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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: OCT 0 9 2013 Office: NEWARK, NJ FILE:

IN RE: APPLICANT:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is the spouse and father of U.S. citizens and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility under section 212(h), 8 U.S.C. § 1182(h), in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish extreme hardship to a qualifying relative in the event of separation and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated March 4, 2013. The Field Office Director additionally found that the applicant did not demonstrate he merited a favorable exercise of discretion. *Id.*

On appeal, counsel submits a brief in support. Therein, counsel contends that the applicant's spouse and children would suffer extreme emotional, financial, and family-related hardship without him present. Counsel moreover asserts that the Field Office Director failed to consider the applicant's positive factors, and that despite his immigration and criminal violations he merits a favorable exercise of discretion.

The record includes, but is not limited to, statements from the applicant and her spouse, a psychological evaluation, financial documents, evidence of birth, marriage, residence, and citizenship, documentation of immigration and criminal proceedings, other applications and petitions, and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO will first address the finding of inadmissibility, which the applicant does not dispute. Section 212(a)(2)(A)(i)(I) 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.)

In determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, 582 F.3d 462 (3rd Cir. 2009), makes a categorical inquiry, which consists of looking "to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute." *Id.* at 465-66. The "inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute "fits" within the requirements of a CIMT." *Id.* at 470.

However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466. This is true "even where clear sectional divisions do not delineate the statutory variations." *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The record reflects that on April, 6, 2005, the applicant was convicted in the New Jersey Superior Court for of child abuse, abandonment, cruelty, or neglect in violation of New Jersey Stat. Ann. §§ 9:6-1 and 3. He was sentenced to one day in jail, probation for two years, and fined. As the applicant lives within the jurisdiction of the Third Circuit analysis of his conviction will be made pursuant to *Jean-Louis v. Holder.*

At the time of the applicant's conviction, the statute pertaining to cruelty and neglect of children, New Jersey Stat. Ann. §9:6-3, provided, in pertinent part: "Any parent, guardian or person having the care, custody or control of any child, who shall abuse, abandon, be cruel to or neglectful of such child, or any person who shall abuse, be cruel to or neglectful of any child shall be deemed to be guilty of a crime of the fourth degree."

The statutory provision defining abuse, abandonment, cruelty, and neglect of a child, New Jersey Stat. Ann. § 9-6-1 provides, in pertinent part:

> Abuse of a child shall consist in any of the following acts: (a) disposing of the custody of a child contrary to law; (b) employing or permitting a child to be employed in any vocation or employment injurious to its health or dangerous to its life or limb, or contrary to the laws of this State; (c) employing or permitting a child to be employed in any occupation, employment or vocation dangerous to the morals

of such child; (d) the habitual use by the parent or by a person having the custody and control of a child, in the hearing of such child, of profane, indecent or obscene language; (e) the performing of any indecent, immoral or unlawful act or deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child; (f) permitting or allowing any other person to perform any indecent, immoral or unlawful act in the presence of the child that may tend to debauch or endanger the morals of such child; (g) using excessive physical restraint on the child under circumstances which do not indicate that the child's behavior is harmful to himself, others or property; or (h) in an institution as defined in section 1 of P.L.1974, c. 119 (C. 9:6-8.21), willfully isolating the child from ordinary social contact under circumstances which indicate emotional or social deprivation.

Abandonment of a child shall consist in any of the following acts by anyone having the custody or control of the child: (a) willfully forsaking a child; (b) failing to care for and keep the control and custody of a child so that the child shall be exposed to physical or moral risk without proper and sufficient protection; (c) failing to care for and keep the control and custody of a child so that the child shall be liable to be supported and maintained at the expense of the public, or by child caring societies or private persons not legally chargeable with its or their care, custody and control.

