

HARDSHIP RECONSTRUCTED: Developing Comprehensive Legal Interpretation and Policy Congruence in INA § 240A(b)’s Exceptional and Extremely Unusual Hardship Standard

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INTRODUCTION

U.S. immigration laws are designed to balance competing policy interests dictating when and how the country should be amenable to opening its doors to foreign nationals. Given the existence of these competing interests, U.S. immigration law has a structure that is stringent and forgiving—rigorous yet generous. Like many other forms of relief built into U.S. immigration law, removal relief statutes recognize that removable foreign nationals¹ who entered the country without authorization or remain in the country without legal status have formed attachments, contributed to the economy and possess certain characteristics valuable to the country’s social construct.² Therefore, perhaps, it is ideologically impermissible to remove them. In the same vein, certain removable people who support permanent resident and U.S. citizen family members are eligible for relief because they add value to the lives of their families and

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¹ For the purposes of this Article, “removable people,” “removable person,” “deportable people” and “deportable person” refers to undocumented immigrants who may be eligible for removal pursuant to Section 237 of the Immigration and Nationality Act (INA). *See* INA § 237, 8 U.S.C. § 1227 (2012). Similarly, “undocumented immigrant(s)” refers to people who unlawfully cross U.S. borders or remain in the U.S. without legal status.

² *See e.g.*, INA § 240A(b), 8 U.S.C. § 1229b(b) (2008) (cancellation of removal for non-permanent residents); 8 CFR § 274a.12(c)(14) (prosecutorial discretion to removal cases of a “lower priority”); INA § 244, 8 U.S.C. § 1254a (2012) (temporary protected status for undocumented nationals of designated countries).

to the U.S. social fabric.³ Nevertheless, the U.S. also seeks to enforce its immigration laws where they have been broken.⁴

With all of these policy goals in mind, Congress has enacted relief-based immigration laws seeking to retain individuals who are otherwise removable.⁵ The cancellation of removal statute for non-lawful permanent residents (“non-LPRs”)⁶ is one such immigration law illustrating competing ideologies—the value in giving certain undocumented people a pathway to U.S. citizenship; and at the same time, fairness in requiring them to meet rigorous eligibility standards before the status is accorded. Specifically, the “exceptional and extremely unusual hardship” standard has evolved to become the dividing line between individuals who will gain relief and those who will not. The standard requires a fact-intensive inquiry into the lives of the removable person, his or her family members, and the many esoteric hardship possibilities that may arise if the person is removed. The outcome of this inquiry will turn on a question of interpretation, which is the factor most fraught with legal uncertainty and policy-based disharmony.

There are three problems restraining uniform interpretation of the hardship standard in the Immigration and Nationality Act’s (INA)⁷ cancellation of removal for non-LPRs.⁸ First, Congress does not provide substantive directives on the kinds of situational factors constituting exceptional and extremely unusual hardship.⁹ As a result, adjudicators are left to interpret the standard on a case-by-case basis.¹⁰ Secondly, administrative case law that would serve as precedent for immigration judges, practitioners and removable people is lacking because only three Board

³ See Bryn Siegel, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291, 292-94 (2008).

⁴ *Id.* at 292.

⁵ See e.g., 8 C.F.R. § 1208 *et seq.* (2012); 8 C.F.R. § 244 (2012); INA § 101(a)(15)(U); see also Memorandum from John Morton, Dir. U.S. Immigration & Customs Enforcement, On Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens to All Field Office Directors, All Special Agents in Charge, and All Chief Counsels (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

⁶ See Immigration and Nationality Act § 240A(b), 8 U.S.C § 1229b(b) (2012) [hereinafter cancellation of removal for non-LPRs].

⁷ Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* (2012).

⁸ INA § 240A(b), 8 U.S.C § 1229b(b) (2012).

⁹ William C. B. Underwood, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 IND. L.J. 885, 903 (1997).

¹⁰ *Id.*

of Immigration Appeals (the Board) cancellation decisions directly addressing the hardship standard have been published to date.¹¹ Lastly, the U.S. federal appellate courts are, in many ways, precluded from reviewing the Board's discretionary decisions.¹² Thus, respondents in cancellation of removal cases are largely barred from seeking judicial review of the Board's decisions relating to its interpretation of the hardship standard.¹³ Without judicial review yielding additional precedential case law to fully develop the meaning of the standard, the standard is subject to varying interpretations that differ from adjudicator to adjudicator.

The three seminal cases published by the Board confirm that the adjudicators' interpretation of the hardship standard will produce counterintuitive policy outcomes for removable people and their families. A closer look into the Board's case rationale shows that the Board is denying cancellation in cases where the removable person faces major losses if he or she leaves the U.S.¹⁴ If we are to follow the Board's precedent, factors such as having a business, financial assets, and a unified family can serve as evidence against a removable person.¹⁵

This Article will argue that because Congress has not substantively defined the cancellation of removal hardship standard, interpretation of the standard is causing idiosyncratic outcomes and creating undue burdens for removable people and their families. Although adjudicators use factors to define the standard, its interpretation is inconsistent and varies from one case to the other.¹⁶ Notably, the interpretation of the hardship

¹¹ *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *Matter of Andazola-Rivas*, 23 I&N Dec. 319 (BIA 2002); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).

¹² *De La Vegas v. Gonzales*, 436 F.3d 141, 144 (2006) (In this case, the Court of Appeals for the Second Circuit held that federal statute "deprives courts of the power to review discretionary determinations concerning cancellation of removal"); INA § 242 (a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i) (2012).

¹³ This statutory limitation barring review of the Board's discretionary decisions in cancellation of removal cases was confirmed in *De La Vegas. Id.*

¹⁴ See generally *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002).

¹⁵ *Id.*

¹⁶ *Monreal*, 23 I&N Dec. 56 at 63 ("In *Matter of Anderson*...we stated that such factors as the age of a respondent, both at the time of entry and at the time of the application for relief, family ties in the United States and abroad, length of residence in this country, the health of the respondent and qualifying family members, the political and economic conditions in the country of return, the possibility of other means of adjusting status in the United States, the alien's involvement and position in his or her community here, and his or her immigration history are all proper factors to be considered."); *Matter of Anderson*, 16 I&N Dec. 596, 597 (BIA 1978).

standard is causing outcomes that are not congruent with emerging U.S. immigration policy.¹⁷

Part I of this Article will explore the legislative history of the exceptional and extremely unusual hardship standard and address barriers stemming from Congress's jurisdictional bar against review of the Board's discretionary decisions. Part II will analyze the interpretive modes employed in the three seminal cancellation of removal cases and discuss how current interpretation can result in undesired policy and individual case outcomes. Further, Part III will discuss two such outcomes. Part IV will delve deeper into policy implications and the reasons why adjudicators and Congress should choose to interpret the standard in congruence with the values that drive progressive and emerging U.S. immigration policy. Finally, Part V will argue for adjudicators to interpret hardship from a loss perspective.

I. EVOLUTION OF THE HARDSHIP STANDARD

Congress established the current cancellation of removal statute in the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA).¹⁸ Cancellation of removal for non-LPRs is based on evidence that a removable person: (1) has been physically present in the U.S. for a continuous period of no less than 10 years; (2) has been a person of good moral character; and (3) can establish that removal would result in "exceptional and extremely unusual hardship" to the removable person's spouse, parent or child who is a citizen of the U.S. or a permanent resident.¹⁹ If these elements are met, the removable person will gain permanent residence and can apply for U.S. citizenship after at least five years of lawful permanent residence.²⁰

¹⁷ See e.g., U.S. Immigration & Customs Enforcement, 11064.1: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities (Aug. 23, 2013), available at http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf; Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. § 2 (2013) (The "Statement of Congressional Findings" section of this 2013 immigration reform bill, discusses policy goals of statutory coherence, integration of those seeking to join American society, and an economic-centric purpose to immigration laws).

¹⁸ Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in 8 U.S.C. § 1229b(b)) [hereinafter IIRIRA].

¹⁹ INA § 240A(b)(1)(D), 8 U.S.C. § 1229b (b)(1)(D) (2012).

²⁰ See INA § 316, 8 U.S.C. § 1427 (2012).

The exceptional and extremely unusual hardship standard is familiar in the history of U.S. immigration law.²¹ It is, therefore, unsurprising that the hardship provision found in the current cancellation of removal statute dates back to 1952.²² One concept well embedded in U.S. immigration law is that the law is constantly shifting along with social and political ideology. Accordingly, an inquiry into the legislative history of previous hardship provisions will create a better understanding of today's standard.

A. "Serious Economic Detriment:" The 1940 Hardship Standard

Since 1940, Congress has enacted immigration statutes governing the termination of deportation for deportable people.²³ Among other requirements, the Alien Registration Act of 1940 permitted the Attorney General to cancel deportation if a deportable person could establish²⁴ "serious economic detriment to a citizen or a [legal] resident alien who [was] the spouse, parent, or minor child of such deportable alien."²⁵ Notably, the serious economic detriment standard considered economic detriment to citizen and legal resident family members, *not* to the deportable person.

