JUDICIAL REVIEW OF J-1 WAIVER DENIALS BASED ON NEGATIVE STATE DEPARTMENT RECOMMENDATIONS

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The essence of intercultural education is the acquisition of empathy--the ability to see the world as others see it . . . .

Sen. J. William Fulbright, the founder of the J-1 exchange program.[1]

The congressional intent to administer the Exchange Visitor Program strictly, especially as applied to medical doctors, is clear. . . . Hence, I do not believe the plaintiff can prevail--even under the Chong *analysis. The preservation of that analysis does seem important, to me, however, in an area where wholly capricious administrative action might otherwise govern the fate of large numbers of young specialists and doctors.*[2]

Introduction

For decades it has been regarded as established law that J-1 waiver denials based on "Not Favorable" recommendations of the State Department's Waiver Review Division (WRD), or its predecessor the U.S. Information Agency (USIA), are not reviewable in federal court. We disagree. This article reviews the law in this area and sets forth ways to challenge the WRD in court.

As background, some J-1 exchange visitors (that is, aliens admitted as nonimmigrants under section 101(a)(15)(J) of the Immigration and Nationality Act (INA)[3]), are subject to the two-year foreign residence requirement of INA §212(e).[4] A person facing that requirement is subject to certain disabilities until he fulfills or obtains a waiver of the requirement (a "J-1 waiver"). In particular, he may not apply for an H or L visa stamp, nor for permanent resident status or an immigrant visa,[5] and, with certain exceptions, may not change status inside the United States to another nonimmigrant status.[6]

INA §212(e) sets forth three ways to become subject to the foreign residence requirement (U.S. or foreign government funding of the exchange; training in an area on the Skills List for the home country; and graduate medical education). That section also sets forth four ways to seek a waiver (exceptional hardship; persecution; no objection statement; and interested government agency recommendation, of which there are many subcategories). Each kind of J-1 waiver has its own unique procedures. This article focuses on Form I-612 J-1 exceptional-hardship applications,[7] but most of its points are relevant to the other J-1 waiver categories as well.

An I-612 exceptional hardship waiver application is adjudicated in three steps.[8] In the first step, USCIS determines whether the applicant's departure would impose exceptional hardship on the applicant's qualifying relatives.[9] In the second step, if USCIS determines that the qualifying relatives will face exceptional hardship, it requests the recommendation

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[1] http://fulbright.state.gov/history/sen-fulbright/quotations.

[2] Singh v. Moyer, 867 F.2d 1035, 1040 (7th Cir. 1989) (Cudahy, J., dissenting in part).

[3] 8 U.S.C. §1101(a)(15)(J).

[4] 8 U.S.C. §1182(e). Note that the INA has not been amended to correct several errors in the text of this section. For example, the section refers to the Director of the USIA, but that agency was abolished in 1999. Its J-1 waiver functions were transferred to the WRD, an office set up for that purpose with the State Department's Bureau of Consular Affairs. The section also refers to the Commissioner of Immigration and Naturalization, although that position was replaced by the Director of the U.S. Citizenship and Immigration Services (USCIS) (among others) when the Department of Homeland Security was created in 2002.

[5] *Id.*

[6] INA §§214(l) and 248, 8 U.S.C. §§1184(l) and 1258.

[7] The authors concentrate on Form I-612 exceptional hardship and persecution applications, but they handle other kinds of J-1 waiver applications as well. Mr. Hake has written extensively on J-1 hardship applications. *See especially Hardship Waivers For J-1 Physicians*, 94-2 Imm. Briefings (Feb. 1994) (this seventy-one-page article contains extensive practical guidelines, notes and appendixes); *Hardship Standards*, 7 Bender's Imm. Bull. 59-80 (Jan. 15, 2002); *The Hake Hardship Scale: A Quantitative System for Assessment of Hardship in Immigration Cases Based on a Statistical Analysis of AAO Decisions*, with David L. Banks, Professor of Statistics, Duke University, 10 Bender's Imm. Bull. 403-20 (March 1, 2005) (this fourth and last version was published with a new addendum); and *Rainbow's Here: The Recent I-612 Crisis*, in AILA's Immigration Options for Physicians 33-43 (Margaret A. Catillaz, ed.) (AILA 3d ed. 2009).

[8] INA §212(e).

[9] *Id.*

of the WRD.[10] If the WRD makes a favorable recommendation, USCIS will grant the waiver if it finds such grant to be in the public interest.[11]

There are more than 7,000 J-1 exchange programs. Most of these are "private" programs operated by a private institution such as a university or a corporation. Some of these are "government" programs sponsored by an agency of the U.S. Government.[12]

Where an exchange visitor's J-1 exchange program was sponsored by the U.S. government, the WRD bifurcates its adjudication, seeking "sponsor's views" from the U.S. agency that sponsored the exchange. In the case of a person on a Fulbright exchange program, for example, that means that the WRD will seek sponsor's views from the Office of Academic Exchange Programs in the State Department's Bureau of Educational and Cultural Affairs (ECA). The views of U.S. program sponsors are usually negative. The WRD usually follows the recommendation of the program sponsor, although it is not legally bound to do so. Therefore, J-1 waiver cases involving U.S. government funding are especially difficult to win.[13] This has always been true, and we have observed that they have gotten significantly harder to win in the last four years.

Most J-1 waiver cases that are denied due to a negative WRD recommendation are cases that involve U.S. government funding. Therefore, judicial review of such decisions necessarily involves the U.S. sponsoring agency, in addition to the WRD and USCIS.

Adverse decisions by USCIS in the first step of the waiver process (that is, where USCIS denies the application without seeking a recommendation from WRD) are subject to administrative review by USCIS's Administrative Appeals Office (AAO).[14] They are also subject to judicial review.[15]

Pursuant to INA §212(e), USCIS may not grant a J-1 waiver if the WRD issues a "Not Favorable" recommendation. Both agencies must agree in order for the waiver to be granted. Where a USCIS J-1 waiver denial is founded on a negative recommendation from the WRD, there is no administrative review at either the WRD or USCIS.[16] Therefore, a J-1 waiver denial founded on a negative recommendation from the WRD is generally considered to be a final and unreviewable decision. In such situations, the WRD has stated to the authors that the only recourse is to re-file a de novo (or "renewed") application, which is sometimes successful.

There have been many efforts to subject this kind of decision to judicial review, challenging action of the WRD (or its predecessor the USIA) and/or USCIS (or its predecessor, the Immigration and Naturalization Service (INS)).[17] The basis for each lawsuit was the Administrative Procedure Act (APA), which provides that U.S. federal administrative agency action is generally reviewable for abuse of discretion.[18] Nearly all attempts at litigation on the second step of the waiver process have been unsuccessful because the WRD has argued that its decisions are isolated from judicial review based on a narrow exception in the APA.[19] The exception is found at 5 U.S.C. §701(a)(2), which provides that judicial review of an agency's

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[10] *Id.* It does so by filling out the top of a special transmittal form, the I-613, putting that form on top of the application along with a memorandum concerning details of the application, and mailing this package to the WRD in Washington, D.C.

[11] *Id.* In practice, USCIS does not conduct a third adjudication on public interest factors but instead relies upon its own initial adjudication, in which public interest factors are equities.

[12] In general, private programs have a program number that starts with "P," while government programs have a program number that starts with "G," but there are historical exceptions in both directions. For a very dated list of such exceptions, *see* 1 Gregory Siskind, William Stock & Stephen Yale-Loehr, *J Visa Guidebook*, App. A5 (Lexis Nexis).

[13] Bruce A. Hake, *U.S. Government Funding in J-1 Waiver Cases--The Worst Form of the Disease*, *in* 2006-2007 Immigration & Nationality Law Handbook 681 (AILA 2006).

[14] Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, and Ronald Y. Wada, 1-3 Immigration Law and Procedure §3.02[6][a] (citing 8 C.F.R. §§100.2(c)(3) and 103.3(a)(1)(iv)). For good information on AAO jurisdictional issues, see American Immigration Lawyers Association (AILA), Practice Advisory, Administrative Appeals Office FAQs, March 10, 2009 (AILA InfoNet Doc. No. 09031862).

[15] *See, e.g.* Al-Khayyal v. INS, 818 F.2d 827 (11th Cir. 1987); Slyper v. Att'y Gen., 576 F. Supp. 559, *rev'd on other grounds*, 827 F.2d 821 (D.C. Cir. 1987); Chen v. Att'y Gen., 546 F. Supp. 1060 (D.D.C. 1982).

[16] No statute, regulation, or administrative policy permits administrative review of such a decision. Moreover, the WRD's standing policy is to refuse to consider motions for reopening or reconsideration. *See* WRD, "Frequently Asked Questions - Waiver of the Exchange Visitor Two-Year Home-Country Physical Presence Requirement," section on "Denied Waiver Applications," *available at* http://travel.state.gov/visa/temp/info/info_5504.html#denied.

[17] Gordon, *supra* note 14, at §22.07[8].

[18] 5 U.S.C. §706(2)(A).

[19] Gordon, *supra* note 14, at §22.07[8].

action is precluded when "the action is committed to agency discretion by law."[20]

This article reviews all circuit decisions in this area, then follows with an analysis of strategies that will provide a pathway to meaningful judicial review of adverse WRD decisions.

I. ANALYSIS OF CIRCUIT DECISIONS ON JUDICIAL REVIEW OF WRD DECISIONS

There is a split in the circuits on the APA jurisdictional issue presented in every case challenging an adverse WRD decision.[21] Five of six circuit courts have found that a district court lacks subject-matter jurisdiction to review an adverse WRD decision.[22] The general holding of these courts (Second, Sixth, Seventh, Ninth, and D.C. Circuits) was that review of an adverse WRD decision is precluded because there is no "meaningful standard" against which to judge the agency's exercise of discretion.[23] The lone outlier is the Third Circuit, which found that there was a meaningful standard to review an adverse WRD decision under an abuse of discretion standard.[24] These six decisions are analyzed below and summarized in a chart at the end of this article.

