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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Avenue, NW, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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DATE: NOV 09 2011 Office: LOS ANGELES FILE: [redacted]

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.

Thank you,

Michael Kumray

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Vietnam 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), in order to reside in the United States with his U.S. citizen mother.

On July 28, 2008, 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.

On appeal, counsel asserts that the director failed to take into account all relevant hardship factors and evidence, improperly weighed economic factors, failed to consider non-economic factors, and did not consider hardship in the aggregate when determining the hardship the applicant's mother would suffer if the applicant is denied admission to the United States. Additionally, on appeal, the applicant's counsel states that the applicant meets the higher "exceptional and extremely unusual hardship" standard.

In support of the waiver application, the record includes, but is not limited to, statements from the applicant's family members, friends, and members of the community, the applicant's court records, financial documentation, the applicant's mother's naturalization certificate and medical records, the applicant's brother's naturalization certificate, the applicant's sister's naturalization certificate and medical records, psychologist's reports, the applicant's father's death certificate, the applicant's brother's death certificate, and documentation of the applicant's immigration history in the United States. The entire record was reviewed and considered in rendering a decision on the appeal.

The relevant facts are as follows. A Petition for Alien Relative (Form I-130) filed on the applicant's behalf by his U.S. citizen brother; with a priority date of October 10, 1991, was approved on January 13, 1992. The applicant was paroled into the United States on August 26, 1993 pursuant to INA § 212(d)(5). At that time he was 19 years old. On February 20, 1997 the applicant was convicted in the Superior Court of California, Los Angeles County, of Lewd Act Upon a Child in violation of California Penal Code § 288(a), for actions that took place on August 31, 1995. He was sentenced to 180 days in jail and three years probation. His probation was terminated on February 19, 2000. The applicant filed an application for adjustment of status on February 3, 2003. That application was denied on June 12, 2006. On July 31, 2007, the applicant was placed into removal proceedings. On January 2, 2008, the applicant filed an application for asylum and withholding of removal. On April 18, 2008, the applicant's application for adjustment of status was reopened by USCIS. The applicant filed a new application for adjustment of status on June 3, 2008. On July 28, 2008, the applicant's application for a waiver of inadmissibility was denied. On February 17, 2009, the applicant was ordered removed to Vietnam based on the

Immigration Judge's finding that he had committed a crime involving moral turpitude as set forth at INA § 212(a)(2)(A)(i)(I), but his removal was deferred under the Convention Against Torture (CAT). The Department of Homeland Security did not oppose the grant of deferral of removal in the applicant's removal proceedings.

A removal order has been issued, however, USCIS retains jurisdiction over the applicant's application for adjustment of status, and as a result, the corresponding application for a waiver of inadmissibility. 8 CFR 245.2(a)(1). A Form I-212 has not been filed in this case and is not under consideration on 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.

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, clarified that for a crime to qualify as a crime involving moral turpitude for purposes of the INA, it "must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness."

The record reflects that on February 20, 1997 the applicant was convicted in the Superior Court of California, Los Angeles County, of Lewd Act Upon a Child in violation of California Penal Code § 288(a). The applicant was sentenced to three years probation, imprisonment for 180 days, and ordered to pay $200 in restitution. He was also ordered not to associate with any minor under 16 years unless in the presence of an adult, cooperate with a probation officer in a plan for sexual socialization counseling, seek and maintain training, schooling, or employment as approved by the probation officer, and to keep the probation officer advised of his residence. Lewd Act Upon a Child is a serious felony within the meaning of California Penal Code § 1192.7(c)(6) with a maximum punishment of eight years. The applicant was also required to register as a sex offender.

California Penal Code § 288, in pertinent part, states:

> Lewd or lascivious acts; penalties; psychological harm to victim
>
> (a) Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

The facts of the applicant's criminal case as presented at the criminal trial were that the applicant, who was 21 years old at the time, swam up beside and "smoothly" rubbed the leg, buttocks, and back of a seven-year-old girl who was swimming in a pool at the applicant's apartment complex. The young girl stated in her testimony that he first touched her leg, then she swam away and came back and he touched her leg, buttocks and back in one "smooth" motion. Testimony at the applicant's criminal trial illustrated that the touching lasted two-to-five seconds and occurred two to three times on that day in the pool. The record reflects that this incident was the only contact between the applicant and the victim and there was no verbal communication between the applicant and the victim.

