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U. S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: MIAMI Date: APR 28 2010

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h), 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Michael Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application will be approved.

The applicant is a native and citizen of Haiti who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen mother, [redacted], and U.S. citizen child, [redacted]

The Field Office Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly.

On appeal, counsel asserts that the circumstances of the applicant's convictions were not serious, the applicant has successfully rehabilitated any violent tendencies through his batterer's intervention program, and there would be extreme hardship on the applicant's son and mother if the applicant is removed. *See Appeal Brief*, dated July 30, 2009.

In support of the application, the record contains, but is not limited to, the applicant's mother's naturalization certificate, the applicant's children's birth certificates, country condition reports, court records, and an affidavit from the applicant's former girlfriend. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent part:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
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> . . . .
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

[1] The applicant's mother naturalized to become a U.S. citizen subsequent to the filing of the applicant's waiver application on September 15, 2006.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record shows that the applicant was convicted in the Ninth Judicial Circuit Court in Orange County, Florida, on October 12, 2000, of aggravated battery in violation of section 784.045(1)(b) of the Florida Statutes (Fl. Stat.) and sentenced to three days in the Orange county jail and two years probation [redacted]. The record further shows that the applicant was convicted in the Twentieth Judicial Circuit Court in Lee County, Florida, on February 13, 2001, of battery in violation of Fl. Stat. § 784.03, and sentenced to one year of probation [redacted]

At the time of the applicant's conviction, Fl. Stat. § 784.03 provided:

> (1)(a) The offense of battery occurs when a person:
>
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to another person.
>
> (b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
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> (2) A person who has two prior convictions for battery who commits a third or subsequent battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this subsection, "conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld.

Simple assault and battery offenses generally do not involve moral turpitude; however, that determination can be altered if there is an aggravating factor such as the infliction of bodily harm upon persons whom society views as deserving of special protection, such as children or domestic partners or intentional serious bodily injury to the victim. *In re Sanudo*, 23 I. & N. Dec. 968, 972 (BIA 2006). Fl. Stat. § 784.03 is violated by "an actual and intentional touching or striking of another person against the will of the other person; or intentionally causing bodily harm to an individual." *Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1341 (11th Cir. 2005)(citation omitted). Thus, based solely on the statutory language, it appears that Florida Statutes § 784.03 encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not.

However, in accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which these criminal statutes were applied to conduct that did not involve moral turpitude. The AAO is aware of a prior case in which Fl. Stat. § 784.03 has been applied to conduct not involving moral turpitude. In *Clark v. State*, the court noted, "under the battery statute the degree of injury caused by an intentional touching is not relevant and '*any* intentional touching of another person against such person's will is technically a criminal battery.'" 746 So.2d 1237, 1239 (Fla. 1st Dist. App. 1999)(citation omitted). The court further noted, "under section 784.03(1)(a) 'there need not be an actual touching of the victim's person in order for a battery to occur, but only a touching of something intimately connected with the victim's body.'" 746 So.2d 1237, 1239-40.

Therefore, the AAO cannot find that all of the offenses described in Fl. Stat. § 784.03 are categorically crimes involving moral turpitude. The AAO must therefore review the entire record,

including the record of conviction and, if necessary, other relevant evidence, to determine if the applicant's conviction under these statutes was for morally turpitudinous conduct. The AAO notes that the documents comprising the record of conviction are inconclusive as to whether the applicant caused bodily injury to the victim. However, the record contains a police report related to the applicant's arrest for this offense. The police report reflects that the applicant was arrested on December 16, 1999 for domestic violence related battery in violation of Fl. Stat. § 784.03. The police report (dated November 4, 1999) provides the following narrative of events:

> On this date this Dep. responded to above location in reference to a possible domestic violence (battery) that had just occurred. Upon my arrival I noticed that the victim was bleeding from the mouth area and had some blood on her blouse. The victim advised that she and her live in boyfriend had got into an argument and it became physical. They then began to struggle. While struggling the suspect punched the victim in the stomach several times. The victim broke loose and ran into the bedroom and tried to open the window. The suspect then ran in the room and bit the victim on her left wrist to keep her from getting out of the window. The victim broke loose again and ran back into the living room and screamed for help. The suspect got even madder at the victim and bit the victim again on her finger and punched her in the mouth with his fist. As the suspect left the residence, the victim ran out the door to a neighbor's house to get help. The suspect then ran and got into his vehicle and left. The victim then ran back home a[nd] dialed 911. The victim's 3 young children were in the residence at the time of the altercation. Suspect was gone upon my arrival.

