U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship and Immigration Services

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**PUBLIC COPY**

[redacted]

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Date: NOV 08 2011 Office: SAN BERNARDINO FILE: [redacted]

IN RE: Applicant: [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.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico 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 been convicted of crimes involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and children.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director,* dated May 18, 2010.

On appeal, counsel for the applicant asserts that the applicant's wife will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated July 4, 2010.

The record contains, but is not limited to: a brief from counsel; psychological evaluations for the applicant's wife; statements from the applicant's mother-in-law and children; copies of medical documents for the applicant's mother-in-law; documentation relating to the applicant's and his wife's expenses, employment, and taxes; and documentation in connection with the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

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 –
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> > (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-
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> > (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.)

The record shows that on or about November 19, 1993 the applicant was convicted of assault with a deadly weapon or force likely to produce great bodily injury under California Penal Code § 245(a)(1), for which he was sentenced to 18 days of incarceration and two years of probation. The applicant was arrested on April 22, 1998, and he pled guilty to forgery under California Penal Code § 470(a) and theft of personal property under California Penal Code § 484(a), for which he was sentenced to 30 days of incarceration and two years of probation. The applicant was arrested on July 5, 1998, and he pled guilty to petty theft under California Penal Code § 488, for which he was sentenced to probation, a fine, and restitution.

At the time of the applicant's conviction for assault with a deadly weapon or force likely to produce great bodily injury, California Penal Code § 245(a)(1) stated:

> Every person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury is punishable by imprisonment in the state prison for two, three or four years, or in a county jail not exceeding one year, or by fine not exceeding ten thousand dollars ($10,000), or by both such fine and imprisonment.

The present case arises within the Ninth Circuit. The Ninth Circuit Court of Appeals in *Gonzales v. Barber* determined that assault with a deadly weapon under the California Penal Code is categorically a crime involving moral turpitude. 207 F.2d 398, 400 (9th Cir. 1953). Further, in *In re Sanudo*, 23 I&N Dec. 968 , 971 (BIA 2006), the BIA stated that "assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude by both this Board and the Federal courts, because

the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the 'simple assault and battery' category." In *Matter of P*, the BIA found that assault with intent to do great bodily harm less than the crime of murder, is a crime involving moral turpitude. 3 I&N Dec. 5 (BIA 1947). Thus, all convictions under California Penal Code § 245(a)(1) are categorically crimes involving moral turpitude, and the applicant's conviction under the section renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

At the time of the applicant's conviction for theft of personal property, California Penal Code § 484(a) stated:

> Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that theft under California Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). In view of the holding in *Castillo-Cruz*, we find that the applicant's conviction for theft under California Penal Code § 484(a) constitutes a crime involving moral turpitude, serving as an additional basis for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

As the applicant's convictions under California Penal Code §§ 245(a)(1) and 484(a) constitute crimes involving moral turpitude, rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, the AAO need not assess whether his convictions under California Penal Code §§ 470(a) and 488 also constitute crimes involving moral turpitude. The applicant has not contested his inadmissibility on appeal. The applicant requires a waiver of inadmissibility under section 212(h) of the Act.

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

> The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
>
> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(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 . . .; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he 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 does not meet the requirements of section 212(h)(1)(A) of the Act, as the most recent activities that rendered him inadmissible occurred less than 15 years ago. Section 212(h)(1)(A)(i) of the Act. He may establish eligibility for a waiver under section 212(h)(1)(B) of the Act should he show that denial of the waiver application will result in extreme hardship to his wife or children. However, even if the applicant establishes that he meets the requirements of section 212(h)(1)(B) of the Act, we cannot favorably exercise discretion in the applicant's case except in an extraordinary circumstance. *See* 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). Black's Law Dictionary, Seventh Edition (1999), defines violent as "of, relating to, or characterized by strong physical force" and dangerous as "likely to cause serious bodily harm." 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.

The AAO finds that a violation of California Penal Code § 245(a)(1), which proscribes committing "an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury", a violent and dangerous crime within the meaning of 8 C.F.R. § 212.7(d), and the heightened discretionary standards found in that regulation are 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 AAO will also consider whether any other extraordinary circumstances are present.

Although 8 C.F.R. § 212.7(d) does not specifically state to whom the applicant must demonstrate exceptional and extremely unusual hardship, the AAO interprets this phrase to be limited to qualifying relatives described under the corresponding waiver provision of section 212(h)(1)(B) of the Act. A waiver of inadmissibility under section 212(h)(1)(B) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. The qualifying relatives in this case include the applicant's U.S. citizen wife and children.

