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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H2

FILE: [redacted] Office: LOS ANGELES Date: APR 08 2011

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Hammerschmidt

for Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The application for waiver of inadmissibility was denied by the Field Office Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guatemala who was found to be inadmissible under 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 been convicted of a crime involving moral turpitude. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside in the United States with his U.S. citizen spouse and three U.S. citizen children.

The director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office*, dated September 27, 2008.

On appeal, counsel asserts that the applicant's spouse and children will suffer extreme hardship if the applicant's waiver application is denied. *Brief from Counsel,* dated November 4, 2008.

In support of the waiver application, the record includes, but is not limited to, a statement from the applicant, statements from the applicant's spouse, a statement from the applicant's daughter, the applicant's spouse's naturalization certificate, the applicant's marriage certificate, the applicant's children's birth certificates, conviction records, and financial records. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (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.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not

> exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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). This case arises in the Ninth Circuit, and the Ninth Circuit Court of Appeals has adopted the realistic probability standard. *See Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008).

The record reflects that on June 12, 2001, the applicant was convicted in the Superior Court of California, County of Los Angeles, of making a criminal threat in violation of California Penal Code § 422. The applicant was placed on formal probation for a period of five years under certain conditions. The conditions included that he serve 270 days in Los Angeles County jail and pay restitution. The applicant was ordered not to "harass, molest, or annoy" his spouse and an order of protection was granted to her (Case No. [redacted].

At the time of the applicant's conviction, California Penal Code § 422 provided, in pertinent part:

> Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

In *Matter of Ajami*, the Board of Immigration Appeals (BIA) addressed whether a stalking offense that involves the making of credible threats against another constitutes a crime involving moral turpitude. 22 I&N Dec. 949 (BIA 1999). The BIA concluded that "the intentional transmission of threats is evidence of a vicious motive or a corrupt mind," and a crime encompassing such conduct involves moral turpitude. 22 I&N Dec. 949, 952. Section 422 of the California Penal Code not only requires the intentional transmission of threats, but also contemplates a degree of threat that causes another person to feel sustained fear. Therefore, it is "evidence of a vicious motive or a corrupt mind" and involves moral turpitude. *See id.* Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest his inadmissibility on appeal.

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

> (h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in [her] discretion, waive the application of subparagraphs (A)(i)(I)...of subsection (a)(2) if—
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that—
>
> (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 established to the satisfaction of the [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...
>
> (2) the [Secretary], in [her] discretion, and pursuant to such terms, conditions and procedures as [she] may by regulations prescribe, has

> consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The applicant is seeking a section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act. A waiver under section 212(h) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. Hardship the alien himself experiences upon removal is irrelevant to section 212(h) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's United States citizen spouse and three U.S. citizen children.

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 conviction indicates that he may be subject to the heightened discretion 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.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or* any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We

note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependant on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous". The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." 67 Fed. Reg. at 78677-78.

This case arises under the jurisdiction of the Ninth Circuit Court of Appeals. In *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003), the Ninth Circuit concluded that a conviction for the offense of criminal threats in violation of section 422 of the California Penal Code is a crime of violence under 18 U.S.C. § 16 and an aggravated felony under the Act. The court noted that "§ 422 is an offense 'that has as an element the ... threatened use of physical force against the person or property of another.' 18 U.S.C. § 16(a). Therefore § 422 meets the definition of a 'crime of violence' as set forth in § 16(a)." 347 F.3d 714, 717. The AAO finds that pursuant to the holding in *Rosales-Rosales* and the plain language of the statute, California Penal Code § 422 is a violent crime, and the heightened discretionary standard of 8 C.F.R. § 212.7(d) is applicable in this case.

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 qualifying relatives under section 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 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.

