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

[redacted]

H2

Date: DEC 1 4 2012 Office: LOS ANGELES 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.

If you believe the AAO inappropriately applied the law in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-190B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Humenay

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of El Salvador 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 a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen wife, five U.S. citizen children, and U.S. Lawful Permanent Resident mother.

In an undated decision mailed to the applicant on November 3, 2008, the field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that his U.S. citizen wife and children would experience extreme hardship as a consequence of his inadmissibility.

On appeal, counsel[1] for the applicant asserts that the field office director denied the Form I-601 waiver application without carefully considering the documentation evidencing extreme hardship to the applicant's wife and children. Counsel for the applicant further asserts that the field office director's extreme hardship analysis is insufficient, as his "conclusory paragraph" failed to acknowledge the evidence outlining educational, emotional, and financial difficulties the qualifying relatives would experience as a result of separation or in the event of relocation to El Salvador. Additionally, counsel states that the director failed to consider hardship to the applicant's youngest son, who has special educational needs resulting from a communication disorder.

The record contains, but is not limited to: counsel's brief; copies of the birth certificates of the applicant's five children; declarations from the applicant's family members and friends, including his wife and children; pay stubs and tax records; medical and psychological records; documentation evidencing rehabilitation, including evidence of attendance of Alcoholic Anonymous meetings by the applicant and evidence of his volunteerism and community service; character reference letters; documentary evidence concerning the applicant's conversion to the Latter Day Saints religious faith; documentation regarding the applicant's criminal history; and documentation regarding the applicant's administrative removal proceeding.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, 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 –

[1] The record reflects that the applicant was represented by [redacted] at the time the Notice of Appeal (Form I-290B) was filed, but is now represented by [redacted]

> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

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 August 28, 1995, the applicant was convicted in the Superior Court of California, Los Angeles County, of forcible sexual penetration with a foreign object, in violation of Cal. Penal Code § 289(a)(1). The record shows that on or about June 15, 1990, he was convicted in the Superior Court of Los Angeles County, of "Inflicting Corporal Injury upon a Spouse/Cohabitant," in violation of Cal. Penal Code § 273.5(a). The field office director found the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. As the applicant has not disputed inadmissibility on appeal, and the record does not show the determination to be erroneous, the AAO will not disturb the finding of the director.

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

> (h) The Attorney General [Secretary of Homeland Security] may, in [her] discretion, waive the application of subparagraph (A)(i)(I), (B), . . . 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 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 . . . .
>
> (2) the [Secretary], in [her] discretion, and pursuant to such terms, conditions and procedures as [she] may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The applicant is seeking a section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act. Here, the AAO notes that the applicant's most recent conviction for a crime involving moral turpitude occurred on or about August 28, 1995. An application for admission or adjustment is a "continuing" application, and inadmissibility is adjudicated on the basis of the law and facts in effect at the time of admission. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). As criminal activities occurred over 15 years ago, we may consider the applicant for a waiver under the requirement of section 212(h)(1)(A)(i) of the Act.

A waiver under section 212(h)(1) is dependent upon a showing that the alien has been rehabilitated and that the alien's admission would not be contrary to the national welfare, safety, or security of the United States. Here, the record does not reflect that the applicant has been involved in conduct or activities that would be contrary to the safety or security of the United States since committing the crimes that resulted in his convictions. In fact, the record shows that the applicant has no other arrests or convictions. Moreover, the record does not support that the applicant presents a risk of engaging in violent behavior in the future.