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.

The applicant has provided two psychological evaluations for his wife from [redacted] based on a total of six interviews that occurred in February, March, and June 2010. [redacted] listed symptoms that the applicant's wife reported, including severe depression, excessive nervousness, anxiety, extreme frustration, debilitating fatigue, an inability to concentrate,

and the general feeling of hopelessness that interferes with her daily tasks and responsibilities. [redacted] listed the results of several diagnostic tests administered to the applicant's wife. She observed that the applicant's wife's symptoms have worsened, and she stated that she referred the applicant's wife to seek supportive psychotherapy from a licensed clinical psychologist or other mental health care provider. [redacted] indicated that the applicant's wife is under the care of a physician and takes two medications to help control her symptoms of depression and anxiety, and to help with anemia.

[redacted] indicated that the applicant's wife has endorsed one or more statements reflecting acts of suicide ideation, which combined with depression and anxiety is a more significant danger signal. [redacted] reported that an administered test found the applicant's wife to be in no imminent danger. [redacted] noted that the applicant's wife reported that she has been unemployed since February 2010, and her depression has worsened since that time. [redacted] indicated that the applicant's wife is dependent on the applicant for financial support. [redacted] stated that the applicant's wife asserted that her hypertension has worsened, which is a danger if left uncontrolled.

[redacted] asserted that residing in Michoacan, Mexico presents risk to the applicant's wife and other members of their family, and she cited statistics and facts from two articles and the U.S. Drug Enforcement Administration. [redacted] indicated that the applicant's wife has not resided in Mexico since the age of three and the applicant has not resided there since the age of 14, so they and their children would have difficulty adjusting to life there.

In a statement dated July 14, 2010, the applicant's mother-in-law described the applicant's assistance to her, and she lauded his good character. She stated that the applicant told her that he suffered a difficult childhood including being sold into slavery by his grandfather. She explained that she has medical problems, and that she has seven children who are all U.S. citizens. The applicant submitted a letter from a physician for his mother-in-law that briefly lists her conditions and asserts that she is unable to work and is dependent on the applicant's wife to take her to appointments.

In statements dated July 8, 2010, the applicant's sons explained that the applicant has served as a strong father figure for them and supported them and their family emotionally and economically. In a statement dated July 8, 2010, the applicant's daughter provided that the applicant has supported her and her academic goals and that she and her brothers would have difficulty completing college without his help.

The record contains a statement from the applicant's wife dated July 9, 2004 that was submitted in support of a prior Form I-601 application for a waiver. As the statement was written over seven years ago, it is not a reliable account of the applicant's wife's present circumstances. However, the AAO has reviewed the statement and notes that it supports that the applicant and his wife share a close relationship and that they have concerns for their children meeting their educational goals should they reside in Mexico. The applicant's wife explained that she left Mexico when she was two years old and that she would face hardship adapting to life there should she return. She expressed that she and her children would face emotional hardship should they become separated from the applicant.

In a brief dated July 4, 2010, counsel reiterates statements made in [redacted] psychological evaluations, including that the applicant's wife is under the care of a physician and taking medications to control depression and anxiety. Counsel asserts that the applicant's wife would suffer extreme hardship should she become separated from the applicant. Counsel notes that the applicant's mother-in-law resides with his wife, and she depends on the applicant's wife's care and financial support.

Upon review, the applicant has shown that a qualifying relative will experience exceptional and extremely unusual hardship should the present waiver application be denied. The AAO has carefully examined the reports from [redacted] regarding the applicant's wife's mental health challenges. It is evident that the applicant's wife is enduring significant emotional suffering due to the possible removal of the applicant. While the reports from [redacted] do not represent treatment for a mental health disorder, they were generated over a period of approximately five months and reflect a worsening of the applicant's wife's mental health. Documentation of the applicant's wife's mental health status is not complete. While [redacted] indicated that she referred the applicant's wife for outside treatment, the applicant has not asserted or shown that his wife has sought such treatment. Counsel and [redacted] assert that the applicant's wife is under the care of a physician and that she has been prescribed medication for depression and anxiety, yet the applicant has not presented any independent evidence to support these facts. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). However, the reports from [redacted] are detailed and the results of testing are discussed to show the decline of her condition. The reports support that the applicant's wife is suffering an unusual level of emotional hardship.

