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

U.S. Citizenship and Immigration Services

H2

[redacted]

DATE: OCT 20 2011 OFFICE: CHICAGO, IL 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 Dale Hammond

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois and the Administrative Appeals Office (AAO) subsequently denied the applicant's appeal. The AAO now reopens the matter pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for purposes of entering a new decision. The AAO's prior decision will be withdrawn. The appeal will be sustained, and the application will be approved.

The record reflects that 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. The applicant is the spouse and father of U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States with his family.

The Field Office Director found that the applicant had failed to establish that the bar to his admission would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated September 19, 2007.[1]

On appeal, counsel contends that United States Citizenship and Immigration Services (USCIS) erred in finding the applicant to have been convicted of crimes involving moral turpitude and submits additional evidence in support of the applicant's hardship claim. *Form I-290B, Notice of Appeal or Motion*, dated October 18, 2007.

In support of the waiver application, the record includes, but is not limited to, counsel's briefs, statements from the applicant and his spouse, a medical statement relating to the applicant's spouse and youngest child; tax returns and W-2 forms; statements of support for the applicant; a rental agreement; school records for the applicant's oldest son and documentation relating to the applicant's criminal history. The entire record was reviewed and considered in reaching a decision on the appeal.

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

> (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:

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[1] The AAO notes that United States Citizenship and Immigration Services denied a prior Form I-601 filed by the applicant on May 5, 2006.

> [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 the present case, the record reflects that, on May 18, 1998, the applicant was convicted of Mob Action pursuant to 720 Illinois Compiled Statutes (ILCS) § 5/25-1(a)(2), fined and placed under court supervision. On July 20, 1999, the applicant pled guilty to the crimes of Resisting a Peace Officer and two counts of Aggravated Battery, Battery upon a Peace Officer under 720 ILCS 5/31-1(a) and 720 ILCS § 5/12-4(b)(6) respectively. On May 28, 2000, the applicant was arrested for Violation of the Liquor Control Act. No disposition for this arrest is found in the record.

On appeal, counsel contends that the applicant has not been convicted of a crime involving moral turpitude as he was convicted of simple battery, not aggravated battery. The AAO notes, however, that the Certified Statement of Conviction/Disposition submitted by the applicant reflects that he pled guilty to Battery upon a Peace Officer under 720 ILCS § 5/12-4, which punishes the offense of Aggravated Battery.

At the time of the applicant's conviction, 720 ILCS § 5/12/4 stated the following:

> § 12-4/ Aggravated Battery
>
> . . . .
>
> (b) In committing a battery, a person commits aggravated battery if he or she:
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> . . . .
>
> (6) Knows the individual harmed to be a peace officer . . . while such officer . . . is engaged in the execution of any official duties including arrest or attempted arrest, or to prevent the officer . . . from performing official duties, or in retaliation for the officer . . . performing official duties, and the battery is committed other than by the discharge of a firearm . . . .

(e) Sentence.

Aggravated battery is a Class 3 felony.

At the time of the applicant's conviction, 720 ILCS 5/31-1 stated:

§ 31-1. Resisting or obstructing a peace officer or correctional institution employee.

(a) A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer . . . of any authorized act within his official capacity commits a Class A misdemeanor.

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining inadmissibility under section 212(a)(2)(i)(I) of the Act, adopting the "realistic probability" standard used by the Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007). The methodology requires an adjudicator to review the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute could be applied to reach conduct that does not involve moral turpitude. 24 I&N Dec. 687, 698 (A.G. 2008)(citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

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

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

The Field Office Director found the applicant's convictions under 720 ILCS §§ 5/31-1(a) and 5/12-4(b)(6) to be convictions for crimes involving moral turpitude. The AAO notes, however, that assault on a law enforcement officer has been found to be a crime involving moral turpitude only when the perpetrator knows the victim to be a law enforcement officer performing his or her official duty and the assault results in bodily injury to the officer. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault); *see also Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engage in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (a*s modified by Matter of Danesh, supra*) (assault on prison guard not a crime involving moral turpitude because offense charged appeared to be only "simple" assault and no bodily injured was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault).