The Alien Registration Act of 1940 was a "step in the right direction" because deportable people could request the U.S. government to suspend their deportation based on hardship resulting from their departure.²⁶ Eight years later, the 1948 amendment to the Alien Registration Act of 1940²⁷ extended suspension to deportable people who did not have family ties in the U.S., but could show seven years of continuous residence in the U.S.²⁸ The Alien Registration Act of 1940 and its 1948

²¹ Elwin Griffith, *The Transition Between Suspension of Deportation and Cancellation of Removal for Nonpermanent Residents Under the Immigration and Nationality Act: The Impact of the 1996 Reform Legislation*, 48 DRAKE L. REV. 79, 79 (1999).

²² See Act of June 27, 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214 (1952).

²³ Griffith, *supra*, at 81-82. In this Section, there is a switch from the use of the term "removal" to "deportation" ("cancellation of removal" to "suspension of deportation"). For the purposes of this Article, the two terms represent the same concept of expelling a foreign national from a country. However, there are nuanced statutory reasons necessitating a switch in usage for this Section and the Sections to follow. These nuances will be addressed in later passages.

²⁴ Griffith, *supra*, at 81.

²⁵ Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 670, 672 (repealed 1952).

²⁶ Griffith, *supra*, at 82.

²⁷ See Act of July 1, 1948, ch. 783, 62 Stat. 1206 (1948).

²⁸ Underwood, *supra*, at 886.

amendment were widely favored and communicated Congress's intent to lessen the heavy burdens families and individuals experienced as a result of deportations.²⁹ After the Alien Registration Act of 1940 was enacted, the Board interpreted the serious economic detriment standard liberally.³⁰ The Board interpreted the standard liberally because of the ease in showing that deportation could negatively impact the deportable person's standard of living.³¹ Therefore, the serious economic detriment standard was relatively simple to prove.³² For that reason, Congress viewed the 1940 standard as "too lenient" and sought to modify it.³³

B. "Exceptional and Extremely Unusual Hardship:" The 1952 Hardship Standard

One response to the Board's liberal reading of the serious economic detriment standard came in 1952 when Congress passed the restrictive McCarran-Walter Act.³⁴ The McCarran-Walter Act was particularly restrictive because it maintained a national origin immigrant quota system, which allotted a predetermined number of visas based on an immigrant's country of origin.³⁵ The Act had a polarizing effect on the House, drawing both support and opposition.³⁶ The Act's opponents favored liberal immigration laws, which would not discriminate against immigrants based on their national origin, believing a national origins quota system would lead to an anti-American sentiment in foreign countries.³⁷ On the other hand, supporters of the McCarran-Walter Act advocated for strict and selective immigration policies because they feared that "unassimilated" immigrants could "threaten the foundations of American life."³⁸ Although President Truman viewed the McCarran-Walter Act as dis-

²⁹ Johnathon Foerstel, *Suspension of Deportation-Toward a New Hardship Standard*, 18 SAN DIEGO L. REV. 663, 665 (1980).

³⁰ See, e.g., S. REP. NO. 82-1137, at 25 (1952); S. REP. NO. 81-1515, at 600-01 (1950).

³¹ Foerstel, *supra* note 30, at 665.

³² *Id.*

³³ Curtis Pierce, *The Benefits of Hardship: Historical Analysis and Current Standard for Avoiding Removal*, 76 INTERPRETER RELEASES 405, 406 (1999).

³⁴ Immigration and Nationality Act, ch. 477 66 Stat. 163 (1952) (codified in 8 U.S.C. §§ 1-1557 (1976)).

³⁵ 244(a)(2) of Act of June 27, 1952, 66 Stat. 163, amending 39 Stat. 889.

³⁶ See generally *Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, U.S. STATE DEP'T OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/immigration-act> (Last visited Apr. 14, 2016).

³⁷ *Id.*

³⁸ *Id.*

criminy and vetoed it, the Act garnered enough bipartisan support allowing both houses of Congress to override his veto.³⁹

The suspension of deportation provision under Section 244(a)(1) of the McCarran-Walter Act required deportable people to establish that their deportation would result in “exceptional and extremely unusual hardship to the alien or his spouse, parent or child who is a citizen or alien lawfully admitted for permanent residence.”⁴⁰ In addition to a heightened hardship standard, Congress required the deportable person to show “good moral character” and seven years of continuous residence in the U.S.⁴¹ By enacting the new hardship provision, Congress sent a clear message that it intended to limit the suspension remedy to a smaller class of immigrants.⁴² At the same time, Congress sought to ensure protection of deportable people who could establish meritorious claims of what Congress viewed as hardship deserving of relief.⁴³

In an attempt to define the standard, Congress established that the suspension remedy “should be available only in the very limited category of cases in which the deportation of [an] alien would be unconscionable.”⁴⁴ Congress’s allusion to unconscionable hardship further illustrated its intent to craft a stricter law.⁴⁵ Another goal of the 1952 standard was to lessen the number of immigrants entering the U.S. without authorization and gaining permanent residence by simply showing economic losses if they were deported.⁴⁶ A 1952 Senate report maintained that unfairness could result from the Board’s liberal interpretation of the 1940 standard especially because legal immigrants were waiting in cue for a limited number of visas.⁴⁷ These allotted immigrant visas were instead assigned to deportable people who entered without documentation or overstayed their nonimmigrant visas.⁴⁸ According to Congress, the serious economic detriment standard incentivized opportunistic immigrants to create

³⁹ Foerstel, *supra*, at 668.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Elwin Griffith, *Admission and Cancellation of Removal Under the Immigration and Nationality*, 2005 MICH. ST. L. REV. 979, 1018 (2005).

⁴³ *Id.*

⁴⁴ *Id.* at 1019.

⁴⁵ Pierce, *supra*, at 406.

⁴⁶ See H.R. REP. NO. 1365; S. REP. NO. 1137 (1952).

⁴⁷ S. REP. NO. 1137, at 24 (1952).

⁴⁸ See 8 C.F.R. § 214.1 (2009) (Nonimmigrants are foreign nationals who do not intend to permanently reside in the U.S.).

hardship situations to gain permanent residence and thus “[made] a mockery of [the] immigration system.”⁴⁹ After the 1952 legislation went into effect, however, it was widely criticized by the executive and its congressional opponents because of its stringent requirements.⁵⁰

At the same time, the Board parsed out the exceptional and extremely unusual hardship provision to guide its interpretation on the ground level. The Board developed a test to help define the provision in *Matter of S*⁵¹, an early suspension of deportation case.⁵² To determine hardship, the test assessed the immigrant’s length of residence in the U.S., familial ties, health and age.⁵³ However, despite the fact that Congress intended the 1952 hardship standard to subject claims to stringent inquiry, this did not occur. This was particularly evident in early decisions where the Board applied the hardship provision.⁵⁴ In some instances, deportable people would gain relief “in the absence of dependents,” or based on economic loss caused by a reduction of earning potential.⁵⁵ Given its legislative history, it was evident that Congress did not intend for the Board to interpret the standard in such a liberal manner. For these reasons, Congress amended the 1952 exceptional and extremely unusual hardship standard ten years after it was enacted.⁵⁶

C. “Extreme Hardship”: The 1962 Hardship Standard

In a 1962 amendment, Congress changed the wording of the standard from “exceptional and extremely unusual hardship” to “extreme hardship.”⁵⁷ Given the Board’s liberal application of the exceptional and extremely unusual standard—even though legislative intent advocated for strict application—Congress deemed the 1952 standard as ineffective to advance the goals of suspension of deportation.⁵⁸ Therefore, Congress

⁴⁹ See S. REP. NO. 1137, *supra*.

⁵⁰ Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 343 (1956).

⁵¹ See *Matter of S*–, 5 I&N Dec. 695 (BIA 1954).

⁵² Kenneth W. Graham, Jr., *Immigration and Naturalization: Suspension of Deportation: A Look at a Benevolent Aspect of the McCarran-Walter Act*, 61 MICH. L. REV. 352 (1962)

⁵³ See *Matter of S*–, 5 I&N Dec. 695 (BIA 1954).

⁵⁴ Griffith, *supra*, at 96.

⁵⁵ *Id.*

⁵⁶ Underwood, *supra*, at 891.

⁵⁷ See Act of October 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247, 1247-48 (repealed 1996).