Abdelhamid v. Ilchert (9th Circuit)

Dr. Abdelhamid was a citizen of Egypt and medical doctor who entered the United States in J-1 status to pursue a master's degree in public health.[25] His program was financed by grants from the U.S. Agency for International Development (USAID) and the government of Egypt.[26] While in the United States, Dr. Abdelhamid married a United States citizen and applied for a waiver of his two-year foreign residence requirement based on exceptional hardship to his wife.[27] The INS determined that "exceptional hardship would be encountered by the subject's wife if he were forced to return to Egypt."[28] The INS submitted this finding of hardship to the USIA for its recommendation.[29] The USIA sent Dr. Abdelhamid's records to USAID, the sponsoring agency, requesting that it "send us your views regarding this case."[30] After soliciting information from the government of Egypt, USAID recommended that the waiver be denied.[31] The USIA recommended the denial of the waiver to the INS, who in turn denied the waiver application.[32] Dr. Abdelhamid sued both the INS and the USIA in district court.[33] The court granted the defendants' motion for summary judgment against Dr. Abdelhamid.[34] Dr. Abdelhamid appealed this decision to the Ninth Circuit.[35]

Dr. Abdelhamid alleged that the USIA's failure to make a favorable recommendation under INA §212(e), based upon the preliminary hardship determination, was arbitrary, capricious, and an abuse of discretion.[36] The court held that the district court lacked subject-matter jurisdiction to review the APA portion of the complaint against the USIA.[37] In so holding, the court reviewed §701 of the APA, noting the exception where "agency action is committed to agency discretion by law."[38] The court stated that the Supreme Court had emphasized that §701(a)(2) establishes "a very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[39] The court indicated that in determining whether agency action is required by law, it will review the statute granting the agency discretion in the context of a complaint.[40] The court then set forth the following rule to guide its review of Dr. Abdelhamid's complaint:

> Every statute . . . has limits which are capable of being exceeded. Thus, even under statutes granting an official the broadest discretion, there will be some (albeit fewer), cases capable of arising under the statute which will present issues to which the court will . . . "have law to apply." However, the test in

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[20] *Id.*

[21] Korvah v. Brown, 66 F.3d 809, 821 (6th Cir. 1995).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Abdelhamid v. Ilchert, 774 F.2d 1447, 1448 (9th Cir. 1985).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 1448-49.

[31] *Id.* at 1449.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* (citing 5 U.S.C. §701(a)(2); Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)).

[39] *Id.*

[40] *Id.*

> *Overton Park* of when a reviewing court lacks jurisdiction due to the provisions of §701(a)(2), is not whether a statute viewed in the abstract lacks law to be applied, but rather, whether "in a given case" there is no law to be applied. When a court is asked to review agency action in instances where considerable discretion is committed by statute to an official, the court lacks jurisdiction due to the provisions of §701(a)(2) only when the agency action of which plaintiff complains fails to raise a legal issue which can be reviewed by the court by reference to statutory standards and legislative intent.[41]

The court found that where an agency action in a given case is found to have been committed to agency discretion, federal courts have jurisdiction to review that action "when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions," but do not have jurisdiction to review such an action "when the alleged abuse of discretion consists only of the making of an informed judgment by the agency."[42]

The court further held that once the USIA Director received an INS waiver request based on a finding of hardship, INA §212(e) did not expressly limit his discretion in deciding whether or not to make a favorable recommendation.[43] The court noted that Dr. Abdelhamid failed to raise a legal issue with respect to the determination that could be reviewed by the court by reference to statutory standards or legislative intent.[44] The court ultimately held that the USIA's failure to make a favorable recommendation for a waiver was "agency action committed to agency discretion by law."[45]

Analysis:

The Ninth Circuit indicated that in assessing whether there was law to apply in an APA case, reference can be made to legislative intent.[46] The court did not analyze the legislative history in its decision. Therefore, if one can find a basis for review in the legislative history, one can argue that the legislative intent was not adhered to.

The Ninth Circuit indicated that it would find jurisdiction to review allegations "that an agency has abused its discretion by exceeding its legal authority or by failing to comply with its own regulations. . . ."[47] The court mentioned the regulations applicable to the USIA in discussing waiver procedure, but it did not analyze whether the USIA followed them. For this reason, a plaintiff can obtain jurisdiction if he can show that the USIA/WRD did not adhere to its regulations, similar to the review conducted in *Chong v. USIA*.[48]

The Ninth Circuit did not consider the case of *Heckler v. Chaney*, which was decided about the same time.[49] The Supreme Court held in *Heckler* that an agency's refusal to take enforcement action is presumptively unreviewable under §701(a)(2) where Congress has provided no guidelines for exercise of enforcement discretion.[50] When an agency does act, that action provides a focus for judicial review because the agency must have exercised its power in some manner.[51] Under *Heckler*, a plaintiff can argue that review of the USIA's (now WRD's) action may be had under the statute, its legislative history, and the related regulations.

The court indicated that federal courts have jurisdiction to review action "when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions. . . ."[52] Dr. Abdelhamid did not raise constitutional violations or other legal mandates (other than the APA claim) in his lawsuit. Therefore, the law in the Ninth Circuit is that a plaintiff can obtain review if he can allege constitutional violations and violations of other legal mandates or restrictions, such as a violation of treaty or other international law.

Dina v. Attorney General (2d Circuit)

Mr. Dina entered the United States as an exchange student in J-1 visa status.[53] He married a U.S. citizen, and the couple had one U.S.-citizen child.[54] Mr. Dina

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[41] *Id.* at 1449-50 (citing Strickland v. Morton, 519 F.2d 467, 470 (9th Cir. 1975)).

[42] *Id.* at 1450 (citing *Strickland*, 519 F.2d at 471).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 1449-50.

[47] *Id.* at 1450.

[48] Chong v. Director, USIA, 821 F.2d 171 (3d Cir. 1987).

[49] Heckler v. Chaney, 470 U.S. 821 (1985).

[50] *Id.* at 838.

[51] *Id.* at 832.

[52] *Abdelhamid*, 744 F.2d at 1450.

[53] Dina v. Att'y Gen. of United States, 793 F.2d 473, 474 (2d Cir. 1986).

[54] *Id.*

was subject to §212(e) based on U.S. government funding from USAID.[55]

In 1981, Mr. Dina applied for a waiver of the foreign residence requirement.[56] The INS found that Mr. Dina's departure would cause exceptional hardship to his spouse, but denied the waiver on the ground that the USIA did not make a favorable recommendation.[57]

Mr. Dina sued the United States and the USIA.[58] He claimed that the statute empowers the District Director (INS) to grant the waiver regardless of the USIA's unfavorable recommendation and that the USIA abused its discretion by relying solely on the recommendation of USAID that a waiver not be granted and by not articulating reasons for its denial.[59] Mr. Dina claimed that USAID had abused its discretion by failing to consider hardships, deferring solely to the Nigerian government's policy that all exchange students sponsored by the organization that sponsored his studies are required to return home.[60] The district court granted summary judgment for the government, and Mr. Dina appealed.[61]

The Second Circuit held that the USIA determination was isolated entirely from judicial review.[62] The court held that the USIA's statutory authorization contained in INA §212(e) was entirely bereft of any guiding principles by which the USIA's action could subsequently be judged.[63] The court looked at the regulations that govern the procedure for an INA §212(e) hardship waiver and determined that those regulations did not offer adequate guidance to make review for abuse of discretion possible where the USIA has considered the required factors.[64] But note well that the court went on to state that it would find jurisdiction over a claim that the USIA had committed fraud or based its decision on constitutionally impermissible factors.[65]

Second Circuit Judge Oakes wrote a concurring opinion based on the holding in *Heckler v. Chaney*.[66] Judge Oakes opined that *Heckler* holds only that an agency's refusal to take enforcement action is presumptively unreviewable under §701(a)(2) where Congress has provided no guidelines for the exercise of discretion.[67] Judge Oakes stated that the "general unsuitability for judicial review of agency decisions to refuse enforcement"[68] arises because failure to act is hard to review; by contrast, "when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner."[69] Judge Oakes reviewed the regulations that guide the procedure for the adjudication of an INA §212(e) waiver and determined that those regulations do provide adequate guidance to make possible review for abuse of discretion.[70] Judge Oakes noted that while he believed *Heckler* did not preclude judicial review of agency action in this case, he recognized that such review for abuse of discretion is limited where a statute and its accompanying regulations constrain agency action only minimally.[71]

Judge Oakes assessed Mr. Dina's claim that the USIA relied entirely on USAID's determination in making its recommendation.[72] The first denial by USIA indicated that it relied solely on USAID's recommendations, which rested on "the policy of Nigeria that all participants in programs sponsored by the Federal Ministry of Education must return to Nigeria upon program completion."[73] Judge Oakes indicated that this rationale may be susceptible to review because INA §212(e) provides for waivers based on hardship to the alien's spouse or children or where one's home country has no objection.[74] Judge Oakes indicated that this perceived abuse of discretion, by itself, could not be a basis of review because the USIA reviewed the waiver application and issued a second, independent rationale for its unfavorable recommendation.[75] The second denial read as follows:

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[55] *Id.* at 475.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 474.

[59] *Id.* at 475.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 476.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 476-77.

[66] *Id.* at 477.

[67] *Id.*

[68] *Id.* (quoting *Heckler*, 470 U.S. at 831).

[69] *Id.* (quoting *Heckler*, 470 U.S. at 832).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

> Aid [sic] has advised that the Government of Nigeria maintains its request that Mr. Dina return home. AID also continues to recommend against a waiver in order to preserve the integrity of the exchange program. After careful reconsideration of Mr. Dina's file, USIA finds that the hardship determined does not outweigh the policy, program, and foreign relations aspects of the case.[76]

Judge Oakes opined that the determination above shows that the hardships in *Dina* were reviewed, that USAID's recommendation with respect to the integrity of the exchange program was considered, and that the USIA took account of foreign policy concerns and found against the recommendation of the waiver.[77]

Analysis:

The court in *Dina* indicated that it would find jurisdiction over a claim that the USIA had committed fraud or based its decision on constitutionally impermissible factors.[78] Mr. Dina did not make constitutional arguments and did not allege fraud.

In his concurring opinion, Judge Oakes set forth an example of where a denial may be an abuse of discretion.[79] The first denial by USIA indicates that it did not consider program, policy, and foreign relations aspects of the case, and instead, simply deferred to the opinion of USAID.[80] This example shows that the USIA violated its own regulations in the first unfavorable recommendation. Therefore, under the concurring opinion, a plaintiff can argue that it is an abuse of discretion to deny a hardship waiver without considering the program, policy, and foreign relations aspects of the case.

Chong v. USIA (3d Circuit)

Dr. Chong entered the United States with his wife and daughter as exchange visitors in J-1 and J-2 status, respectively.[81] Dr. Chong came from Hong Kong to pursue graduate medical training as a resident.[82] During Dr. Chong's residency, the family had two U.S.-citizen children.[83]

Dr. Chong applied to the INS for a waiver of the foreign residence requirement based on exceptional hardship to his U.S.-citizen children.[84] He claimed that he would not be permitted to practice medicine in Hong Kong because he lacked requisite certification from the United Kingdom.[85] In support of this contention, Dr. Chong submitted a letter from the Medical Council of Hong Kong.[86] The INS sent a request for recommendation on the waiver to the USIA, which contained the following statement: "Subject produced a letter dated May 1982 from the Medical Council Secretary, Hong Kong, which does not conclusively prove that he cannot practice medicine in Hong Kong."[87] The USIA declined to make a favorable recommendation, stating: "it is not felt the hardship outweighs the intent of Public Law 94-484."[88] The USIA went on to state: "The letter that Dr. Chong provided does not conclusively prove that he will not be able to practice medicine."[89] The INS denied the waiver based on the USIA's unfavorable recommendation.[90]

Dr. Chong requested that the USIA reconsider its position, submitting another letter from the Medical Council of Hong Kong that stated that Dr. Chong would have to obtain full registration from the United Kingdom before he would be eligible to practice medicine in Hong Kong.[91] The USIA responded that it would not change its position.[92]

Dr. Chong filed a lawsuit against the USIA Director and the INS District Director.[93] The suit challenged the USIA's refusal to make a favorable recommendation.[94] The district court dismissed the application for lack of subject-matter jurisdiction, holding that the USIA's recommendation function was not judicially reviewable.[95]

Dr. Chong appealed to the Third Circuit, alleging that the USIA's decision not to recommend a waiver

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[76] *Id.*

[77] *Id.*

[78] *Id.* at 476-77.

