007, (1) medical hardship arguments had a 64 percent chance of being addressed as insufficient in the AAO's dismissal decision, (2) psychological hardship arguments had an 83 percent chance, and (3) financial hardship arguments had a 92 percent chance. In contrast, appellants who made arguments based on career disruption, risk of physical harm, or sociocultural hardships were less likely to have their appeal dismissed based on those arguments and facts presented.

While medical and psychological evidence is given the most weight, financial evidence is empirically the most disfavored hardship category.[42] This is challenging for many appellants, as financial evidence is often the most acute problem that they face. The AAO looks for appellants to show an inability to support a household or provide necessities both in the United States and at the foreign residence.[43] For the AAO, if it is looking to dismiss an appeal, it is practically simpler to deny the case based on financial evidence because the adjudicator can always claim that the appellant did not provide enough documentation—i.e., that they did not think of all possible ways to save on expenses or make a greater income[44]—whereas it is more difficult to dismiss an appeal when presented with strong medical or psychological evidence from a healthcare professional. One way to ameliorate this problem is to affirmatively disclaim financial hardship arguments in waiver applications and in appeals. 8 C.F.R. § 212.7(c)(7) only requires "... pertinent information concerning the incomes and savings of the applicant and spouse." The waiver practitioner and applicant can strategically omit financial hardship and

[40] *See Matter of Redacted*, 5-7 (AAO Mar. 26, 2008) (finding that the applicant spouse's statement that the child would suffer exceptional hardship relocating to Montenegro for two years was completely unsupported in the record of the appeal); *Matter of M-I-H-*, 2-3 (AAO Aug. 6, 2019) (deciding that medical evidence did not support that the child would require medical intervention to manage his health if he were to relocate to Egypt, and the described financial hardship was not abnormal for relocating families); *Matter of B-H-*, 3-4 (AAO Aug. 13, 2019) (holding that the evidence of the child's medical condition was not current and did not indicate a need for treatment and that he was "otherwise healthy" and able to relocate to Benin).

[41] Hake & Banks, *supra* note 9, at 411.

[42] Hake & Banks, *supra* note 9, at 413 ("My rule of thumb [for grading financial hardships] is whether there is a real risk that children may go without essential needs or that a mortgage could not be paid.").

[43] *Id.* at 413.

[44] *See infra* note 60.

specifically disclaim same to take this off the table for an adjudicator to latch onto in a denial. An additional advantage of this technique is that adjudicators will frequently issue a Request For Evidence (RFE) regarding financial hardship even when the lawyer and applicant disclaim financial hardship. That shows a lack of intention to detail and sets up a very strong position for arguing that any future denial is an abuse of discretion as the adjudicator is citing to arguments explicitly not made in the application.

3. Appellant Country and Region

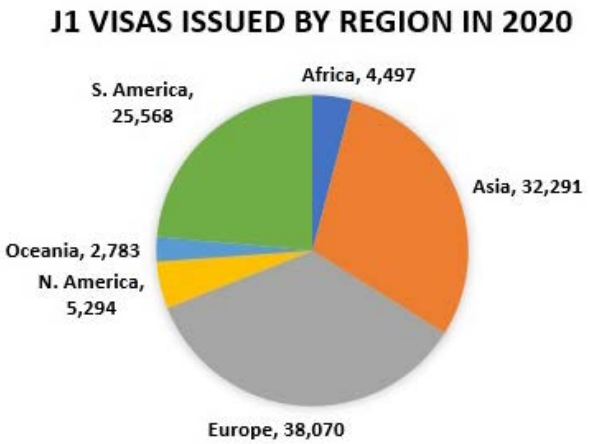
Country	Total Cases	Dismiss	Remand	Percentage Success
Argentina	5	2	3	60%
China	14	8	6	43%
Egypt	14	6	8	57%
India	17	2	15	88%
Jordan	5	0	5	100%
Lebanon	12	2	10	83%
Pakistan	16	4	12	75%
Philippines	17	6	11	65%
Russia	15	4	11	73%
Syria	7	0	7	100%
Ukraine	7	3	4	57%
Venezuela	12	4	8	67%

Countries Typically Receiving More Favorable Decisions, 2007 to Present.

