U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: MAR 2 5 2013 Office: SAN SALVADOR FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and (a)(9)(B)(v) respectively, and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Salvador, El Salvador, 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 crimes involving moral turpitude. The record shows that the applicant was also found to be inadmissible pursuant to section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii), for having been unlawfully present in the United States for more than one year and again seeking readmission within 10 years of his last departure from the United States. The applicant was further found to be inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for having been ordered removed under any provision of law and seeking admission within 10 years of the date of his departure or removal. The applicant seeks a waiver of inadmissibility pursuant to sections 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h), (a)(9)(B)(v), and permission to reapply for admission to the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States with his U.S. citizen wife and children.

In a decision dated May 16, 2011, the field office director concluded that the applicant demonstrated that his wife is experiencing extreme hardship as a consequence of his inadmissibility. The field office director noted that "[t]he hardship detailed by the submitted letters — potential loss of house and car, medical problems and your wife's inability to move to El Salvador because of child custody stipulations — can be considered extreme." However, the field office director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, in the exercise of discretion by finding that the negative factors in the applicant's case outweighed the positive ones.

On appeal, counsel for the applicant asserts that the documentary evidence submitted on appeal demonstrates that the applicant has rehabilitated and that he merits a favorable exercise of discretion. Counsel contends that the statements by the applicant submitted on appeal accepting responsibility for his crimes and his remorse, together with the various character reference letters from family members and friends, show that the favorable factors of the applicant's case outweigh the negative ones and that the applicant is deserving of a favorable exercise of discretion.

The record includes, but is not limited to: counsel's brief; the applicant's statement; a statement by the applicant's wife; several character reference letters from the applicant's family members and friends; medical reports and evaluations; letters concerning the applicant's financial obligations in the United States; documentation regarding the applicant's wife's child custody agreement; utility bills; country conditions evidence; documentation regarding the applicant's 1992 deportation proceeding; documentation regarding the applicant's removal proceeding; and documentation regarding the applicant's criminal history.

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)(9)(B) of the Act, provides, in pertinent part, that:

(B) Aliens Unlawfully Present.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

The record shows that the applicant entered the United States without inspection on or about July 8, 1992, and remained in the United States until his removal on February 27, 2008. The applicant was placed in deportation proceedings in July 1992, and was ordered deported *in absentia* on August 24, 1992. The applicant remained in the United States without lawful immigration status until 2001, when he was granted Temporary Protected Status (TPS). However, the record shows that United States Citizenship and Immigration Services (USCIS) withdrew the applicant's TPS on August 15, 2006, after finding that the applicant failed to comply with the TPS re-registration requirements by failing to submit the final court dispositions for any and all criminal convictions. The applicant remained in the United States without status until his removal on February 27, 2008. Consequently, the AAO finds that the applicant accrued unlawful presence in the United States for more than one year. As the applicant accrued unlawful presence of more than one year and is seeking admission within 10 years of his 2008 departure, he is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest his inadmissibility on 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 –

(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 shows that on April 16, 1996, the applicant was convicted in the 177th District Court of Harris County, Texas, of forgery to defraud another in violation of section 32.21 of the Texas Penal Code. The applicant was sentenced to 30 days in jail and was ordered to pay court costs. Texas Penal Code § 32.21 provides, in pertinent part, that "a person commits an offense if he forges a writing with intent to defraud another." For purposes of section 32.21 of the Texas Penal Code, the term "forge" means:

> (A) to alter, make, complete, execute, or authenticate any writing so that it purports:
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> (i) to be the act of another who did not authorize that act;
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> (ii) to have been executed at a time or place or in a numbered sequence other than was in fact the case; or
>
> (iii) to be a copy of an original when no such original existed;
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> (B) to issue, transfer, register the transfer of, pass, publish, or otherwise utter a writing that is forged within the meaning of Paragraph (A); or
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> (C) to possess a writing that is forged within the meaning of Paragraph (A) with intent to utter it in a manner specified in Paragraph (B).