In the applicant's removal proceedings, the Immigration Judge found in a decision dated February 17, 2009, that the applicant, an arriving alien, was removable for having been convicted of a crime involving moral turpitude under INA § 212(a)(2)(A)(i)(I). Moreover, it is well-settled law that a violation of California Penal Code § 288(a) is categorically a crime involving moral turpitude because it contains the elements that are instrumental in a finding of moral turpitude: protected class – children under the age of 14 – and scienter. *See Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010) (citing *Schoeps v. Carmichael*, 177 F.2d 391, 394 (9th Cir.1949)). The applicant did not appeal the Immigration Judge's order and has not challenged his inadmissibility for having been convicted of a crime involving moral turpitude. The applicant has not been arrested for or convicted of any additional crimes. In view of Immigration Judge's decision and because neither the law nor the facts have changed since that time, we will not disturb the Immigration Judge's

holding that the applicant's 1997 conviction under California Penal Code § 288(a) is a crime involving moral turpitude.

The Immigration Judge also found in this particular case that the applicant's conviction under California Penal Code § 288(a) was a conviction of a particularly serious crime baring him from withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). In making that finding, the Immigration Judge analyzed the four factors set forth in *Matter of Frentescu*, 16 I&N Dec. 244 (BIA 1982): 1) the nature of the conviction, 2) the circumstances and underlying facts of the conviction, 3) the type of sentence imposed, and 4) if the type and circumstances of the crime indicate that the alien would be a danger to the community. *Id* at 247; *see also Matter of N-A-M*, 24 I&N Dec. 336, 338 (BIA 2007) (holding that the proper focus is on the nature of the crime and not on the likelihood of future misconduct). The Immigration Judge held that nature of the crime committed by the applicant, a lewd act against a child, is by its nature a particularly serious crime covered by INA §241(b)(3)(B)(iii).

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

> (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.

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Since the activities that are the basis for the applicant's criminal conviction occurred more than 15 years ago, on August 31, 1995, he is eligible for a waiver under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of a letter from the County of Los Angeles, Probation Department, dated March 27, 2008, indicating that the applicant's probation was terminated on February 19, 2000 and that there were no active or pending cases in Los Angeles County under his name at the time of the letter. Additionally, a letter and evaluation by a psychologist and letters from family members and members of the community in the record attest to the applicant's moral character and lack of criminal propensity.

In a letter dated March 26, 2009, [redacted] a licensed psychologist with extensive experience in the field, followed-up on his December 2008 evaluation of the applicant, adding that he found the applicant "to be a fully stable man without any evidence of psychiatric or emotional disturbance." [redacted] added that "after thoroughly examining [the applicant's] history and background and juxtaposing that data with his test results, I was able to affirm that [the applicant] does not pose any risk o danger to himself or his community." Moreover, [redacted] added that he "has evaluated many incarcerated adults" and he "can say without a doubt that [the applicant] is a well-functioning man who does not pose a danger to anyone." The record indicates that [redacted] testified on the applicant's behalf in his removal proceedings and was qualified as a credible expert witness.

Additionally, the record reflects that numerous other individuals indicated in sworn statements that the applicant is a calm and trustworthy person who devotes his time to caring for his mother. In a sworn statement dated February 6, 2008, the owner of [redacted], a Buddhist temple in San Gabriel, California, stated that she knew the applicant to visit the temple to accompany his mother. She also stated that the applicant was "helpful and very generous in volunteering to assist" in activities such as landscaping work around the temple garden. She added that he had a calm demeanor, was patient and courteous, and she did not believe that he would hurt anyone, especially a child. In a sworn statement dated February 6, 2008, a U.S. citizen neighbor of the applicant provides that he knows of the crime that the applicant was convicted of, but he had never heard of anyone else that had ever accused the applicant of having inappropriate contact with children and that he had never seen the applicant "do anything that would make me think that he is violent or would hurt another person." The record includes additional statements from community members and family members reiterating their belief in the applicant's good moral character.

In view of the record, which shows that the applicant has not committed any crimes since 1995,

has been found by a psychologist accepted as an expert witness before the Immigration Court to not pose any harm to the community, and has been actively involved in the community and in the lives of his family members, the AAO finds that the applicant has provided sufficient evidence to demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

However, even though the applicant establishes that he meets the requirements of section 212(h)(1)(A), 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). Moreover, the Immigration Judge's finding that the applicant's offense was a particularly serious crime under INA §241(b)(3)(B)(iii) does not in and

of itself lead to a determination that the crime is "violent" or "dangerous" as set forth in 8 C.F.R. § 212.7(d).