Cruelty to a child shall consist in any of the following acts: (a) inflicting unnecessarily severe corporal punishment upon a child; (b) inflicting upon a child unnecessary suffering or pain, either mental or physical; (c) habitually tormenting, vexing or afflicting a child; (d) any willful act of omission or commission whereby unnecessary pain and suffering, whether mental or physical, is caused or permitted to be inflicted on a child; (e) or exposing a child to unnecessary hardship, fatigue or mental or physical strains that may tend to injure the health or physical or moral well-being of such child.

Neglect of a child shall consist in any of the following acts, by anyone having the custody or control of the child: (a) willfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance or surgical treatment, and a clean and proper home, or (b) failure to do or permit to be done any act necessary for the child's physical or moral well-being. Neglect also means the continued inappropriate placement of a child in an institution, as defined in section 1 of P.L.1974, c. 119 (C. 9:6-8.21), with the knowledge that the placement has resulted and may continue to result in harm to the child's mental or physical well-being.

In *Matter of R-*, 4 I&N Dec. 192, 193 (C.O. 1950), the Board held that the act of willfully neglecting or refusing to provide for the support and maintenance of a child in destitute circumstances involves moral turpitude. The Board stated that an examination of the past decisions regarding child neglect and abandonment showed that "in each case where a statute was held to be one involving moral turpitude …, the statute specifically required that the failure to provide support be willful and that the child be in destitute circumstances." *Id.* "One or the other or both of these elements were absent in each of the cases wherein the decision was reached that the statute under consideration was one

which did not involve moral turpitude." *Id.* As an example, the Board in *Matter of R-* cited with approval the case of *Matter of E-*, 2 I&N Dec. 134 (BIA 1944; A.G. 1944), in which it was found that not providing support to a child when acting in good faith and with honest motives, and where the child is not in destitute circumstances and where the health or the life of the child has not been impaired, is not a crime involving moral turpitude. 4 I&N Dec. at 193. Additionally, Circuit Courts and the Board have found that the offense of child abuse, with the infliction of corporal injury upon a child as an element of the offense, has been found to involve moral turpitude. *See Guerrero v. INS*, 407 F.2d 1405, 1407 (9th Cir. 1969); *Matter of Tobar-Lobo*, 24 I&N Dec. 143, 145 (BIA 2007). Consequently, child cruelty under NJSA 9:6-3 would constitute a crime involving moral turpitude given that it contains the additional element of "inflicting unnecessarily severe corporal punishment upon a child." *See* NJSA 9:6-1, cruelty to a child, subsection (a). However, while the Board has generally held that abuse or neglect of children constitutes a crime involving moral turpitude where the criminal statute includes as elements willfulness and a child in destitute circumstances, it has also found that child neglect or abandonment cases lacking these additional elements do not constitute crimes involving moral turpitude.

NJSA 9:6-1 prohibits four types of conduct toward a child: abuse, abandonment, cruelty and neglect. The statute contains no restriction as to who may commit abuse and cruelty; however, only a person having "the custody or control of the child" may be guilty of abandonment and neglect. *In Re R.B.*, 376 N.J. Super. 451, 467 (A.D. 2005). The abuse provision of NJSA 9:6-1 provides, in part, "Abuse of a child shall consist in any of the following acts: ... (e) the performing of any indecent, immoral or unlawful act, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child...." *See id.* New Jersey Courts have interpreted this provision by finding that the reference in NJSA 9:6-1 to "debauch[ing] or endanger[ing] or degrad[ing] the morals of the child" is a reference to prohibited sexual conduct under NJSA 2C:24-4. *Id.* at 469. Additionally, "knowing" culpability applies to the offense of fourth-degree child abuse or child cruelty. *Id.* Under the abuse and cruelty portions of the statute, once injury to a child is shown to have occurred, the only requirement is that it not be accidental. *State v. Hofford*, 152 N.J. Super. 283, 294 (L. 1977).