Evidence of the applicant's rehabilitation includes his acceptance of responsibility for the crimes he committed. In a declaration dated January 2, 2009, the applicant admitted his involvement. He expressed remorse for his participation, stating that he was addicted to alcohol when he committed the offenses and that he realized he had "a problem and worked hard to overcome [his] addiction to alcohol." The record reflects that, as part of his sentence resulting from the 1995 conviction, the applicant was required to attend Alcoholics Anonymous (AA) meetings and anger management counseling. The applicant's probation was successfully terminated because the goals of probation were achieved after he attended all of his scheduled AA meetings and counseling sessions. In a letter dated July 14, 2003, [redacted] a specialist at the National Council on Alcoholism and Drug Dependence of the San Fernando Valley, stated that the applicant does not fit the profile of a violent person. According to Mr. [redacted] the applicant benefitted from his counseling programs, which taught the applicant new coping skills for handling ordinary anger in family situations. Mr. [redacted] characterized the applicant as a "wonderful, generous, and sensitive" man who is also a "caring father" and a "dutiful husband." The declarations from the applicant's wife and children further corroborate the assertions Mr. [redacted] made about the applicant. Additionally, the applicant's mother stated in her declaration that the applicant has become a more conscientious person in recent years, and the absence of any arrests or convictions in 17 years strongly support this assertion.

The applicant has been a member of the Church of Jesus Christ of Latter-day Saints since August 1997. The record indicates that the applicant is a devout and active member in the church ministry and lives his life according to the church's precepts. In an undated letter, church leader Bishop [redacted] asserted that the applicant routinely volunteers to pick-up, to cook for, and to supervise teenagers during the church's annual youth camp. Bishop [redacted] also asserted that the applicant serves as president of the church's Sunday School program and ensures that every member of the ward receives gospel lessons by scheduling different classes throughout the year and serving as substitute teacher. The record also contains documentary evidence regarding the applicant's volunteerism and community service, particularly with children from the Santa Clarita Community Center and students at the Yun Academy of Martial Arts. Moreover, the applicant has a long history of stable employment as a paver and truck driver. His long history of employment is supported by employment reference letters and income tax returns submitted by the applicant with his waiver application. These are favorable indicators of efforts at rehabilitation which, when evaluated in the aggregate, demonstrate that the applicant has rehabilitated.

The AAO next considers whether the applicant merits a favorable exercise of discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996). In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). However, the AAO cannot find that the applicant merits a favorable exercise of discretion solely by balancing the applicant's favorable and adverse factors. The applicant's conviction indicates that he may be subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

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

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

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the

use, attempted use, or threatened use of physical force against the person or property of another, *or* any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

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

Here, a conviction under Cal. Penal Code § 289(a)(1) requires an act of sexual penetration, "by any foreign object, substance, instrument, or device, or by any unknown object when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." CA Penal § 289(a)(1). The AAO notes that the probation officer's report in the record indicates that the applicant, in committing the offense, held the victim by the neck while she was lying in bed, tore open the victim's blouse, and shoved a hand between the victim's legs to commit digital penetration. The report further indicates that, as a result of the attack, the victim was treated for multiple bruising and hand and wrist pain. The AAO therefore finds that the applicant's conviction for forcible sexual penetration with a foreign object is a violent crime that renders him subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

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.*

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), he must meet the higher standard of exceptional and extremely unusual hardship. Therefore, the AAO will, at the outset, determine whether the applicant meets this standard.

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61.

The BIA stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. These 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 upon the qualifying relatives; 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-Aguinaga*, 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 in this case. *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 record reflects that the applicant's mother, [redacted] is a U.S. Lawful Permanent Resident. The applicant married [redacted] a U.S. citizen, on January 13, 2001. The applicant and his spouse have five U.S. citizen children: a 22-year-old son, [redacted] a 21-year-old daughter, [redacted] a 15-year-old son, [redacted] a 13-year-old daughter, [redacted] and an 11-year-old son, [redacted] The applicant's spouse, mother, and children are qualifying members in these proceedings.

Counsel for the applicant asserts that the applicant's spouse has never been to El Salvador, knows very little about the country, and does not know if the children can survive there. Counsel contends that the applicant's five children have never been to El Salvador and that it would be difficult for them to learn a new language. Counsel asserts that the applicant and his wife have been advised by their children's speech therapists not to teach them a second language so that they do not get confused and so that their educational development is not hindered.