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."

In the context of a different section of the Act, the Ninth Circuit held that the crime defined by section 288(a) of the California Penal Code, which prohibits lewd or lascivious conduct, constitutes sexual abuse of a minor, and is therefore an aggravated felony, even though the child need not suffer any harm or injury under the statute. *United States v. Baron-Medina,* 187 F.3d 1144 (9th Cir. 1999). According to the court, even an "'innocuous' touching, 'innocently and warmly received,'" violates the statute, if the touching was done with a sexual intent. *Id.* at 1147 (quoting *People v. Lopez,* 965 P.2d 713, 718 (Cal. 1998)). Sexual abuse directed toward a child under the age of 14 years is an exploitive act that poses a danger to the child's long-term well-being. Under the United States Sentencing Guidelines § 2L1.2, 18 U.S.C. § 2L1.2, a "crime of violence" includes sexual abuse of a minor. Moreover, in the *United States v. Medina–Villa,* the Ninth Circuit Court of Appeals held that a violation of California Penal Code § 288(a), the statute in question in this case, is categorically a crime of violence. 567 F.3d 507, 511–16 (9th Cir.2009). The AAO finds that a violation of California Penal Code § 288(a), which proscribes the intentional and lewd touching of a child under the age of 14 for the purposes of sexual gratification, a violent and dangerous crime within the meaning of 8 C.F.R. § 212.7(d), and thus 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." *Id.* Decisions whether 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.

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 abroad 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, counsel asserts that the aggregate effect of the numerous hardship factors that will affect the applicant's U.S. citizen mother amount to exceptionally and extremely unusual hardship. Counsel cites to *Mejia-Carrillo v. U.S.*, 656 F.2d 520, 522-23 (9th Cir. 1981) to illustrate that a lack of economic hardship should not be over-relied upon in the hardship determination. The primary hardship asserted by the applicant appears to be the emotional and physical hardship on his U.S. citizen mother should they be separated.

As to the emotional hardship the applicant's U.S. citizen mother would experience, the record indicates that the applicant's mother has suffered significant loss in her life. Additionally, the record indicates that the applicant's mother has relied on the applicant as her primary caregiver for the last fifteen years. A death certificate in the record indicates that the applicant's father, his mother's husband, passed away in 1987 from illness. The family in their sworn statements report that the applicant's father was a member of the South Vietnamese Army and aided the U.S. during the Vietnam war and as a result was imprisoned and tortured in a Vietnamese reeducation camp for

several years. It is their contention that the applicant's father never recovered his health after being released from prison and passed away at the young age of 54, as a result. The record also indicates that the applicant's younger brother was murdered, at 23 years old, on June 10, 2001 in Los Angeles County. The applicant's mother also states that she suffered when she believed that her elder son was dead for many years when he was brought to the United States at a young age and separated from the family for 10 years. The record illustrates that the applicant's mother has also suffered emotionally due to fact that her only daughter is legally blind, anemic, and has had multiple operations to remove tumors in her thyroid and abdomen.

In his evaluation dated September 9, 2008, [redacted] diagnosed the applicant's mother with "acute distress disorder" as a result of the trauma and loss that she has endured. [redacted] found that if the applicant's mother were separated from the applicant, her health would clearly be jeopardized. He stated that "her physical and emotional health would deteriorate so severely that it would require immediate professional and mental health intervention." [redacted] noted that no other family members are able to provide the support that the applicant provides his mother. The applicant's eldest brother has been successful in the United States and provides financial assistance to his mother, but his job as an engineer for Boeing requires him to live where the company's need demands. At the time of the appeal, the record reflects that applicant's older brother, his wife, and their three children, the applicant's mother's only grandchildren, lived in Oklahoma. The record indicates that an additional psychological assessment by [redacted] found that the applicant's U.S. citizen mother's "depression will continue, her life will become greatly constricted, and her safety and well-being will be jeopardized" if she is separated from the applicant as she was during his immigration detention.