NJSA 9:6-1 and 9:6-3 also prohibit neglect of a child. The neglect which is made an offense by the referenced statutes consists of any of the following acts by anyone having the custody or control of the child: "(a) willfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance, and a clean and proper home, or (b) failure to do or permit to be done any act necessary for the child's physical or moral well-being." *State v. Muniz*, 150 N.J. Super. 436, 443 (L. 1977). New Jersey State Courts have found that this latter act of omission includes: (a) a failure to complain to the proper authorities; (b) a failure to call the hospital and ask for emergency help; and (c) a failure to have sought medical care sooner. *See id.* at 444; *State v. Burden*, 126 N.J. Super. 424 (App. Div. 1974). Additionally, in the case of *State v. Burden*, it was held that evil intent or bad motive is not required to prove child neglect under NJSA 9:6-1 and 9:6-3. *State v. Burden*, 126 N.J. Super. at 427. "The word "willful" in the context of this statute means intentionally or purposely as distinguished from inadvertently or accidentally." *Id.* As such, a person may be convicted of child neglect under the relevant statutory provisions without knowing that his or her conduct would result in an injury to and/or adversely affect the welfare of a child. Furthermore, it does not appear that neglect of child by failing to provide a clean home or by failing

to complain to proper authorities, where there is no element requiring harm, injury, or the impairment to the health or life of the child, is the type of conduct that has been found by the Board to involve moral turpitude. *See Matter of E-*, 2 I&N Dec. 134 (BIA 1944; A.G. 1944). Consequently, based on the statutory language, it appears that NJSA 9:6-3 encompasses conduct that involves moral turpitude and conduct that does not.

The AAO now turns to an examination of the documents comprising the judicial record of conviction for the purpose of determining the specific subpart under which the applicant was convicted. *See Jean-Louis*, 582 F.3d at 466. In *Shepard*, the Supreme Court opined that the record of conviction includes the charging document, the plea agreement or transcript of the plea colloquy in which the defendant confirmed the basis for the factual plea, or a comparable judicial record of information. *Shepard v. United States*, 544 U.S. at 26.

In this case, the judgment of conviction indicates the applicant was charged with sexual assault in violation of NJSA §2C:14-2B, endangering the welfare of a child in violation of NJSA §2C:24-4A, and child abuse, abandonment, cruelty, or neglect in violation of NJSA §9:6-3. As stated above, the judgment reflects that the applicant pled guilty and was ultimately convicted of child abuse in violation of New Jersey Stat. Ann. §§ 9:6-1 and 3. The record of conviction, specifically, the transcript of the plea colloquy, reveals that the applicant, then 30 years of age, had sexual contact with a minor who he knew was 12 years old.

The applicant was an adult, he knew the victim was a minor, and that by kissing her breasts, he made intentional, prohibited sexual contact with that minor. As stated above, the abuse provision of NJSA 9:6-1 provides, in part: "Abuse of a child shall consist in any of the following acts: ... (e) the performing of any indecent, immoral or unlawful act, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child...." New Jersey Courts have interpreted this provision by finding that the reference in NJSA 9:6-1 to "debauch[ing] or endanger[ing] or degrad[ing] the morals of the child" is a reference to prohibited sexual conduct under NJSA 2C:24-4.[1] *In Re R.B.*, 376 N.J. Super. 451, 467 (A.D. 2005). The applicant's conduct, as stated in his plea colloquy, resulted in a conviction of the abuse provision of NJSA §9:6-1, specifically, the portion defining abuse as "the performing of any indecent, immoral or unlawful act or deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child." Additionally

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[1] New Jersey Stat. Ann. 2C:24-4 (2005) states, in pertinent part:

a. (1) Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this paragraph to a child is guilty of a crime of the third degree.

(2) Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who causes the child harm that would make the child an abused or neglected child as defined in R.S.9:6-1, R.S.9:6-3 and P.L.1974, c. 119, § 1 (C.9:6-8.21) is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this paragraph to a child is guilty of a crime of the third degree.

b. (1) As used in this subsection:

"Child" means any person under 18 years of age.

the applicant's plea and conviction were for fourth-degree child abuse, "knowing" culpability applies to his offense. *Id.* at 471-72.