Section 32.21 of the Texas Penal Code is violated when the offender has the "intent to defraud" by uttering, executing, possessing, or delivering a fictitious writing. It has generally been held that forgery, in all its degrees, involves an intent to defraud, and is thus a crime of moral turpitude. See *United States ex rel. McKenzie v. Savoretti*, 200 F.2d 546 (5th Cir. 1952); *Matter of Seda*, 17 I&N Dec. 550, 552 (BIA 1980) (finding that a conviction for forgery in violation of the Code of Georgia including "intent to defraud" as an element of the offense is a crime involving moral turpitude). The United States Supreme Court in *Jordan v. De George* concluded that "[w]hatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." 341 U.S. 223, 232 (1951). Therefore, the applicant's offense is categorically a crime involving moral turpitude, and he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest his inadmissibility resulting from this conviction on appeal.

The record further shows that on August 10, 2004, the applicant was convicted in the Harris County Criminal Court, Houston, Texas, of assault causing bodily injury to a family member in violation of section 22.01(a)(1) of the Texas Penal Code. The applicant was sentenced to 6 days in jail and was ordered to pay a $300 fine. Texas Penal Code § 22.01 provides, in pertinent part, that:

> A person commits an [assault] offense if the person:
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> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
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> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
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> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

It is noted that as a general rule, a simple assault and battery offense does not involve moral turpitude. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involves an aggravating factor that significantly increases their culpability. *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). Assault and battery offenses requiring the "intentional infliction of serious bodily injury on another have been held to involve moral turpitude because such intentionally injurious conduct reflects a level of immorality that is greater than that associated with a simple offensive touching." *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006).

In *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996), the Board held that the willful infliction of corporal injury resulting in a traumatic condition on "a person with whom one has . . . a familial relationship is an act of depravity which is contrary to accepted moral standards." The statute at issue there required the willful infliction of "'corporal injury resulting in a traumatic condition'" upon the perpetrator's spouse, a person with whom he or she was cohabiting, or the mother or father of his or her child. *Id.* at 292 (quoting section 273.5(a) of the California Penal Code). The Board concluded in that case that the crime involved moral turpitude.

In *Matter of Sanudo*, the Board examined the California crime of domestic battery and found that, unlike the statute in *Matter of Tran*, there was no requirement that there be "actual or intended physical harm to the victim." *Sanudo*, 23 I&N Dec. at 973. The offense at issue involved nothing "more than the minimal nonviolent 'touching' necessary to constitute" the battery offense. *Id.* at 972-73. As the Board explained, moral turpitude is found in general assault and battery offenses when the offense "necessarily involved the *intentional* infliction of *serious* bodily injury." *Id.* at 971 (emphasis in the original). The Board concluded that an intentional touching of a domestic partner without causing or intending to cause physical injury does not involve moral turpitude. *Id.* at 972-73; *see also Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1055, 1061-62 (9th Cir. 2006).

In Texas, an assault is either an act causing bodily injury to another, threatening another with imminent bodily injury, or an offensive or provocative physical contact with another. *See City of*

Waco v. Williams, 209 S.W. 3d 216, 223 fn. 7 (Tex. App. 2006). "Bodily injury" means "physical pain, illness, or any impairment of physical condition." Texas Penal Code § 1.07(a)(8). Texas State Courts have consistently noted that "bodily injury" is a "purposefully broad" term that encompasses even relatively minor physical contacts so long as they constitute more than a mere offensive touching. *See Forbes v. Lanzl*, 9 S.W. 3d 895, 901 (Tex. App. 2000); *Wal-Mart Stores, Inc. v. Odem*, 929 S.W. 2d 513, 522 (Tex. App. 1996) (noting that a grabbing of the arm considered offensive by the victim was sufficient to satisfy the bodily injury subpart of section 22.01); *Lane v. State*, 763 S.W. 2d 785, 786 (Tex. App. 1989) (stating that a police officer who testified that she suffered physical pain when her wrist was twisted by appellant as he grabbed her wallet and twisted it out of her hands was enough to constitute "bodily injury"). Thus, state courts have interpreted subsection (1) of the Texas assault statute to require a physical contact consisting of more than a nonviolent touching. *See Morales v. State*, 293 S.W. 3d 901, 907 (Tex. Crim. App. 2009). In contrast, state courts have also noted that subsections (2) and (3) of the assault statute require only a threat to do harm or an offensive or provocative touching. *See Wal-Mart Stores Inc.*, 929 S.W. 2d at 522 (noting that conduct of grabbing the victim's purse while the victim was holding onto it was sufficient to establish an assault under subsection (3) of section 22.01).