The AAO recognizes that the applicant's five children have resided in the United States their entire life and are integrated into their community. The BIA and U.S. Courts decisions have found extreme hardship in cases where the language limitations of the children impeded an adequate transition to daily life in the applicant's country of origin. In *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language abilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life style, and the BIA found that uprooting her at that stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the Fifth Circuit Court of Appeals stated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether "extreme hardship" has been shown. In *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit Court of Appeals found the BIA abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

The applicant's spouse notes in her declaration that none of her five children speak, read, nor write in Spanish "because when the boys were having speech difficulties, [the applicant and his wife] were advised to speak only one language at home, in order not to confuse them." The AAO notes that the assertions the applicant's spouse has made regarding the children's inability to speak the Spanish language is inconsistent with a Psycho-Educational Assessment the applicant submitted with his waiver application. In page 3 of the assessment dated April 22, 2009, [redacted] school psychologist stated that [redacted] mentioned during the evaluation that "[b]oth English and Spanish are spoken in the home." The psychologist further stated that [redacted] said he is comfortable using either language." Although this assessment refers primarily to [redacted] Spanish language skills, it suggests that Spanish is understood and likely spoken with some fluency by the applicant's other children. Accordingly, the AAO will not give much weight to the applicant's wife's assertions regarding the children's inability to communicate in Spanish. The AAO notes that the record does not include additional evidence to show that the applicant's children speak, read, or write in the Spanish language.

The applicant's wife states that, because of the children's educational challenges, it would be difficult for them academically to transition into a different country. As corroborating evidence, the applicant submitted copies of school developmental plans, which indicate that [redacted] demonstrate a communication disorder in articulation and language. In her report, the school's special education teacher notes that the disorder adversely affects their educational progress and performance. The record indicates that both [redacted] currently benefit from individualized educational plans designed to meet their academic and educational needs. Additionally, the record contains documentary evidence showing that the applicant's daughter, [redacted] receives support through her school's Individualized Education program. The report, which was prepared by the school's psychologist and special education specialist, notes that [redacted] demonstrates an emotional disturbance. Specifically, she exhibits inappropriate types of

behavior under normal circumstances. The report indicates that [redacted] "displays a general pervasive mood of unhappiness and a tendency to develop physical symptoms or fears associated with personal or school problems over a long period of time." In the report, [redacted] teacher notes that [redacted] displays "anxiety in school, depression, somatization, low adaptability, attention problems, and low persistence and motivation." It is concluded in the report that [redacted] behavior adversely affects her educational performance and that placement in the Individualized Education program will help her increase concentration, comprehension, and access the school's core curriculum. Furthermore, the record contains corroborating evidence demonstrating that the applicant's oldest son, [redacted], also received support through his school's Special Education program for a learning disability.

The applicant asserts that his family's relocation to El Salvador would be detrimental to his children, as they would not be able to function normally, receive special education, or learn a new language. Additionally, the applicant furnished a copy of his mother's lawful permanent resident card as well as her declaration. The applicant's mother states that she has a very close relationship with the applicant, his wife, and their children. She further states that she sees her grandchildren "at least twice a week" and is involved in their lives. She cannot imagine a life without her grandchildren and without the support of the applicant.

Thus, the record supports a finding that the applicant's children have resided in the United States their entire lives, have family ties in the United States, are integrated into the U.S. school system, and four of the five children have received special educational assistance for communication disorders, speech impediments, and learning disabilities.

With regards to financial hardship upon relocation, the applicant and his wife both assert that the family would suffer financially if they relocated to El Salvador. A review of the record shows that the applicant has supported his household through gainful employment in the United States as a paver and truck driver with Commercial Paving and Coating since January 1, 1992. The most recent Form W-2 in the record is from 2007 and reflects that the applicant earned $65, 137. The applicant's spouse states in a declaration dated January 2, 2009, that she started working three hours a day as a home care provider. She further states that, because she has to take care of five children, she cannot work more than three hours a day. The AAO acknowledges that if the applicant's spouse and five children relocated with him to El Salvador, he would have to obtain employment in El Salvador that would enable him to support a seven member household.

The applicant and his wife assert that the family would experience psychological and emotional difficulties if they relocated to El Salvador. The record shows that the applicant's wife was treated for depression and stress in 2003 and 2004, around the time the applicant was detained by U.S. Immigration and Customs Enforcement (ICE). In a medical report dated January 13, 2005, her treating psychiatrist indicated that the applicant's spouse's condition improved since the applicant's release from detention, and that there was no further need for medication. Notwithstanding, the psychiatrist recommended she remain in therapy to continue treatment. Additionally, the record contains several letters from school psychologists, special education teachers, and counselors all attesting to the emotional difficulties the children have endured since they were told the applicant might be removed to El Salvador.