The applicant's conviction under the abuse provision of NJSA §9:6-1 constitutes a conviction for a crime involving moral turpitude. The record of conviction indicates the applicant knew his victim was a 12 year old minor, and that he made intentional sexual contact with that minor. It is well established that such contact, with knowledge that the victim is a minor, necessarily involves moral turpitude. *See Matter of Silva-Trevino*, 24 I&N Dec. at 705 (finding that "so long as the perpetrator knew or should have known that the victim was a minor, any intentional sexual contact by an adult with a child involves moral turpitude"). In *Silva-Trevino*, the Attorney General further stated,

> "[s]uch contact is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general," *Hamdan v. INS, 98 F.3d 183, 185-86 (5th Cir. 1996)* (quoting Department precedent), when measured "in terms either of the magnitude of the loss that [it] cause[s] or the indignation that [it] arouse[s] in the law-abiding public," *Wei Cong Mei v. Ashcroft,* 393 F.3d 737, 740 (7th Cir. 2004). The sexual abuse of children destroys, in a way that cannot be described as anything other than "base" and "vile," the trust and innocence of society's most vulnerable members. See, e.g., *Eze v. Senkowski,* 321 F.3d 110, 112 (2d Cir. 2003) ("The sexual abuse of children is heinous beyond words. It is intolerable … reprehensible … [and] destructive of young lives."); *Nicanor-Romero*, 523 F.3d at 1013 (Bybee, J., dissenting) ("Children in particular—because of their naiveté, their dependence on adults, and their inability to understand, flee, or resist such advances—are vulnerable to adults who seek to take advantage of them sexually. Thus, we find such conduct especially repulsive and worthy of the severest moral opprobrium."); cf. *New York v. Ferber,* 458 U.S. 747, 756-57, 763 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'"); *Osborne v. Ohio,* 495 U.S. 103, 109 (1990) (concluding that child pornography, unlike adult pornography, does not merit First Amendment protection).

Id. at 705-6. Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. The applicant's qualifying relatives for a waiver of this inadmissibility are his U.S. citizen spouse and two children. Section 212(h) of the Act provides, in pertinent part:

> The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . 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,

> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
>
> (iii) the alien has been rehabilitated; or
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative. Under section 212(h), qualifying relatives include U.S. citizen or lawful permanent resident spouses, parents, sons and daughters. Hardship to the applicant is considered only to the extent it results in hardship to the qualifying relative. If extreme hardship to a qualifying relative is established, USCIS then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

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 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 Board 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 Board 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 Board 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 v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (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 contends the documents submitted with the I-601 waiver application establish that the applicant's spouse would experience extreme hardship upon separation from the applicant. Counsel asserts that the psychological evaluation should have been given more weight given the evaluator's expertise. In the evaluation, the licensed marriage and family therapist states that the applicant's spouse was raised by her aunt and uncle in El Salvador because her father had passed away and her mother was in the United States. The therapist relates that the spouse does not have a high school diploma, and that she previously worked as a waitress for a Salvadoran restaurant owned by one of her five sisters. The therapist additionally reports that the spouse met the applicant a few months later, had their first child in 2009, and now have two children who are one and four years old. The therapist states that, since the applicant has been detained, his spouse has reported incessant crying, feelings of helplessness, insomnia, loss of appetite, fatigue, loss of pleasure in daily activities, trouble concentrating, and difficulty making simple decisions. The therapist opines that the reported symptoms are consistent with that of a major depressive episode. The therapist moreover states that the spouse's psychological difficulties are aggravated by her family history of perceived abandonment and her father's early death. Additionally, the therapist states that continued separation would exacerbate her symptoms of depression, and may result in

her inability to give her children the love and attention they would need to deal with the loss of separation from their father. The spouse concurs, stating that the present separation has been emotionally difficult for her.

