



U.S. Citizenship  
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FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: APR 19 2010

IN RE:

[REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The applicant, [REDACTED] is a native and citizen of Cuba. He 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 committed crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and children.

The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) pursuant to the Cuban Adjustment Act on July 30, 2007. The applicant also filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on April 17, 2008.

The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, the applicant asserts that if his waiver is denied, his United States citizen spouse, children and mother would experience extreme hardship. The applicant notes that he was arrested only once in 1994 for a “domestic dispute” where he pled *nolo contendere* and was placed on probation. The applicant admits that his “actions in 1994 were wrong” and states that he has “never been involved since that date in any criminal matter, or have been arrested for any reason.” *See Brief in Support of Appeal*, dated May 22, 2008.

In support of the application, the record contains, but is not limited to, the applicant’s marriage certificate, birth certificates for the applicant’s spouse and children, the applicant’s mother’s U.S. passport, medical reports, school records, financial records, employment records, country condition reports, court dispositions, and attestations from the applicant and his spouse. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

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

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record shows that the applicant was convicted in the Eleventh Judicial Circuit Court, Miami-Dade County, Florida, on March 27, 1995 of "aggravated assault with deadly weapon" in violation of section 784.021(1)(a) of the Florida Statutes (Fl. Stat. § 784.021(1)(a)), a third degree felony, and "criminal mischief over \$1,000" in violation of Fl. Stat. § 806.13(1)(b)3, a third degree felony [REDACTED]. Pursuant to Fl. Stat. § 775.082(d), the term of imprisonment for a felony of the third degree is a maximum of five years imprisonment. The applicant was placed on probation for a period of one year.

At the time of the applicant's conviction, Fl. Stat. § 784.021 provided in pertinent part:

(1) An "aggravated assault" is an assault:

(a) With a deadly weapon without intent to kill; or

...

(2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

An “assault” is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent. Fl. Stat. Ann. § 784.011 (West 1995). The applicant was convicted of “assault with a deadly weapon” in violation of Fl. Stat. § 784.021. In *Matter of Fualaau*, the BIA noted, “The crime of assault includes a broad spectrum of misconduct, ranging from relatively minor offenses, e.g., simple assault, to serious offenses, e.g., assault with a deadly weapon.” 21 I&N Dec. 475, 447 (BIA 1996). The BIA noted further, “Assault with a deadly weapon has been held to be a crime involving moral turpitude.” *Id.* (citing *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976)(stating that assault with a deadly weapon under the Illinois Revised Statutes is a crime involving moral turpitude even if the perpetrator only engages in reckless misconduct.); *see also Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006)(“assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude by both this Board and the Federal courts, because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the ‘simple assault and battery’ category.”) Therefore, the AAO can conclude that the applicant’s conviction under Fl. Stat. § 784.021 is categorically a crime involving moral turpitude.

At the time of the applicant’s conviction, Fl. Stat. § 806.13(1)(b)3, provided in pertinent part:

- (1)(a) A person commits the offense of criminal mischief if he willfully and maliciously injures or damages by any means any real or personal property belonging to another, including, but not limited to, the placement of graffiti thereon or other acts of vandalism thereto.
- (b) 1. If the damage to such property is \$200 or less, it is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.
2. If the damage to such property is greater than \$200 but less than \$1,000, it is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
3. If the damage is \$1,000 or greater, or if there is interruption or impairment of a business operation or public communication, transportation, supply of water, gas or power, or other public service which costs \$1,000 or more in labor and supplies to restore, it is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. . . .

A conviction for “criminal mischief” under Fl. Stat. § 806.13 requires the perpetrator to “willfully and maliciously” injure or damage another’s property. The BIA in *Matter of M* addressed whether an alien’s conviction for malicious and wanton injury to property in violation of the Oregon Penal Code constituted morally turpitudinous conduct. 3 I&N Dec. 272 (BIA 1948). In finding that the crime constitutes moral turpitude, the BIA noted that:

[T]he indictment avers the terms “maliciously” and “wantonly.” An act which is done for sufficient cause has been held not to be done “wantonly.” *State v. Klein*, 98 Oreg., 116, 193 P. 208 (1920). However, it has been held that the terms “wantonly” and “wilfully” are substantially the same. *McHargue v. Calchina*, 78 Oreg. 326 (1915). Thus we do not have a case where the act was merely accompanied by negligence or carelessness, but one which was perpetrated maliciously and wantonly. Although the statute does not contain a specific intent except where poison is exposed with the intent that same shall be taken by any animal, the statute obviously does require a motive which is manifested by the elements of malice and wantonness.