Appellants from the above countries typically receive more favorable decisions than appellants from other countries—with preference to those with more appeals, the ranking is (1) India, (2) Lebanon, (3) Pakistan, (4) Russia, and (5) Venezuela. Out of the 261 decisions since 2007, the above 12 countries—out of a total of 73—made up the majority with 141 of those decisions. Out of these 12, appellants who would have had to meet the two-year requirement in Jordan or Syria always received a remand, although they made up only 12 of the 141 decisions. Appellants from India and Lebanon—respectively, 17 and 12 decisions—had the highest success rates out of those countries which had the greatest number of appellants, while China and Egypt—having 14 appeals each—only had an average success rate of 43 and 57 percent, respectively.

We cannot, however, conclude from this limited dataset that the AAO is likely discriminating against some countries over others.[45] Because there are so many other variables involved in these decisions—not to mention that they occurred over a period that exceeded a decade—these statistics likely only can amount to circumstantial evidence. Nonetheless, this information may prove useful in evaluating chances of success on appeal.

DOS issued 108,510 J-1 visas in 2020, and an average of 317,114 per year between 2007 and 2020.[46]



J-1 Visas Issued by Region, 2020.[47]

The regions of Europe, Asia, and South America typically make up the majority of J-1 visas issued each year, while Asia makes up a strong majority of the hardship waiver appellants followed distantly by Europe and Africa.[48] This suggests that these regions find it more difficult to get favorable decisions at initial adjudication at the CSC.

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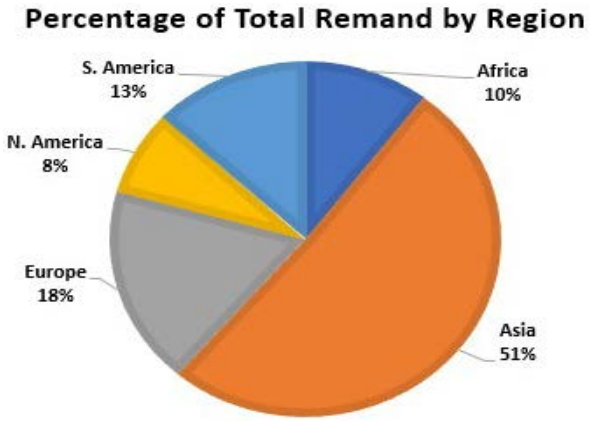
[45] *See, e.g.*, *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 663 (9th Cir. 2002) (finding in a racial discrimination case that with small sample sizes, "slight changes in the data can drastically alter the result"); *Sengupta v. Morrison-Knudsen Co., Inc.*, 804 F.2d 1072, 1076 (9th Cir. 1986) (quoting *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409, 412 (8th Cir. 1975) (finding in a racial discrimination case that "'statistical evidence derived from an extremely small universe'. . .'has little predictive value and must be disregarded'").

[46] Calculated from the latest data available. *See supra* note 35.

[47] Oceania makes up less than one percent of the hardship waiver appeals throughout this period, so it is excluded from the following regional analysis. Not shown on the chart are the seven J-1's that DOS categorized as "No Nationality."

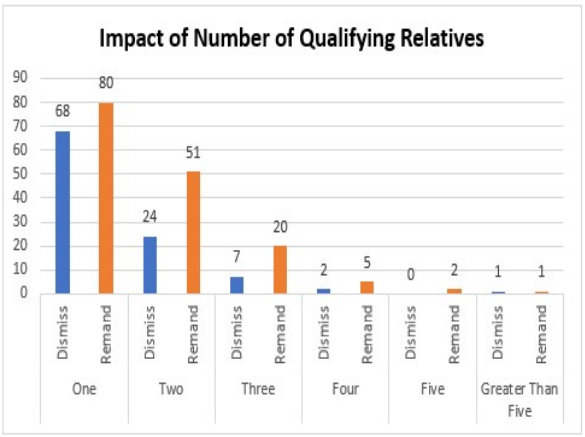
[48] The percentages for each region from 2007 to present are: Asia with forty-three percent, Europe with nineteen percent, Africa with sixteen percent, South America with twelve percent, and North America with eight percent.



Percentage of Total Remand by Region, 2007 to present.