The police report reflects that the applicant was arrested for a battery related to domestic violence. The applicant punched his domestic partner in the stomach several times and bit her on the left wrist as a method to restrain her, causing her to sustain injuries. The police officer witnessed the victim bleeding from her mouth. As previously discussed, the BIA in *In re Sanudo* determined that bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer, constitutes morally turpitudinous conduct. 23 I&N Dec. 968, 971-72 (BIA 2006). The AAO finds that the applicant's conviction for battery in violation of Fl. Stat. § 784.03 was based on conduct that caused bodily injury to an individual deserving of special protection, the applicant's domestic partner. Consequently, this conviction is a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act.

At the time of the applicant's conviction, Fl. Stat. § 784.045 provided:

> (1)(a) A person commits aggravated battery who, in committing battery:
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> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
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> 2. Uses a deadly weapon.
>
> (b) A person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.
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> (2) Whoever commits aggravated battery shall be guilty of a felony of the second

degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The AAO notes to be convicted of aggravated battery under Fl. Stat. § 784.045(1)(b), the offender must have been found to have committed simple battery under Fl. Stat. § 784.03. The essential elements of aggravated battery on pregnant person include: (1) conduct required to establish a simple battery, i.e., that the defendant either actually and intentionally touched or struck another person against the person's will, or, intentionally caused bodily harm to another person; (2) that the victim was pregnant at the time of the battery; and (3) that the defendant either knew or should have known at the time of the battery that the victim was pregnant. *Small v. State*, 889 So.2d 862, 863 (Fla. 1st Dist. App. 2004). Therefore, Fl. Stat. § 784.045(1)(b) requires that the victim have the status of an individual deserving special protection, but there is no requirement that the victim suffer an injury or be harmed. As discussed, in *Clark v. State*, the appeals court noted, "under the battery statute the degree of injury caused by an intentional touching is not relevant and '*any* intentional touching of another person against such person's will is technically a criminal battery.'" 746 So.2d 1237, 1239. The victim's status as an individual deserving of special protection, does not, alone, render the crime morally turpitudinous. *See, e.g., In re Sanudo*, 23 I&N Dec. at 973 (stating, "the existence of a current or former 'domestic' relationship between the perpetrator and the victim is insufficient to establish the morally turpitudinous nature of the crime.").

Therefore, the AAO cannot find that Fl. Stat. § 784.045(1)(b) is categorically a crime involving moral turpitude. The AAO must review the entire record, including the record of conviction and, if necessary, other relevant evidence, to determine if the applicant's conviction under these statutes was for morally turpitudinous conduct. The AAO notes that the documents comprising the record of conviction are inconclusive as to whether the applicant caused bodily injury to the victim. However, in the record contains a police report related to the applicant's arrest for this offense. The police report (dated April 2, 2000) reflects that the applicant was arrested on April 1, 2000 for committing aggravated battery on a pregnant female (domestic violence) in violation of Fl. Stat. § 784.045(1)(b). The police report provides the following narrative of events:

> On 4-01-2000 around 1930 Hours, the above named person checked into [redacted] which is located at [redacted] He was checking in with his girlfriend named [redacted]. [redacted] is 4 months pregnant and this is known by both of these persons. . . . [redacted] W-2, says in her sworn statement that they had checked into room [redacted] and with her being 4 months pregnant she wanted to go to bed to sleep, not have sex. She says her boyfriend [redacted] wanted to have sex and did not like no for the answer. [redacted] says she called the office to see if there was another room and the manager confirms that request. When she packed her things to go to that room, the telephone was disconnected and the door was blocked by her boyfriend. He told her that she came with him and she was leaving with him, now go lay down. A little pushing and shoving occurred as [redacted] wanted to leave this room at which time she was struck in the face by the boyfriend causing her nose to bleed and knocking her to the floor. . . . The boyfriend also gave a sworn statement which basically says the same thing. He says he hit her in the face because she is pregnant and did not want to have sex so he hit her in the face instead of her stomach. He says he knew she was pregnant as it is his kid she is having. . . .