[79] *Id.* at 477.

[80] *Id.*

[81] *Chong*, 821 F.2d at 173.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 174.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 175.

[95] *Id.*

was subject to judicial review because there was "law to apply" as set forth in the agency's own regulations.[96] Dr. Chong also argued that even if the court found that there was "no law to apply," the USIA decision was still subject to judicial review under the administrative-law principle that requires reasoned decisions that are consistent with congressional intent and that do not deviate from existing policy unless articulated reasons for the change are given.[97]

The Third Circuit stated that 5 U.S.C. §701(a)(2) precludes judicial review of any "agency action [that] is committed to agency discretion by law."[98] The court stated that 5 U.S.C. §706(2)(A) permits judicial review of agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[99] The court acknowledged that the Supreme Court construed §701(a)(2) and addressed its apparent conflict with §706(2)(A), stating:

> [E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute can be taken to have "committed" the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in §706 -- if no judicially manageable standards are available for judging how and when an agency should exercise its discretion then it is impossible to evaluate agency action for "abuse of discretion."[100]

The court reviewed *Citizens to Preserve Overton Park, Inc. v. Volpe*, which stated, "the legislative history of the Administrative Procedure Act indicates that 5 U.S.C. §701(a)(2) is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[101] The court indicated that in order to find that an agency action is not subject to judicial review, it must find that there are no judicially manageable standards against which a court may judge whether an agency abused its discretion.[102] In a footnote, the court stated that it agreed with Judge Oakes's concurrence in *Dina v. Attorney General*, that *Heckler* does not stand for the proposition that §701(a)(2) precludes judicial review in a large number of cases.[103] The court stated that it did not believe that *Heckler* changed the presumption of reviewability of agency action under the APA.[104] The court indicated that *Heckler* held that when Congress does not provide guidelines for the exercise of enforcement discretion, an agency's refusal to institute proceedings is presumptively unreviewable under §701(a)(2).[105]

The USIA maintained that there was "no law to apply" because INA §212(e) merely states "that . . . upon the favorable recommendation of the Director of the United States Information Agency," the Attorney General [now Director of USCIS] may grant a waiver of the two-year foreign residence requirement.[106] The court agreed that INA §212(e) provided no guidance to the USIA on how to make its recommendations and sets forth no standards against which a court may judge whether it abused its discretion.[107] The court found that the USIA adopted regulations that delineated the procedure it must use to review waiver requests.[108] The court found that 22 C.F.R. §514.31(b)(2) required the INS to submit its findings of hardship "together with the summary of the details of the expected hardship . . . to the Waiver Review Branch" of the USIA for the Director's recommendation.[109] The court found that 22 C.F.R. §514.32 provided that "upon receipt of a request for a recommendation of [a] waiver . . . the Director will review the policy, program, and foreign relations aspects of the case and will transmit the recommendation to the Attorney General for decision."[110]

The court disagreed with the Ninth Circuit, which held, "this regulation raises no legal issues for review."[111] The *Chong* court held that the USIA's

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[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* (quoting *Heckler*, 470 U.S. at 830).

[101] *Id.* (quoting *Overton Park*, 401 U.S. at 410).

[102] *Id.*

[103] *Id.* (citing *Dina*, 793 F.2d at 477).

[104] *Id.*

[105] *Id.* (citing *Heckler*, 470 U.S. at 838).

[106] *Id.*

[107] *Id.* at 176.

[108] *Id.*

[109] *Id.*

[110] *Id.* (22 C.F.R. §514.32 was redesignated and amended at 64 Fed. Reg. 54538, 54539, 54540 (Oct. 7, 1999); 67 Fed. Reg. 77159, 77160 (Dec. 17, 2002); 71 Fed. Reg. 34519, 34521 (June 15, 2006); 72 Fed. Reg. 10060, 10061 (Mar. 7, 2007). The present citation for this provision is 22 C.F.R. §41.63).

[111] *Id.* (citing *Abdelhamid*, 744 F.2d at 1450).

regulations provide sufficient guidance to allow for judicial review under an abuse of discretion standard.[112]

In a footnote, the court commented that its holding is consistent with prior Third Circuit precedent, in which it prescribed three criteria to be considered when determining reviewability of agency action.[113] To be held unreviewable, an agency action must (1) involve broad discretion, not just some discretion, (2) be "the product of political, military, economic, or managerial choices that are not really susceptible to judicial review," and (3) not be challenged with "charges that the agency lacked jurisdiction, that the agency's decision was occasioned by impermissible influences, such as fraud or bribery, or that the decision violates a constitutional, statutory, or regulatory command."[114] The court held that the challenge raised by Dr. Chong involved a charge that the USIA did not adhere to its own regulations.[115]

The court recognized that the scope of review of the USIA's recommendation function under INA §212(e) was severely limited because the statute and the USIA's regulations vested broad discretion in the Director of the USIA.[116] The court found that the USIA conceded that its role was to determine the policy, program, and foreign relations aspects of a case, weigh them against the hardship determined by the INS, and make a favorable recommendation for a waiver if the hardship clearly outweighed the other aspects.[117]

The court rejected USIA's argument that its recommendation function was not subject to judicial review because it was the product of political choices made in the context of foreign policy.[118] The court found that the foreign relations considerations in the Chong case were minimal because neither Hong Kong (the country of Dr. Chong's nationality) nor Taiwan (the country of Dr. Chong's last residence) had any objection to Dr. Chong remaining in the United States.[119] The court found that Dr. Chong had received no government funding for his program.[120] The USIA admitted that policy and program considerations, rather than foreign relations aspects, prompted the unfavorable recommendation.[121]

Under the constrained standard of review, the court reviewed the merits of Dr. Chong's claim and found that the USIA did not abuse its discretion in making an unfavorable recommendation.[122] The USIA stated: "[I]t is not felt the hardship outweighs the intent of Public Law 94-484. The letter that Dr. Chong provided does not conclusively prove that he will not be able to practice medicine."[123] The court found that this statement indicates that the USIA "review[ed] the policy, program, and foreign relations aspects of the case."[124] The court found that this was all that was required by the USIA's regulations.[125] The court agreed that the evidence submitted by Dr. Chong did not demonstrate that he would be denied British certification to practice medicine in Hong Kong.[126]

Dr. Chong argued that the USIA's decision was based on a misinterpretation of congressional intent and was without a reasoned explanation.[127] The court dismissed this argument because cases involving an exchange visitor program necessarily implicate foreign policy concerns and involve an agency exercising its discretionary powers, and therefore a more particularized explanation by the USIA was not required.[128] Dr. Chong insisted that the court remand to give him an opportunity to prove what he characterized as a "recent and dramatic change in policy" on the part of the USIA.[129] The court rejected this request in view of its conclusion that both the legislative intent and USIA policy were followed in the case.[130]

The court went on to analyze the development of the United States Information and Educational Exchange Act of 1948, subsequent amendments, and select legislative history, ultimately finding that the

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[112] *Id.*

[113] *Id.* (citing Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574 (3d Cir. 1979); Hondros v. United States Civil Service Commission, 720 F.2d 278 (3d Cir. 1983)).

[114] *Id.* (quoting *Local 2855*, 602 F.2d at 578-80).

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 177.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* (quoting Appellant's Brief at 17).

[130] *Id.*

USIA did not abuse its discretion in not recommending the waiver.[131]

Analysis:

This is the strongest circuit court decision in favor of our position that judicial review should be available for J-1 waiver denials founded on negative WRD recommendations.

The Third Circuit held that the regulations provided sufficient guidance to make judicial review possible under an abuse of discretion standard.[132] At some point in the litigation, discovery was permitted in which the USIA answered a set of interrogatories, where it admitted that only program and policy considerations, rather than foreign policy aspects, prompted its decision not to make a favorable recommendation.[133] The court found that USIA adhered to the regulations in making its recommendation.[134] The court then went on to assess the merits of Dr. Chong's application, finding that his hardship claim was premised on his inability to practice medicine in Hong Kong.[135] The court agreed with the USIA's assessment that Dr. Chong did not conclusively prove that he would not be able to do so.[136]

This decision shows that the USIA/WRD is subject to review under an abuse of discretion standard under the regulations. The decision also shows that discovery is available to ensure that the WRD adheres to the regulations.[137] Finally, even after the court determined that the USIA complied with its own regulations, it still assessed the merits of the case, indicating that if the demonstrated hardships were more severe than the mere inability to practice medicine in the home country, the court might have decided differently.

Volynsky v. Clinton[138] is a pending lawsuit against the WRD and USCIS.[139] The applicant was a Fulbright scholar and is subject to the foreign residence requirement based on U.S. government funding.[140] The WRD issued an unfavorable recommendation, and USCIS denied the waiver.[141]

The plaintiffs alleged that the denial of the applicant's waiver violated the APA, the Mandamus Act, and the Due Process Clause of the Fifth Amendment.[142] The government filed a motion to dismiss the entire complaint.[143] The court denied the government's motion to dismiss the plaintiffs' APA claim; denied the government's motion to dismiss the plaintiffs' Mandamus Act claim seeking a writ compelling the State Department to review the case under the regulations; granted the government's motion to dismiss the mandamus claim insofar as the plaintiffs sought a writ of mandamus compelling the State Department to issue a favorable recommendation in the case; and granted the government's motion to dismiss the plaintiffs' due process claim.[144]

Slyper v. Attorney General (D.C. Circuit)

Slyper v. Attorney General comprises two consolidated cases involving foreign medical graduates who came to the United States under an exchange program authorized by the USIA.[145] Each student married a U.S. citizen and sought a J-1 exceptional-hardship waiver.[146]

The USIA issued an unfavorable recommendation in Dr. Slyper's case, stating: "it is considered that what hardship may exist does not outweigh the program and policy considerations of the Exchange Visitor Program or the Congressional intent of Public Law 94-484."[147] Dr. Slyper brought a suit alleging that the USIA's refusal to make a favorable recommendation was "arbitrary, unreasonable, and an abuse of discretion."[148] The district court dismissed the action, holding that the statute vested the USIA with so "broad and vague" a mandate that it had "no law to apply."[149]

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[131] *Id.* at 177-79.

[132] *Id.* at 176.

[133] *Id.*

[134] *Id.* at 177.

[135] *Id.*

[136] *Id.*

[137] The United States District Court for the Eastern District of California issued an order compelling discovery against the WRD on May 30, 2012. Afato v. Clinton, No. Civ. S-10-0060 (E.D. Cal. filed Jan. 8, 2010).

[138] 778 F. Supp. 2d 545 (E.D. Pa. 2011).

[139] *Id.* at 548.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] Slyper v. Att'y Gen., 827 F.2d 821, 822 (D.C. Cir. 1987).

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* at 822-23 (quoting Slyper v. Attorney General, No. 82-3048, Memorandum Order at 4-5 (D.D.C. Mar. 26, 1986)).

The district court dismissed the companion *Baquero* case, stating: "The Court can find no significant factual difference in this case which might distinguish it from *Slyper* or otherwise provide this Court with jurisdiction in spite of the *Overton Park* doctrine."[150]

On appeal, the D.C. Circuit considered whether the district court had subject-matter jurisdiction to review the USIA's failure to make a favorable recommendation.[151] The court indicated that it is clear from the face of the statute that Congress intended to vest maximum discretion in the USIA/WRD to oppose waivers requested by visiting physicians.[152] The court found that the statute contains no standard or criterion upon which the USIA/WRD is to base a decision to make or withhold a favorable recommendation.[153] The court held that this broad delegation of discretionary authority is "clear and convincing evidence" of congressional intent to restrict judicial review in cases such as *Slyper* and *Baquero*.[154]

The court noted that the USIA acknowledged that it was subject to review if a colorable claim were made of constitutional, statutory, or regulatory violation, or of fraud or lack of jurisdiction on the part of the USIA.[155] Neither Dr. Slyper nor Dr. Baquero made any such claim.[156]

The court acknowledged that there was a circuit split on APA jurisdiction over USIA waiver recommendations, noting that the Second and Ninth Circuit decisions on this issue were in accord with its, whereas the Third Circuit found jurisdiction to review such a claim.[157]

The D.C. Circuit court's decision in *Slyper* was appealed to the Supreme Court.[158] The petition for certiorari was denied by Justices Rehnquist, Brennan, Marshall, Blackmun, Stevens, O'Connor, Scalia, and Kennedy.[159] Justice White issued a dissenting opinion, indicating that he would grant certiorari to resolve the split.[160]

Analysis:

The D.C. Circuit held that the broad delegation of discretionary authority is "clear and convincing evidence" of congressional intent to restrict judicial review in cases like Dr. Slyper's.[161] The court came to this conclusion on congressional intent without any review of the legislative history surrounding INA §212(e). The USIA acknowledged that its decisions would be subject to review "if a colorable claim were made of constitutional, statutory, or regulatory violation, or of fraud or lack of jurisdiction on the part of the USIA."[162]

The *Slyper* decision indicates that if a plaintiff can assert that USIA (or now WRD) action runs counter to the legislative history, a federal court may find jurisdiction for review. *Slyper* is significant because the USIA acknowledged that its decisions would be subject to review if constitutional, statutory, regulatory violations, fraud, or lack of jurisdiction occurred.

Singh v. Moyer (7th Circuit)

Dr. Singh, a citizen of India, entered the United States to obtain graduate medical training in J-1 visa status.[163] At the conclusion of his training program, Dr. Singh applied for a waiver of the foreign residence requirement on hardship and persecution grounds.[164] The basis for the hardship waiver concerned the applicant's pregnant U.S.-citizen wife.[165] The persecution waiver was filed on the basis that Dr. Singh was a Sikh and would be subject to religious persecution upon return to his home country of India.[166]

After originally denying the hardship waiver, the INS revised its finding after Dr. Singh's wife gave birth.[167] The INS then forwarded its revised hardship finding to the USIA, requesting its recommendation.[168]

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[150] *Id.* at 823 (quoting Baquero v. Attorney General, No. 86-0692, Memorandum Order at 3 (D.D.C. Mar. 27, 1986)).

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967) ("Only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.").

[155] *Id.* at 824.

[156] *Id.*

[157] *Id.*

[158] Slyper v. Meese, 485 U.S. 941 (1988).

[159] *Id.*

[160] *Id.*

[161] *Slyper*, 827 F.2d at 823.

[162] *Id.* at 824.

[163] *Singh*, 867 F.2d at 1036.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.* at 1037.

[168] *Id.*

The USIA recommended that Dr. Singh's request be denied.[169] The INS denied the waiver application.[170]

Dr. Singh filed suit in the U.S. District court for the Northern District of Illinois, claiming that the USIA and the INS had "abused their discretion" under the APA in denying his waiver.[171] The district court indicated concern over "the apparent insensitivity of the immigration bureaucracy" in refusing to issue a waiver, but the court granted the defendants' motion to dismiss based on its holding that there was "no law to apply."[172]

Dr. Singh appealed to the Seventh Circuit, contending that the USIA's action was subject to judicial review under an "abuse of discretion" standard.[173] Dr. Singh conceded that INA §212(e) vested considerable discretion in the USIA, but he relied on the holding in *Chong*[174] to argue that the USIA's own regulations provided a "meaningful standard" by which to gauge whether the agency had abused its discretion.[175] The INS and the USIA contended that the statutory language, the statutory structure, the legislative history, and the nature of the USIA's actions under INA §212(e) provided "no law to apply" to review the USIA's actions.[176]

The Seventh Circuit noted the circuit split on the issue of APA jurisdiction to review USIA decisions.[177] The court disagreed with the *Chong* decision, stating that: "[O]ur review of the statute and regulation compels us to conclude that there is no 'meaningful standard' with which to review the USIA's action."[178] The court held that the statutory language was void of criteria by which to judge how the USIA determined the content of its inquiry or the nature of its recommendation.[179] The court examined the legislative history, indicating that Congress's original intent was to limit the number of waivers granted under INA §212(e) by giving the Attorney General the discretion to issue waivers.[180] The court stated that over time, this intent to restrict the granting of waivers has become even more pronounced, especially for those persons with medical-training visas.[181]

The court then looked at the nature of the USIA's action, which was for the "Director [to] review the program, policy, and foreign relations aspects of the case" in making a waiver recommendation.[182] The court held that while the court in *Chong* reviewed these areas under the "abuse of discretion" standard, federal courts are without expertise in assessing these determinations and judicial review is uniquely inappropriate in these areas.[183] The court ultimately held that, "by virtue of the statutory language, the statutory structure, the legislative history, and the nature of the USIA's action under INA §212(e), Congress has provided no 'meaningful standard' for reviewing the USIA's action, and has 'committed' the USIA's 'waiver recommendation function' to that agency's discretion."[184]

Circuit Judge Cudahy dissented in part.[185] Judge Cudahy noted that there is a statutory presumption in favor of judicial reviewability of administrative action and that the exception for commitment to agency discretion is very narrow.[186] Judge Cudahy noted that of all the cases in other circuits that had addressed the matter of first impression to the Seventh Circuit, *Chong* has been the most faithful to this fundamental presumption of reviewability.[187]

Judge Cudahy proceeded to apply the *Chong* standard of review to the USIA's determination in Dr. Singh's case, noting that the record shows that the USIA was in compliance with its own regulations as evidenced by its statement that "the program and policy considerations of the Exchange-Visitor Program outweigh the hardship claimed for the American citizen spouse."[188] Judge Cudahy went on to state that Dr. Singh's complaint could not prevail even

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[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.* at 1038.

[174] *Chong*, 821 F.2d 171.

[175] *Singh*, 867 F.2d at 1038.

[176] *Id.* (quoting *Overton Park*, 401 U.S. at 410).

[177] *Id.*

[178] *Id.*

[179] *Id.* at 1039.

[180] *Id.* (citing S. Rep. No. 84-1608, at 2, *reprinted at* 1956 U.S.C.C.A.N. 2662, 2664).

[181] *Id.* (citing Pub. L. No. 94-484, §601, 90 Stat. 2300, 2300-03).

[182] *Id.* (citing 22 C.F.R. §514.32) (current version at 22 C.F.R. §41.63).

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* at 1039-40 (citing *Overton Park*, 401 U.S. at 410).

[187] *Id.* at 1040.

[188] *Id.*

under the *Chong* analysis.[189] Judge Cudahy indicated that the preservation of the *Chong* analysis seems important in "an area where wholly capricious administrative action might otherwise govern the fate of large numbers of young specialists and doctors."[190]

Analysis:

The ultimate holding by the court was that, "by virtue of the statutory language, the statutory structure, the legislative history, and the nature of the USIA's action under INA §212(e), Congress has provided no 'meaningful standard' for reviewing the USIA's action, and has 'committed' the USIA's 'waiver recommendation function' to that agency's discretion."[191] The court conclusorily stated that it had reviewed the legislative history, but it did not discuss that anywhere in the decision.

Korvah v. Brown (6th Circuit)

Antoinette Korvah entered the United States in J-1 visa status for the purpose of participating in a one-year public health program sponsored by the USIA.[192] Ms. Korvah was subject to the foreign residence requirement of INA §212(e) because her program was funded by the U.S. government.[193] At the completion of her J-1 program, she filed a no objection waiver application, which included a statement from the Liberian government that it did not object to her continued presence in the United States.[194] The USIA recommended "that the waiver should be denied and that she should return to Liberia, thereby fulfilling the purpose and intent of the Mutual Educational and Cultural Exchange Act."[195] The INS denied the waiver application.[196]

Following the denial of the no objection application, Ms. Korvah filed a second request for a waiver, this time claiming a fear of persecution if she returned to her home country of Liberia.[197] The request was routed to the State Department's Bureau of Human Rights and Humanitarian Affairs.[198] The bureau determined that, even assuming the facts provided by Ms. Korvah to be true, "it is the Department's opinion that the applicant would not be persecuted on account of race, religion, or political opinion upon return to Liberia."[199] Based on this determination, the USIA recommended against the waiver.[200] The INS denied the waiver request.[201]

Following the denial, Ms. Korvah filed a lawsuit challenging the INS adjudication, but did not join the USIA.[202] The district court dismissed the case without prejudice, and the case was appealed to the Sixth Circuit.[203]

The Sixth Circuit concluded that there was no meaningful standard against which to judge the agency's exercise of its discretion.[204] The court reviewed both waiver applications in reaching its conclusion.[205] With respect to the no objection application, the court held that it had no rational basis to conclude that it was an abuse of discretion for the USIA to decide that overall policy trumps a no objection letter.[206]

In Ms. Korvah's persecution waiver application, she claimed that she would be subject to persecution, but the State Department determined that if she returned and had problems the cause would not be "race, religion, or political opinion."[207] The USIA accepted this evaluation, as did the INS.[208] The court held that there was no standard of review that could be applied that would dictate a different result.[209] The court concluded that the USIA's and INS's reliance on the Bureau of Human Rights and Humanitarian Affairs was reasonable and in no way arbitrary or capricious.[210] In reaching its decision, the court noted a split of authority, where the district court followed the decision of four of the five circuits that had addressed this issue.[211] The court stated that it believed that the majority view was the better view, although it

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[189] *Id.*

[190] *Id.*

[191] *Id.* at 1039.

[192] Korvah v. Brown, 66 F.3d 809, 810 (6th Cir. 1995).