As for physical hardship upon separation from the applicant, the record contains evidence that the applicant's U.S. citizen mother suffers from vision impairment, weakness due to a fractured arm, bladder weakness, elevated blood pressure, high cholesterol and hearing impairment. This information was provided in a medical evaluation by [redacted] Additionally, [redacted] states that he found the applicant's mother to be illiterate. In her statement dated February 7, 2008, the applicant's mother states that the applicant is her only child left to care for her. She states that for many years he has been her primary care provider. She states that she depends on the applicant to take her to doctor's appointments, to the Buddhist Temple, and to visit other family members and members of the community. She also states that he cooks every meal for her and does the laundry and cleaning in the house. The record illustrates that the applicant's mom has had at least one serious fall where she broke her arm and relied on the applicant to find her, pick her up, and care for her. The record contains documentation indicating that in Vietnamese culture children physically care for their parents and should not permit them to live alone. The record illustrates that while the applicant was detained, his mother lived alone as the applicant's other siblings were unable to physically care for her. The applicant had been detained for over one year by the time his appeal was submitted to the AAO. The record illustrates that the applicant's mother's medical condition worsened while he was detained and that her ability to function on daily basis diminished while she was separated from him. The applicant's sister states that her mother became more anxious and depressed and experienced increased memory loss. [redacted] in his September 9,

2008 assessment, noted that the applicant's mother was experiencing acute distress due to the separation from the applicant. He also noted the applicant's mother's significant weight loss since his initial assessment of her a year prior and described her as "frail." In her statement, the applicant's sister relayed that her mother had a serious fall while the applicant was detained and that she just happened to be there visiting her mother and was able to assist, but she worried what will happen in the future if her mother falls and her brother is not there to care for her on a daily basis. The applicant's sister explains and provides evidence to illustrate that her own medical conditions have worsened and prevent her from caring for her mother on a full-time basis. Although the family could presumably afford to put their mother in a paid assisted living facility, in this particular case, due to the cultural issues put forth by the applicant and the applicant's mother's own unique history of psychological trauma, we find that separation from her son and caregiver would amount to hardship that is "'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *Matter of Monreal-Aguinaga*, 23 I& N Dec. at 62.

The applicant has also submitted evidence that he financially provides for his mother. The record, however, does not illustrate that his mother would suffer significant financial hardship in his absence as the applicant's older brother appears to be able to financially support his mother. In the aggregate, however, the AAO finds that the applicant's U.S. citizen mother would suffer hardship if she were separated from the applicant due in part to her particular vulnerability to loss based on her past experiences, including the torture and imprisonment of her husband in Vietnam, the murder of her youngest son, and a long term separation from her eldest son when he was a child and she believed him to be dead. Additionally, the AAO finds that the applicant's U.S. citizen mother's would suffer hardship due to the fact that the applicant is uniquely situated to provide live-in care to his mother, care that the record reflects that she has relied on him to provide for over ten years. The record also makes clear that in the absence of the applicant's care during the period of time that he was detained, the applicant's mother's health and ability to function on a day-to-day basis suffered. In the aggregate, based on the particular facts of this case, this hardship rises to the level of exceptional and extremely unusual.

As previously discussed, a determination of exceptional and extremely unusual hardship should also include a consideration of the impacts of relocation on the applicant's qualifying relatives. Counsel asserts that the applicant's mother will not likely relocate to Vietnam with the applicant should that be necessary due to her advanced age and her fear of persecution in that country. The record contains extensive evidence of the country conditions in Vietnam and the applicant's removal to that country was deferred due to the fact that he would more likely than not face torture there due to his deceased father's association with the South Vietnamese Army. The applicant's mother is 75-year-old woman who fled her native Vietnam where her deceased husband was imprisoned and tortured, has lived in the United States since 1993, and has been a United States citizen for 10 years. The AAO finds that the applicant has established that his U.S. citizen mother would suffer exceptional and extremely unusual hardship in the case of relocation to Vietnam, primarily due to the emotional hardship she would suffer returning to a country where her deceased husband was imprisoned and tortured and from being separated from her other children who are

U.S. citizens and reside in the United States. The record does not show that the applicant's mother has any immediate family members who currently reside in Vietnam.

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives). *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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." *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the applicant's conviction for an extremely serious offense. He has no other criminal or immigration violations. The favorable factors in the present case are the exceptional and extremely unusual hardship the applicant's U.S. citizen mother would suffer if the applicant's waiver were denied, the support the applicant has consistently provided to his mother for what appears to be his entire adult life, the indications by a psychologist that the applicant does not pose a danger to the community, letters from family and community members attesting to the applicant's moral character, and the lack of a criminal record or offense since 1995.

The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See* 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.