The therapist moreover contends that the spouse may be unable to maintain herself economically. The therapist explains that as the spouse does not have a high school diploma and speaks very little English, she will not be able to find employment which would enable her to support herself and her two children. The therapist notes that she and the children are currently living with her mother and stepfather, which also creates concern because the mother works in a factory and the step-father is unemployed. The spouse asserts in her affidavit that the applicant is a great father, husband, and provider. She explains that the applicant owns a trucking business which delivers furniture for , and that since he has been detained, the applicant's brother has been trying to manage the business on top of his own full-time job. Documentation on the applicant's business, including a certificate of incorporation and federal income tax returns, are submitted in support. Counsel emphasizes that the applicant is the family's sole breadwinner.

The spouse claims the children experienced emotional difficulties while the applicant was in immigration detention. She states that she first told her son that the applicant was on vacation, and that he would come home soon. The spouse indicates that when she finally took to see his father, it was hard for him as he was not able to hug his father. She concludes that misses his father, and that both her children would be devastated without him. The applicant's spouse additionally contends that her children would be severely disadvantaged educationally if they relocate to El Salvador. Counsel claims the Field Office Director erred by failing to consider hardship to the applicant's U.S. citizen children.

The Field Office Director found that the applicant's spouse would experience extreme hardship in the event of relocation to El Salvador. In making this finding, the Field Office Director noted that El Salvador's Temporary protected Status (TPS) designation was renewed because of the substantial, but temporary, disruption of living conditions in that country. The Field Office Director additionally considered the U.S. Department of State's 2012 Trafficking in Persons report, which noted that El Salvador is a source, transit, and destination country for women, men, and children who are subjected to sex trafficking and forced labor. *See Decision of Field Office Director* at 7. The Field Office Director moreover stated that, given the length of time the spouse has resided in the United States, the fact that she has no support in El Salvador, her lack of transferrable skills, and her fear for her safety and that of her children's, the record supported a finding that the spouse would experience extreme hardship upon relocation to El Salvador.

As the record contains no evidence indicating the Field Office Director's finding should be disturbed, the AAO affirms the applicant has submitted sufficient evidence indicating his spouse would experience extreme hardship upon relocation to El Salvador.

The record does not contain sufficient evidence, however, to demonstrate that the applicant's spouse would suffer extreme hardship in the event of continued separation. With respect to financial hardship, the applicant's spouse and therapist contend that she would have difficulty meeting her

financial obligations and supporting herself and her two children without the applicant present. Despite these assertions, the record does not contain evidence, such as copies of household bills and other documentation of the spouse's expenses, indicating what those obligations are. Furthermore, there is no evidence of record demonstrating what the spouse's current living expenses are, in light of the fact that she and her children now live with her mother and father-in-law. In addition to insufficient evidence on the spouse's expenses, the applicant has not provided documentation on income in the event of continued separation. Although the applicant has provided documentation indicating that he earns money from his furniture moving business, he has not shown that he would be unable to provide financial assistance to his family from El Salvador. The record also does not contain an explanation of why the spouse cannot resume employment at her sister's restaurant. Although the assertions on financial hardship are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. See *Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Similarly, without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without sufficient details and supporting evidence of the family's expenses and income, the AAO is unable to assess the nature and extent of financial hardship, if any, the applicant's spouse will face.

The applicant has submitted sufficient evidence to show that his spouse would continue to experience emotional and family-related difficulties without the applicant present. The psychological evaluation indicates that the spouse has emotional difficulties given the absence of her parents in her childhood, and that she is currently experiencing a major depressive episode. The record moreover reflects that the spouse is simultaneously caring for two young children. The record also reflects that the applicant's spouse has emotional and psychological support and strong family ties in the United States.

