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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 0 4 2013 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, 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 any 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Nicaragua and a citizen of Canada 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 crimes involving moral turpitude. He seeks a waiver of inadmissibility 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 wife.

The director determined that the applicant's crime had occurred less than 15 years ago and that he was ineligible for a waiver based on rehabilitation under section 212(h)(1)(A) of the Act. The director also found that the applicant had failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Director's Decision*, dated May 28, 2012.

On appeal, the applicant asserts that the director erred in finding that his crime occurred less than 15 years ago. He also contends that his spouse is experiencing extreme hardship in his absence.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The record in this case includes, but is not limited to, statements from the applicant; a note from the applicant's wife's doctor; employment records relating to the applicant and his wife; mortgage records; photographs of the applicant's wife's home; and documents relating to the applicant's criminal convictions. The entire record was reviewed and considered in rendering a decision on the motion.

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

> (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 (Board) 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 reflects that on October 15, 1997, the applicant was convicted of "failure to comply with condition of undertaking or recognizance" in violation of section 145(3) of the Criminal Code of Canada and was ordered to pay a fine. On December 19, 1997, the applicant was again convicted of "failure to comply with condition of undertaking or recognizance" under section 145(3) and was also convicted of "mischief" in violation of section 430(4) of the Criminal Code of Canada. He was sentenced to 20 days in jail for each charge, to be served concurrently. On November 2, 1998, the applicant was convicted of aggravated assault under section 268 of the Criminal Code of Canada and sentenced to 45 days in jail.

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. The methodology adopted by the Attorney General consists of a three-pronged approach. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). If a case exists in which the criminal statute in question was 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 or "modified categorical" inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. 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.

Finally, 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. *Id.* 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. 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 (citation omitted).

The AAO will first address whether the applicant's conviction for aggravated assault is a crime involving moral turpitude. Section 268 of the Criminal Code of Canada provides:

> Aggravated assault
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> 268. (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
>
> Punishment
>
> (2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Section 265 of the Criminal Code of Canada provides the following definition of assault:

> Assault
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> 265. (1) A person commits an assault when
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> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
>
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> Application
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> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

As a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau,* 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon or serious bodily harm. *See, e.g., Matter of Danesh,* 19 I&N Dec. 669 (BIA 1988), *Matter of Goodalle*, 12 I&N Dec. 106 (BIA 1967), *Matter of S-*, 5 I&N Dec. 668 (BIA 1954), and *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000). "[I]n the context of assault crimes, a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional

conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous." *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007).

The Supreme Court of Canada has stated that a conviction for aggravated assault under section 268 requires "intent to apply force intentionally or recklessly or being wilfully blind to the fact that the victim does not consent[,] plus objective foresight of the risk of bodily harm . . . ." *See R. v. Williams*, 2003 SCC 41 (Can.), *available at* http://canlii.ca/t/50dc. The Provincial Court of Newfoundland and Labrador has also indicated that "[t]he strength of the force is immaterial and thus the slightest touching of another person without their consent can constitute an assault . . . ." *See R. v. Bennett*, 2006, CanLII 31012 (NL PC) (Can.), *available at* http://canlii.ca/t/1p8m1.

The AAO also notes that the Criminal Code of Canada contains a separate section penalizing assault which "causes bodily harm to the complainant . . . ." Section 267(b) of the Criminal Code of Canada. Canadian courts have noted that assault causing bodily harm under section 267(b) is less serious than aggravated assault under section 268, which is the "most serious" of Canadian assault offenses. *See, e.g., R. v. Soluk*, 2001 BCCA 519 (Can.), *available* at http://canlii.ca/t/4z86; *R. v. Lukas*, 34 CCC (3d) 28 (Can.); *R. v. MacNeil*, 2012 NSPC 106 (Can.), *available at* http://canlii.ca/t/fv2jh. The courts have also indicated that a conviction under 267(b) can occur where there was only "minor" bodily injury, while "wounding [under section 268] must amount to more than 'minor' bodily harm." R. v. MacNeil, 2012 NSPC 106 (Can.), *available at* http://canlii.ca/t/fv2jh. The existence of a lesser offense which involves "bodily harm falling short of wounding, maiming or disfiguring the victim" indicates that section 268 is likely applied to very serious conduct or harm. *See* R. v. S.C.R., 2012 BCPC 90 (Can.), *available at* http://canlii.ca/t/fqt6z. The applicant does not contest his inadmissibility on appeal. As the AAO has found that the applicant's conviction for aggravated assault renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, we need not address separately his other convictions.