In *Esparza-Rodriguez v. Holder*, 699 F.3d 821 (5th Cir. 2012), the Fifth Circuit Court of Appeals interpreted the statutory provision at issue in this case. The Fifth Circuit noted that section 22.01 of the Texas Penal Code is not categorically a crime involving moral turpitude because the conduct proscribed by subsection (3) of the statute, which consists of offensive or provocative physical contact, has been held by the BIA to not qualify as morally turpitudinous. *See id.* at 825; *see also Matter of Solon*, 24 I&N Dec. at 239, 241 (BIA 2007) (explaining that assault statutes that criminalize "offensive or provocative physical contact" are not categorically crimes involving moral turpitude). In *Esparza*, the Fifth Circuit applied the modified categorical approach and determined, from review of the documents comprising the judicial record of conviction, that the alien was convicted of an assault under subsection (1), which proscribes "intentionally, knowingly, or recklessly caus[ing] bodily injury to another, including the person's spouse." *Esparza-Rodriguez*, 699 F.3d at 825. After determining that Esparza-Rodriguez pleaded guilty to subsection (1) of the Texas assault statute, the Fifth Circuit reviewed the Board's conclusion that assault under subsection (1) of the Texas Penal Code was a crime involving moral turpitude, and held that it was reasonable. By noting *Matter of Solon*, a case in which the Board found that the New York assault statute proscribing the intent to cause physical injury involved moral turpitude, the Fifth Circuit affirmed the Board's construction of the term "moral turpitude" and found that it was reasonable to conclude that an "intentional assault that is intended to and does cause more than a *de minimis* level of physical harm, is "contrary to the accepted rules of morality and the duties owed between persons or to society in general" and, therefore, a crime involving moral turpitude. *Id.* at 826.

Applying the foregoing standards to the case at hand, the AAO finds that the applicant's assault conviction qualifies as a crime involving moral turpitude. As noted by the Fifth Circuit Court of Appeals, the crime of assault in violation of section 22.01 of the Texas Penal Code is not categorically a crime involving moral turpitude. Since the full range of conduct proscribed by the statute at hand is not morally turpitudinous, the AAO applies the modified categorical approach and engages in a second-stage inquiry by reviewing the record of conviction, or other documents admissible under federal regulations as evidence in proving a criminal conviction, to determine if the

conviction was for an assault involving the intentional, knowing, or reckless causation of bodily injury to another. *Esparza-Rodriguez*, 699 F.3d at 825; *Matter of Pichardo-Sufren*, 21 I&N Dec. 330, 334 (BIA 1996) (noting that where the statute of conviction is divisible, the Board will look to the record of conviction, or other documents admissible under federal regulations as evidence in proving a criminal conviction, to determine whether the offense renders the alien inadmissible).

Here, the document in the record that serves as proof of the applicant's conviction for assault in violation of Texas Penal Code § 22.01 is the "Certificate of Disposition," a document issued by the District Court of Harris County, Texas indicating that the applicant was charged, pled guilty to, and was convicted of assault causing bodily injury to a family member. The document indicates that the applicant pled guilty to a class A misdemeanor. It is noted that only a conviction for assault causing bodily injury in violation of Texas Penal Code § 22.01(a)(1) could give rise to a class A misdemeanor, as the statute clearly indicates that subsections (2) and (3) are class C misdemeanors. *See* Texas Penal Code § 22.01(c).

Therefore, the applicant's guilty plea and subsequent conviction for a class A misdemeanor assault narrows his crime to an assault which, statutorily, did cause bodily injury beyond an offensive touching—indeed, did cause pain, illness or impairment. Having determined that the applicant pled guilty to an assault under subsection (1) of the statute, the AAO concludes that the applicant's offense is similar to the assault offenses found to involve moral turpitude in *Matter of Solon* and noted by the Board in *Matter of Sanudo* because the Texas assault offense under subsection (1) proscribes the causation of physical pain, illness, or injury upon a person deserving special protection. Accordingly, the AAO finds that the applicant's "assault causing bodily injury" conviction renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

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

> (h) 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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> . . .
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> (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 . . . .

Section 212(a)(9)(B)(v) of the Act provides that:

> Waiver.-The Attorney General [Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary of Homeland Security] that the refusal of admission to such immigrant alien would result in extreme hardship to

> the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General [Secretary of Homeland Security] regarding a waiver under this clause.

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives here are the applicant's U.S. citizen spouse and children.

Additionally, a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant's children can be considered only insofar as it results in hardship to a qualifying relative. Here, the record reflects that the applicant is married to a U.S. citizen. The applicant's spouse therefore meets the definition of a qualifying relative.

If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 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 applicant was convicted of assault causing bodily injury to a family member. 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.

As stated, the applicant was convicted on August 10, 2004, the applicant was convicted in the Harris County Criminal Court, Houston, Texas, of assault causing bodily injury to a family member in violation of section 22.01(a)(1) of the Texas Penal Code. The crime is limited to intentional acts and does not include the infliction of injuries by accident. *Esparza-Rodriguez*, 699 F.3d at 825. Additionally, the statutory elements of the crime require the actual infliction of "physical pain, illness, or any impairment of physical condition." Texas Penal Code § 1.07(a)(8). From the plain language of the statute, it can be concluded that the applicant has been convicted of a violent crime pursuant to 8 C.F.R. § 212.7(d). Therefore, even if the applicant satisfied the "extreme hardship" requirements of sections 212(h)(1)(B) and 212(a)(9)(B)(v) of the Act, he would still be subject to the heightened hardship requirement of showing extraordinary circumstances or exceptional and extremely unusual hardship to warrant a favorable exercise of discretion. The regulation at 8 C.F.R. § 212.7(d) requires a showing of a higher level of hardship for applicants who have committed violent or dangerous crimes.

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 Boarddetermined 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 Board 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. 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 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 an exclusive list. *Id.*

In *Monreal-Aguinaga*, 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 63-4.

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 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 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 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 is married to [redacted], a U.S. citizen. The applicant and his spouse have a 15-year-old U.S. citizen son, [redacted]. The applicant's spouse, mother, and child are qualifying relatives in these proceedings.

The record evidence establishes that the applicant's removal has affected his son emotionally and academically. The applicant's spouse indicates that their son is distant, is not doing well in school, has become irresponsible with his scholastic responsibilities, and his grades have lowered since his father was removed from the United States. Additionally, the record contains several letters from family members attesting to the emotional and academic difficulties the applicant's son has endured since the applicant was removed to El Salvador. Furthermore, the record reflects that the applicant's removal has caused emotional hardship for his mother, who stated in a declaration dated February 16, 2010, that she is suffering with the applicant's absence. She stated that the applicant is a "hard worker and responsible person." She noted that the applicant "is the person who gave her economic and emotional support," and that since his removal, she "cannot sleep at night thinking that he would be in risk to die because of the high delinquency that is in El Salvador."

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.

With regard to remaining in the United States without the applicant, the applicant's wife asserts that she will suffer economic and emotional distress if the applicant is denied admission into the United States. In her sworn statement dated November 27, 2009, the applicant's wife indicates that her husband financially supported their household and that without his financial assistance she will be unable to pay their mortgage loan. She also indicates that she has been unable to make monthly payments to the applicant's car loan since his removal to El Salvador. The account was referred to a collection agency by [redacted] due to their owing almost $10,000 on this loan. The applicant's wife asserts that a representative of the collection agency contacted her and mentioned that she was personally responsible for the outstanding loan balance. In addition, the applicant's wife asserts that her husband entered into several contracts with [redacted], a construction company based in Houston, Texas. She states that the company is requesting the applicant complete work on the above-mentioned contracts; otherwise, the applicant and his wife may be subject to a civil lawsuit.