⁵⁸ See *Wang v. INS*, 622 F.2d 1341, 1345 (9th Cir. 1980), rev’d, 450 U.S. 139 (1981) (“... it is generally agreed that Congress intended to lessen the degree of hardship required for suspension of deportation.”).

concluded that a standard worded in a more lenient manner would allow for better outcomes.⁵⁹ In other words, “extreme hardship” communicated Congress’s intent to depart from the overly strict and ineffectual requirements of the 1952 standard.⁶⁰ Consequently, the Board interpreted the extreme hardship standard by requiring a lower threshold of evidence. And in spite of adopting several factors to interpret the standard, the Board still struggled to define it.⁶¹ Forty years after the 1962 amendments to INA Section 244(a), the Board granted suspension of deportation in the seminal case *Matter of O-J-O*.⁶² *O-J-O* served as Congress’s most “extensive” evaluation of how immigration judges and the Board interpreted the extreme hardship standard.⁶³ Particularly, Congress directly responded to the *O-J-O* decision by meticulously evaluating the Board’s rationales and modes of interpretation. In addition to directly evaluating the adjudicators, *O-J-O* ultimately caused Congress to modify the hardship standard once more.⁶⁴

The Respondent in *O-J-O* was a twenty-four year old native of Nicaragua who unlawfully entered the U.S. as a teenager with his father.⁶⁵ In its opinion, the majority in *O-J-O* focused on certain aspects of the Respondent’s life, such as his involvement in his church and other civic community groups.⁶⁶ The Board also emphasized how well the Respondent had assimilated into U.S. culture.⁶⁷ In addition, the Board praised the Respondent’s ability to sustain employment throughout his adult years and his dedication to helping the young people in his community.⁶⁸ Therefore, in granting suspension of deportation, the Board framed the

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *Matter of Anderson*, 16 I&N Dec. 596, 597 (BIA 1978) (enumerating factors that will be assessed when the evaluating hardship in suspension of deportation proceedings including: “age of the subject; family ties in the United States and abroad; length of residence in the United States; condition of health; conditions in the country to which the alien is returnable—economic and political; financial status—business and occupation; the possibility of other means of adjustment of status; whether of special assistance to the United States or community; immigration history; position in the community.”).

⁶² *Matter of O-J-O*, 21 I&N Dec. 381 (BIA 1996).

⁶³ Underwood, *supra*, at 902.

⁶⁴ Underwood, *supra*, at 903.

⁶⁵ *O-J-O*, 21 I&N Dec. 381 at 381.

⁶⁶ *Id.* at 382.

⁶⁷ *Id.* at 384.

⁶⁸ *Id.*

Respondent as a model citizen. After *O-J-O-* was published, the Board's analysis in that case was met with strong criticism in Congress.⁶⁹

Congress viewed the Board's interpretation of extreme hardship in *O-J-O-* as "[weak]"⁷⁰ and relied on *O-J-O-*'s strongly-worded dissent and two concurrences to support this position.⁷¹ The last concurring opinion and the dissent advanced arguments addressing the majority's proposition that departure from community ties and assimilation into U.S. culture can cause hardship after deportation. The dissent, written by Board Member Lauri Filppu, argued that a deportable person's departure from "ordinary community ties...[and] assimilation into American culture" could not rise to an "extreme" level.⁷² According to the Filppu, "extreme" involved a showing of a "very pronounced" degree of hardship, which the Respondent failed to prove.⁷³ The last concurrence, written by Board Member Lory Rosenberg, on the other hand, directly opposed this proposition. Rosenberg maintained that deportation could result in extreme hardship if a deportable person was forced to sever the community and personal ties they had established since adolescence, as was the case in *O-J-O-*.⁷⁴

Confusion surrounding the meaning of the extreme hardship standard was evident among lawmakers and the Board's differing views did not go unnoticed. In 1996, one year after the Board published the *O-J-O-* decision, Congress responded to this confusion by once again changing the standard. Discussing the *O-J-O-* decision, Congress declared that a deportable person's mere assimilation into U.S. society did not constitute valid evidence of extreme hardship.⁷⁵ After the *O-J-O-* opinion was published, Congress decided that extreme hardship had run its course and no longer fit into America's emerging ideology about immigration law, which relied on stricter requirements for undocumented people seeking a path to citizenship.⁷⁶

⁶⁹ See generally H.R. CONF. REP. NO. 104-828 (1996).

⁷⁰ *Id.* at 213.

⁷¹ Underwood, *supra*, at 903.

⁷² *O-J-O-*, 21 I&N Dec. 381 at 411.

⁷³ *Id.* at 412.

⁷⁴ *Id.* at 403.

⁷⁵ H.R. CONF. REP. NO. 104-828, at 213 (1996).

⁷⁶ *Id.*

D. Return to “Exceptional and Extremely Unusual Hardship”: The 1996 IIRIRA Hardship Standard

Prior to April 1, 1997, undocumented immigrants who were placed in deportation or exclusion hearings and sought to remain in the U.S.⁷⁷ could apply for a form of relief called “suspension of deportation.”⁷⁸ This changed after April 1, 1997 when IIRIRA took effect. Under IIRIRA, Congress combined deportation and exclusion proceedings into a process labeled “removal proceedings.”⁷⁹ Congress also replaced the “suspension of deportation” terminology with “cancellation of removal.”⁸⁰ Although suspension of deportation and cancellation of removal are functionally similar, cancellation of removal has heightened eligibility requirements. Under cancellation of removal, Congress also reverted to the 1952 exceptional and extremely unusual hardship provision.

Along with its reversion to the 1952 hardship provision, Congress directed adjudicators not to measure the hardship of the removable person, but only that of qualifying family members.⁸¹ In addition, and unlike the 1952 standard, Congress declared that the current hardship standard would not be interpreted as “unconscionable” hardship.⁸² Rather, exceptional and extremely unusual hardship requires hardship “substantially beyond that which ordinarily would be expected from the alien’s deportation.”⁸³ Aside from these instructions, Congress went no further in defining the standard. Implicit in Congress’s silence is its grant of deference to immigration judges and the Board to interpret the standard. With little or no guidance from Congress,⁸⁴ the Board has interpreted the standard in a vacuum. What is more, Congress has barred U.S. federal appellate courts from reviewing the Board’s discretionary decisions.

Pursuant to 8 U.S.C. § 1252(a)(2)(B):

⁷⁷ See *Hernandez Nodarse v. U.S.*, 166 F.Supp.2d 538, 542-43 (2001) (“United States immigration laws create two types of proceedings in [where] aliens may be denied the hospitality of this country...“Deportation hearings are the usual means by which aliens who have effected actual entry into this country are removed; exclusion hearings, on the other hand, are the means of proceeding against aliens who are seeking initial admission into the United States.”)

⁷⁸ Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law and Crimes* §9:13 (2012).

⁷⁹ *Id.*

⁸⁰ H.R. REP. NO. 104-828, at 213 (1996).

⁸¹ INA § 240A(b)(D), 8 U.S.C. § 1229b(b)(D) (2012) (Qualifying family members are the U.S. citizen and/or permanent resident children, parents and spouses of removable people).

⁸² H.R. REP. NO. 104-828, at 213 (1996).

⁸³ *Id.*

⁸⁴ Underwood, *supra*, at 887.

... Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, *no court shall have jurisdiction to review—(i) any judgment regarding the granting of relief under section...1229b of this title*⁸⁵

Through a jurisdictional bar, Congress prevents U.S. federal appellate courts from reviewing the Board's discretionary decisions in cancellation of removal proceedings.⁸⁶ Before IIRIRA, a deportable person seeking judicial review of her Board decision could file a petition with a U.S. court of appeals within ninety days from the date of the decision.⁸⁷ Now, Congress has limited the scope of judicial review to "constitutional colorable claims and questions of law."⁸⁸ The federal appellate courts defined colorable constitutional questions as claims that present due process issues and a showing of prejudice.⁸⁹ As a result, the Board's interpretation of the exceptional and extremely unusual hardship will not be reviewed, overturned or otherwise assessed by any U.S. federal appellate court unless there was some sort of egregious constitutional violation. In essence, the Board has become the final arbiter of what constitutes hardship in cancellation of removal cases.

II. TOWARD COMPREHENSIVE INTERPRETATION OF HARDSHIP

Given the few precedential administrative cases published on the topic, immigration judges and legal practitioners do not find it easy to interpret the standard. To date, the Board has published only three cancellation of removal cases directly defining the meaning of the hardship standard—*Matter of Monreal*, *Matter of Andazola*, and *Matter of Recinas*.⁹⁰ The first was published four years after the current cancellation of removal statute was enacted.⁹¹ Due to the lack of precedent in this area

⁸⁵ INA § 242(a)(B), 8 U.S.C §1252(a)(B) (2012) (emphasis added).

⁸⁶ *Copsito v. Attorney Gen.*, 539 F.3d 166, 167 (3d Cir. 2008).

⁸⁷ Underwood, *supra* note 10, at 903 (citing footnote at 71).

⁸⁸ *Copsito*, 539 F.3d 166 at 170.

⁸⁹ See *Torres-Arguillar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2011); *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999).