On appeal, the applicant's spouse asserts that going to Guatemala "would not be a viable option" for her and her children. The applicant's spouse states that her children are U.S. citizens by birth, do not speak Spanish, and have never been to Guatemala. She states that she came to the United States from Cambodia when she was fourteen years old, and only speaks English and Cambodian. She asserts that her children would not know how to socialize and interact in Guatemala. The applicant's spouse asserts that Guatemala has a very high rate of crime. She contends that she would not know anyone in Guatemala, and her husband does not have any family in Guatemala. The applicant's spouse notes that she and her children would live in poverty, and would be unable to find jobs to provide for basic necessities, such as medical care or proper housing. She asserts that she has resided in the United States since she was fourteen years old, and would not know how to live in Guatemala. *Affidavit of* [redacted] dated November 3, 2008.

The applicant's daughter states that she and her brothers are U.S. citizens by birth and have never been to Guatemala. She states that neither she nor her brothers speak or read Spanish, and they grew up speaking English in their home. The applicant's daughter notes that she would not know how to socialize and interact in Guatemala. She notes further that she is not familiar with the customs and traditions in Guatemala. She asserts that Guatemala is not a safe country, and it would be dangerous for her and her brothers to reside there. She contends that they do not have family in Guatemala, and they would reside in severe poverty. *Affidavit of* [redacted] dated November 3, 2008.

The AAO notes that the assertions the applicant's spouse and daughter have made regarding the applicant not having family in Guatemala is inconsistent with a letter the applicant submitted with his waiver application. The applicant stated in his letter that his mother and father reside in Guatemala. Furthermore, the applicant's Biographic Information Form (Form G-325A) lists his parents' place of residence as Cuatepeque, Guatemala. *See Form G-325A*, dated November 11, 2003.

However, it is recognized that a relocation for the applicant's qualifying family members to Guatemala would likely result in a reduction in their standard of living since "[m]ore than half of the population is below the national poverty line and 15% lives in extreme poverty." *CIA – The World Factbook*, dated March 16, 2011. The applicant's spouse and daughter's concerns about their safety in Guatemala is also recognized, as the U.S. Department of State has warned that "Guatemala has one of the highest violent crime rates in Latin America. In 2010, approximately 55 murders a week were reported in Guatemala City alone." *Guatemala, Country Specific Information*, dated February 25, 2011. The applicant's spouse and daughter have indicated that they do not speak Spanish and are unfamiliar with the culture. The AAO acknowledges that they are not natives of Guatemala, and would likely be regarded as foreigners in the country. According to the U.S. Department of State, "The number of violent crimes reported by U.S. citizens and other foreigners has remained high and incidents have included, but are not limited to, assault, theft, armed robbery, carjacking, rape, kidnapping, and murder, even in areas once considered safe such as zones 10, 14, and 15 in the capital." *Id.* The AAO finds that the poverty and safety issues in Guatemala are significant, and these hardships will be given considerable weight in an overall assessment of hardship.

The AAO recognizes that the applicant's three children (20, 19, and 17 years old, respectively) have resided in the United States their entire life, and are integrated into their community. The Board of Immigration Appeals and U.S. Courts have found extreme hardship in cases where the language capabilities of the children were not sufficient for them to have an adequate transition to daily life in the applicant's country of origin. For example, *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life style. The BIA found that uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the Fifth Circuit Court of Appeals stated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the

language," must be considered in determining whether "extreme hardship" has been shown. In *Prapavat v. INS*, 638 F.2d 87, 89 (9th Cir. 1980) the Ninth Circuit Court of Appeals found the BIA abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

The AAO has considered all elements of hardship to the applicant's spouse and children, should they relocate to Guatemala, in the aggregate. The AAO finds that the hardships to the applicant's children of integrating into a new culture, language, environment in Guatemala combined with the high levels of poverty and crime in Guatemala are "substantially" beyond the ordinary hardship that individuals suffer when they relocate due to a family member's inadmissibility. Therefore, the applicant has established that his children would experience exceptional and extremely unusual hardship upon relocation.

As previously discussed, a determination of exceptional and extremely unusual hardship should include a consideration of the impacts of separation from the applicant on his spouse and children.