[redacted] asserted that residing in Michoacan, Mexico presents risk to the applicant's wife and other members of their family, and she cited statistics and facts from two articles and the U.S. Drug Enforcement Administration. The applicant has not shown that he and his family will or must reside in Michoacan, Mexico, yet the AAO acknowledges that conditions in Mexico can be challenging, and that the applicant's wife has concern for her family residing there. *See United States Department of State Travel Warning: Mexico*, dated April 22, 2011.

The AAO acknowledges that the applicant's wife has resided in the United States for a lengthy duration, most of her life, and that returning to Mexico would constitute separation from her country, culture, and community. The record also supports that applicant's wife's mother has medical challenges and that the applicant's wife assists her. It is noted that the applicant's mother-in-law reported that she has seven U.S. citizen children, and the applicant has not asserted that her other

children are unavailable to assist her should the applicant's wife reside in Mexico. Yet, due consideration is given to the applicant's wife's desire to continue to assist her mother.

The applicant has not submitted recent documentation relating to his and his wife's financial circumstances, and he has not shown that his wife in fact relies on his support. However, it is evident that the applicant's wife would face challenges due to acting as a single parent for her children should she remain in the United States. It appears that the applicant's wife would have responsibility for their two children who are ages six and 10. Their two oldest children are approximately ages 19 and 20, and the applicant has not shown whether they require significant assistance, and if so, at what level. Yet, consideration is given to the applicant's wife's wish to continue to provide support for their two older children and the hardship such effort would create for her. The AAO acknowledges that acting as a single parent for two young children and two young adults often involves considerable challenges, including emotional and financial difficulty. It is also understood that having four children, at least two who require close parental supervision and support, creates significant challenges should the applicant's wife relocate to Mexico. Should the applicant's wife leave their two young adult children in the United States, she would face the emotional burden of becoming separated from them.

All elements of hardship to the applicant's wife have been considered in aggregate, whether she remains in the United States or relocates to Mexico. The AAO finds that the applicant has sufficiently distinguished his wife's circumstances from those commonly endured by individuals who face the removal of a spouse, particularly given her documented mental health challenges and responsibilities as a parent for four children. Based on the foregoing, the applicant has shown that denial of the present waiver application would result in exceptional and extremely unusual hardship to his wife. 8 C.F.R. § 212.7(d).

Additionally, the AAO finds that the gravity of the applicant's offenses does not override the extraordinary circumstances in the applicant's case. In determining the gravity of the applicant's criminal conduct, the AAO must not only look at the criminal acts themselves, 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 negative factors in this case consist of the following:

The applicant entered the United States without inspection in or about 1989 and has remained for a lengthy period without a legal immigration status. The applicant was convicted of assault with a deadly weapon or force likely to produce great bodily injury in 1993, and forgery and petty theft in 1998.

The positive factors in this case include:

The applicant's U.S. citizen spouse will experience exceptional and extremely unusual hardship should he reside outside the United States. The applicant's four children will endure significant hardship should the waiver application be denied. The record does not reflect that the applicant has committed a crime since 1998, in approximately 13 years. The applicant has shown a propensity to work and pay taxes, and to support his wife and children. The record supports that the applicant has provided meaningful emotional support to his wife and children, and he has cultivated a close family unit. Statements from the applicant's two older children, who are his stepchildren, express that he has served as a strong father figure for them and supported their educational goals.

The applicant's crime of violence is troubling and raises concern regarding whether he poses a danger to others residing in the United States. However, his offense occurred approximately 22 years ago, and the record does not show that he has a propensity to engage in further violent acts. His convictions for petty theft and forgery call into question his veracity and character, yet as 13 years have passed, the AAO finds no cause to believe he will engage in further dishonest or criminal acts. Thus, the benefits of keeping the applicant's family intact in the United States outweigh the gravity of his prior misconduct, such that a favorable exercise of discretion is warranted.

As the applicant has shown that his wife will suffer "exceptional and extremely unusual hardship" as contemplated by the regulation at 8 C.F.R. § 212.7(d), he has also met the lesser standard of showing that his wife will suffer "extreme hardship", as required by section 212(h) of the Act. Accordingly, he has established that he is eligible for a waiver under section 212(h) of the Act. As discussed above, the applicant has shown that he warrants a favorable exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

**ORDER:** The appeal is sustained.