⁹⁰ *Monreal*, 23 I&N Dec. 56 (BIA 2001); *Andazola*, 23 I&N Dec. 319 (BIA 2002); *Recinas*, 23 I&N Dec. 467 (BIA 2002).

⁹¹ Hassan M. Ahmad, *Exceptional and Extremely Unusual Hardship*, THE HMA LAW

of immigration law, interested parties in removal proceedings have little case law on which to rely. Although *Monreal* and *Andazola* established the kinds of circumstances that do not rise to exceptional and extremely unusual hardship, the two decisions beg the question as to whether any showing of hardship could ever pass muster.

The current interpretive framework is difficult to understand because if separation from children, loss of large financial assets, and an impending removal to a country that is experiencing social and economic strife does not meet the standard, then what does? Moreover, *Recinas*,⁹² the seminal case granting removal based on what the Board accepts as a proper showing of hardship, does not substantively answer this question.⁹³ Lastly, the legal and structural constraints surrounding interpretation of the standard are resulting in policy outcomes that are counter to some of Congress's presently stated interests in the area of immigration policy. More specifically, the current interpretation of the standard tends to create an incentive structure that discourages wealth, well-being and productivity.⁹⁴ The hardship inquiry is as much a policy inquiry about the country's stance on undocumented immigration as it is an interpretive one. And without a clear guide to making the hardship inquiry, it will be quite unfeasible to create incentives, which are congruent to America's current policy goals.

A. Analysis of the Interpretive Modes Used in Cancellation of Removal Case Law

In *Monreal* and *Andazola*, the Board denied cancellation of removal based on its finding that the Respondent was either healthy enough to earn income or had accumulated enough financial assets in the U.S. to support qualifying family members if removed.⁹⁵ In *Recinas*, the Board granted cancellation based on the absence of the Respondent's children's

FIRM PPLC. (Oct. 21, 2012), available at <http://www.hmalegal.com/2/post/2010/03/exceptional-and-extremely-unusual-hardship.html>.

⁹² *Recinas* was a cancellation of removal case decided in 2002. Unlike *Monreal* and *Andazola*, the Board granted cancellation of removal to *Recinas* noting that the evidence she presented "[was] higher than that established in either *Monreal* or *Andazola* and...sufficient to be considered exceptional and extremely unusual." *Recinas*, 23 I&N Dec. 467 at 472 (BIA 2002). Therefore, *Recinas* serves as the seminal case demonstrating what currently constitutes exceptional and extremely unusual hardship.

⁹³ See generally *Recinas*, 23 I&N Dec. 467 (BIA 2002).

⁹⁴ See Griffith, *supra*, at 1030.

⁹⁵ *Monreal*, 23 I&N Dec. 56 at 65; *Andazola*, 23 I&N Dec. 319 at 324.

father and Respondent's reliance on qualifying family members to care for her children.⁹⁶

In *Monreal* and *Andazola*, the Board disregarded factors that should have resulted in cancellation if it considered the policy rationales driving removal relief. These factors include the accumulation of substantial economic assets, impending familial separation, and substantial continuous residence, as well as detrimental social and economic conditions in the Respondents' home country.⁹⁷ Instead, the adjudicators in *Monreal* and *Andazola* used factors generally considered as positive life conditions against the Respondents as grounds for removal.⁹⁸ The key factors immigration adjudicators overlooked in both decisions are captured in four broad categories: familial separation, economic loss, adverse psychological and social outcomes, and length of residence considerations.⁹⁹

1. Familial Separation

Family unity is a well-established goal of U.S. immigration law.¹⁰⁰ Although the Board greatly considered the risk of familial separation in the 1950s and pre-IIRIRA suspension of deportation cases,¹⁰¹ the Board now interprets hardship by creating an artificial dividing line between the situational factors that may cause familial separation and those that may not. More specifically, the delineating variable or the deciding factor is not consistent across the three seminal cases. More than sixty years ago, the Board emphasized the idea of hardworking individuals who took care of qualifying family members, specifically children.¹⁰² During that era, hardship resulting from familial separation was interpreted liberally. That regime, unlike the current one which can disadvantage citizen and

⁹⁶ *Recinas*, 23 I&N Dec. 467 at 472-73.

⁹⁷ See *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 (BIA 2001); *Matter of Andazola-Rivas*, 23 I&N Dec. 319 (BIA 2002).

⁹⁸ *Andazola*, 23 I&N Dec. 319 at 324.

⁹⁹ See generally What constitutes "extreme hardship" or "exceptional and extremely unusual hardship," under sec. 244(a) of Immigration and Nationality Act (8 U.S.C.A. sec. 1254(a)), allowing Attorney General to suspend deportation of alien and allow admission for permanent residence, 72 A.L.R. FED. 133 (Originally published in 1985).

¹⁰⁰ See Monique Lee Hawthorne, *Family Unity in Immigration Law: Broadening the Scope of "Family,"* 11 LEWIS & CLARK L. REV. 809, 815(2007); see also *Kaliski v. Dist. Dir. of I.N.S.*, 620 F.2d 214, 217 (9th Cir. 1980).

¹⁰¹ See generally Patrick Glen, *The Removability of Non-Citizen Parent and the Best Interest of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings*, 30 BERKELEY J. INT'L L. 1 (2012).

¹⁰² See, e.g., *Matter of U-*, 5 I&N Dec. 413.

permanent resident children, was malleable and receptive to the plight children would endure if a primary caretaker were removed.¹⁰³ Under the current standard, the Board minimizes familial separation hardship as illustrated in *Monreal* and *Andazola*.

In *Monreal*, a thirty-four year old Mexican man who had lived in the U.S. for twenty-one years failed to establish hardship under the current standard.¹⁰⁴ After the Immigration Judge's denial, *Monreal* appealed his case to the Board.¹⁰⁵ By the time the Board heard his case, *Monreal's* wife had voluntarily departed¹⁰⁶ the country and had taken their infant child along with her.¹⁰⁷ *Monreal* remained in the U.S. to care for his twelve and eight-year old U.S. citizen children.¹⁰⁸ The core of *Monreal's* argument was that his children would suffer without him as he was the children's only means of financial and parental support.¹⁰⁹ He argued that if the children accompanied him to Mexico, they would be deprived of the educational opportunities they had access to in the U.S.¹¹⁰

Although the Board characterized *Monreal* as "gainfully employed,"¹¹¹ and recognized that he was his children's sole caretaker, the Board upheld the Immigration Judge's denial of cancellation. Further, the Board held that denial was warranted because *Monreal* was in good health and able to work to provide for his family in Mexico. In addition, his wife was in Mexico with his infant child; therefore, the family would be reunited if *Monreal* were removed.¹¹² The Board also recognized that *Monreal's* children would face fewer educational and career opportunities in Mexico, but they minimized that consideration by concluding that the children would not be deprived of *all* opportunities.¹¹³ The majority opinion conceded that "some" hardship would occur,¹¹⁴ but found

¹⁰³ Jennifer Lindsley, *All Relevant Factors: Gender in the Analysis of Exceptional and Extremely Unusual Hardship*, 19 WIS. WOMEN'S L.J. 337, 344 (2004).

¹⁰⁴ *Monreal*, 23 I. & N. Dec. at 57.

¹⁰⁵ *Id.*

¹⁰⁶ INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1) (2012)

¹⁰⁷ *Monreal*, 23 I. & N. Dec. at 57.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 65.

¹¹⁰ *Id.* at 57.

¹¹¹ *Id.*

¹¹² *Id.* at 65.

¹¹³ *Id.*

¹¹⁴ *Id.*

that it would not rise to the level of exceptional and extremely unusual hardship.¹¹⁵

In effect, the Board gave Monreal's children two equally difficult options: (1) remain in the U.S. with relatives absent either biological parent, or (2) follow their father to Mexico.¹¹⁶ If they were to choose the second option, the minor children would be "involuntary[ily]" displaced in a completely different social and economic environment.¹¹⁷ If the former occurred, family unification goals of U.S. immigration law would be defeated. The dissent highlighted the counterintuitive outcome that resulted from the majority's interpretation of the familial separation question. The dissent maintains that the majority was too eager to dismiss the fact that "[Monreal] ... established an entire immediate family ... and [had] close ties with his siblings and parents...in [the U.S.]."¹¹⁸ In contrast, the familial separation factors that the majority dismissed in *Monreal* were embraced in *Recinas*.¹¹⁹

In *Recinas*, the Board held that if the Respondent were removed with her six children, the Respondent and her children would be brutally separated from their extended family including Recinas' permanent resident parents and her six U.S. citizen siblings.¹²⁰ Although a similar scenario was at issue in *Monreal*, the Board dismissed separation factors to arrive at its conclusion in that case. In *Recinas*, the Board presented its hardship analysis with the assumption that the Respondent's children *would* accompany her to Mexico. With this assumption, the Board focused its attention on the Respondent's status as a single parent to enhance its argument that Recinas would endure a severe future in Mexico, especially if she was separated from her extended family. However, like *Recinas*, the respondent in *Monreal* had U.S. permanent resident or citizen family members in the country—factors that were not fully explored in that case.¹²¹ This dismissive mode of interpretation took the form of

¹¹⁵ Glen, *supra*, at 18.