The police report reflects that the applicant struck his pregnant girlfriend in the face causing her nose to bleed and knocking her to the floor. The applicant admitted to knowing his girlfriend was

pregnant. The applicant's actions caused bodily harm to an individual deserving of special protection, his domestic partner, whom he knew was pregnant. As discussed, bodily harm on a domestic partner constitutes morally turpitudinous conduct. *See In re Sanudo*, 23 I&N Dec. at 971-72. Therefore, the AAO finds that the applicant's conviction for aggravated battery in violation of Fl. Stat. § 784.045(b)(1) is a crime involving moral turpitude. Consequently, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Beyond the decision of the director, the AAO finds under its de novo review that the applicant is also inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within 10 years of his last departure from the United States.[2]

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
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> . . . .
>
> (v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record reflects that the applicant entered the United States without inspection in November 1998. The applicant remained in the United States, and on April 28, 2001, he filed an Application for Adjustment of Status (Form I-485) based on an underlying approved Petition for Alien Relative (Form I-130) filed by his mother. Consequently, the applicant accrued unlawful presence from November 1998 until the date he filed his adjustment of status application, April 28, 2001. The applicant departed the United States after he was issued an advance parole travel document. The record shows that on January 5, 2002 and April 13, 2002 the applicant was paroled into the United

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[2] The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

States to resume the processing of his adjustment of status application. The AAO finds that the applicant's departure from the United States triggered the ground of inadmissibility arising under section 212(a)(9)(B)(i)(II) of the Act.

Sections 212(a)(9)(B)(v) and 212(h) of the Act waivers of the bar to admission, resulting from the respective violations of sections 212(a)(9)(B)(i)(II) and 212(a)(2)(A)(i)(I) of the Act, are dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the alien herself experiences upon refusal of admission is irrelevant to sections 212(a)(9)(B)(v) and 212(h) waiver proceedings. In the present case, the only relative that qualifies is the applicant's U.S. citizen mother, [redacted]

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996). In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957). However, the AAO cannot find, based on the facts of this particular case, that the applicant merits a favorable exercise of discretion solely on the balancing of favorable and adverse factors. The applicant's convictions for battery and aggravated battery render him subject to the heightened discretionary standard of 8 C.F.R. § 212.7(d).

The regulation at 8 C.F.R. § 212.7(d) provides:

> The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

Accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative. *Id.*

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to his U.S. citizen mother under sections 212(a)(9)(B)(v) and 212(h) of the Act is not sufficient. He must meet the higher standard of

exceptional and extremely unusual hardship. Therefore, the AAO will at the outset determine whether the applicant meets this standard.

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean*, *supra*, and codified at 8 C.F.R. § 212.7(d).

The BIA stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

In *Monreal*, the BIA provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

> [T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the BIA noted that, "the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face." 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent's minor children was demonstrated by evidence that they "would suffer hardship of an emotional, academic and financial nature," and would "face complete upheaval in their lives and hardship that could conceivably ruin their lives." *Id.* at 321 (internal quotations omitted). The BIA viewed the evidence

of hardship in the respondent's case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The BIA noted:

> While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former "extreme hardship" standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher "exceptional and extremely unusual hardship" standard.

23 I&N Dec. at 324.

However, the BIA in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." 23 I&N Dec. 467, 470 (BIA 2002). The BIA found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The BIA noted that these factors included her heavy financial and familial burden, lack of support from her children's father, her U.S. citizen children's unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The BIA stated, "We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. *See Gonzalez Recinas*, 23 I&N Dec. at 469 ("While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship."). The AAO notes that exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record reflects that the applicant is the son of [redacted], a native of Haiti and a naturalized U.S. citizen. He is the father of a nine-year-old U.S. citizen child, [redacted]. The applicant's mother and child are qualifying family members for purposes of determining exceptional and extremely unusual hardship under 8 C.F.R. § 212.7(d).

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[3] The applicant furnished a birth certificate for an eight-year-old U.S. citizen child, [redacted]. Although this child has the applicant's surname, the applicant is not listed as the child's father on the birth certificate. There is no indication in the record that the applicant has any type of parental rights over this child. Since a parental relationship has not been established, [redacted] will not be considered a qualifying relative for purposes of a hardship determination in these proceedings.