3 I&N Dec. at 273-74.

The AAO finds that the applicant’s conviction under F1. Stat. § 806.13, requiring a “willful and malicious” conduct to damage another individual’s property, constitutes an “act of baseness, vileness, or depravity in the private and social duties owing to fellow men, and society in general, contrary to accepted and customary rules,” and therefore is categorically a crime involving moral turpitude. *Id.* at 274.

In sum, the AAO finds that the applicant’s convictions for aggravated assault and criminal mischief constitute crimes involving moral turpitude, and the applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant has not contested this determination on appeal.

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has 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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions

and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Since the criminal conviction for which the applicant was found inadmissible occurred more than 15 years ago, it can be waived under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

The record reflects that the applicant, a native and citizen of Cuba, was paroled into the United States on April 11, 1969. He is the son of [REDACTED] a U.S. citizen. He wed [REDACTED], a U.S. citizen, on January 14, 1995 in Miami, Florida. The applicant and his spouse have a twelve-year-old U.S. citizen child, [REDACTED] and a fourteen-year-old U.S. citizen child, [REDACTED]. The applicant also has a 22-year-old U.S. citizen child from his prior marriage, [REDACTED].

The applicant filed a Form I-601 waiver application on April 17, 2008. The supporting documentation accompanying the applicant's waiver application includes his 2007 tax return, Form G-325A (Biographic Information Sheet) dated July 25, 2007, and Wage and Tax Statements (Forms W-2) from 2006 and 2007. These documents reflect that the applicant has been employed in the field of medical research since June 1997. The applicant's Wage and Tax Statements (Forms W-2) show his gainful employment with ADP TotalSource in Miami, Florida in 2006 and 2007. The record contains a brief from counsel that was filed with the applicant's waiver application stating that the applicant was diagnosed with cancer in October 2006. Counsel noted that the applicant's kidney was removed and he has not been able to work since his surgery. *See Counsel's Brief* at 2, dated April 15, 2008.

The applicant filed supplemental documentation with the AAO on March 23, 2010 to request the expedited processing of his appeal. The applicant submitted a letter from his spouse stating that the applicant and his immediate family members are suffering financial hardships as a result of the

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<sup>1</sup> The applicant's spouse indicated in the "expedite request" letter she filed with the AAO on March 23, 2010 that she and the applicant have two children and two stepchildren. The applicant submitted his Certificate of Health Insurance Coverage showing that the dependent children on his health insurance coverage include [REDACTED] and [REDACTED]. However, the record does not contain [REDACTED] birth certificate; therefore he will not be considered a qualifying family member for purposes of the applicant's Form I-601 waiver application.

denial of the applicant's employment authorization document.<sup>2</sup> See Letter from [REDACTED] dated March 23, 2010. The applicant also submitted a letter from the University of Miami stating that the applicant's employment as clinical research coordinator will be terminated because he has not renewed his employment authorization. See *Termination of Employment Letter*, dated February 18, 2010. Although the applicant's employment has now been terminated because he no longer has employment authorization, the letter from the University of Miami reflects that the applicant had resumed his employment in the field of medical research. The evidence of the applicant's continued employment and payment of taxes demonstrate his integration into his community and rehabilitation.

The AAO finds that the record indicates that the applicant's admission to the United States is not contrary to the national welfare, safety, or security of the United States and that he has been rehabilitated, as required by section 212(h)(1)(A) of the Act. The criminal acts for which the applicant is inadmissible occurred over 15 years ago on March 27, 1995, and he has had no other convictions since this date. The applicant is the husband of a U.S. citizen and the father of three U.S. citizen children. The applicant financially supports his dependent family members, has paid his taxes, and has shown his previous gainful employment as a medical researcher. Therefore, the applicant has established that he satisfies the requirements for a waiver under section 212(h)(1)(A) of the Act.

The applicant must also establish that he merits a waiver of inadmissibility as a matter of discretion. 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, based on the facts of this particular case, that the applicant merits a favorable exercise of discretion solely on the balancing of favorable and adverse factors. The applicant has been convicted of aggravated assault with a deadly weapon, and therefore, the Secretary of Homeland Security will not favorably exercise discretion in his case except in an extraordinary circumstance. See 8 C.F.R. § 212.7(d).