The applicant and his spouse convey that they will fear for their safety and live with constant worry if they relocate to El Salvador. The 2008 U.S. Consular Country Specific Information Sheet for El Salvador conveys that:

> The criminal threat in El Salvador is critical. Random and organized violent crime is endemic throughout El Salvador. Many Salvadorans are armed, and shootouts are not uncommon. Armed holdups of vehicles traveling on El Salvador's roads are increasing, and U.S. citizens have been victims in various incidents.
>
> The U.S. Embassy considers El Salvador a critical crime-threat country. The homicide rate in the country has increased 25 percent from 2004 to 2007, and El Salvador has one of the highest homicide rates in the world. Criminals often become violent quickly, especially when victims fail to cooperate immediately in surrendering valuables. Frequently, victims who argue with assailants or refuse to give up their valuables are shot.

Finally, the AAO notes that El Salvador was designated for Temporary Protected Status (TPS) in March 2001, due to the devastation caused by a series of severe earthquakes that occurred in January and February of 2001. *See* 77 Fed. Reg. 1710 (January 11, 2012). The TPS designation for El Salvador has been extended through September 9, 2013, because: "[t]here continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from a series of earthquakes in 2001, and El Salvador remains unable, temporarily, to handle adequately the return of its nationals." *Id.*

In sum, the record shows that the applicant's five U.S. citizen children are integrated into the U.S. school system and have family ties in the United States. Four of the applicant's five children have special educational needs. The applicant would have to find employment in El Salvador to support a household of seven, possibly causing financial hardship to his spouse and children. The AAO finds similarities with the applicant's case and the facts set forth in *Gonzalez-Recinas*. In particular, the AAO notes the applicant's heavy financial contributions and familial burden, his wife's inability to work outside the home full-time to provide for the household, his U.S. citizen children's unfamiliarity with the culture and environment of the country of relocation, the children's special educational needs, the lawful residence of his immediate family, and the residence in the United States of the applicant's spouse's immediate family. The applicant, his spouse and their children will be separated from their family ties of the applicant's mother, the applicant's wife's six siblings, and in-laws if they move to El Salvador. Additionally, the record shows that relocation to El Salvador will be difficult for the family, especially because both the applicant and his spouse are concerned about their return to a violent country with considerable safety issues. As El Salvador has been designated for TPS, their relocation would likely result in a lower standard of living and adverse country conditions. Considering the weight of all of these factors in the aggregate, the AAO finds that relocation of the applicant's spouse and children to El Salvador would cause them exceptional and extremely unusual hardship.

The next issue to be addressed is whether the applicant, his spouse and their children would suffer exceptional and extremely unusual hardship if they remained in the United States separated from him.

The record shows that the children's separation from the applicant would be especially hard on her daughter, [redacted] because she has been dealing with anger management problems ever since she found out the applicant might be removed to El Salvador. In a declaration dated September 14, 2007, [redacted] stated that she "cannot begin to imagine the psychological pain that my family would suffer if my father were deported. I have many anger problems, and losing my father would only increase these problems." [redacted] statement is corroborated by the marriage and family therapist at her high school. [redacted] therapist stated that she has "seen [redacted] in several counseling sessions because of her feelings of instability accompanied by anger. According to [redacted] most of her stress comes from the fact that her family has been under great stress . . . because of her father's immigration problems."