The applicant furnished an affidavit from [redacted] mother, [redacted] stating that she and the applicant "have an informal verbal agreement as to child support, whereby [redacted] pays me directly the sum of $100.00 bi-weekly." She further states that the applicant "visits [redacted] at least 3 and often 4 and 5 times per week and they have a very close relationship." She notes that if the applicant moved to Haiti, [redacted] "would be broken hearted" and his "standard of living would decline." The affidavit indicates that although the applicant has not taken action to establish legal custody of [redacted], he has agreed to an informal arrangement where he frequently visits [redacted] at [redacted] home and pays child support. *Affidavit of* [redacted], dated March 6, 2003.

The applicant also furnished a letter from his mother stating that if the applicant is not granted she will be "distressed" because of country conditions in Haiti. She states that she has family ties in the United States, including a daughter who was born the United States and four other children who are residing in the United States. *See Letter from* [redacted], dated May 23, 2002.

In *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and that "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted). *Salcido-Salcido* involved the separation of an alien from her dependent children. *Id.* The record in the instant case reflects that the applicant does not reside with either of his qualifying relatives. Although the record does not reflect that the applicant and his qualifying family members comprise a traditional family unit, the AAO acknowledges that the applicant's mother and minor child will suffer emotionally if they remain in the United States without the applicant. Whereas inadmissibility for unlawful presence under section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), is temporary, and inadmissibility for crimes involving moral turpitude that are not violent or dangerous can be waived under the 212(h)(1)(A) standard after 15 years, inadmissibility for violent or dangerous crimes involving moral turpitude is permanent. Therefore, the applicant's qualifying family members face the prospect of permanent separation from the applicant, a significant hardship factor to be considered in these proceedings.

In the appeal brief, counsel cites to country conditions in Haiti as a hardship factor, stating that they are "generally bleak" according to a 2007 U.S. Department of State country report. *See Appeal Brief* at 7, dated July 30, 2009.

The Department of Homeland Security (DHS) Secretary, Janet Napolitano, has determined that an 18-month designation of Temporary Protected Status (TPS) for Haiti is warranted because of the devastating earthquake and aftershocks which occurred on January 12, 2010. *See* Section 244(b)(1) of the Act, 8 U.S.C. § 1254a(b)(1). As a result, Haitians in the United States are unable to return safely to their country. Even prior to the current catastrophe, Haiti was subject to years of political and social turmoil and natural disasters. In a travel warning issued on January 28, 2009, the U.S. Department of State noted the extensive damage to the country after four hurricanes struck in August and September 2008 and the chronic danger of violent crime, in particular kidnapping. *U.S. Department of State, Travel Warning – Haiti,* January 28, 2009.

The Department of State's recent travel warning issued on March 15, 2010 provides the following details on problematic country conditions in Haiti:

> The Department of State strongly urges U.S. citizens to avoid travel to Haiti. The January 12 earthquake caused significant damage to key infrastructure, and access to basic services is extremely limited. Additional aftershocks remain a possibility. All forms of communication within Haiti are limited. The country is experiencing a shortage of food, water, transportation, and adequate shelter. Many medical facilities have been operating beyond maximum capacity, and the current sanitation situation poses serious health risks. . . .
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> U.S. citizens who intend to work for an organization involved in relief efforts in Haiti should be aware that living conditions are difficult, and the availability of food supplies, clean drinking water, and adequate shelter in Haiti is limited. . . .
>
> Strong aftershocks are likely for months after an earthquake. In the event of an aftershock, persons outside should avoid falling debris by moving to open spaces, away from walls, windows, buildings, and other structures that may collapse. If indoors, persons should take shelter beside furniture, not underneath. Experts believe that curling into a fetal position beside a table, desk or couch may create a "survivable void" inside collapsed buildings. Avoid damaged buildings and downed power lines. Do not use matches, lighters, candles, or any open flame in case of disrupted gas lines.

U.S. Department of State, Bureau of Consular Affairs, Travel Warning – Haiti, March 15, 2010.

As stated in *Matter of Monreal-Aguinaga*, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship. 23 I& N Dec. 56, 64. The AAO finds that given the designation of TPS for Haitians and the disastrous conditions which have compounded an already unstable environment, and which will affect the country and people of Haiti for years to come, the applicant's mother and son would experience exceptional and extremely unusual hardship if they were to remain in the United States without the applicant. This finding is based on the exceptional and extreme emotional harm the applicant's mother and son will experience due to family separation and concern about the applicant's wellbeing and safety in Haiti, hardship factors that are substantially beyond the common or usual result of inadmissibility.