As evidence of financial hardship, the applicant submitted a letter dated November 25, 2009, from [redacted] a construction manager at [redacted]. In his letter, Mr. [redacted] indicates that it is necessary that the applicant return to Houston, Texas to complete the contracts he left pending. Mr. [redacted] also indicates that the contracts need to be finished by the applicant, though he fails to detail why and how the applicant and his wife are legally responsible for completion of this work. The applicant also submitted a letter dated November 6, 2009, from a debt recovery agency, which indicates that the applicant's account with [redacted] was referred to the collection agency due to the applicant owing [redacted] $9,999.84. The applicant furnished utility bills totaling around $394, credit card statements, daycare expenses for their

children, and a mortgage loan statement indicating that the monthly payment totals $1,285.95. The applicant did not submit income tax returns, or other documentary evidence to show his earning to assist the AAO in determining the financial hardship to the applicant's wife as the sole supporter of their household. Nevertheless, the AAO notes that there is sufficient evidence in the record demonstrating that the applicant's wife is now the main supporter of her four-member household, and further notes the outstanding debt and financial issues endured by her as a result of the applicant's separation from his family resulting from inadmissibility. Additionally, the AAO acknowledges that if the applicant's spouse, their son, and her two children from a prior relationship were to relocate with the applicant to El Salvador, he would have to obtain employment in El Salvador that would enable him to support a five member household.

In her sworn statement dated November 27, 2009, the applicant's wife asserts that the applicant has been a "loving, caring, supportive, and faithful spouse." She states that she needs the applicant in the United States to continue to foster a family environment for their son and her two children from a prior marriage. The applicant's wife states that she cannot bear living separated from him, particularly because of gang violence in El Salvador and the dangers he would face in that country. The record contains country conditions documentation and news articles conveying the challenges the Salvadoran government is encountering with street gangs. The 2011 U.S. Department of State 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 State Department considers El Salvador a critical crime-threat country. El Salvador has one of the highest homicide rates in the world; violent crimes, as well as petty crimes are prevalent throughout El Salvador, and U.S. citizens have been among the victims. Central America has been identified as the most violent region in the world, with El Salvador reporting the highest death rate due to armed violence. According to a recent study, El Salvador has the highest rate of violent fatalities, with over 70 deaths recorded for every 100,000 inhabitants. The Embassy is aware of at least thirteen U.S. citizens who were murdered in El Salvador since 2010. 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.

Moreover, 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.* Additionally, documentary evidence in the record indicates that the area where the applicant resides has local problems that echo those found in the urban centers, such as a rising

rate of violent crime, increasing drug traffic and a marked presence of gangs. Therefore, the ability of the applicant's wife and children to visit the applicant in El Salvador is limited. The AAO notes that the applicant's wife's assertions regarding the unsafe conditions in El Salvador are corroborated by the information contained in the Country Specific Information Sheet and in various news articles in the record. These submissions indicate unsafe conditions and an increase in gang-related violence in El Salvador. The emotional difficulties these unsafe conditions would cause the applicant's wife, son, and mother are detailed by their statements, the documentary evidence, and several attestations submitted in support of the applicant's waiver application.

The AAO also recognizes that the emotional challenges the applicant's wife, son, and step-children would face in the event of separation constitute a hardship factor to be weighed, as the evidence demonstrates the contributions of the applicant to the family's well-being. Family separation must be considered in determining hardship. In *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998) the Ninth Circuit discussed the effect of emotional hardship on the alien and her husband and children as a result of family separation. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886. Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)).

The applicant's wife stated that she is treated for depression, anxiety, and toxoplasmosis, which is a parasitic disease affecting her immune system and her left eye. The medical records show that the applicant's wife was diagnosed with toxoplasmosis in 2005 and that she has received treatment for this condition. Additional evidence in the record indicates that a doctor of internal medicine prescribed the applicant's wife anti-depressant and anti-anxiety medication in December 2009. The same doctor advised her to seek psychological counseling.

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 financial contributions and familial burden; his wife's financial hardship; the record evidence indicating that the applicant's son is integrated into the U.S. school system and has family ties in the United States; the son's academic issues resulting from separation from the applicant; the prospect of permanent separation from the applicant; the evidence indicating applicant's wife would have to financially support their son and two step-children without the applicant's economic contributions; and that the applicant's spouse would be the sole parental figure providing financial and emotional support to their son, who is struggling academically as a result of separation from the applicant. Additionally, the record shows that visits to El Salvador will be limited, especially because both the applicant and his spouse are concerned about visiting a violent country with considerable safety issues. 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.

With regards to joining the applicant to live in El Salvador, the applicant's wife asserts that it would be impossible for her to move because of her current child custody agreement. The applicant's wife explains that moving to El Salvador with the applicant's stepchildren would be in violation of the December 1, 2003, agreement, which grants visitation rights to the children's biological father. Pursuant to the agreement, the children's biological father has the right to possession of the children

on every other weekend and for two hours every Thursday. If the applicant's wife joined the applicant to live in El Salvador, she would likely have to either: separate from her children, seek a new custody agreement, or violate the terms of the custody agreement as it relates to the biological father's visitation rights. The applicant's wife would also have to move with her and the applicant's U.S. citizen son to a country experiencing social and economic problems.

The record evidence also indicates that the applicant's son has never been to El Salvador and that it would be difficult for him to relocate to that country. The applicant asserts that his family's relocation to El Salvador would be detrimental to his son, as he would not be able to function normally or receive the type of education he currently receives in the United States. Here, the AAO recognizes that the applicant's son has resided in the United States his entire life and is integrated into the local community and school system. The Board 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 Board 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 Board 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 Board 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.

Here, the record shows that the applicant's son is integrated into the U.S. school system and has significant family ties in the United States. The applicant would have to find employment in El Salvador to support a household of five, possibly causing financial hardship to his spouse, son, and step-children. In addition, the record indicates the applicant's U.S. citizen son and step-children's unfamiliarity with the culture and environment of the country of relocation, the son's academic issues, 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, his son and step-children will be separated from their family ties of the applicant's mother, the applicant's siblings, the step-children's natural father and in-laws if they move to El Salvador. Additionally, relocation to El Salvador signifies the applicant's wife's violation of the custody agreement as it relates to the biological father's visitation rights. Furthermore, 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.

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). In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "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." *Id.* at 300.

The adverse factors in this case are the applicant's convictions for forgery in 1996 and assault causing bodily injury to a family member in 2004; the applicant's unlawful presence in the United States; any period of unauthorized employment; and the applicant's disregard of a removal order issued by an immigration judge in 1992.

The favorable factors in this case are the applicant's family ties to the United States; the applicant's 16 year residence in the United States; the exceptional and extremely unusual hardship to the applicant's family members if he were denied a waiver of inadmissibility; hardship to the applicant's stepchildren if he were denied admission into the United States; the applicant's lack of a criminal record or offense since 2004; and the evidence demonstrating remorse for his crimes and rehabilitation.

On appeal, the applicant submitted a sworn statement dated May 25, 2011, accepting responsibility for the crimes he committed. In his declaration, the applicant expresses remorse for his participation

in these offenses, and states that he is "sorry for all the inconvenience that [he has] caused." In support, the record includes six letters from family members and friends attesting to the strength of the applicant's marriage, the applicant's good qualities, his devotion to his children, and the applicant's good moral character.

The applicant's actions in this matter cannot be condoned. The AAO has weighed the severity of the applicant's criminal convictions; his remorse, his 16 years of residence in the United States; the facts that the most recent conviction occurred over eight years ago and that there is no indication of any additional dishonest or violent acts; and the other favorable facts in the record, including his U.S. citizen wife and children, and the exceptional and extremely unusual hardship the applicant's family members would face if he were denied admission, and finds that the applicant merits a favorable exercise of discretion. Taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for an application for waiver of grounds of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) 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.

ORDER: The appeal is sustained.