¹¹⁶ Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 24 IMMIGR. & NAT'LITY L. REV. 351, 378 (2003).

¹¹⁷ *Monreal*, 23 I. & N. Dec. at 71.

¹¹⁸ *Id.* (Rosenberg, J., dissenting).

¹¹⁹ *Recinas*, 23 I. & N. Dec. at 469.

¹²⁰ *Id.*

¹²¹ *Monreal*, 23 I. & N. Dec. at 57 (Aside from his children, Monreal's parents and seven siblings resided lawfully in the U.S.); *Andazola*, 23 I. & N. Dec. at 320 (Andazola had no remaining family members in Mexico. All of her relatives including siblings resided in the U.S., albeit, without valid immigration status).

disregarding compelling factors without providing thorough reasoning. By failing to consider these factors, the Board sacrificed an opportunity to establish a clear criterion for judging what constitutes qualifying hardship based on familial separation. In fact, when a factor is considered, one can better interpret it by creating meaningful delineations.

2. *Economic Loss*

It is fair to conclude that one of the primary reasons people immigrate to the U.S. is to achieve economic stability.¹²² In practice, immigration law practitioners who represent clients in cancellation of removal cases use evidence of the removable person's financial accumulation to show hardship to qualifying family members if the person is removed.¹²³ However, this intuitive method of showing hardship was rejected in *Andazola*. Although the Immigration Judge initially granted Andazola cancellation of removal, the United States Citizenship and Immigration Services (USCIS)¹²⁴ disagreed with the Immigration Judge that Andazola's evidence met the hardship requirement.¹²⁵ Accordingly, USCIS filed an appeal with the Board.¹²⁶

Andazola was a thirty-year old native and citizen of Mexico¹²⁷ and the mother of two U.S. citizen children ages eleven and six.¹²⁸ Andazola owned a single-family home, two vehicles and \$19,000 in total assets.¹²⁹ Although the father of her children lived with Andazola, there was no indication that he provided for the family.¹³⁰ Still, the Board concluded that Andazola did not qualify for cancellation because she had family in the U.S. who could send money to her in Mexico; was healthy enough for work; and owned enough financial assets to make the necessary adjustments to live in Mexico.¹³¹ The counterintuitive reasoning in *Andozola*

¹²² S. REP. NO. 99-1070, at 3 (1986).

¹²³ B. JOHN OVINK, IMMIGRATION LAW: BASICS AND MORE 198 (2005).

¹²⁴ United States Citizenship and Immigration Services, formerly United States Immigration and Naturalization Service, is a U.S. Department of Homeland Security bureau tasked with effectuating administrative procedures for immigrants seeking immigration benefits, enforcing U.S. immigration law and maintaining national security. See 8 C.F.R. § 1.2 (2011).

¹²⁵ *Andazola*, 23 I. & N. Dec. at 320.

¹²⁶ *Id.* at 319.

¹²⁷ *Id.*

¹²⁸ Monique Lee Hawthorne, *Family Unity in Immigration Law: Broadening the Scope of "Family,"* 11 LEWIS & CLARK L. REV. 809, 830 (2007).

¹²⁹ *Andazola*, 23 I. & N. Dec. at 324.

¹³⁰ *Id.* at 320.

¹³¹ *Id.* at 323-24.

makes the decision susceptible to criticism. By denying the Respondent's cancellation of removal in *Andazola*, the Board implicitly held that the loss of a relatively successful life in the U.S. was unsatisfactory to establish hardship.¹³² The risk of loss of one's health, wealth and family ties should necessarily result in an alternate conclusion.

If we are to follow the *Andazola* precedent, evidence that a removable person faces substantial financial losses and a diminution of earning potential does not warrant relief. Further, *Andazola* Board decision viewed the Respondent's economic assets as a signal that the Respondent would fare well if deported because she would use those assets to support her family. The adjudicators, however, did not consider how Respondent's gender could affect her life in Mexico—a country generally less favorable to the career potential of women¹³³—may cause her to lose the earning power she enjoyed in the U.S.¹³⁴ As discussed, the current interpretive regime does not recognize extreme losses, but rather creates tenuous logical links to minimize the effects of those losses.

Although the Board in *Andazola* did not dispute the poor economic conditions that existed in Mexico, the Board held that economic detriment alone was insufficient to establish the requisite level of hardship.¹³⁵ One of the interpretive methods of immigration adjudicators, as shown in *Andazola*, is to discount a prior showing of hardship that should “latch on” to the other hardship factors. Instead of aggregating economic loss with related hardship factors, the Board judged it singularly in isolation from the rest. However, *Andazola* presented numerous factors to show hardship including familial separation and length of residency losses, as recounted in the Board opinion.¹³⁶ For example, it is reasonable to infer that any economic loss *Andazola* may experience would adversely affect her ability to care for her children in the same manner she did when in the U.S.¹³⁷ Instead, the adjudicators did not address the interconnectivity of the factors. Although the Board held that it would consider

¹³² Glen, *supra*, at 18-19.

¹³³ U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2013, MEXICO 34 (2013), available at <http://www.state.gov/documents/organization/220667.pdf>.

¹³⁴ *Andazola*, 23 I. & N. Dec. at 321-22.

¹³⁵ *Andazola*, 23 I. & N. Dec. at 323.

¹³⁶ *Id.*

¹³⁷ *Id.*

hardship in the aggregate in the seminal case of *Monreal*,¹³⁸ *Andazola* does not fulfill this promise.

3. Adverse Social and Psychological Outcomes

Social and psychological hardship experienced by qualifying family members manifests in three major ways as illustrated in *Monreal* and *Andazola*: (1) diminished educational opportunities for qualifying children who may accompany removable parents, (2) emotional distress caused by separation from loved ones or the sudden alteration of life circumstances, and (3) discrimination women and single female parents may endure in developing countries. In the published cancellation cases, the Board considers social and psychological hardship factors, however, it glosses over its realistic effects as shown in *Monreal* and *Andazola*.

In *Monreal*, the Respondent's oldest son expressed a strong desire for his father to remain in the country. The Board recounted the oldest son's testimony and acknowledged that Respondent's removal—if the children were to accompany the Respondent—would result in the child's separation from his grandparents and his friends.¹³⁹ *Monreal*'s oldest son also testified that he was doing well in school and explicitly communicated that living in the U.S. would be “better...than in Mexico.”¹⁴⁰ Although the Board illustrated how hardship could arise through the testimony of the Respondent's son, it condensed that evidence and concluded that it merely amounted to “some hardship.”¹⁴¹ The Board maintained, as a primary explanation of its decision, that deference to congressional intent dictated that cancellation of removal be reserved for “truly exceptional cases” of hardship.¹⁴² The Board also held that the evidence *Monreal* presented did not suffice to show the requisite hardship under the cancellation remedy.¹⁴³

On the contrary, the congressional intent argument proffered by the Board, does not provide any clear reason as to why the Board minimized or failed to thoroughly address the potential hardship *Monreal*'s children could face. For example, a thorough analysis would consider the long-term effects of mental distress or missed educational opportunities.

¹³⁸ *Monreal*, 23 I. & N. Dec. at 64.

¹³⁹ *Monreal*, 23 I. & N. Dec. at 64.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 65.

¹⁴² H.R. REP. NO. 104-828, at 213 (1996) (Conf. Rep.).

¹⁴³ *Monreal*, 23 I. & N. Dec. at 65.

Secondly, although the majority acknowledged a lack of evidence as *Monreal*'s legal defect, the Board failed to remand the case back to the Immigration Court for further proceedings as the Dissent argues.¹⁴⁴

In granting cancellation of removal in *Andazola*, the Immigration Court noted that *Andazola*'s daughter would suffer because she was not fluent in Spanish and may not succeed in an academic environment in Mexico. In addition, she would face "complete upheaval" if she departed to a new country. Further, the Board acknowledged that the older daughter might have to discontinue her education to work and support the family. *Andazola* also argued that because of her social status as a single mother, she might be subjected to discrimination making it difficult for her to thrive because women in Mexico were "paid less and [held] lower level jobs."¹⁴⁵ In response to *Andazola*'s discrimination argument, the Board relied on precedent from the extreme hardship era, which pronounced that economic detriment alone could not support even extreme hardship.¹⁴⁶ Yet again, *Andazola* presented several hardship factors. Importantly, her discrimination argument was not meant as standalone economic evidence of hardship as the Board concluded.

Instead of minimizing the possibility of mental and emotional distress, the Board should aggregate this loss along with economic and familial factors. This is a more comprehensive approach. When a factor like mental distress is isolated from other factors and evaluated singularly, there is greater ease in minimizing it because one factor alone is susceptible to a weakening effect. In addition, positive life conditions such as obtaining an education can be used against a removable person if an adjudicator frames it as a factor that will benefit the person in his or her life overseas. Another major factor adjudicators tend to misinterpret is the amount of time a removable person has resided in the U.S.¹⁴⁷

4. Length of Residence Considerations

Length of residence considerations like familial separation has long been recognized in the Board's review of suspension of deportation appeals.¹⁴⁸ However, barring the ten-year requirement removable people

¹⁴⁴ *Monreal*, 23 I. & N. Dec. at 65 (Rosenberg, J., dissenting).

¹⁴⁵ *Andazola*, 23 I. & N. Dec. at 322.

¹⁴⁶ *Id.* at 322; see generally *Pilch*, 21 I. & N. Dec. 627 (BIA 1996).

¹⁴⁷ *S-*, 5 I. & N. Dec. 409 (BIA 1953).

¹⁴⁸ *S-*, 5 I. & N. Dec. at 497; *Anderson*, 16 I. & N. Dec. at 597.

already have to meet under the cancellation of removal statute,¹⁴⁹ the Board gave little weight to the Respondents' length of residence in both *Monreal* and *Andazola*. In fact, both respondents had maintained continuous physical presence in the U.S. for over ten years.¹⁵⁰ Although the residence factor is a good way for the removal person to show intent to remain in the country, the Board has interpreted legislative material to mean that long-term residence should not be a major consideration warranting relief.¹⁵¹ Therefore, decades of residence in the U.S. is not dispositive evidence to show hardship. Even more, Congress increased the continuous residence requirement from seven years to ten years when it amended the cancellation of removal statute in 1996.¹⁵² Evidently, there exists a policy seeking to reward removable people who have maintained longer residence in the U.S.¹⁵³

The first concurrence in *Monreal* addressed a major conflict in Board's interpretation of the hardship standard. The concurrence points out that the standard is subjective in nature and highly dependent on an ad hoc analysis.¹⁵⁴ Nonetheless, ad hoc analysis is necessary especially because the cancellation remedy does not take the form of bright-line rule. Each case compels a fact-specific inquiry. However, the reward of permitting case-by-case adjudication of the hardship standard is lessened because the interpretation appears arbitrary. Still, interpretation of the exceptional and extremely unusual hardship standard is only one side of the issue. Another compelling concern is that the manner in which the

¹⁴⁹ See INA § 240A(b)(1)(a), 8 U.S.C. § 1229b(b)(1)(a) (2012).

¹⁵⁰ *Andazola*, 23 I. & N. Dec. at 320; *Monreal*, 23 I. & N. Dec. at 57.

¹⁵¹ *Monreal*, 23 I. & N. Dec. at 64.

¹⁵² INA § 240A(d), 8 U.S.C. § 1229b(d) (2012); see Paul B. Hunker III, *Cancellation of Removal or Cancellation of Relief - The 1996 IIRIRA Amendments: A Review and Critique of Section 240A(A) of the Immigration and Nationality Act*, 15 GEO. IMMIGR. L.J. 1 (2000) (discussing how applicants establish "continuous residence").

¹⁵³ See e.g., INA § 240A(a), U.S.C. § 1229b(a) (2008) (The Cancellation of Removal for Certain Permanent Residents statute requires continuous presence of seven years); JANET NAPOLITANO, DEP'T OF HOMELAND SEC., EXERCISING PROCEDURAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012) (The "Deferred Action for Childhood Arrivals" executive action relief, discussed in more detail below, requires the applicant to have maintained continuous presence in the U.S. from June 15, 2007, up to the present time); Pub L. No. 105-100, 111 Stat. 2160 (1997) (Section 203 of the Nicaraguan Adjustment and Central American Relief Act requires that the applicant establish that he has been physically present in the U.S. for a continuous period of seven years immediately preceding the date the application for relief).

¹⁵⁴ *Monreal*, 23 I. & N. Dec. 56, 66.

standard is interpreted today creates unintended policy incentives for undocumented people seeking relief.¹⁵⁵

III. UNINTENDED POLICY OUTCOMES UNDER THE CURRENT INTERPRETIVE REGIME

The indeterminate nature of the current hardship standard has created policy incentives that will continue to produce undesirable outcomes for undocumented immigrants. The phrase exceptional and extremely unusual hardship is indeterminate because the weight and relevance of the various factors remains under the purview of a substantially unreviewable administrative entity.¹⁵⁶ Undocumented immigrants who seek to access the cancellation remedy are subject to high uncertainty. To that end, the question of whether a removable person's circumstance meets the hardship standard is left up to "unguided and unrestrained" discretion thus producing dire results, as explained in the sections below.¹⁵⁷

A. "Deportation" of U.S. Citizen Children

In some instances, the existence of mixed status families—families comprised of individuals who do not share the same immigration status¹⁵⁸—can prove problematic in cancellation of removal decisions as illustrated in *Monreal* and *Anadazola*. In *Monreal* and *Anadazola*, both Respondents were the parents of U.S. citizen children.¹⁵⁹ Also, both *Monreal* and *Anadazola* had relatives who possessed legal immigration statuses. When parents in mixed-status families are removed, they usually leave behind U.S. citizen children with relatives. The alternative, which also occurs, is that the U.S. citizen children of the removed parents have no choice but to depart the country with their parents. This "de facto deportation" of U.S. born citizen children implicitly "contradicts the constitutional guarantee of birthright citizenship."¹⁶⁰ People who disagree with the constitutional argument counter that the children are not being forced out of the country, because they can choose to exercise their

¹⁵⁵ Underwood, *supra*, at 926.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1166 (2006).

¹⁵⁹ *Anadazola*, 23 I. & N. Dec. 319, 320; *Monreal*, 23 I. & N. Dec. 56, 57.

¹⁶⁰ Amanda Colvin, *Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Towards Proposing a Solution*, 53 ST. LOUIS U. L.J. 219, 221 (2008).

citizenship.¹⁶¹ However, this concept is trivializing because children of removable parents who remain in the U.S. are either left in the care of relatives or placed in foster care.¹⁶² Without any willing and financially stable relatives, parents prefer to keep their families together rather than leave children behind in the foster care system.¹⁶³

From July 1, 2013 to December 31, 2013, Immigration and Customs Enforcement (ICE) removed 33,000 parents who claimed to have at least one U.S. citizen child.¹⁶⁴ In fact, the “Deportation of Aliens Claiming U.S.-Born Children” Report was a data collection effort established by ICE in response to three congressional requests including House Report 111-157 and Senate Report 111-31.¹⁶⁵ House Report 111-157 directed ICE to begin tracking “the number of instances in which both parents of a particular child were removed; the length of time a parent lived in the United States before removal; and whether the U.S. citizen children remained in the U.S. after the parents’ removal.”¹⁶⁶ It is important to note that the House Report instructs ICE to track the length of time the removable parent lived in the U.S. before a removal order was enforced.¹⁶⁷ This demonstrates that Congress is aware that length of time and familial separation factors are critical, interwoven considerations. However, where length of residence and familial separation considerations are minimized, undocumented immigrants who have resided in the U.S. for

¹⁶¹ *Id.*

¹⁶² Satya Grace Kaskade, *Mothers Without Borders: Undocumented Immigrant Mothers Facing Deportation and the Best Interests of Their U.S. Citizen Children*, 15 WM. & MARY J. WOMEN & L. 447, 459 (2009).

¹⁶³ Gretchen Gavett, *Study: 5,100 Kids in Foster Care After Parents Deported*, PBS FRONTLINE (Nov. 3, 2011), available at <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/study-5100-kids-in-foster-care-after-parents-deported> (“When a parent is deported, opportunities to house their child with other family members or friends often prove elusive . . . children of detained and deported parents are likely to remain in foster care when they could be with their own family”).

¹⁶⁴ See U.S. Dep’t of Homeland Security, ICE, *Deportation of Aliens Claiming U.S.-Born Children: Second Half, Calendar Year 2013, Report to Congress* (Apr. 28, 2014) available at <http://big.assets.huffingtonpost.com/2013report2.pdf> (“ICE removed 33,000 aliens who claimed at least one U.S.-born child” referring to reporting period July 1, 2013 to December 31, 2013).

¹⁶⁵ U.S. Dep’t of Homeland Security, ICE, *Deportation of Parents of U.S.-Born Citizens: Fiscal Year 2011 Report to Congress, Second Semi-Annual Report* (Mar. 26, 2012) available at <http://www.lirs.org/wp-content/uploads/2012/07/ICE-DEPORT-OF-PARENTS-OF-US-CIT-FY-2011.pdf>.