The applicant's spouse asserts that if the applicant were to be removed to El Salvador, their children would lose "a huge role model in their life and his absence would greatly affect their mental stability leading to problems in school." The applicant's wife states that she "would not only struggle in raising [her] five children on [her] own, [she] would be losing a part of [her]self and have to find a way to provide twice the support, discipline, and security to [her] children." Further, the record reflects that the applicant's departure would cause emotional hardship for his mother, who stated in a declaration dated December 28, 2008, that she cannot imagine a life in the United States without the applicant. She also stated that the applicant is a "devoted husband, a wonderful father, and a great son." She noted that she spends time with the applicant at least twice a week and is very much involved in his children's daily life. The AAO acknowledges that the separation of the applicant from his qualifying family members "would deprive his family of various forms of non-economic familial support and that it would disrupt family unity." *United States v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000). In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and that "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted). The AAO will therefore give consideration to the emotional hardship that the applicant's qualifying relatives would suffer as a result of their separation from the applicant.

The record also demonstrates that the applicant's family members would suffer financially if they were separated from the applicant. The applicant's wife asserts that the applicant is the sole financial provider for the family. She contends that she cannot work full-time because she takes care of their children and has been especially busy with their "three boys, who require[] special education." She notes that in the years 2003-2004, when the applicant was detained by ICE, she received public assistance to support the household because she was unable to work full-time and, at the same time, take care of their children. The record shows that the applicant has been employed with Commercial Paving and Coating as a paver and truck driver since January 1, 1992. Therefore, he has a history of stable, long-term employment with the company. The applicant has demonstrated that he is the financial head of his household, earning a sufficient income to support his spouse and

five children. The AAO therefore finds that the applicant's removal would leave his spouse and children without any source of financial support, causing them significant economic hardship.

Considering the weight of all of these factors in the aggregate, the AAO finds that the hardships related to separation presented in this case rise to the level of exceptional and extremely unusual hardship. While the emotional and financial hardships the applicant's family members would suffer if separated from the applicant are extreme, the AAO acknowledges that they are, on the surface, among the more common hardships presented in most waiver cases. The determining factors that raise this case to one presenting exceptional and extremely unusual hardship are that: the applicant's spouse and children would be faced with the prospect of permanent separation from the applicant; the applicant's spouse would have to financially support five children on her own,[2] without having the work history to find gainful, stable employment; and the applicant's spouse would be the sole parental figure providing financial and emotional support to her five children, four of which have special educational needs. Therefore, the AAO finds that the applicant has established that his family members will experience exceptional and extremely unusual hardship if his waiver application is denied.

Additionally, while 8 C.F.R. § 212.7(d) permits us to deny the waiver as a discretionary matter based on the gravity of the applicant's offense, we note that, in general, a traditional discretionary analysis requires that the AAO "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 primary unfavorable factor in this case is the nature and seriousness of the applicant's convictions, crimes of significant gravity. Other unfavorable factors include any periods of unlawful presence and employment. On the other hand, the favorable factors presented by the applicant are the exceptional and extremely unusual hardship to his U.S. citizen spouse and children, who depend on him for emotional and financial support; the applicant's stable work history in the United States; the evidence regarding federal income tax payments; the lack of any other arrests or convictions since his last conviction in 1995; the evidence demonstrating rehabilitation; and the evidence about the applicant's community service and volunteerism.

Here, the AAO has weighed the severity of the applicant's criminal convictions, his rehabilitation, his 25 years of residence in the United States, and the other favorable facts in the record, including his U.S. citizen wife, his five U.S. citizen children, and his history of steady employment, and finds that the applicant merits a favorable exercise of discretion. The AAO recognizes that it is favorably exercising discretion in a case presenting serious and severe criminal conduct. However, the AAO finds that the applicant is sincere in his remorse for his crimes and has been rehabilitated. The AAO acknowledges the significant positive factors, which were not present at the time of the applicant's conviction. The applicant is now an active and productive member of his church and community. He has been married since 2001, and the evidence in the record indicates that the applicant takes care

[2] As the record does not indicate that the two children who reached majority of age work either full- or part-time, or that they no longer reside with the applicant, the AAO presumes that the applicant's spouse will have to financially support their five children by herself in the event of the applicant's separation and removal to El Salvador.

of and financially provides for his U.S. citizen wife and children. He has long residence in the United States, with no arrests or convictions in over 17 years. Given these factors, coupled with the hardship that would be experienced by his U.S. citizen wife and children upon his removal, we find that the positive factors outweigh the negative factors in this case.

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, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained.