Abstract

A psychological assessment protocol is presented for determination of extreme hardship to qualifying relatives in assistance to discretionary relief from removal from the U.S. or waivers to inadmissibility proceedings in federal immigration courts. A working definition of the legal standards of extreme hardship to qualifying relatives of an immigrant alien is proposed and the rationale for selection of instruments is explained in the interest of limiting adverse consequences to qualifying relatives by application of immigration law.

Key Words

Assessment Protocol, extreme hardship, immigration court

Introduction

In the past several years, federal immigration courts have been increasingly facing a serious judicial dilemma in alien immigrant removal proceedings and in waivers to inadmissibility of foreign immigrants. (In the past three years, the author has conducted several such evaluations for the court.) The characteristic case involves an immigrant who has been residing in the U.S. and has come to the attention of law enforcement because of some legal charge, and, subsequently, has been brought to the attention of immigration authorities (whether convicted or found innocent). Typically, the foreign immigrant has been married and/or sired children (usually U.S. born American citizen minors) during his or her stay in the country and has established permanence for some years (e.g., residence, employment, school for children, etc.).

The legal dilemma arises in inadmissibility for immigration to the U.S. and in removal hearings when the claim of extreme hardship is made on behalf of a qualifying relative (usually a U.S. resident or U.S. citizen spouse of the alien and, more frequently, U.S.-born children of the alien who are American citizens). In such cases, federal immigration courts have to weigh the ultimate consequences in application of immigration law against potential harm to others related to the immigrant adjudicated and adversely affected by such application of the law.
The standard that is often applied in removal cases and in cases of inadmissibility when U.S. born American citizen children are considered "qualifying relatives" is of particular interest here because the concept is borrowed from family divorce proceedings. The standard is based on the moral principle of protection of children, which had been widely accepted in the courts in the past two decades (Maloney, 1985; Deyoub & Douthit, 1996). This principle is also set in states' family courts divorce proceedings and custody evaluations which place the "child's best interest" as fundamentally central to other legal rights and to the ultimate ruling. Furthermore, since the well being of the child takes precedence over the rights of the parents, it also takes precedence over application of immigration law. Consequently, if removal of an alien immigrant would be against the best interest of the qualifying U.S. citizen minor relative, a waiver based on extreme hardship may be considered. Thus, for foreign immigrants who come to the attention of immigration courts and have sired children in the U.S., their rights and interests as "qualifying relatives" and as U.S. born American citizens become central to the evaluation of extreme hardship.

One of the most critical questions in the evaluation then becomes the actual legitimacy of the family of the immigrant respondent, whose children are regarded as "qualifying relatives," for whom the standard of extreme hardship is considered. The concerns of immigration courts are with respondents who sired children in the United States only to satisfy their immigration aspirations, but who are not legitimately "connected" to these children. Thus, the financial, physical and emotional connection of the children to the respondent immigrant becomes crucial to the determination of extreme hardship, even if the ultimate ruling could cause the entire family (with children who are U.S.-born citizens) to be removed from the country.

Another question of psychological import is the likely effect of the removal upon the ability of the respondent immigrant to effectively parent his American citizen children. Here the analysis of the respondent’s (and sometimes of his spouse as well) parenting capacity and psychological sturdiness is relevant in establishing extreme hardship upon the qualifying relatives. If a respondent alien immigrant cannot adequately parent his children because the removal is damagingly stressful beyond the respondent’s capacity to cope, the qualifying relatives (the children) could suffer extreme hardship as a result.

Legal Standard

of Extreme Hardship

The legal standard of extreme hardship has become loosely defined over the years by precedence and is still evolving in response to changes in immigration trends. This presents a challenge to the forensic evaluator who has to work with a seemingly moving target. Nevertheless, extreme hardship remains the legal standard against which discretionary relief from removal from the country and waivers to inadmissibility are considered. Precedence indicates a current definition of extreme hardship to a qualifying relative involving the following factors:

–Permanent residence or family ties to the United States of a qualifying relative of the foreign immigrant.

–Qualifying relative ties outside the United States (usually in the country of the alien’s origin).

–Conditions in the country to which the qualifying relative would relocate and the extent of the family ties in that country.

–Financial impact upon the qualifying relative that would result from the departure of the alien immigrant.

–Significant conditions of health (particularly important if suitable medical care is unavailable in the country of relocation).

–Educational impact upon the qualifying relative (particularly children) that would result from the departure of the alien immigrant.

–Financial, physical and emotional connection of the qualifying relative (particularly children) to the respondent, and the legitimacy of the family of the alien immigrant.*

*The list of factors described is not exclusive, nor does establishing extreme hardship create any privilege to relief. (Jong Ha Wang v. INS, 450 U.S. 139 (1981); Guiterrez-Centeno v. INS, 99 F. 3d 1529 (9th Cir. 1996); Shooshtary v. INS, 39 F. 3d 1049 (9th Cir. 1994); Palmer v. INS 4 F. 3d 482 (7th Cir. 1993); Cerrillo-Perez v. INS, 809 F. 2d 1419 (9th Cir. 1987); Ramirez-Durazo v. INS, 794 F. 2d 491 (9th Cir. 1986); Sanchez v. INS, 755 F. 2d 1158 (5th Cir. 1985); Contreras-Buenfil v. INS, 712 F. 2d 401 (9th Cir. 1983); Ramirez-Gonzalez v. INS, 695 F. 2d 1208 (9th Cir. 1983); see also Matter of Pilch, Interim Decision 3298 (BIA 1996); Matter of L-O-G-, Interim Decision 3281 (BIA); Matter of O-J-O-, Interim Decision 3280 (BIA 1996); Matter of Ige, 20 I&N Dec. 880 (BIA 1994); Matter of Anderson, 16 I&N Dec. 596 (BIA 1978).

Sample Case Which Does Not Meet the Legal Standard of Extreme Hardship
The respondent is a 24 year-old male who is a native citizen of Mexico but has lived in the United States since 1989. Most of the respondent’s family still lives in Mexico. His wife, whom he married in 1995, is both a resident and citizen of the United States (naturalized in 1996). The couple lives with her family and provides them financial support in exchange for room and board. Since the couple has very little money, if the wife were forced to move back to Mexico, she would not be able to travel back and forth to the United States to visit her family. In addition, it would be difficult for the wife to obtain work in Mexico.

Case Discussion

Having fully considered the factors above, it is determined that the respondent fails to establish extreme hardship to the spouse. The respondent’s wife was aware that he was in deportation proceedings at the time of marriage. She knew that she might have to decide whether or not to follow him to Mexico, and leave her family in the U.S. in the event that he was deported. Additionally, at no time during the proceedings did the respondent’s wife suggest that she would suffer any particular hardships by moving to Mexico. Furthermore, she speaks Spanish and the majority of her family is originally from Mexico, and therefore, she would have less difficulty adjusting to life in a foreign country. Finally, neither the respondent nor his wife has any real financial ties to the United States. The respondent’s wife is unemployed and the respondent is a musician in a band. No evidence exists that he would have to give up a lucrative career by moving to Mexico, forcing his wife into poverty. In conclusion, the respondent has failed to show that his spouse would suffer extreme hardship beyond the normal economic and social disruptions involved in the deportation of a family member.

Sample Case Which Probably Meets the Legal Standard of Extreme Hardship

The respondent is a 37-year-old male who is a native of a rural village in Mexico, but has lived in the United States since 1986. Some of the respondent’s family still lives in Mexico, while a sister with whom the respondent has some contact lives in the United States. His wife, whom he married in the United States in 1995, is also an undocumented alien who is a native of the same place in Mexico. The couple had two children, now 10 and 8 years of age, both of whom are U.S. born American citizens who are attending the public school system in the district where the respondent lives.

The respondent has been consistently employed since 1990 as a forklift operator in a large warehouse in the city and his wife has been working part-time while attending evening ESL (English as Second Language) classes. The wife of the respondent also suffers from a medical condition (chronic cysts in the uterus which have to be routinely removed) that would most likely go untreated in Mexico, and could eventually cause her early death. The couple has been financially supporting his and her family in Mexico and has invested in their children’s education in the United States. Consequently, the children are obtaining good grades and demonstrating good integration in the American culture and society. Believing the respondent was a drug-lord, the narcotics police division raided the family’s home at night and erroneously arrested the respondent. When the mistake was realized, the police transferred his case to immigration authorities without criminal charges. If the respondent and his family return to Mexico, his children will likely be unable to continue their education, the couple will not be able to support themselves and the wife’s health will likely deteriorate.

Case Discussion

In this case, the respondent’s children and the respondent’s wife probably meet the criteria set by the law for consideration of extreme hardship. The children (who are U.S.-born American citizens) are deemed connected to the respondent financially, physically and emotionally. They will likely suffer from undue and unnecessary educational limits imposed upon them by the transfer to rural Mexico, where they will not be able to continue their studies beyond sixth grade. Consequently, obstacles in the children’s education and subsequent economic disadvantage will be imposed upon the children by a removal order in this case. Furthermore, the wife of the respondent could meet the criteria by virtue of her medical condition which, if gone untreated in Mexico, will likely lead to her early death and/or serious medical complications.

The Typical Questions a Forensic Psychological Evaluation Should Address

A psychological assessment protocol has been established to expertly advise federal immigration courts by attempting to answer the following typical questions:

–Is the family of the foreign immigrant a legitimately functioning nuclear family or is the family a “front” which has been established for the immigration aspirations of the respondent?

–What is the relative psychological importance of the immigrant to his or her family members?

–What is the psychological impact of removal of the immigrant upon his or her family members staying in the U.S.?

–What is the psychological impact upon the family members of the immigrant, in the event of removal of the entire family from the U.S.?
Description of Instruments Utilized and the Rationale for Their Use

The selection of instruments in this protocol was based on a paucity of specific forensic assessment instruments that are directly relevant to the legal standard of extreme hardship definitions. Furthermore, no specific forensic instruments can effectively determine if a family evaluated is, indeed, a legitimately functioning nuclear family or a "front" established in the service of immigration aspirations of an alien immigrant. Similarly, no assessment tools exist to predict the relative impact of removal of a family member or the entire family unit from the country upon its members. Thus, the protocol comprises forensically relevant assessment procedures which address clinical constructs that are pertinent to the legal actions considered (APA, 1985; 1991), as well as clinical measures which possess high predictive validity (Bricklin, 1989; Bricklin, 1990; Caldwell, 1996; Grisso, 1986; Meyer, et al., 2001; Otto & Heilbrun, 2002).

Investigative Interview

The investigative interview is usually conducted with the respondent in efforts to establish the claim for extreme hardship. Characteristically, a referral from an immigration attorney is made when there is an assumption that the respondent has qualifying relatives who would be severely and adversely affected by removal of the respondent. Thus, the initial selection for psychological evaluation is made by the attorneys who decided that the respondent might qualify for a waiver under existing provisions in the law.

The investigative interview seeks answers to possible factors involved in the definition of extreme hardship. Namely, evidence of residence permanency or family ties to the United States of a qualifying relative of the respondent, qualifying relative ties outside the United States (usually in the country of the immigrant’s origin), conditions (adverse or beneficial) in the country to which the qualifying relative would relocate and the extent of the family ties in that country, the financial impact upon the qualifying relative that would result from the departure of the respondent, significant conditions of health (particularly important if suitable medical care is unavailable in the country of relocation), and the educational impact upon the qualifying relative (particularly children) that would result from the departure of the foreign immigrant.

Also, the investigative interview seeks to substantiate other findings from instruments used to predict the financial, physical and emotional connection of the qualifying relative (particularly children) to the respondent, and the legitimacy of the immigrant’s family. During the interview, the respondent is required to furnish documentation to support the request for a waiver due to extreme hardship such as, medical records, employment records, school records, marriage and birth certificates, etc.

MMPI-II

The Minnesota Multiphasic Personality Inventory-II (Regents of the University of Minnesota, 1989) provides scores and measurements of a wide variety of aspects of personality (hence, “multiphasic”), and it is a measure of both personality and psychopathology. Highly elevated scores in the profile indicate major psychiatric disorders, whereas scores in the normal range reveal the personality patterns of essentially "normal" adults. Clinical interpretations derived from the scores are made based on a profile pattern or from an assessment of elevations in certain scales in relation to other scales. Interpretations are not based on elevations on specific scales or responses to specific items of the inventory.

As a measure of a person’s emotional state and behavioral tendencies at a point in time, the MMPI-II indicates the person’s current clinical status as well as the influences of the person’s long-term personality makeup and emotional history on present functioning. The pattern and severity of a test profile reflect both the effects of past experiences (traumatic or beneficial) on the personality makeup, as well as their activation by ongoing contextual threats and pressures.

The MMPI-II is a useful tool (usually in conjunction with other clinical instruments) for the assessment of adaptability to new circumstances. It produces contextual factors, including perceived stress and various aspects of social support, and clinical factors including symptoms, personality disorder diagnoses, level of functioning and substance abuse. Together with an array of moderator factors such as age, sex, socio-economic status, etc., the MMPI-II can be used to produce a likely indicator of psychological threshold for mental & emotional decomposition, which is relevant here. In other words, the MMPI-II can be used as a predictor of the coping style and efficacy of the person taking the test.

The test-taking attitude measured by the validity scales of the MMPI-II is an accurate indicator of the degree to which the person taking the test is defensive. Attempts to lie and displays of guardedness against admitting impulses or behaviors that could reflect badly on one’s moral values are commonplace in forensic evaluations such as this. These attempts are effectively accounted for by the validity scales and become another measure of adjustment to the clinical scales and their calculated elevations. Similarly, sophisticated attempts to either minimize and understate problems or to exaggerate problems are also attenuated for in the profile, producing a fairly accurate, lie-free representation of the person’s current functioning and psychological makeup.

Finally, the MMPI-II test is first scored and interpreted electronically by a computer, which selects the words and sentence combinations used in the narrative, producing a higher degree of objectivity and eliminating evaluators' personal biases. The narrative report generated by the computer is actuarial in the sense that the interpretive material is case-based. The
content of interpretive statements come from thousands of cases seen over many years and the consistencies of behaviors that have emerged within each of the “code types.” It is therefore fair to conclude that the interpretive statements generated by the computer and utilized in a report are probably the most accurate descriptions and predictions of behavior and psychological makeup of the person taking the test (Caldwell, 1996).

PASS

Parent Awareness Skills Survey (PASS) is a clinical tool designed primarily to reflect strengths and weaknesses in a parents’ ability to recognize critical intervention opportunities in childcare situations, and subsequently to communicate clearly and effectively at these points of opportunity. PASS scores can be used for comparative purposes in a custody evaluation case and to establish minimal adequacy in parenting skills (Bricklin, 1990).

The Parent Awareness Skills Survey presents a parent with 18 childcare problems, and asks how he or she should respond to each. The test deals with the adequacy with which a parent becomes aware of critical aspects of childcare issues, and the effectiveness with which the parent is then able to communicate with his or her children.

Awareness is stressed because the process of responding adequately to a child begins with the degree to which a parent is able to discern just what it is about a given situation that should (or should not) become the focal point of intervention. The PASS reflects, therefore, the kinds of skills a parent must have in order to be an effective parent, regardless of the age of his or her children, and regardless of the situation presented.

The PASS yields scores that mirror a parent’s awareness of the elements that one should, in fact, address or ignore in various situations to bring about positive solutions (a recognition called the critical issues involved). The scores also reflect the parent’s awareness of the necessity of selecting strategies adequate to bring about positive solutions, and the need to respond in words and actions that are understandable to the child. The test also taps into the desirability of acknowledging the feelings aroused in the child by various situations; the desirability of taking a child’s unique past history into account in deciding how to respond; and a recognition that an effective communicator pays attention to whether and how an offered response is in fact coming across to the child (a recognition called feedback data).

The scores in the PASS are further computed for responses given under three separate conditions: (1) The Spontaneous Level – the spontaneous, uninterrupted responses to the various childcare dilemmas. They reflect what parents are most likely to actually do in the various situations. (2) Probe Level One are scores generated from parents’ responses offered to gentle, nonleading probe questions. (3) Probe Level Two are scores generated from parents’ responses offered to very direct, leading questions.

Probe level responses allow parents the opportunity to reveal what they know but did not think to express spontaneously, and to mirror thoughts and subsequent actions likely to find their way to motor expression only under favorable circumstances e.g., situations in which a parent has had time to think things over, is not upset about something else, etc. Furthermore, the probe questions result in a much greater dispersion of parental responses, which allow finer and more precise distinctions to be made among respondents.

PORT

Perception Of Relationship Test (PORT) measures the degree to which a child seeks psychological closeness and positive interactions with each parent as well as the child’s particular action tendencies and dispositions to behave in certain ways (e.g., assertively, passively, aggressively, fearfully, etc.). Adaptive as well as maladaptive, the child has had to develop to permit or accommodate interaction with each parent. It is particularly useful in forensic decision-making because it sheds light on the degree to which a child actually seeks interaction with a given parent, and reflects the degree to which he or she has been able to work out a comfortable, conflict-free style of relating to each parent (Bricklin, 1989).

The PORT assesses key parent-child interactions and offers data suggesting the likelihood that a given parent can offer psychological nourishment and competency in a way so that a child can effectively utilize what is offered. This test further indicates what skills and dispositions the child is likely to carry forth in life as a result of his or her interactions with a particular parent and whether these response potentials are likely to be assets or liabilities. This test avoids the common hunt for “pathology” in parent-child interactions, opting for a positive, less harmful discovery of the quality of perceived relationships between a child and his/her parents.

The utility of the PORT is in that it taps into largely unconscious sources. These sources reflect more of the child’s actual interactions with a given parent and less of what he or she has been told. Hence, the verbal bribery that children in forensic settings are often exposed to is bypassed and loyalty conflicts are avoided. Also, this test circumvents the impossible demand placed upon a child to choose between the parents; it does not bear on the verbal capacity of a child’s language to respond to the complexities of his or her vital relationships; and finally, it disguises the intentions of the test administrator.

Double-Blind Clinical Family Observations
The Double-Blind Clinical Family Observations seek to answer the concern that a family evaluation is done by a “hired gun” (i.e., a professional hired by one party in legal proceedings to support a particular point of view). The scientific methodology circumvents all potential threats to the validity of the clinical observations obtained and their likely psychological meanings, because both the clinician making the observations and the family being observed are unaware or “blind” as to the purpose of the observation.

Characteristically, the family is invited to join a clinician and is given a specific task, or a series of tasks, to complete while all are being observed. Usually the tasks given require no verbal skills and are not based on a substantial fund of knowledge (e.g., jigsaw-puzzles, drawings, etc.) This is done to allow equal opportunity for children of all ages to participate, and to allow for members in families who speak diverse languages to express themselves without limitations. The clinician is given a neutral set of study questions to guide his or her observations, which do not indicate the purpose of the evaluation (e.g., what is the nature and style of interactions between the members of the group, who talks to whom, who is closer to whom, what is being verbally exchanged, who seeks whose company, etc.). The narrative of the clinician’s evaluation is then incorporated into the report in its essence to substantiate or refute the conclusions and recommendations offered.

Rationale for the Use of Procedures

The main purpose of the use of these procedures in this context is to establish the legitimacy of the respondent’s qualifying relative’s claim for a waiver due to extreme hardship. Psychological knowledge and clinical experience are crucial in determining the subtleties involved in each case. For example, the psychological impact of a respondent’s removal upon her 14 year-old daughter who has extensive peer connections in the school she is attending, or the impact of removal of a respondent upon his 8-year-old learning disabled son’s scholastic future reveal the importance of psychological knowledge in these cases.

The investigative interview seeks to substantiate the claims made by the alien immigrant that a qualifying relative would be adversely and gravely impacted by removal of the respondent from the United States. In particular, the interview establishes the veracity of the claims made by the respondent with the use of supporting documentation. The interviewer’s task is to generate as realistic a picture as possible about the circumstances of the respondent and his qualifying relatives. The interview captures the interpersonal and psychological nuances of the respondent and qualifying relatives, which other instruments fail to recognize. Together with other findings, it creates a reliable and authentic image of the respondent and of the qualifying relatives.