On appeal, the applicant's spouse asserts that she and the applicant "have a very close, supportive and loving relationship." She states that when she met the applicant in March 1989, she already had two children from a previous relationship, who at that time were four and seven years old. She states that the applicant has "raised them as his own children and they love him as though he were their natural father." The applicant's spouse notes that after she married the applicant, they had three children together. She states that the applicant is "a loving and caring father, and very generous with all the children." She states that the applicant has a "secure job" as an assistant manager with Ross Dress for Less company. The applicant's spouse asserts that her earnings from her employment as a card dealer with Hollywood Park Casino is "not as good" as the applicant's salary. She indicates that she depends on the applicant financially. She contends that if the applicant is deported, she would be "forced to work all the time," and no one would be available to care for their five children. She notes that her husband "is even more important to [her] in terms of family than for most people" because her parents died when she was a young child in Cambodia. The applicant contends that a separation from the applicant would "be an insurmountable emotional trauma." She states that she has lost weight and has problems sleeping because of her worry about the applicant.

The applicant's daughter states that she and her brothers will experience extreme hardship if they are separated from their father. She states that they have loving parents who make sacrifices for them. She notes that her father is available to them and takes them to their activities. She notes further that her father cooks for them and takes them to beach and parks. The applicant's daughter indicates that her father has financially provided for them as an assistant manager at the Ross Dress for Less company. She asserts that if they are separated from her father, it would "devastate" her family. She asserts that she worries about her father's safety in Guatemala, and that she and her brothers would not get to visit him because of "the safety problems for United States citizens."

The AAO recognizes that the applicant's spouse and children will suffer financially if the applicant is removed from the United States, but the record does not indicate the extent of the financial

hardship they would suffer. The Wage and Tax Statements (Forms W-2) in the record reflect that in 2007 the applicant's spouse earned $23,246.74 and the applicant earned $35,197.73. The applicant's spouse asserts that she and the applicant reside with their three children, and her older daughter from a previous relationship, who is 23 years old. *Affidavit of* [redacted], dated November 3, 2008. The AAO acknowledges that a salary of $23,246.74 for a household of five is below the federal poverty line. *See Department of Health and Human Services 2007 Federal Poverty Guidelines.* However, the applicant's children are now 17, 19, and 20 years old. While we do not have the birth certificates of the applicant's stepchildren, the AAO observes that the stepdaughter that was residing with the applicant at the time of the appeal must now be at least 25 years old. The AAO notes that the applicant has only one minor child, and other children have reached the age of majority. It is reasonable to presume that the applicant's older children can work either full- or part-time. Moreover, the record does not contain documentation of the applicant's major household expenses such as his mortgage or rent. While the AAO recognizes that the applicant's family members will experience some financial hardship if they are separated from him, we cannot determine the extent of this financial hardship without supporting documentation.[1]

The applicant's spouse and daughter have described their strong family bond with the applicant and their interests in keeping their family unified. *See Affidavit of* [redacted] dated November 3, 2008 and *Affidavit of* [redacted] dated November 3, 2008. The AAO acknowledges that the applicant's spouse and children will experience emotional hardship if they are separated from the applicant as a result of his inadmissibility. This case arises in the Ninth Circuit. 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). Similarly, in *United States v. Arrieta,* the Ninth Circuit assessed the factors to be considered in a section 212(h) waiver and stated, "Of particular importance is the evidence Mr. [redacted] produced of the effect that separation from him would have on his immediate family members, as to whom he provided essential emotional and other non-economic familial support. We have previously explained that 'preservation of family unity' may be a central factor in an extreme hardship determination." 224 F.3d 1076, 1082 (9th Cir. 2000). Therefore, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido,* 138 F.3d at 1293.

All elements of hardship to the applicant's mother and children if they remain in the United States without the applicant have been considered in the aggregate. While the applicant has demonstrated that his family members will experience considerable emotional hardship, he has not demonstrated

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[1] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)).

the extent of his financial hardship. We find that while the hardships illustrated here may be considered "extreme," the applicant has failed to demonstrate that they rise to the heightened level of exceptional and extremely unusual. While almost every case will present some hardship, the fact pattern here is not "substantially" beyond ordinary hardship.

In conclusion, the record does not reflect that the applicant's spouse or children would suffer exceptional and extremely unusual hardship upon separation from the applicant. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act. Having found the applicant ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.