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

> The Attorney General may, in his discretion, waive the application of subparagraph[] (A)(i)(I) . . . of subsection (a)(2) . . . if–
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> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
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> (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,
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> (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
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> (iii) the alien has been rehabilitated . . . and
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> (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 applicant is inadmissible occurred more than 15 years before the date of the applicant'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). The applicant's convictions occurred in 1997 and 1998, and his culpable conduct occurred in 1996 and 1997. As the applicant correctly notes, the activities for which he was convicted took place over 15 years ago, so he meets the requirement of section 212(h)(1)(A)(i) 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 the applicant establish his rehabilitation. In view of the record, which shows that the applicant has not committed any crimes since the events that occurred in 1996 and 1997 and that he financially and emotionally supports his wife, 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) of the Act.

Once eligibility for a waiver is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996). A favorable exercise of discretion is limited in the case of an applicant who has been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d) states:

> 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 (Dec. 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.

The AAO finds that aggravated assault under section 268 of the Criminal Code of Canada is a violent and dangerous crime as it involves wounding, maiming, disfiguring, or endangering the life of the victim. We therefore conclude that the applicant has been convicted of a violent crime, and is thus subject to the heightened discretionary standard under 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" to a qualifying relative. *Id.*

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board 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 AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean*, *supra*, and codified at 8 C.F.R. § 212.7(d).

The Board has 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 Board 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 Board 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 63-64.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the Board 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 Board determined that the evidence of hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The Board 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 Board 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 Board found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The Board 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 Board 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 qualifying relative in this case is the applicant's wife. The record of hardship includes a statement from the applicant in which he indicated that, at the time of his appeal in June 2012, his wife was nine months pregnant and living alone in the United States. He worried that she would give birth without his support and would be left to care for their newborn on her own. He

noted that she was residing in an unfinished home he considered unsafe for his wife and a newborn baby. He stated that he had intended to renovate the home himself but that he had been unable to do so while barred from the United States, so his wife lived there without the necessary improvements in "harsh conditions." The applicant also asserted that his wife had been under stress due to the applicant's absence and that she had "suffered emotionally and physical[y] because of this." Furthermore, he noted that his wife was planning to take twelve weeks of unpaid maternity leave during which the applicant would be responsible for paying the mortgage on their home in the United States, but that he would not be able to afford to do so while paying his rent in Canada.

The applicant has submitted copies of the deed and mortgage statements for his home, which are in his wife's name. He has also submitted photographs of what he alleges is the home, showing that it is undergoing renovations. He states that his wife has continued to live in the home despite the need for major repairs. The applicant has also submitted copies of employment records indicating that he and his wife are both employed and that his wife has health insurance through her job. Finally, the record contains a note from the applicant's wife's doctor stating, "Pt. is pregnant[.] [H]er EDC is 6/25/12[.]"

The AAO finds that the applicant has failed to establish that his wife would suffer exceptional and extremely unusual hardship if his waiver application were denied. First, the evidence is insufficient to prove that the applicant would be unable to make the mortgage payments on his wife's behalf if his wife were on unpaid maternity leave. Mortgage records indicate that the payment is $904 per month and the applicant's pay stubs show that he generally earns between $800 and $900 Canadian dollars, or approximately $770 to $900 U.S. dollars, per week. The record does not contain any evidence of the monthly expenses of the applicant and his wife which might show that she would suffer financial hardship, and that his income would be insufficient to support her, even if she were on temporary leave from work.

Furthermore, while the note from the applicant's wife's doctor indicated that she was pregnant and due to give birth in June 2012, the note did not suggest any circumstances which would rise to the level of exceptional and extremely unusual hardship. The note did not state that the applicant's wife was suffering from any pregnancy-related complications or that she was struggling to care for herself or that she would be unable to care for her baby. The evidence is insufficient to show that any hardship to the applicant's wife would be "substantially beyond" that which might normally result from the removal or inadmissibility of a close family member. *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001).

Finally, the applicant has not claimed that his wife would be unable to relocate to Canada to be with him, or that any hardship she would experience there would rise to the level of exceptional and extremely unusual hardship. Therefore, in evaluating whether the applicant warrants a favorable exercise of discretion, we note that the record does not establish that the difficulties that would be faced by the applicant's wife as a result of his inadmissibility, even when considered in the aggregate, would rise beyond the common results of removal or inadmissibility

to the level of exceptional and extremely unusual hardship. *Matter of Monreal-Aguinaga*, 23 I&N Dec. at 62. Accordingly, the AAO finds that the applicant has failed to demonstrate exceptional and extremely unusual hardship as required by 8 C.F.R. § 212.7(d) and therefore does not warrant a favorable exercise of discretion.

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

ORDER: The appeal is dismissed.