On appeal, the most successful regions are (1) Asia with a 70 percent win rate and with 51 percent of all remands; (2) South America with a 63 percent win rate and 13 percent of all remands; (3) Europe with a rate of 56 percent and 18 percent of all remands; (4) North America with a 55 percent win rate and eight percent of all remands; and (5) Africa with a 39 percent win rate and 10 percent of all remands. This shows that while applicants from Asia make up most of the appeals, they are the most successful in earning a favorable decision from the AAO.[49] Additionally, while appellants from Africa are the third-most for number of appeals, they are the least successful by far in getting a favorable decision from the AAO.

4. The Number of Qualifying Relatives



Impact of the Number of Qualifying Relatives on AAO Decisions, 2007 to Present.

Those with more qualifying relatives generally have higher rates of success.[50] Most appeals involve appellants with between one and three qualifying relatives, the majority having one. Those with only one qualifying relative had a 54 percent average rate of success in achieving a remand from the AAO, whereas those with more than one qualifying relative generally had greater rates of success.

5. Summary of Factors

To summarize: (1) in single travel alternative cases—such as when both parents of a U.S. citizen child have no permanent basis to remain in the U.S. and the children cannot remain by themselves—the AAO will almost always concur that only one travel alternative exists; (2) the AAO prefers medical and psychological evidence over any other hardship category and will usually cite financial evidence deficiencies in dismissals; (3) applicants from Asia, Europe, and Africa statistically appeal the CSC's decisions more frequently, and applicants from Asia are more likely to get a favorable decision from the AAO than applicants from any other region; and (4) those with more than one qualifying relative generally have higher rates of success.

VI. Overall Trends in AAO Decisions

Generally, appellants that present substantial evidence—in addition to the evidence in their initial application—to support a compelling story are the most successful in gaining a favorable AAO decision.[51] The strongest appeals include medical and psychological issues that directly create exceptional hardship for the qualifying relative(s), whether they join the appellant during their two-year foreign residence requirement or stay in the United States while the appellant completes the requirement alone. In hostile adjudication climates, the effectiveness of normally sufficient evidence may not be enough to gain a favorable outcome.[52]

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[49] Note that, as discussed above, Asia contains the three overall most successful countries: India, Lebanon, and Pakistan.

[50] This data supports the scoring system behind the "Hake Hardship Scale," which assigns, for example, five points for each U.S. citizen spouse or child and one point per additional child. Hake & Banks, *supra* note 9, at 412-415.

[51] "Success in a hardship waiver case requires telling a story that is sufficiently full of human detail… backed up by authoritative documentation." Bruce A. Hake, *Hardship Waivers for J-1 Physicians*, 94-02 Immigr. Briefings 1, 11 (1994).

[52] Hake, *supra* note 13, at 756 (theorizing that USCIS officials will occasionally deny normally meritorious cases when they decide that applicants are "abusing the system").

The AAO expects medical evidence[53] to show a *current* effect on the qualifying relative in their *daily life* and indicate the *severity* of the condition on them both if they were to relocate to the foreign residence or remain in the United States. When providing evidence for medical hardship, the appellant should give documentation that outlines the treatment and the necessary medication that the qualifying relative is taking to manage his/her condition. The AAO finds the evidence even more compelling if it shows that not only does the appellant's absence create an exceptional medical hardship for the qualifying relative but that relocating to the foreign country would place the qualifying relative at medical risk due to the lack of medicine, treatment, or specialized care; even if the condition is relatively minor, the AAO will find the argument persuasive if the appellant can sufficiently support the possibility that relocation to the country could cause exceptional medical hardship to the qualifying relative.[54]

Sufficient psychological evidence—in addition to the requirements for medical evidence—should derive from more than one meeting with a mental health professional. The AAO views a lack of an established relationship between the qualifying relative and the mental health professional as an indicator that the psychological documentation is too weak to support a claim of exceptional hardship.[55] Moreover, infrequency of visits to the mental health professional or documentation from someone on behalf of the physician is also insufficient evidence to show exceptional psychological hardship.[56] Often, letters from treating professionals are inadequate to show exceptional hardship because the treating professional might not submit the most effectively persuasive document because of a concern that if their patient sees it, it will impact their treatment of the patient.[57]