In the present case, the crimes of which the applicant was convicted do not necessarily require the causing of bodily harm to a peace officer. The definition of battery in 720 ILCS § 5/12-3(a) indicates that a person is guilty of battery when he or she "intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." Accordingly, battery upon a peace office under 720 ILCS § 5/12-4(b)(6) may only involve physical contact with the officer rather than causing him or her bodily harm. The AAO also notes that resisting a peace officer under 720 ILCS § 5/31-1(a) can be committed simply by pulling or running away from the officer. *City of Chicago v. Brown*, App. 1 Dist.1978, 18 Ill. Dec. 395, 61 Ill.App.3d 266, 377 N.E.2d 1031. Based solely on the language of the statutes under which the applicant was convicted, it appears that both encompass conduct that involves moral turpitude and conduct that does not. Accordingly, the AAO cannot conclude that the applicant's offenses are categorically crimes involving moral turpitude.

Under *Silva-Trevino*, the AAO would normally proceed with a second-stage review of the applicant's record of conviction and, as necessary, a review of any additional evidence that would indicate the nature of his offenses. However, this additional analysis is precluded in the present case by the limited nature of the evidence submitted relating to the applicant's criminal history. The only document in the record that addresses his convictions under 720 ILCS § 5/31-1(a) and 720 ILCS § 5/12-4(b)(6) is a Certified Statement of Conviction/Disposition that identifies the sections of Illinois statute under which he was charged and reports his convictions for these offenses. As a result, the AAO does not have sufficient evidence to conduct a modified categorical inquiry for purposes of determining whether the applicant's convictions for resisting a peace officer and battery constitute crimes involving moral turpitude.

However, that the burden of proof in this proceeding, which includes the burden of production, is on the applicant to establish his admissibility under the Act. *See* section 291 of the Act, 8 U.S.C. §

1361. As the record fails to demonstrate that the applicant's offenses did not result in bodily injury to the peace officer involved, we will not disturb the finding that the applicant has not been convicted of a crime involving moral turpitude. Accordingly, he is found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act.

The AAO also finds the record to contain a sworn statement from the applicant, signed at the time of his February 10, 2005 adjustment interview, in which he asserts that he entered the United States through the El Paso, Texas port-of-entry in 1991 when 11 years old as a member of a family group claiming U.S. citizenship. In that the applicant has testified that he was allowed to enter the United States as the result of a claim to U.S. citizenship, the AAO must consider whether he is inadmissible pursuant to section 212(a)(6)(C) of the Act.[2]

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.
>
> (ii) Falsely claiming citizenship.—
>
> a. In general.—Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible

We note that while individuals making false claims to U.S. citizenship on or after September 30, 1996 are ineligible to apply for a Form I-601 waiver, provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 allow aliens who made false claims to U.S. citizenship prior to September 30, 1996, to apply for a waiver under section 212(i) of the Act. As the applicant entered the United States based on a claim to U.S. citizenship in April 1991, his inadmissibility, if any, may be waived under section 212(i) of the Act, which states:

> The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for

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[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

> permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The AAO now turns to a consideration of whether the applicant is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act.

Section 212(a)(6)(C)(i) of the Act may be violated by committing fraud or willfully misrepresenting a material fact. *See Mwongera v. INS,* 187 F.3d 323, 330 (3rd Cir. 1999); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). Fraud consists of "false representations of a material fact made with knowledge of its falsity and with intent to deceive." *See Matter of G-G-,* 7 I&N Dec. 161, 164 (BIA 1956. In the immigration context, a finding of fraud requires that an individual "know the falsity of his or her statement, intend to deceive the Government official, and succeed in this deception." *In re Tijam*, 22 I&N Dec. 408, 424-25 (BIA 1998). Willful misrepresentation does not require an intent to deceive, only the knowledge that the representation is false. *See Parlak v. Holder*, 57 F.3d 457 (6th Cir. 2009)(citing to *Witter v. I.N.S.*, 113 F.3d 549, 554 (5th Cir. 1997); *see also Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995); *In re Tijam,* 22 I&N Dec. at 424-24. The "element of willfulness is satisfied by a finding that the misrepresentation was deliberate and voluntary." 187 F.3d at 330.