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.* at 811.

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.* at 812.

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

made clear that even if it did reach the merits it could not see an abuse of discretion.[212]

II. STRATEGIES TO OBTAIN JUDICIAL REVIEW OF J-1 WAIVER DENIALS BASED ON NEGATIVE RECOMMENDATIONS FROM WRD

A. Abuse of Discretion under the Administrative Procedure Act

A complaint against the government under 28 U.S.C. §1331 cannot be filed until there is "final agency action."[213] Once the agency has issued a "final decision," a lawsuit can be filed.[214] For lawsuits brought under the APA for declaratory and/or injunctive relief, there is a six-year statute of limitations.[215] An action not filed within a reasonable time may, however, be subject to dismissal in accordance with the doctrine of laches.[216]

In cases brought under 28 U.S.C. §1331, the APA "generally provides the standards of review for agency action."[217] Unless otherwise limited by statute, courts review discretionary decisions for abuse of discretion[218] and factual determinations for substantial evidence.[219]

The determination of proper plaintiffs in an APA lawsuit is set forth in 5 U.S.C. §702, which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . ."[220] As long as the district court has subject-matter jurisdiction under 28 U.S.C. §1331, this provision authorizes suit by persons who suffered an "injury in fact" by reason of the challenged agency action and who are "arguably within the zone of interests to be protected or regulated" under the relevant statute.[221] In I-612 hardship waivers, the noncitizen applicant and all qualifying relatives related to the application would be proper plaintiffs.

The rule governing the proper defendant to be named in a 28 U.S.C. §1331 lawsuit is set forth in 5 U.S.C. §703, which provides: "If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer…."[222]

In general, it is useful to name as defendants all the officials, executive departments, and other entities that may be able to grant the requested relief.[223] If the only defendant named is an officer or agency that does not have authority to take the actions necessary to afford full relief, the court may not have the ability to compel the government to grant relief.[224] Where it is unclear which officer or agency has the authority to act, it is advisable to name multiple defendants and the United States.[225] Proper defendants in a complaint for declaratory and injunctive relief against the WRD for an unfavorable recommendation in an I-612 hardship waiver case are: (1) the Secretary of the U.S. State Department; (2) the head of the department issuing program sponsor views (if applicable); (3) the Chief, Waiver Review Division, U.S. State Department; (4) the Secretary of Homeland Security; (5) the Director, U.S. Citizenship and Immigration Services; (6) the United States; and (7) the Attorney General of the United States.

Venue is governed by 28 U.S.C. §1391. In particular, subsection (e) provides the venue rule for cases in which an officer of an agency of the United States is the defendant.[226] It provides in part:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a

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[212] *Id.*

[213] Robert Pauw, Litigating Immigration Cases in Federal Court 161 (AILA 2007) (quoting 5 U.S.C. §704).

[214] Pauw, *supra* note 213, at 161.

[215] *Id.* (citing 28 U.S.C. §2401, which provides: "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues").

[216] *Id.*

[217] *Id.* (citing Spencer Enters., Inc. v. United States, 345 F.3d 683, 688 (9th Cir. 2003)).

[218] *Id.* at 162 (citing 5 U.S.C. §706(a)(2)(A); Button Depot, Inc. v. DHS, 386 F. Supp. 2d 1140 (C.D. Cal. 2005)).

[219] *Id.* (citing 5 U.S.C. §706(a)(2)(E); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)).

[220] 5 U.S.C. §702.

[221] Pauw, *supra* note 213, at 162.

[222] 5 U.S.C. §703 (2012).

[223] Pauw, *supra* note 213, at 163.

[224] *Id.*

[225] *Id.*

[226] *Id.*

> substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action.[227]

In the case of an unfavorable recommendation by the WRD, the lawsuit should be brought in the judicial district in which the plaintiff resides.

INA §242(a)(2)(B), as amended by the REAL ID Act,[228] purports to eliminate judicial review of discretionary decisions.[229] INA §242(a)(2)(B) states in pertinent part:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and section 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 212(h), 212(i), 240A, 240B, or 245, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 208(a).[230]

The limitation on judicial review of discretionary decisions applies whether the decision is made within or outside the context of removal proceedings.[231] This does not mean that agency decisions that involve discretionary aspects are not subject to judicial review.[232] Although the discretionary aspects of such decisions may not be subject to judicial review, the decisions themselves are reviewable for legal and constitutional error.[233]

With respect to I-612 hardship waivers, INA §212(e) provides that a waiver of the two-year foreign residence requirement may be granted by the Attorney General, pursuant to a request of the Commissioner (USCIS), upon the latter's determination that the exchange visitor's departure would impose exceptional hardship on his or her spouse or child who is a U.S. citizen or lawful permanent resident.[234] INA §212(e) provides that the Attorney General may grant a hardship waiver if it is found by the Attorney General that the grant would be in the public interest.[235] The statute has been interpreted as requiring a favorable recommendation by the WRD following the initial hardship determination of USCIS.[236] As noted above, the procedure in an I-612 waiver application is as follows: (1) USCIS decides whether the applicant has shown that his qualifying relatives would be subjected to exceptional hardship in all travel alternatives; (2) if USCIS determines that the qualifying relatives would be subjected to exceptional hardship if the applicant is not granted a waiver, it seeks a recommendation from the WRD; and (3) if the WRD issues an unfavorable recommendation, USCIS must deny the waiver.

Thus, judicial review of WRD recommendations is not precluded by INA §242(a)(2)(B), even though the WRD recommendations involve elements of discretion. The discretionary elements of the WRD recommendations may be shielded from review, but the recommendations themselves are generally reviewable for error, violations of duty, violations of law, and constitutional and treaty violations, among other faults.

B. Legislative History

In 1948, Congress passed the United States Information and Educational Exchange Act, popularly referred to as the Smith-Mundt Act.[237] The main purpose of the legislation was to promote mutual understanding between the American people and other countries "to correct misunderstandings about the United States abroad."[238] In 1947, hearings were held by a Senate subcommittee on the proposed legislation, H.R. 3342, that had been introduced in the House of

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[227] 28 U.S.C. §1391(e).

[228] The REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231.

[229] Pauw, *supra* note 213, at 164.

[230] 8 U.S.C. §1252 (a)(2)(B).

[231] Pauw, *supra* note 213, at 165.

[232] *Id.*

[233] *Id.*

[234] INA §212(e), 8 U.S.C. §1182(e).

[235] *Id.*

[236] Silverman v. Rogers, 437 F.2d 102, 107 (1st Cir. 1970).

[237] Naomi Schorr & Stephen Yale-Loehr, *The Odyssey of the J-2: Forty-Three Years of Trying Not to Go Home Again*, 18 Geo. Immigr. L.J. 221, 224 (2004) (citing Pub. L. No. 80-402, 62 Stat. 6 (1948)). An earlier version appeared at 8 Bender's Immigr. Bull. 1810 (Dec. 1, 2003). (Subsequent citations are to the version at 18 Geo. Immigr. L.J. 221).

[238] *Id.* at 224 (quoting S. Rep. No. 80-573, at 1 (1947)).

Representatives.[239] Among those testifying was Secretary of State George C. Marshall, who urged the bill's passage:

> There is no question today that the policies and actions of the United States are often misunderstood and misrepresented abroad. The facts about the United States are withheld or falsified, and our motives are distorted. Our actions do not always speak for themselves unless the people of other countries have some understanding of the peaceful intention of our people. An understanding of our motives and our institutions can come only from knowledge of the political principles which our history and traditions have evolved and of daily life in the United States.[240]

In January 1948, the Senate Committee on Foreign Relations issued an additional report on H.R. 3342, reporting the bill favorably to the Senate and offering several amendments.[241] Prior to analyzing the bill, the Committee thought it wise to step back and discuss the general considerations underlying the legislation.[242] Foremost among them was the concern that:

> The present hostile propaganda campaigns directed against democracy, human welfare, freedom, truth, and the United States, spearheaded by the Government of the Soviet Union and the Communist Parties throughout the world, call for urgent, forthright, and dynamic measures to disseminate the truth. The truth can constitute a satisfactory counter-defense against actions which can only be described as psychological warfare against us as well as the purposes of the United Nations.[243]

Section 201 of the Smith-Mundt Act set the groundwork for the immigration portion of the exchange visitor program that we know today.[244] It provided for the interchange between the United States and other countries of "students, trainees, teachers, guest instructors, professors, and leaders in fields of specialized knowledge or skill."[245] Those who entered to participate in the exchange program were to be admitted as nonimmigrant visitors for business under clause 2 of section 3 of the Immigration Act of 1924, as amended.[246]

From the start, the exchange visitor program imposed a requirement that those coming to the United States to take part in the program must leave when their program objectives were realized.[247] Anyone so admitted, the 1948 statute warned, who "fails to depart from the United States at the expiration of the time for which he was admitted . . . shall . . . be taken into custody and promptly deported."[248]

In 1952, the Smith-Mundt Act was amended and §201 was changed to reflect the passage of the Immigration and Nationality Act of 1952.[249] "The persons specified in this section," the amendment read, "shall be admitted as nonimmigrants under section 101(a)(15) of the Immigration and Nationality Act, for such time and under such conditions as may be prescribed by regulations, promulgated by the Secretary of State and the Attorney General."[250]

From 1952 to 1956, many exchange visitors who completed their visits, but who wanted to remain in the United States, took advantage of a loophole in the statute by going north to Canada, turning around, and coming back.[251] Departure was required under the act, and departure was achieved by going north and then returning.[252] Alternatively, applicants flooded Congress with private bills.[253] President Eisenhower vetoed a private bill, and he outlined his reasons for the veto in a letter to the Senate.[254] The reasons set forth in President Eisenhower's letter set the stage for what we know of as the two-year foreign residence requirement.[255]

In 1956, prompted by the loophole in the Immigration and Nationality Act of 1952, Congress amended §101(a)(15) to more strictly enforce the requirement that exchange visitors depart the United States.[256] The purpose of the bill was to give effect to

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[239] *Id.*

[240] *Id.* (quoting S. Rep. No. 80-573, at 8 (1947)).

[241] *Id.* at 225.

[242] *Id.*

[243] *Id.* (quoting S. Rep. No. 80-811, at 4 (1948)).

[244] *Id.*

[245] *Id.* (quoting Pub. L. No. 80-402, 62 Stat. 6 (1948)).

[246] *Id.* (citing S. Rep. No. 80-811, at 4).

[247] *Id.* at 226.

[248] *Id.* (quoting Pub. L. No. 80-402, 62 Stat. 6 (1948)).

[249] *Id.* (citing Pub. L. No. 82-414, §402(f), 66 Stat. 163, 276-77 (1952)).

[250] *Id.* (quoting Pub. L. No. 82-414, §402(f), 66 Stat. 163, 277 (1952)).

[251] *Id.* at 227.

[252] *Id.*

[253] *Id.*

[254] *Id.* (citing 101 Cong. Rec. 7,605-06 (1955)).

[255] *Id.*

[256] *Id.* at 226-27.

the President's 1955 recommendation to tighten up on the requirement that an exchange visitor depart the United States when his program was over.[257] The Senate report said, "there is nothing to deter them from qualifying for an immigration visa after leaving the United States, and from being readmitted immediately from a neighboring country such as Canada or Mexico."[258]

To deal with this problem, Congress amended §201 of the Smith-Mundt Act by adding subsection (b), which read, in pertinent part:

> No person admitted as an exchange visitor under this section or acquiring exchange visitor status after admission shall be eligible to apply for an immigrant visa, or for a nonimmigrant visa under section 101(a)(15)(H) of the Immigration and Nationality Act, or for adjustment of status to that of an alien lawfully admitted for permanent residence, until it is established that such person has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States. . . .[259]

In 1961, Congress passed the Mutual Educational and Cultural Exchange Act, popularly called the Fulbright-Hays Act.[260] The House and Senate carefully considered the legislation that became the Fulbright-Hays Act, particularly Subcommittee Number 1 of the House Committee on the Judiciary, which held extensive hearings on the immigration-law aspects of that bill.[261]

To correct some of the problems with the 1961 enactment, in 1970 Congress amended INA §212(e), limiting its application to an exchange visitor who entered on a J visa, or acquired that status after entry, to participate in a program that was financed by the U.S. government or the government of his nationality or last residence, or whose field of specialized knowledge or skill was on the "skills" list.[262] The 1970 amendment limited the country of fulfillment to the country of nationality or last residence.[263]

The rest of this Part discusses how that history might be used in litigation.

In assessing a hardship waiver application, the WRD considers the following factors: "The Waiver Review Branch shall review the program, policy and foreign relations aspects of the case, make a recommendation, and forward it to DHS. . . ."[264]

In reviewing the program, policy, and foreign relations aspects of a case, the WRD assesses whether the waiver applicant has demonstrated that the approval of the waiver would fulfill the statutory purposes of the Mutual Educational and Cultural Exchange Act of 1961, described in the regulations as: "to increase mutual understanding between people of the United States and the people of other countries by means of education and cultural exchanges. Educational and cultural exchanges assist the Department of State in furthering the foreign policy objectives of the United States."[265] If an applicant can persuade the WRD that approval of the waiver would fulfill the statutory purposes, the WRD is more likely to provide a favorable recommendation. For this reason, an applicant should present documentary evidence to establish that his continued presence in the United States increases mutual understanding between the United States and other nations. If possible, an applicant can argue that his continued presence in the United States promotes cultural exchange and mutual understanding. The applicant may be able to demonstrate that if he returns to his home country, he would not be able to fulfill the purposes of the Act as effectively as if he remained.

There is favorable legislative history that may help some applicants with respect to the WRD's analysis of program considerations. Specifically, the House Committee on the Judiciary recommended the following analysis in waiver determinations:

> In recommending the immediate application of a revised policy of granting waivers of the 2-year foreign residence requirement *so as to make administrative practice and procedures more consistent with the objectives and purposes* of the international educational exchange program and with its international ramifications, the subcommittee suggests that the Secretary of State and the Attorney General may consider the advisability of examining the application of a somewhat different policy in two clearly discernible categories of exchange visitors, to wit:

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[257] *Id.* at 228 (citing S. Rep. No. 84-1608 (1956)).

[258] *Id.* (quoting S. Rep. No. 84-1608 (1956)).

[259] *Id.* at 227 (quoting Pub. L. No. 84-555 (1956)).

[260] *Id.* at 231 (citing Pub. L. No. 87-256, 75 Stat. 527 (1961)).

[261] *Id.* at 232 (citing H.R. Rep. No. 87-1094 (1961)).

[262] *Id.* at 238 (citing Pub. L. No. 91-225, §2, 84 Stat. 116, 116-17 (1970)).

[263] *Id.* at 238-39.

[264] 22 C.F.R. §41.63(b)(2)(ii).

[265] 22 C.F.R. §62.1(a).

> (1) the person whose primary purpose in coming to the United States is to acquire education, skill, experience, and training; and--on the other side of the ledger--(2) the person who comes to the United States to impart or share with Americans or teaching Americans what he, himself, has acquired abroad in a way of scientific knowledge or skill.
>
> Indicative information as to the feasibility of an informal classification of exchange visitors into one or the other of the above outlined categories is contained in the several items of part 1, section 1 of the form DSP-37, reproduced on page 49. While exchange visitors specified in items A, B, and F would appear to fall within the first category, above, persons specified in items C, D, and E of the form appear to fit into the second category.
>
> If such determination is made, the waiver policy could be applied *with a different degree of stringency* to exchange visitors in each of the two categories. While it is axiomatic with this subcommittee that a person who has come to the United States to *learn* in order to *give his countrymen the benefit of such education* should not be permitted to evade the "return home" rule, the person who--*in exchange*--has come here to *educate* Americans, may have an equitable claim for remaining, if his services are needed here.[266]

The suggested analysis set forth above has been followed in two precedent decisions. In *Matter of Duchneskie*, the waiver applicant was admitted as an exchange visitor for a postgraduate course in dentistry.[267] During her training, the applicant participated in the dental treatment of children from schools in New York City.[268] Because the treatment of the children was based upon her knowledge already acquired from prior training, the INS determined that she had come to the United States to impart her skill to persons here, as well as to receive further training.[269] The Service held that a more liberal attitude could therefore be taken in determining if the necessary degree of hardship was established.[270] Prior to issuing its decision and granting the waiver, the INS sought the recommendation of the State Department.[271] The State Department recommended that the waiver be granted.[272]

In *Matter of Coffman*, the applicant was admitted to the United States as an exchange teacher to instruct American teachers.[273] The applicant was admitted in J-1 status on June 14, 1967, and departed from the United States on September 4, 1967.[274] The Service found that the applicant had been admitted to participate in a private program at her own expense as a teacher to impart her skills, not to receive knowledge to be imparted to natives of her own country.[275] The Service held that a more liberal attitude could be taken in determining if the necessary degree of hardship has been established.[276] Prior to issuing its decision and granting the waiver, the Service sought the recommendation of the State Department.[277] The State Department recommended that the waiver be granted.[278]

Both *Duchneskie* and *Coffman* show that the Service and the State Department employed the analysis recommended by the Subcommittee of the House Committee on the Judiciary. *Duchneskie* is the stronger case of the two, showing that an exchange visitor can come to the United States to impart his already acquired knowledge while receiving further training.[279] Many highly skilled exchange visitors, for example, Fulbright Program participants, are selected based on their already acquired knowledge and skill, and are asked to impart such knowledge and skill when they arrive in the United States. A Fulbright grantee may enter to take part in graduate studies in

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[266] H.R. Rep. No. 87-721, at 122 (1961) (emphasis in original). Classifications A, B, and F represent student, trainee, and specialist, respectively. Classifications C, D, and E represent teacher, guest instructor, and professor, respectively. The DSP-37 was replaced by the IAP-66. The IAP-66 was replaced by Form DS-2019.

[267] 11 I. & N. Dec. 583 (Dist. Dir. 1966).

[268] *Id.*

[269] *Id.*

[270] *Id.* (citing H.R. Rep. No. 87-721, at 122 (1961)).

[271] *Id.* at 584.

[272] *Id.*

[273] Matter of Coffman, 13 I. & N. Dec. 206 (Dep. Assoc. Comm'r 1969).

[274] *Id.*

[275] *Id.* at 207.

[276] *Id.* (citing *Duchneskie*, 11 I. & N. Dec. 583).

[277] *Id.* at 208.

[278] *Id.*

[279] *Duchneskie*, 11 I. & N. Dec. at 583.

his field of expertise, while at the same time being asked to impart his already acquired knowledge to individuals in the United States.

If a waiver applicant can show that he was brought over to the United States not only to gain knowledge but also to impart it, and that he faithfully imparted said knowledge, the waiver application should be reviewed under the "relaxed standard" recommended by Congress, which has been followed by the Service and the State Department.

The analysis of the relaxed standard above will provide litigators with additional law to apply. The key consideration in enabling an applicant to benefit from this kind of argument would be to ensure that the administrative record has thorough documentation that the applicant not only came to gain knowledge, but also came to impart his already acquired knowledge within the United States.

C. Due Process--Fundamental Right to Family Unity

Student author Inna V. Tachkalova argues that a denial of a hardship waiver amounts to an infringement of the substantive due process right to fundamental family unity.[280] Ms. Tachkalova's argument is based on the Supreme court's decision in *Moore v. City of East Cleveland.*[281] *Moore* held that an ordinance that forced children and adults into narrowly defined family patterns violated the Due Process Clause.[282] In reaching its holding, the Court that stated it "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[283] In considering overbreadth, the Court stated: "the family is not beyond regulation."[284] The Court went on to state: "But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[285] The Court found that the East Cleveland Housing Code violated the Due Process Clause of the Fourteenth Amendment because it had a tenuous relation to alleviation of the conditions mentioned by the city.[286] The court stated: "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society."[287] The court went on to state: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[288] The court also stated: "It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[289]

Ms. Tachkalova also relies on a later case, *Lyng v. Castillo*,[290] where the Court elaborated that to constitute an infringement on the right to keep family together, the statute needs to "directly and substantially interfere with family living arrangements."[291]

Ms. Tachkalova argues that when INA §212(e) is applied to exchange visitors who are married to U.S. citizens or permanent residents, the foreign residence requirement infringes on the fundamental right to family unity set forth in *Moore* and *Lyng*.[292] Ms. Tachkalova boldly asserts that despite the Supreme Court's declaration that family unity is a fundamental right protected by the Constitution, Congress mandates the separation of families to further the government's interest in having exchange students carry out foreign policy work on behalf of the United States.[293] Ms. Tachkalova asserts that INA §212(e) directly and substantially interferes with family living arrangements by not allowing the alien spouse to live together with his or her qualifying relative(s).[294] Both of these assertions are flawed because, in most cases, the qualifying relative(s) involved with a hardship waiver application have the choice to accompany the exchange visitor abroad during the fulfillment of the requirement.

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[280] Inna V. Tachkalova, *The Hardship Waiver of the Two-Year Foreign Residency Requirement Under Section 212(e) of the INA: The Need for a Change*, 49 Am. U. Int'l L. Rev. 549, 568 (1999).

[281] *Id.* at 567 (citing 431 U.S. 494, 505-06 (1977)).

[282] *Moore*, 431 U.S. at 506.

[283] *Id.* at 499 (quoting Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40 (1974)).

[284] *Id.*

[285] *Id.*

[286] *Id.* at 500.

[287] *Id.* at 503.

[288] *Id.*

[289] *Id.* at 504.

[290] 477 U.S. 635 (1986).

[291] Tachkalova, *supra* note 280, at 568 (citing *Lyng*, 477 U.S. at 638).