¹⁶⁶ H.R. REP. NO. 111-157, at 54 (2009).

¹⁶⁷ *Id.*; see *supra* Section A1, A4.

longer periods of time and have minor U.S. citizen children may not reap the benefits of cancellation. Today's interpretive methods work against the familial unification goals of U.S. immigration law. When families are kept together, outcomes can include the departure of U.S. citizen children to developing countries.

B. Skewed Incentives in Interpreting Hardship

One major policy driving cancellation of removal is recognition that families often endure adversity when an undocumented relative is removed.¹⁶⁸ However, the manner in which the hardship standard is currently interpreted tends to reward undocumented people who have not necessarily fared-well in the U.S. and, perhaps, penalize their counterparts. In other words, undocumented people who are educated, gainfully employed, provide financial support to their families, own businesses and do not depend or depend very little on government aid¹⁶⁹ can be deterred by the hardship inquiry.¹⁷⁰ If we are to rely on the *Andazola* and *Monreal* decisions, an adjudicator will view an industrious lifestyle as evidence of the likelihood of stability if the person is removed.¹⁷¹ As a caveat, this not to say that adjudicators should begin distinguishing between respondents who are indigent and those who are not. Alternatively, the basic argument is that adjudicators should not turn away individuals who have fared-well—as the current reading of the hardship statute and case law appears to communicate. Instead, they should interpret their departure as a loss to American society because such individuals actually embody the policies driving immigration law today.

¹⁶⁸ H.R. CONF. REP. NO. 104-828, at 213 (1996).

¹⁶⁹ See generally Steven A. Camarota, *Welfare Use by Immigrant Households with Children*, CENTER FOR IMMIGRATION STUDIES (Apr. 2011), available at <http://www.cis.org/articles/2011/immigrant-welfare-use-4-11.pdf>. (“In 2009 (based on data collected in 2010), 57 percent of households headed by an immigrant (legal and illegal) with children (under 18) used at least one welfare program, compared to 39 percent for native households with children ... A large share of the welfare used by immigrant households with children is received on behalf of their U.S.-born children, who are American citizens. But even households with children comprised entirely of immigrants (no U.S.-born children) still had a welfare use rate of 56 percent in 2009”).

¹⁷⁰ Realistically, some removable parents who have U.S. citizen children do rely on government aid programs to support their children because they lack the immigration status required to accept employment or they do not have enough income. For example, undocumented parents can apply for governmental aid on behalf of their minor children even though they do not themselves qualify for such aid—as explained above. Therefore, access to social services should not be interpreted as a negative factor in the cancellation of removal analysis.

¹⁷¹ Griffith, *supra*, at 1030.

IV. CURRENT THEMES IN IMMIGRATION POLICY

It has been twenty years since the passage of the exceptional and extremely unusual hardship standard in the IIRIRA immigration bill. Since that time, much has evolved in terms of the values surrounding U.S. immigration law. As is the norm, the policies bringing immigration laws into existence are usually congruent with current events and the political, economic, social, and prudential concerns present in American society at the time. For that reason, reformation of the hardship standard should consider these normative factors favoring undocumented people who are similar to those denied cancellation in *Andazola* and *Monreal*. In the wake of the post-economic downturn of 2008 and a growing awareness of the contributions of the undocumented population, the “merit” and pro-labor policies driving U.S. immigration reform have been made clear, as depicted in the following examples.¹⁷²

A. Senate Bill 744

On June 27, 2013, the Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744), a comprehensive immigration reform bill.¹⁷³ The three major areas addressed in S. 744 are interior enforcement, border security and a detailed legalization program for the eleven-plus million undocumented people living in the U.S. today.¹⁷⁴ The “legalization program”¹⁷⁵ would grant undocumented people who meet certain eligibility requirements a pathway to citizenship after an initial six-year provisional status period.¹⁷⁶ Certain features of S. 744, specifically the ones outlined in the Registered Provisional Immigrant (RPI) program, are noteworthy in that it communicates the policy values the U.S. legislature intends to enforce before undocumented individuals are recognized as legal residents.

¹⁷² Elizabeth Keys, *Race and Immigration, Then and Now: How the Shift to “Worthiness” Undermines the 1965 Immigration Law’s Civil Rights Goals*, 57 *How L.J.* 899, 920 (2014) (“The interesting change comes from the emphasis, both rhetorical and legal, on the utility of future immigrants. Economic concerns have always been part of immigration history, but perhaps never more clearly, prominently and at the rhetorical forefront as with the current reforms...”).

¹⁷³ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

¹⁷⁴ See ANDORRA BRUNO ET AL., CONG. RES. SERV., IMMIGRATION LEGISLATION AND ISSUES IN THE 113TH CONGRESS (2013).

¹⁷⁵ *Id.* at 29.

¹⁷⁶ PETER SCHEY, CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW, ANALYSIS OF SENATE BILL 744’S PATHWAY TO LEGALIZATION AND CITIZENSHIP (2013).

First, according to Section 2101(a) of the bill, the RPI¹⁷⁷ is to show regular employment during the initial six-year provisional status period.¹⁷⁸ The bill also disqualifies RPIs from renewing their provisional status if they have been unemployed for sixty or more days prior to renewal.¹⁷⁹ Nevertheless, lawmakers have embedded a few exceptions to that rule for those who qualify.¹⁸⁰ Secondly, the program requires RPIs to pay back taxes from the years the undocumented immigrants were employed, but did not file tax returns.¹⁸¹ Along with the implementation of the RPI program, S. 744 seeks to increase the H-1B Professional Specialty Worker visa category from 65,000 admissions per cycle to about 115,000 to 180,000 depending on demand.¹⁸² Lastly, recognizing the demanding monetary requirements of the RPI program, S. 744 provides that Department of Homeland Security (DHS) “may” implement a grant system administered by nonprofit organizations.¹⁸³ The grant system will provide monetary assistance to qualifying applicants of the RPI program and other such programs under the INA.¹⁸⁴

One profound theme consistent in S. 744’s RPI program and other reform proposals is the importance of the beneficiaries’ labor contributions to the U.S. economy.¹⁸⁵ After the recession of 2008, the country has turned its focus to rewarding individuals who will bring in substantial economic stimulus for coming decades.¹⁸⁶ The legislation seeks to en-

¹⁷⁷ RPIs may include persons who have entered without inspection, have overstayed their visa, or are otherwise removable.

¹⁷⁸ *Id.* at 4.

¹⁷⁹ *Id.* at 5.

¹⁸⁰ One such exception permits an RPI brief periods of unemployment lasting “not more than 60 days.” Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 245(a)(b)(3) (2013).

¹⁸¹ *Id.* at 7-8. It is important to note, however, that a large majority of undocumented immigrants currently pay taxes. The Institution on Taxation & Economic Policy (ITEP) found that, as of 2013, undocumented immigrants collectively pay an estimated \$11.64 billion a year in state and local taxes. ITEP also found that under full implementation of comprehensive immigration reform, state and local tax revenue would increase by an estimated \$2.1 billion. See *Undocumented Immigrants’ State & Local Tax Contributions*, THE INSTITUTE ON TAXATION & ECONOMIC POLICY (Feb. 2016), available at <http://www.itep.org/pdf/immigration2016.pdf>.

¹⁸² Bruno, *supra*, at 17.

¹⁸³ Schey, *supra*, at 13.

¹⁸⁴ *Id.*

¹⁸⁵ Giovanni Peri, *Letter from America: The Economic Consequences of the Proposed Immigration Reform*, 48 INTERECONOMICS REV. OF EUR. ECON. POL. 191, 192 (2013).

¹⁸⁶ *Id.* at 191.

courage economic contribution, independence, and productivity.¹⁸⁷ At the same time, the grant program seeks to enable undocumented people who may live on the margins to take advantage of the RPI program. This structure represents the constant “push and pull” present in U.S. immigration law, which seeks to incentivize merit, but at the same time, offer compassionate relief.

A thorough hardship analysis should consider these nuances that would alleviate the harsh outcomes undocumented people and their families endure. This type of analysis should award compassionate relief; however, it should not alienate undocumented immigrants who embody the values emphasized in current immigration reform discourse. Nonetheless, the exceptional and extremely unusual hardship inquiry does not frequently address these concerns because the inquiry is conducted facially. With the changing demographics of the U.S. population and a preference toward economic-centric immigration reform, policies promoting labor and merit are rational. Along with the 2013 Senate reform bill,¹⁸⁸ the implementation of the Deferred Action for Childhood Arrivals program is another example of how emerging immigration ideologies are being put into practice.