The 2005 statement given by the applicant indicates that at the time of his April 1991 entry, he was 11 years old and traveling as a passenger in a car with a family of four, accompanied by his brother. While the statement indicates that there was a declaration of U.S. citizenship for the car's passengers, it does not indicate the manner in which it was made, i.e., whether the applicant was directly questioned with regard to his citizenship or the adult member(s) of his party made this claim on behalf of the children accompanying them. Considering the applicant's age, the AAO finds it reasonable to assume that the group's claim to U.S. citizenship was made by the adult(s) in the car. In support of this conclusion, we note that the statement signed by the applicant does not include any detail as to the questions asked to establish his citizenship or the responses. Neither does it offer any information as to his understanding of the questions asked during the inspection process. Even had the applicant himself asserted that he was a U.S. citizen

In considering whether a claim to U.S. citizenship made on behalf of the applicant bars his admission to the United States under section 212(a)(6)(C) of the Act, the AAO has sought guidance in precedent decisions that have addressed the inadmissibility of children whose parents have fraudulently claimed immigration benefits. While we are aware of no decisions published by the Board of Immigration Appeals (BIA) that have relied on age as a dispositive factor in determining a child's culpability in instances of parental fraud or misrepresentation under section 212(a)(6)(C) of the Act, we find that several circuit courts have considered the issue in dealing with cases involving immigration fraud.

In *Singh v. Gonzales*, the Sixth Circuit Court of Appeals found that the immigration fraud committed by the parents of a five-year-old child could not be imputed to her as fraudulent conduct "necessarily includes both knowledge of falsity and an intent to deceive" and requires proof of such. 451 F.3d 400, 407 (6th Cir. 2006). The Sixth Circuit found that imputing fraud to a five-year-old child was "even further beyond the pale," than imputing a parent's negligence to that child. *Id.*, at 407. However, in *Malik v. Mukasey,* the Seventh Circuit Court of Appeals found that two 17-year-old brothers whose father had misrepresented their identities, nationality, and religious affiliation when he listed them as derivatives on his asylum application, could be held accountable for that fraud. While the brothers contended that the immigration judge had erred by imputing their father's fraud to them, the court concluded that the brothers "given their ages at the time" were accountable for the misrepresentations. The court also indicated in its opinion that the BIA had previously acknowledged that while the brothers were young at the time their father filed for asylum, "they were old enough to know better and to be held accountable for their actions." 546 F.3d 890, 892-893 (7th Cir. 2008). In deciding the case, the Seventh Circuit specifically noted that young was a "relative term and that "[b]eing over 16 - and eligible for a driver's license – is quite different than being 10." *Id.*, at 892.

The age of the applicant in the present case falls midway between the 5-year-old child in *Singh* and the 17-year-old brothers in *Malik*. While at 11 years-of-age, the applicant would certainly have been considerably more cognizant of the circumstances surrounding his 1991 entry into the United States than a 5-year-old child, the AAO, paraphrasing the Seventh Circuit, finds there is a great difference between the understanding of an 11-year-old and that of a 17-year-old when it comes to immigration fraud or misrepresentation. If the claim to U.S. citizenship was made on the applicant's behalf by the adult(s) who transported him to the United States, we cannot conclude that, at the age of 11, he was complicit in that claim, understood that he was not a U.S. citizen, or otherwise understood the significance of the claim at that time it was made. *See Sandoval v. Holder*, 641 F.3d 982 (8th Cir. 2011) (citing inconsistency in government's argument that section 212(a)(6)(C) applies regardless of age – the government conceded the statute would not apply to an eight-year-old child whose parents armed her with a fraudulent birth certificate and instructed her to say she was a United States citizen – the court remanded the case to BIA for development of clear agency position). Moreover, the record fails to demonstrate that the adult(s) who claimed U.S. citizenship on the applicant's behalf, or the applicant himself, was aware that he was not a U.S. citizen or that he or she made the claim with an intent to deceive the immigration inspector.