The purpose of standardized psychological instruments is to answer the four more difficult questions proposed previously: (1) Is the family of the immigrant a legitimately functioning nuclear family or is the family a “front” which has been established for the immigration aspirations of the immigrant? (2) What is the relative psychological importance of the immigrant to his or her family members? (3) What is the psychological impact of removal of the immigrant alien upon his or her family members staying in the U.S.? (4) What is the psychological impact upon the family members of the immigrant, in the event of removal of the entire family from the U.S.?

The MMPI-II (Regents of the University of Minnesota, 1989) is used to obtain answers to the third and fourth questions, which seek to measure the level of distress that will be inflicted upon the family if the respondent were to be removed from the United States. Since the MMPI-II measures the psychological adaptability to new and difficult circumstances (Caldwell, 1996), it is used to predict the coping adequacy of the respondent upon returning to his or her country of origin while maintaining physical, financial and emotional support to the qualifying relatives. If it is predicted that the respondent’s removal will result in inability to meet his/her obligations, the qualifying relatives may experience extreme hardship.

The PASS (Bricklin, 1990) offers answers to the first two questions. First, it helps determine if the family is simply a front to disguise immigration aspirations. Specifically, if either or both parents demonstrate poor parenting skills, this could mean that the parents are not actually involved in parenting their qualifying children and that they might be using the family to further their immigration purposes. Second, it can provide insight into the respondent’s level of psychological importance to the qualifying relatives remaining in the United States. The removal of a respondent who is only marginally psychologically important to the qualifying relatives would not constitute extreme hardship.

The PORT (Bricklin, 1989) assists in answering the first two questions. First, it helps determine the relative psychological importance of the respondent to a minor relative who qualifies as a U.S. born American citizen. Consequently, removal of a respondent who is psychologically important to a qualifying U.S. citizen minor relative, would constitute extreme hardship. Second, it helps determine whether a qualifying U.S. born American citizen minor relative is used as a front to disguise the respondent’s immigration aspirations. A strong emotional bond between the respondent and the qualifying U.S. born American citizen minor relative indicates the relationship is legitimate for waiver considerations.

The Double-Blind Clinical Family Observation seeks to substantiate answers to the above questions, particularly, whether the family the respondent is presenting is legitimate for consideration for extreme hardship. The exposure of the respondent and the qualifying relatives to a naturalistic observation by a neutral professional can support or refute the claim of the legitimacy of the relationships involved. The observer can ascertain the quality and importance of the emotional connections
between the respondent and the qualifying relative/s. Together with other findings, the observation creates a reliable view of the familial ties and their significance in this context.

Summary and Conclusions

The assessment protocol presented here has been offered by the author and accepted in various different cases presented before federal immigration courts in the past three years, and a few more evaluations have been ordered and are currently pending. The protocol presented here has been established as a standard for the evaluation of cases involving waiver of inadmissibility and relief from removal due to extreme hardship to qualifying relatives of alien immigrants. It is conceivable that other valid and reliable psychological tests and forensic procedures could be presented interchangeably and accepted by federal immigration courts to address the questions presented above (e.g., MCMI - 3 [Millon, Millon & Davis, 1994] instead of MMPI; PSI -3 [Abidin, 1995] instead of PASS, etc.) providing that the answers gleaned are consistent with the principles set forth.

It is expected that the factors comprising the definition of extreme hardship will continue to evolve in precedence as do the realities that federal immigration courts face. Also, as the mores of our society continue to change, so will the values placed on qualifying relatives' legal rights and the emphases on the best interests of children. Hence, it is predicted that future assessment protocols will have to accommodate new requirements using other instruments and new procedures. It will, nevertheless, remain the responsibility of the forensic community to expertly advise federal immigration courts on these important issues.

About the Author

Reuben Vaisman-Tzachor, Ph.D., graduated with a Bachelor’s degree in psychology from Pomona College and received his Master’s degree and Ph.D. in clinical psychology from the California School of Professional Psychology in Los Angeles. His past military training earned him the equivalent of a military engineering degree and command posts in the Israeli Navy and the Israeli government terrorism prevention agency.

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References