[292] *Id.*

[293] *Id.*

[294] *Id.*

To bolster her argument that INA§212(e) infringes on the fundamental right to family unity, Ms. Tachkalova couples that right with the U.S. citizen's right to reside in the United States.[295] She begins by asserting that a U.S. citizen has a constitutional right to reside in the United States and that courts have found this right both fundamental and undisputed.[296] She asserts that this right is violated because courts and agencies assess exceptional-hardship waivers under all possible travel alternatives.[297] She asserts that in consideration of all possible travel alternatives, agencies ignore the fundamental right of U.S. citizens to reside in the United States.[298] This assertion is false because INA §212(e) and Service practice do not require the U.S. citizen to accompany the exchange visitor to the home country. Qualifying U.S.-citizen relative(s) are left with a choice of remaining in the United States or accompanying the exchange visitor abroad. Thus, the denial of a waiver application based on marriage to a U.S. citizen or the presence of a U.S.-citizen qualifying relative does not, in and of itself, infringe on the fundamental right of a U.S. citizen to reside in the United States.

The coupling of the fundamental right to family unity and the fundamental right of U.S. citizens to reside in the United States does not, in and of itself, result in the unconstitutionality of INA §212(e). That said, the coupling of these fundamental rights, in particular cases, may give rise to argument that the application of INA §212(e) by the Service and the WRD is unconstitutional. In other words, while INA §212(e) is not facially unconstitutional, it may be applied unconstitutionally in particular cases.

An example where the application of INA §212(e) may be unconstitutional is where a qualifying relative cannot accompany the exchange visitor to the home country.[299] This could be demonstrated where the qualifying relative can show that he could not legally be admitted to the exchange visitor's home country. In this scenario, a denial of a hardship waiver would infringe on the fundamental right to family unity. The argument would be that INA §212(e) has been applied unconstitutionally because it infringes on the right of the qualifying relative to family unity.

Another example where the application of INA §212(e) may be unconstitutional is where a hardship waiver applicant has demonstrated that he has a serious and life-threatening medical condition that can be treated only in the United States, or where the U.S.-citizen qualifying spouse has a life-threatening medical condition that could not be treated in the applicant's home country. Normally, hardship to the applicant does not count in a J-1 hardship waiver application. However, it is indisputable that serious and permanent injury or death to the applicant would leave the U.S.-citizen qualifying relative with a lifetime of misery and suffering. If a hardship waiver was denied in this scenario, the U.S. citizen's fundamental right to family unity would be infringed because, while he or she could choose to accompany the qualifying relative abroad, such a decision would result in a risk to life and limb for the U.S. citizen, as well as a lifetime of misery and suffering.

One example implicating the fundamental right of U.S. citizens to reside in the United States would be a U.S. citizen who is a member of a religion that requires family unity. In this example, the denial of a hardship waiver application would leave the U.S.-citizen qualifying relative with the choice of remaining in the United States to face any religious consequences or accompanying the exchange visitor for the fulfillment of the foreign residence requirement.

U.S. immigration law provides many additional examples of the great value accorded to family unity and family reunification, most of which is routinely ignored in J-1 waiver adjudications, but would be useful in litigation.

D. Due Process--Fundamental Right to Life

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law."[300] The Supreme court has held that the Clause "guarantees more than fair process" and accords substantive protection to the

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[295] *Id.*

[296] *Id.* at 569 (citing Perdidio v. INS, 420 F.2d 1179, 1181 (5th Cir. 1969); Nayak v. Vance, 463 F. Supp. 244, 247 (D.S.C. 1978)).

[297] Tachkalova, *supra* note 280, at 569.

[298] *Id.*

[299] *See*, *e.g.*, U.S. State Department, Iran: Country Specific Information, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1142.html#entry_requirements (last visited June 22, 2012). ("Iranian authorities have prevented a number of U.S. citizen academics, scientists, journalists, and others who traveled to Iran for personal/cultural/business reasons from leaving the country and in some cases have detained, interrogated, and imprisoned them on unknown or various charges, including espionage and being a threat to the regime.") Libya, Sudan, and Lebanon, among others, will not admit U.S. citizens if they have Israeli stamps in their passports. Another example would be the case of a qualifying relative in the military service, where the military would not let said relative accompany the applicant abroad..

[300] U.S. Const. amend. V.

rights it guarantees.[301] Substantive due process claims can present difficulties for courts.[302] In a case where fundamental rights may be at stake, determining the limits of the government's authority over an individual's freedom to make certain personal decisions entails a careful assessment of that personal decision's objective characteristics in order to determine whether it warrants protection under the Due Process Clause.[303]

The Supreme Court has employed two distinct approaches when faced with a claim to a fundamental right.[304] In some cases, the Court has discerned the existence of fundamental rights by probing what "personal dignity and autonomy" demand.[305] In other cases, the Court has derived fundamental rights by reference to the nation's history and legal tradition.[306] The line of cases beginning with *Griswold v. Connecticut*,[307] *Eisenstadt v. Baird*,[308] *Roe v. Wade*,[309] and *Casey*[310] follows the first approach and relies on the concepts of individual rights to autonomy and self-determination, and on the court's unwillingness to allow state intrusion into certain protected domains such as the bedroom, the clinic, and the womb.[311] This approach is captured by the *Casey* Court's characterization of substantive due process rights as those that involve "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[312]

The second approach for determining whether a claimed right warrants substantive due process protection, which is more restrictive, has two "features."[313] Under *Glucksberg*, courts must inquire whether the fundamental right asserted is "objectively, 'deeply rooted in this Nation's history and tradition,'"[314] and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed."[315] Additionally, in order to ensure that they do not multiply rights without principled boundaries, courts must provide a "'careful description' of the asserted fundamental liberty interest."[316] If a court concludes that the claimed right is a fundamental right entitled to protection under the Due Process Clause, then the burden shifts to the government to show that its encroachment upon the right "is narrowly tailored to serve a compelling state interest."[317]

In certain exceptional cases, the application of INA §212(e) in a hardship waiver may give rise to a Fifth Amendment Due Process Clause argument. One such scenario may be when a qualifying relative has a life-threatening condition that could be exacerbated by the stress of separation or relocation, where the condition could not be treated in the home country. If a hardship waiver were denied in this scenario, the qualifying relative could face serious health consequence and even die.

Applying the *Casey* line of decisions, a court reviewing such a due process claim would look to see what "personal dignity and autonomy" demand.[318] If the Service or WRD were to deny a hardship waiver application in this scenario, a court may find that personal dignity and autonomy demand substantive protection of the qualifying relative's right to life. This is true because but for the denial of the hardship waiver, the applicant will have the best chance to live. In other words, rigid enforcement of the foreign residence requirement in this scenario would increase the risk of irreparable physical and psychological harm to the qualifying relative. Thus, in this scenario, a court may find that such an application of INA §212(e) would violate the qualifying relative's Fifth Amendment right to life.

The *Glucksberg* approach is more restrictive than that of *Casey*. Under *Glucksberg*, a court must inquire whether the fundamental right asserted is "objectively, 'deeply rooted in the Nation's history and tradition,'"

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[301] Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion); Washington v. Glucksberg, 521 U.S. 702, 719 (1997); Reno v. Flores, 507 U.S. 292, 301-02 (1993).

[302] Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (plurality opinion); *Moore*, 431 U.S. at 502.

[303] Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470, 476 (D.C. Cir. 2006) (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984)).

[304] *Id.* at 476.

[305] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

[306] *Glucksberg*, 521 U.S. at 702.

[307] 381 U.S. 479 (1965).

[308] 405 U.S. 438 (1972).

[309] 410 U.S. 113 (1973).

[310] *Casey*, 505 U.S. 833.

[311] *Abigail Alliance*, 445 F.3d at 476.

[312] *Id.* (quoting *Casey*, 505 U.S. at 851).

[313] *Id.* (quoting *Glucksberg*, 521 U.S. at 720).

[314] *Id.* (quoting *Glucksberg*, 521 U.S. at 720-21).

[315] *Id.* at 477 (quoting *Glucksberg*, 521 U.S. at 721).

[316] *Id.* (quoting *Glucksberg*, 521 U.S. at 721).

[317] *Id.* (quoting *Glucksberg*, 521 U.S. at 721).

[318] *Casey*, 505 U.S. at 851.

and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed," and provide a "'careful description' of the asserted fundamental liberty interest."[319]

In the scenario presented above, the interest is the preservation and protection of the life of the qualifying relative. This includes protecting the qualifying relative from succumbing to his own disease.

Addressing whether the fundamental right is objectively, deeply rooted in the nation's history and tradition, the government has a duty to protect its citizens.[320] Thus, a denial of a hardship waiver in the above scenario would violate the duty of the U.S. government to protect its own citizens. The Supreme Court has declared: "It is the duty of all governments to pass all laws which may be necessary to shield and protect [their] citizens."[321] In *Ex parte Gilroy*, the Court discussed the consistent duty of the U.S. government to protect its citizens.[322] In *Perez v. Brownell*,[323] the Supreme Court discussed legislation premised on the fundamental notion of the "duty of the Government to protect citizens abroad."[324] Based on these precedents, a court would likely find that the right asserted in the above scenario would be a fundamental right that is objectively rooted in the nation's history and tradition.

Under either the *Casey* or *Glucksberg* analysis, the people in the scenario presented above are worthy of substantive due process protection.

E. Violation of the International Covenant on Civil and Political Rights

The United States Constitution's Supremacy Clause makes ratified treaties an integral part of our domestic legal system by declaring them part of the "supreme Law of the Land."[325] The Constitution makes ratified treaties part of our domestic law.[326] This is true even where a treaty does not create a private cause of action.[327] As such, government actors are subject to constraints beyond their discretionary decisions regarding whether they comply with the law.[328] Judicial review provides one such constraint.[329]

The Supreme Court has recognized that mandamus is an available remedy for government officials' failure to perform duties required by the law.[330]

Traditional requirements for mandamus relief are as follows: "(1) the plaintiff's claim is clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available."[331] These requirements are designed to respect separation of powers principles by ensuring that "to the extent a statute vests discretion in a public official, his exercise of that discretion [is] not [to] be controlled by the judiciary."[332] A plaintiff can invoke mandamus to seek the enforcement of an underlying right.[333]

Considering whether a treaty provision imposes a duty that is amenable to mandamus enforcement requires an assessment of what the United States agreed to do when it ratified the treaty.[334] The major human rights treaties that the United States has ratified impose a duty of domestic enforcement.[335] States parties are required to make effective the rights guaranteed by the treaty in their domestic law.[336]

The United States has ratified the International Covenant on Civil and Political Rights (ICCPR).[337] The ICCPR textually requires domestic implementation.[338] Article 2(1) provides that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights

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[319] *Glucksberg*, 521 U.S. at 720-21.

[320] Paul v. Virginia, 75 U.S. 168 (1868).

[321] *Id.* at 176.

[322] 257 F. 110, 117 (S.D.N.Y. 1919).

[323] 356 U.S. 44 (1958).

[324] *Id.* at 56.

[325] William M. Carter, Jr., *Treaties as Law and The Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 Md. L. Rev. 344, 345 (2010) (quoting U.S. Const. art. VI, cl. 2).