We also find the record to lack the evidence necessary to establish fraud or willful misrepresentation in the unlikely event that the applicant personally claimed U.S. citizenship at the time of his 1991 entry. There is no evidence that demonstrates that he made such a declaration intending to deceive the immigration inspector, as required for a finding of fraud under section 212(a)(6)(C)(i), or that his declaration was both deliberate and voluntary, as required to establish willful misrepresentation. Therefore, the record fails to demonstrate that the applicant is inadmissible to the United States under section 212(a)(6)(C) of the Act for having sought an immigrant benefit through fraud or the willful misrepresentation of a material fact.

Based on the record before us, the AAO finds the only bar to the applicant's admission to the United States to be section 212(a)(2)(A)(i)(I) of the Act. Accordingly, he must seek a waiver under section 212(h), which states:

> (h) The Attorney General [now Secretary of Homeland Security]may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if-
>
> (1)(A) [I]t is established to the satisfaction of the Attorney General that-
>
> (i) [T]he 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 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.

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* 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 exclusive. *Id.* at 566.

The BIA has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the

United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the BIA has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

On appeal, counsel states that the applicant's spouse was born in the United States and has resided in the United States her entire life. Counsel further states that the applicant's family has a great number of family ties to the United States, including her mother who is a lawful permanent resident and three siblings who are U.S. citizens. Counsel asserts that the applicant's spouse is close to her family and that relocating to Mexico would deprive her of her family's interaction, love and support. A move to Mexico, counsel contends, would also result in financial hardship for the applicant's spouse as the family would have to return to Taxco in the State of Guerrero, the applicant's small, rural hometown, where there would be no viable jobs for either the applicant or his spouse. Counsel also asserts that the applicant's spouse suffers from gall stones and that his youngest child has been diagnosed with a heart murmur. She contends that, in Taxco, there would be no way for the applicant's spouse or children to obtain the medical treatment they need or to ensure that the children would grow up healthy. Counsel also states that the applicant and his spouse, even if employed, would be unable to afford medical treatment in Mexico.

The applicant's spouse in statements dated February 17, 2006 and October 17, 2007, indicates that the family does not own a home in Mexico, that all of the applicant's family members are in the United States and that her children only know life in the United States having never lived in Mexico. She notes that her oldest son is doing well in school. The applicant's spouse also asserts that she is very close to her lawful permanent resident mother, and her U.S. citizen siblings and their families. She states that she has never been to Mexico and has no family in Mexico. The applicant's spouse also indicates that she has had one surgery for gall stones and is scheduled for another. She further reports that she suffers from "epistasis," and has had surgery as a result of this condition. The applicant's spouse states that her youngest child has a heart murmur and that, depending on his prognosis, may need surgery.

The record establishes that the applicant's spouse has gall stones and that her youngest child has been diagnosed with a heart murmur. In an October 17, 2007 medical statement, [redacted] Chicago indicates that he treats both the applicant's spouse and his youngest child. [redacted] reports that the applicant's spouse suffers from obesity and has a history of gall stones, which can be debilitating at times and will not resolve without the removal of her gall bladder. [redacted] also reports that he detected a systolic ejection heart murmur in the applicant's youngest child at the time of his last visit, but that there is, at yet, no prognosis for the child's condition. [redacted] states that reaching a prognosis will require further work up, which could be very demanding for the applicant's spouse.