While the AAO acknowledges that the applicant's spouse would face difficulties as a result of the applicant's inadmissibility, the evidence of record does not demonstrate that her hardship would rise above the distress normally created when families are separated as a result of inadmissibility or removal. In that the record fails to provide sufficient evidence to establish the financial, emotional, or other impacts of separation on the applicant's spouse are cumulatively above and beyond the hardships commonly experienced, the AAO cannot conclude that she would suffer extreme hardship if the waiver application is denied and the applicant returns to El Salvador without his spouse.

Furthermore, there is insufficient evidence of record to demonstrate that the applicant's children would experience extreme hardship without the applicant present. The spouse asserts that the children miss their father, they would be devastated without him, and that the elder son in particular experienced hardship because he was not able to hug his father when he visited the applicant in

immigration detention. Again, the AAO acknowledges that the children will experience emotional difficulties without the applicant present, and that growing up without the applicant will also entail some hardship. However, as with his spouse, the applicant has provided no evidence to demonstrate that the children's hardship would rise above that of others who separate as a result of inadmissibility or removal. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Without additional documentary evidence on the children's hardship, the AAO cannot find that, in the aggregate, the applicant's children would experience extreme hardship in the event of separation from the applicant.

The applicant has shown that his children would experience extreme hardship in the event of relocation. The AAO again notes that the TPS designation for El Salvador indicates that there continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from a series of earthquakes in 2001. 78 Fed. Reg. 104 (May 30, 2013). Furthermore, the U.S. Department of State's current travel warning indicates that crime and violence are serious problems throughout the country, and in particular, Usulutan, where the applicant was born, has a higher homicide rate than the national average. *See travel warning: El Salvador, U.S. Department of State,* August 9, 2013. In addition to adverse country conditions and safety concerns, the AAO also takes into consideration the children's young age and their lack of ties in El Salvador.

The evidence of record establishes that the applicant children's difficulties would rise above the hardship commonly created when families relocate as a result of inadmissibility or removal. In that the record demonstrates that the safety-related or other impacts of relocation on the applicant's children are in the aggregate above and beyond the hardships normally experienced, the AAO concludes that they would experience extreme hardship if the waiver application is denied and the applicant's children relocate to El Salvador.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id., also cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relatives in this case.

The AAO further finds that, even if the applicant demonstrated that a qualifying relative would experience extreme hardship, he does not merit a favorable exercise of discretion. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary

factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

Counsel asserts that the applicant has significant positive equities which outweigh his negative factors. The record does reflect that the applicant has family ties, namely, a U.S. citizen spouse and two children, in the United States. The applicant has moreover demonstrated that he owns an established business in the United States, and that he has resided in the United States since 1990. Furthermore, the applicant has expressed remorse for his actions, indicating that he knows what he did with respect to his criminal conviction was wrong, and that he has never done anything like it since.

These positive equities, however, do not outweigh the negative factors in his case. The applicant's acknowledged immigration violations are serious adverse factors, and they span a number of years. The applicant admitted he entered without inspection in May 1990, and six years later, he filed an asylum application which he abandoned when he failed to appear at subsequent removal proceedings. The applicant failed to depart as ordered. The applicant subsequently claimed in his TPS applications that he had never been assigned an alien registration number, and that he had never been ordered removed.

In addition to the applicant's violations of immigration law, the applicant's criminal conduct and conviction constitute significant negative factors. The record of conviction indicates the applicant sexually assaulted a 12 year old girl he was living with. The applicant admitted in the plea colloquy that he kissed this girl's breasts, knowing that his conduct was wrong. The applicant's admitted sexual violation of a 12 year old girl who was in his care is "heinous beyond words." *See Matter of Silva-Trevino*, 24 I&N Dec. at 705, *citing Eze v. Senkowski,* 321 F.3d 110, 112 (2d Cir. 2003).

The positive factors, though significant, fail to overcome the nature and duration of the applicant's serious violations of immigration and criminal law. For this reason, the Field Office Director's decision to deny the waiver as a matter of discretion is affirmed.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.