B. Deferred Action for Childhood Arrivals

On June 15, 2012, DHS, under the direction of the Obama Administration, announced the requirements of the Deferred Action for Childhood Arrivals (DACA) remedy.¹⁸⁹ DACA is a “special form” of prosecutorial discretion combined with a benefit. DACA temporarily defers immigration adjudication¹⁹⁰ for certain individuals who entered the U.S. as children—with or without inspection—and do not currently possess any legal immigration status. Notable among the seven requirements, are the provisions that a noncitizen can obtain DACA relief if he or she (1) came to the U.S. before reaching the age of sixteen, (2) is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a general education development (GED)

¹⁸⁷ *Id.*

¹⁸⁸ On June 27, 2013, the Senate passed S. 744 by a vote of 68-32. However, the House has not acted on this bill.

¹⁸⁹ JANET NAPOLITANO, DEP’T OF HOMELAND SEC., EXERCISING PROCEDURAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012).

¹⁹⁰ Immigration adjudication in this instance includes placing the undocumented immigrant in removal proceedings.

certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States.¹⁹¹

If an applicant successfully meets the DACA requirements, USCIS will grant deferred action for two years.¹⁹² In addition, if the applicant successfully shows economic necessity, USCIS will grant the applicant a work permit. The author of the June 15, 2012 DACA memorandum, former DHS Secretary Janet Napolitano, maintains that current U.S. immigration laws are to be “enforced in a strong and sensible manner.”¹⁹³ She also announces that U.S. immigration laws are not designed to remove productive young people to countries where they have never lived, or do not speak its native language.¹⁹⁴ Napolitano notes that U.S. immigration law should protect young people who have “contributed to [the U.S.] in significant ways.”¹⁹⁵ Further, DACA rewards individuals based on factors similar to those the Board rejects under the hardship inquiry in cancellation of removal proceedings. The most notable factors, which were considered in *Monreal*, were that the Respondent had resided in the U.S. since he was a child and had contributed significantly to his community. In the context of policy congruence, denying cancellation of removal to such individuals does not comport with the idea of prudent immigration enforcement, as addressed by Napolitano.¹⁹⁶ For that reason, any future congressional or interpretive reform to the current hardship standard should adopt the same political ideology, which brought DACA into existence. For instance, congressional or interpretive reform should permit adjudicators to consider a removable person’s community ties and how entrenched the person has become within U.S. society.¹⁹⁷

V. MEASURING HARDSHIP FROM A LOSS PERSPECTIVE

Respondents and their family members are better served if the adjudicators view hardship from a loss perspective. The loss perspective proposes to employ the same hardship factors promulgated in *Anderson*

¹⁹¹ Anna Marie Gallagher, *Prosecutorial Discretion in the Immigration Context*, 12-11 IMMIGR. BRIEFINGS 1 (2012) (emphasis added).

¹⁹² The DACA recipient is permitted to renew the status at the conclusion of the two-year period.

¹⁹³ Napolitano, *supra*, at 2.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Gallagher, *supra*, at 1.

¹⁹⁷ *Id.*

and used in *Monreal*.¹⁹⁸ However, instead of considering the factors based on the three published cancellation cases, the adjudicators should instead “tally” up the losses a removable person *and* qualifying family members will experience.¹⁹⁹ This analysis will take the form of a step-by-step assessment; therefore, fulfilling one step moves the inquiry forward.

First, when a removable person, during a cancellation of removal hearing, presents evidence of financial, familial, health, social and length of residency losses, the adjudicator—whether the Board or an immigration judge—can decide whether the evidence meets the lower threshold standard of “extreme hardship.” Next, if the evidence meets the lower threshold of extreme hardship, then the adjudicator will move on to the “exceptional and extremely unusual hardship” inquiry. At this point, the Board or the immigration judge should evaluate hardship in terms of degree or magnitude of loss.²⁰⁰ How many U.S. citizen and permanent resident children will either have to accompany the removable person or be left behind in the U.S.? How many financial assets does the removable person own? How many years has the removable person resided in the U.S.? Finally, what has the removable person invested in while residing in the U.S. (i.e., business ownership, college or high school degrees)? Again, the more the removable person stands to lose after the loss inquiry, the greater the likelihood hardship will elevate from extreme to exceptional and extremely unusual hardship. The loss perspective inquiry is workable for multiple reasons.

As discussed above, one provisional change that emphasizes fairness and ease of interpretation is a return to the extreme hardship provision where hardship was measured to the removable person *and* qualifying family members. Today’s standard only considers hardship qualifying

¹⁹⁸ *Monreal*, 23 I. & N. Dec. 56, 63 (“In *Matter of Anderson* ... we stated that such factors as the age of a respondent, both at the time of entry and at the time of the application for relief, family ties in the United States and abroad, length of residence in this country, the health of the respondent and qualifying family members, the political and economic conditions in the country of return, the possibility of other means of adjusting status in the United States, the alien’s involvement and position in his or her community here, and his or her immigration history are all proper factors to be considered”).

¹⁹⁹ Unlike the current cancellation of removal statute which looks only at the hardship qualifying family members may endure, the loss perspective proposes to consider hardship to the removable person also.

²⁰⁰ See *In Re O-J-O-*, 21 I. & N. Dec. 381, 400 (BIA 1996) (Board Member Rosenberg alluding to the “degree” and “level” of hardship the Respondent would experience if deported).

members will experience.²⁰¹ This mode of interpretation is inherently flawed. Any hardship qualifying family members experience has a reciprocal effect on the removable person and vice versa. For example, the hardship a mother experiences after she is removed to Mexico directly affects U.S. citizen children who are left in the care of relatives, especially if the mother is unable to provide support. Similarly, reverting back to the extreme hardship regime for the first inquiry is practical because there exists a larger body of precedential case law defining the extreme hardship standard.²⁰² Moreover, this initial analysis will immediately deny unmeritorious cases and move cases with merit to the second stage. The two-stage process will also allow meritorious cases “two turns” at establishing hardship, thus acknowledging the harsh consequences that may result from removal. Furthermore, analyzing the degree and magnitude of loss reduces esoteric questions of what hardship should entail. This will produce a manageable interpretative framework. The new framework would also alleviate the inconsistency of the current regime, because the new framework encourages actual recognition of loss rather than a reliance on conjecture.

Therefore, the more qualifying family members and the removable person stand to lose—considering economic, length of residence,²⁰³ social, economic and familial losses—the more likely hardship will resemble the sort that is “substantially beyond that which ordinarily would be expected from the alien’s deportation.”²⁰⁴ Pursuant to the cancellation provision, Congress permits only 4,000 cancellations per year.²⁰⁵ Accordingly, removable people who meet the requirements of cancellation, but do not qualify based on the cap can gain a certain type of temporary protected status²⁰⁶ until the subsequent year when the quota is uncapped. This system will, nevertheless, add more immigrants to American society.

²⁰¹ INA § 240A(b)(D), 8 U.S.C. §1229b(b)(D) (2012).

²⁰² See, e.g., Matter of Saekow, 17 I. & N. Dec. 138 (BIA 1979); Matter of Chumpitazi, 16 I. & N. Dec. 629 (BIA 1978); Matter of Liao, 11 I. & N. Dec. 113 (BIA 1965); Matter of Piggott, 15 I. & N. Dec. 129 (BIA 1974); Matter of Gee, 11 I. & N. Dec. 639 (BIA 1966).

²⁰³ Maintaining ten years of continuous residence should only begin the length of residence inquiry. Ten years of continuous residence should serve as the rule that dictates who is eligible to apply for cancellation of removal. Further evaluation should consider lengthier residence in the U.S.

²⁰⁴ H.R. CONF. REP. No. 104-828, at 213 (1996).

²⁰⁵ See INA § 240A(e)(1), U.S.C. §1229b(e)(1) (2012).

²⁰⁶ INA § 244, 8 U.S.C. § 1254a (2012).

At the same time, these immigrants have shown the most attachment to the U.S. and exemplify current policy values.

Given the divisive sentiment surrounding immigration reform, crafting a solution based on a statutory overhaul appears ambitious in today's political current.²⁰⁷ Nevertheless, undocumented people who have lived in the U.S. for ten years or more, are of good moral character and meet the remaining cancellation requirements, deserve thorough consideration of the harms they and their family may encounter if they are removed.²⁰⁸ This is what current policy considerations dictate.

CONCLUSION

The hardship standard created under INA Section 240A(b) is strict. Since it was enacted in 1996, fewer undocumented people have qualified for cancellation of removal. This was Congress's intent. In the same vein, the convoluted nature of the hardship standard has made it difficult for adjudicators to interpret. Consequently, cancellation of removal has become less of a remedy and does not incentivize the values driving U.S. immigration law today. Adjudicators should develop interpretive methods, like the loss perspective, to guide its inquiry. Such an interpretive method should focus on magnitude and degree of loss, permitting more uniform application across cases. More importantly, it will create desirable outcomes for countless people.

²⁰⁷ Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1375-76 (2007).

²⁰⁸ INA § 240A, 8 U.S.C. §1229b (2012).