[326] *Id.* at 365.

[327] *Id.*

[328] *Id.*

[329] *Id.*

[330] *Id.* at 367 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

[331] *Id.* (quoting Guerrero v. Clinton, 157 F.3d 1190, 1197 (9th Cir. 1998)).

[332] *Id.* (quoting Estate of Smith v. Heckler, 747 F.2d 583, 591 (10th Cir. 1984)).

[333] *Id.*

[334] *Id.* at 371.

[335] *Id.*

[336] *Id.* at 371-72.

[337] *Id.* at 372.

[338] *Id.*

recognized in the present Covenant."[339] Article 2(2) provides that, "[w]here not already provided for by existing [domestic law], each State Party . . . undertakes to take the necessary steps, in accordance with its constitutional processes . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[340]

The United States has the following legal obligations under the ICCPR: (1) to "respect" the rights provided in the ICCPR by refraining from violating those rights; (2) to "ensure" the rights in the ICCPR by taking the steps necessary to prevent others from violating those rights; and (3) to take whatever measures may be necessary to effectuate ICCPR rights if those rights are not already protected under domestic law.[341] When the United States ratified the ICCPR, the Supremacy Clause made these duties part of domestic law.[342] The Clause also provides for constitutional parity in domestic law of ratified treaties and federal statutes.[343] As such, these duties should be enforceable by mandamus where similar duties would be enforceable if contained in a federal statute.[344] Where the duties imposed by the treaty have not been fulfilled, mandamus would be the appropriate remedy.[345]

The implementation duties contained in the human rights treaties that the United States has ratified are phrased as affirmative commands ("shall"), rather than discretionary suggestions ("may").[346] The constitutional parity of treaties and statutes under the Supremacy Clause indicates that mandatory language in a treaty should be construed to have similar domestic effect as mandatory language in a federal statute.[347]

Mandamus will be inappropriate if the law's command, although phrased in a mandatory fashion, is too indeterminate or unclear to be enforced.[348] There is nothing indeterminate or unclear about Article 2(2) of the ICCPR, where the questions would be the following: (1) are there rights under the ICCPR that are not adequately protected by existing domestic law; and (2) if so, has the state party taken "the necessary steps, in accordance with its constitutional processes . . . to adopt such legislative or other measures"[349] to give effect to those rights?[350] For the purposes of mandamus, such duties do not need to be further construed; they are clear and understandable.[351]

The Constitution's Treaty Clause gives the President the power to make treaties as long as he obtains the Senate's "Advice and Consent."[352] The Senate often attaches conditions to its consent in the form of reservations, understandings, or declarations (RUDs).[353]

In providing its consent to ratification of the ICCPR, the Senate entered a declaration stating that "[t]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."[354] The declaration does not state that the ICCPR lacks the force of domestic law.[355]

Using Professor Carter's analysis (see note 325), an applicant who is denied a hardship waiver may consider filing a complaint for relief in the nature of mandamus through various articles in the ICCPR. One argument that could be made in an appropriate mandamus action is that the government has generally not taken action to implement one or more provisions of the ICCPR. Alternatively, a plaintiff could argue that the application of INA §212(e) in his particular case violates a provision or provisions of the ICCPR. Common articles that may be implicated in a hardship waiver denial are 13, 17, 23, and 24.

F. Violation of Customary International Law

The current law or the "modern position" shows that customary international law (CIL) is part of this country's federal common law.[356] During the last thirty years, almost every federal court that has

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[339] International Covenant on Civil and Political Rights, art. 2(1), Dec. 19, 1966, 999 U.N.T.S. 171 (hereinafter "ICCPR").

[340] *Id.* art. 2(2).

[341] Carter, *supra* note 325, at 372.

[342] *Id.* at 374.

[343] *Id.*

[344] *Id.*

[345] *Id.*

[346] *Id.* at 376.

[347] *Id.* at 376-77.

[348] *Id.* at 377.

[349] *Id.* at 378 (quoting ICCPR, art. 2(2)).

[350] *Id.*

[351] *Id.* (citing Miguel v. McCarl, 291 U.S. 442, 453 (1934)).

[352] *Id.* (quoting U.S. Const. art. II, §2, cl. 2).

[353] *Id.* at 382.

[354] *Id.* (citing 138 Cong. Rec. 8071 (1992)).

[355] *Id.* at 383.

[356] Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 816 (1997).

considered the modern position has endorsed it.[357] Several courts have referred to CIL's incorporation into federal common law as "settled."[358] This position has the overwhelming approval from academia as well.[359]

A rule of international law is one that has been accepted as such by the international community of states in the form of customary law, by international agreement, or by derivation from general principles common to the major legal systems of the world.[360] Customary international law results from a general and consistent practice of states followed from a sense of legal obligation.[361] International agreements create law for the states that are parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.[362] General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.[363] Whether a rule has become international law is determined by evidence appropriate to the particular source from which that rule is alleged to derive.[364] In determining whether a rule has become international law, substantial weight is accorded to judgments and opinions of international judicial and arbitral tribunals, judgments and opinions of national judicial tribunals, the writings of scholars, and pronouncements by states that undertake to express a rule of international law, when such pronouncements are not seriously challenged by other states.[365]

Substantive due process rights of fundamental family unity and of U.S. citizens to reside in their country are discussed above. Similarly, the due process fundamental right to life is discussed above. The ICCPR is also discussed above. These sources of law evidence enforceable customary international law norms.

G. Due Process--Property Interest

An I-612 hardship waiver applicant has a property interest in the application fees paid to the State Department and the Department of Homeland Security. To have a property interest in a benefit, an individual clearly must have more than an abstract need or desire for it.[366] The individual must have more than a unilateral expectation of it.[367] The individual must have a legitimate claim of entitlement to it.[368] The Supreme Court held, "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."[369] The Supreme Court also held that "It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."[370]

Property interests are created and defined by existing rules or understandings that come from an independent source, such as federal law that support claims for entitlement to such a benefit.[371] For example, the Supreme Court in *Goldberg v. Kelly*[372] found that welfare recipients had a claim of entitlement to welfare payments grounded in the statute defining the terms of eligibility.[373] The recipients had not shown that they were eligible under the statute, but the Court held that they had a right to a hearing at which they could attempt to do so.[374]

Under *Roth*, an I-612 waiver applicant has a property interest in the application fees paid to both the State Department and the Department of Homeland Security. An I-612 waiver applicant has a legal right to a waiver of the two-year foreign residence requirement if he can show that it would

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[357] *Id.* at 817.

[358] *Id.* (citing Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980); Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995); United States v. Schiffer, 836 F. Supp. 1164, 1170 (E.D. Pa. 1993); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987)).

[359] *Id.*

[360] Restatement (Third) of the Foreign Relations Law of the United States §102(1) (1987).

[361] *Id.* at §102(2).

[362] *Id.* at §102(3).

[363] *Id.* at §102(4).

[364] *Id.* §103(1).

[365] *Id.* §103(2).

[366] Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

[367] *Id.*

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] *Id.*

[372] 397 U.S. 254 (1970).

[373] *Roth*, 408 U.S. at 577.

[374] *Id.*

cause exceptional hardship to his qualifying relatives and others.[375]

Pursuant to *Roth*, in the case of a denial of an I-612 hardship waiver application, the Service and the State Department must provide the applicant with a statement of reasons for the denial. In a case where the Service has found that the applicant's qualifying relatives would face exceptional hardship, and where the State Department issues an unfavorable recommendation, neither the State Department nor the Service provides a statement of reasons for the denial.

The State Department now typically provides the following basis for an unfavorable recommendation in an I-612 waiver case:

> Pursuant to 22 C.F.R. §41.63(b)(2)(ii), the Waiver Review Division has reviewed the program, policy, and foreign relations aspects of this case and has determined that these considerations outbalance the Exceptional Hardship claims presented. Therefore, it is the recommendation of the Department of State that the foreign residence requirement of INA 212(e) not be waived.[376]

This statement does not even provide a rational basis for the denial and thus violates the applicant's right to due process of law under the Fifth Amendment to the United States Constitution.

When an I-612 hardship waiver application receives an unfavorable recommendation, the Service is required under INA 212(e) to deny the waiver. As such, when the Service receives an unfavorable recommendation from the WRD, the denial notice will cite the unfavorable recommendation as the basis of the denial. This is not legally adequate.

Conclusion

The State Department does not want to overturn the supposedly established law that holds it unaccountable for negative recommendations on J-1 waiver applications. Applying the principles of this article hopefully will help lawyers to fight back when such decisions are unfair, unjust, inhumane, and unreasonable.

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REMINDER:

The correct citation form for the BIB is Author, *Title*, 17 Bender's Immigr. Bull. 1385 (July 15, 2012).

[375] INA §212(e).

[376] Attachment to I-613 where the WRD issues an unfavorable recommendation.

SUMMARY Of PART I

Accepted Grounds for Review (On Appropriate Facts) By Circuit*

Basis of Review	9th Circuit (1985)	2d Circuit (1986)	3d Circuit (1987)	D.C. Circuit (1987)	7th Circuit (1989)	6th Circuit (1995)
APA abuse of discretion	No	No	Yes	No	No	No
Legislative history	Yes	Not argued	Yes	Not argued	No	Not argued
Constitutional violations	Yes	Yes	Not argued	Yes	Not argued	Not argued
Treaty law	Yes	Not argued	Not argued	Not argued	Not argued	Not argued
Customary int'l law	Yes	Not argued	Not argued	Not argued	Not argued	Not argued
Agency regulations**	Yes	No	Yes	Yes	No	Not argued
Statutory violations***	Yes	No	Not argued	Yes	No	Not argued
Agency fraud****	Not argued	Yes	Not argued	Yes	Not argued	Not argued
Lack of agency jurisdiction*****	Not argued	Not argued	Not argued	Yes	Not argued	Not argued

* Each basis of review in the left column is a potential basis of review in federal court litigation. The chart indicates whether each circuit has considered each basis. When a circuit has done so, the chart indicates the position of the circuit on that basis. Part II of this paper discusses the first five bases (abuse of discretion under the APA, legislative history, constitutional violations, treaty law, and customary international law). The discussion of these five bases is presented in the order of strength. Depending on the facts of a case, these grounds should be harmonized in federal litigation.

** Use of agency regulations is discussed in the summary of decisions from the 9th, 3d, and D.C. Circuits in Part I of this paper.

*** Statutory violations are discussed in the summary of decisions from the 9th, and D.C. Circuits in Part I of this paper.

**** Agency fraud is discussed in the summary of decisions from the 2d and D.C. Circuits in Part I of this paper. Note that these circuits stated that they would consider agency fraud, although agency fraud was not raised in any of the circuit decisions in this area of law.

***** Lack of jurisdiction is discussed in the summary of the D.C. Circuit decision in Part I of this paper. Note that the D.C. Circuit stated that it would consider an argument on lack of jurisdiction, although lack of jurisdiction was not raised in any of the circuit decisions in this area of law.