The AAO largely considers financial evidence[58] as useful to support medical and psychological hardships but considers it insufficient to create exceptional hardship without accompanying hardship categories.[59] An appellant should include the most recently available tax documents, other records to show current income and expenses, and detailed projected income and expenditures in the foreign residence to include, but not be limited to, the inability to obtain gainful employment, specific impact on the qualifying relative, cost-of-living, etc.[60]

VII. Conclusion

We conclude that between 2018 and early 2020, hardship waiver appellants experienced a very hostile adjudication climate at the AAO, and that it is currently too soon to determine whether this hostility persists. An

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[53] The DHS regulation on hardship waivers requires that an "applicant shall submit a medical certificate from a qualified physician setting forth in terms understandable to a layman the nature and effect of the illness and prognosis as to the period of time the spouse or child will require care or treatment." 8 C.F.R. § 212.7(c)(7).

[54] *See, e.g.*, *Matter of Redacted*, 6-8 (AAO May. 21, 2008) (finding that although a U.S. citizen child was in good health, the child's heart murmur combined with the healthcare conditions in Ukraine at that time was sufficient medical evidence for exceptional hardship); *Matter of M-A-A-H-*, 2-3 (AAO Aug. 11, 2017) (deciding that although the U.S. citizen child is recovering from multiple conditions at birth, the child would be put at exceptional medical risk if they had to relocate to the healthcare environment in Jordan).

[55] *See, e.g.*, *Matter of M-N-*, 3-4 (AAO Apr. 29, 2019) (concluding that a single visit with a counselor did not show exceptional psychological hardship for the possibility of relocation to Senegal); *Matter of Redacted*, 6 (AAO Oct. 3, 2008) ("The conclusions reached in the submitted letter . . . based on a single interview, do not reflect . . . an established relationship with a mental health professional, thereby diminishing the letter's value to a determination of exceptional hardship.").

[56] *See, e.g.*, *Matter of Redacted*, 5 (AAO Jul. 10, 2009) (determining that a letter submitted by the physician's office manager was not sufficient evidence and the fact that the spouse's last meeting with the physician was two years prior showed that the spouse's mental health situation was not exceptional); *Matter of Redacted*, 7-8 (AAO Dec. 30, 2008) (ruling that the evidence "failed to reflect an ongoing relationship between a mental health professional and the applicant's spouse").

[57] To remedy this, it is helpful to include forensic psychological assessments based on at least six one-hour sessions by an objective mental health professional; this additional documentation results in a much stronger case that makes it more difficult for the CSC or AAO adjudicator to dismiss.

[58] Federal regulation requires an applicant to submit "all pertinent information concerning the incomes and savings of the applicant and spouse." 8 C.F.R. § 212.7(c)(7).

[59] *See supra* Part V.C.2. (showing that the AAO is most likely to list insufficient financial evidence as a reason for dismissal).

[60] *See, e.g.*, *In Re: 10963676*, 3 (AAO Mar. 2, 2021) (finding that documentation that is over several years old is not sufficient to show exceptional financial hardship); *Matter of A-E-S-M-*, 3 (AAO Sep. 30, 2019) (deciding that because the appellant did not submit an official tax return their documentation did not support their current income and the appellant did not provide evidence that their spouse would be unable to find employment in Venezuela); *Matter of S-N-*, 3 (AAO Sep. 17, 2018) (ruling that the appellant's documentation of projected groceries and other expenses in Thailand was not sufficient to show the overall monthly expenses and additionally that the appellant failed to prove that they and their spouse would be unable to find employment there).

analysis of the dataset shows that (1) in single travel alternative cases the AAO will almost always find that qualifying relative would experience exceptional hardship if separated from the applicant; (2) the AAO gives medical and psychological evidence the greatest weight over any other hardship category and strongly disfavors financial evidence; and (3) those with more than one qualifying relative generally have higher rates of success in hardship waiver appeals. In terms of predicting success, the existence of these factors in an appeal will likely increase the chances of a successful outcome.

We further conclude that because of the unpredictability of the current adjudications climate, an I-612 hardship waiver applicant's best option after a USCIS denial may be to seek resolution in the federal court system over appealing to the AAO. Through this avenue, an applicant is more likely to achieve a favorable determination on their application and much faster than appealing a decision to the AAO.

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