The next issue to be addressed is whether exceptional and extremely unusual hardship to the applicant's mother and son has been established in the event that they accompany the applicant to Haiti. The AAO notes that there is no indication that the applicant's son, [redacted] would accompany him to Haiti. The record indicates that Baker resides with his mother, [redacted], and the applicant does not have parental rights over him. *See Affidavit of* [redacted], dated March 6, 2003. The applicant's mother has stated that if the applicant was removed to Haiti, she would "have to pack everything and moved [sic] back to Haiti with him." *Letter from* [redacted], dated May 23, 2002. In denying the application, the director noted that the applicant's mother is currently employed and has children in the United States. The director determined that there is no clear explanation of the reason she would move back to Haiti if the applicant were removed as the applicant is an adult and not a minor child. *Decision of the Field Office Director*, dated June 29, 2009. The applicant failed to address this issue on appeal.

Although the factual circumstances of the applicant's case as presented in the record indicate that the effect of the applicant's removal would likely result in separation from his qualifying family members rather than joint relocation to Haiti, the AAO notes that the two circumstances are intertwined in this case. Since the applicant's son is a minor under the custody and care of his mother, we will limit our discussion to the hardship experienced by the applicant's mother. As discussed, the separation of the applicant from his mother would result in exceptional and extremely unusual harm. However, the applicant's mother would not be able to alleviate this emotional hardship by accompanying her son to Haiti without facing additional, more serious hardships involving her safety and welfare.

As stated in the U.S. Department of State's recent travel warning:

> U.S. citizens traveling to and residing in Haiti despite this warning are reminded that there remains a persistent danger of violent crime, including homicides and kidnappings. Since the January 12 earthquake, four American citizens have been murdered in Port-au-Prince. Most kidnappings are criminal in nature, and the kidnappers make no distinctions of nationality, race, gender, or age. Some kidnap victims have been killed, shot, sexually assaulted, or physically abused. While the capacity and capabilities of the Haitian National Police have improved since 2006, the presence of UN stabilization force (MINUSTAH) peacekeeping troops and UN-formed police units remain critical to maintaining an adequate level of security throughout the country. The lack of civil protections in Haiti, as well as the limited capability of local law enforcement to resolve crime, further compounds the security threat to American citizens. . . .

U.S. Department of State, Bureau of Consular Affairs, Travel Warning – Haiti, March 15, 2010.

The AAO finds that requiring the applicant's mother to join the applicant in Haiti would result in exceptional and extremely unusual hardship to her for the same reasons she would be concerned about the applicant if he relocated to Haiti. The Department of State has strongly urged U.S. citizens to avoid travel to Haiti. The travel warning indicates that should a U.S. citizen travel to Haiti despite the warning, they should be aware of "a persistent danger of violent crime," resulting in serious threats to their safety. The conditions described in the warning indicate that the applicant's mother would find it difficult or nearly impossible to reestablish herself in Haiti as there is a shortage of food, water and lack transportation. *See U.S. Department of State, Bureau of Consular Affairs, Travel Warning – Haiti*, March 15, 2010. The difficulties described are substantial and rise beyond the common or usual results of removal or inadmissibility to the level of exceptional and extremely unusual hardship.

Additionally, the AAO finds that the gravity of the applicant's offense does not override the extraordinary circumstances discussed. In determining the gravity of the applicant's offense, the AAO must not only look at the criminal act itself, but also engage in a traditional discretionary analysis and "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 300 (BIA 1996)(Citations omitted).

The adverse factors in the present case are the applicant's convictions for aggravated battery and battery and his unlawful presence in the United States. The favorable factors in the present case are the extreme hardship to the applicant's mother and the passage of almost nine years since he was convicted of the aforementioned offenses. The record reflects that the applicant completed a 29-week batterer's intervention program for each of his offenses. Further, the victim of the crimes, [redacted], has issued an affidavit stating that the applicant has a close relationship with their son, [redacted] and they have an informal child support agreement. The applicant does not appear to have been arrested for any other criminal offenses and he has not been charged with any other immigration violations.

The AAO finds that the crimes committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted. Therefore, the applicant has established his eligibility for sections 212(h) and 212(a)(9)(B)(v) of the Act waivers.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.