Having reviewed the evidence of record, the AAO finds it sufficient to support a finding that relocation to Mexico would result in extreme hardship for the applicant's spouse. In reaching this decision, the AAO has noted that the applicant's spouse was born in the United States, has lived her entire life in the United States and has no family ties to Mexico. We have also considered her health problems and the as yet undiagnosed nature of her youngest son's heart murmur. Although the record does not indicate that the applicant and her youngest child would be unable to receive treatment for their health problems in Mexico, the AAO acknowledges that relocation would disrupt their medical treatment until such time as appropriate medical providers could be found. When the specific hardship factors of the applicant's spouse's health, the concerns created by the uncertain nature of her youngest child's medical condition, and her unfamiliarity with Mexico are considered in combination with the hardships normally created by relocation, the AAO finds the applicant has established that his spouse would experience extreme hardship if she moves with him to Mexico.

If the applicant's spouse remains in the United States without him, counsel states that she would experience financial hardship as the family has significant monthly expenses and she is employed only on a part-time basis. Counsel notes that the applicant's spouse is working as a cashier and earns $400/month and that it is the applicant's income that covers the family's expenses. Without that income, counsel states, the applicant's spouse and his children would become destitute and would have to resort to public assistance. Counsel also notes that as a result of her employment, the applicant's spouse does not have the energy to do all of the housework and that the applicant, therefore, helps with household cleaning chores and grocery shopping. Counsel further indicates

that the applicant helps care for his children on the three days a week that his spouse works. Counsel asserts that the applicant's spouse's medical condition and recent surgeries have made it difficult for her to care for her children on her own and that the applicant has been critical to her ability to manage her employment and childcare responsibilities. Counsel further asserts that if the applicant is removed, his spouse would be forced to seek full-time employment and that it is highly unlikely that she could obtain a better-paying job as she has had little education or training. Counsel contends that any income earned by the applicant's spouse would have to be spent on childcare for her children. She states that the applicant's spouse and children would suffer emotional hardship if the applicant is removed.

As previously indicated, the record contains an October 17, 2007 statement from [redacted] that reports the applicant's spouse suffers from gall bladder disease and her youngest son has been diagnosed with a heart murmur. In this statement, [redacted] further indicates that the medical workup required to establish a prognosis for the applicant's youngest son could become "very demanding" for the applicant's spouse.

The record also establishes that the applicant's spouse would experience financial hardship if she remains in the United Sates. Although it does not document the applicant's spouse's current part-time employment or her salary, it does indicate that her income for 2003, the last year in which she was employed on a full-time basis, was approximately $18,700. Even when adjusted for inflation, this level of income would place the applicant's spouse and four children significantly below the 2011 federal poverty guideline of $26,170 for a family of five.

When the applicant's spouse's health problems; the added responsibilities that she would face as a single parent, including the burden that would be placed on her as a result of her youngest son's heart murmur; the significant economic hardship that she would experience in the applicant's absence, and the disruptions and difficulties normally created by the separation of a family are considered in the aggregate, the AAO finds the record to establish that the applicant's spouse would experience extreme hardship if his waiver application is denied and she remains in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of 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).

> 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 factors in the present case are the applicant's convictions for Mob Action, Resisting a Peace Officer, and Aggravated Battery, Battery upon a Peace Officer in 1998 and 1999; and his periods of unlawful employment and residence in the United States. The mitigating factors in the present case are the applicant's spouse and four U.S. citizen children; the extreme hardship to his spouse if the waiver application is denied; the absence of any criminal convictions or arrests for more than ten years; and the applicant's strong commitment to his spouse and children, as demonstrated by the statements written by two of the applicant's friends.

The AAO finds that the applicant's convictions were serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the AAO will withdraw our prior decision and sustain the appeal.

ORDER: The AAO's prior decision is withdrawn. The appeal is sustained and the application approved.