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

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

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<sup>2</sup> The record reflects that on February 17, 2010, the applicant's Employment Authorization Application (Form I-765) was denied by the National Benefits Center because his underlying Form I-485 adjustment application is no longer pending.

insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

Accordingly, the applicant must show that “extraordinary circumstances” warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant’s admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has “clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship” to a qualifying relative. *Id.*

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that “must be ‘substantially’ beyond the ordinary hardship that would be expected when a close family member leaves this country.” However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean, supra*, and codified at 8 C.F.R. § 212.7(d).

The BIA stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

In *Monreal*, the BIA provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

[T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the BIA noted that, “the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face.” 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent’s minor children was demonstrated by evidence that they “would suffer hardship of an emotional, academic and financial nature,” and would “face complete upheaval in their lives and hardship that could conceivably ruin their lives.” *Id.* at 321 (internal quotations omitted). The BIA viewed the evidence of hardship in the respondent’s case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The BIA noted:

While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former “extreme hardship” standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher “exceptional and extremely unusual hardship” standard.

23 I&N Dec. at 324.

However, the BIA in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that “the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief.” 23 I&N Dec. 467, 470 (BIA 2002). The BIA found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The BIA noted that these factors included her heavy financial and familial burden, lack of support from her children’s father, her U.S. citizen children’s unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The BIA stated, “We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met.” *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. 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 AAO notes that exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying

relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The applicant's U.S. citizen mother, [REDACTED], U.S. citizen spouse, [REDACTED], [REDACTED] twelve-year-old U.S. citizen child, [REDACTED] fourteen-year-old U.S. citizen child, [REDACTED] and 22-year-old U.S. citizen child, [REDACTED] are qualifying family members for purposes of determining exceptional and extremely unusual hardship under 8 C.F.R. § 212.7(d).

The AAO will first assess whether the applicant's qualifying family members would suffer exceptional and extremely unusual hardship if they relocated to Cuba due to the applicant's inadmissibility. In the brief filed with the waiver application, counsel asserted that the applicant's son, [REDACTED], suffers from attention deficit hyperactive disorder (ADHD). Counsel stated that [REDACTED] is under psychological treatment and undergoes evaluation and treatment several times per year. Counsel stated that the applicant's daughter is in the gifted program at her public school. *See Counsel's Brief* at 2, dated April 15, 2008.

The record contains an "intellectual evaluation" of the applicant's daughter, [REDACTED]. The evaluation states that the applicant's daughter, "exhibits a fast rate and speed of learning" and "[b]oth her verbal comprehension and perceptual organization skills were found to be of above-average quality." The report finds that the applicant's daughter, "Meets the intellectual criteria for participation in a Gifted type of educational program." *See Miami-Dade County Public Schools, Department of Psychological Services, Multi-Disciplinary Team Report*, dated May 20, 2003.

The record also contains an evaluation diagnosing the applicant's son, [REDACTED], with ADHD and an adjustment disorder. The report states that the applicant's son has extreme impulsivity, angry outbursts, poor self-esteem oversensitivity, poor attention and focus. The report instructs that, "Both parents should be actively involved with discipline, structure, emotional support, building of esteem, and overall treatment to insure an easy transition to new school as well as long term improvement." The report further instructs, "Patient's needs are extreme and it is clear that the constant hands on support of both parents is required." *See Report from the Institute For Child and Family Health, Inc.*, dated November 19, 2007.

The applicant submitted with his expedite request, a psychological evaluation of his son, which states that it was requested by his son's elementary school because of his son's "problems with reading, spelling, writing, impulsive behavior and distractibility." The evaluation states that the applicant's son "is reported to be experiencing academic problems centered on difficulties with attention, poor behavior in the classroom, distractibility, difficulty following directions, completing tasks and staying focused." The report finds that the applicant's son "is high risk for ADHD and meets the DSM criteria for making this diagnosis." The report contains numerous recommendations for [REDACTED], which include placing him on a "behavior modification program in order to address his attention/concentration," "individual tutoring with an educational specialist trained in assisting students develop compensatory strategies for better managing his cognitive defects and ADHD," and

individual and family psychotherapy. *See Psychological Evaluation from* [REDACTED], [REDACTED], dated June 14, 2008.

In the brief, counsel asserted that the applicant's daughter would not have access to a gifted program in Cuba and would be "handicapped" the rest of her life in Cuba. Counsel further asserted that the applicant's son would suffer from the "tremendous lack of medications in Cuba." *See Counsel's Brief* at 3, dated April 15, 2008. Counsel furnished country condition reports on Cuba, including the U.S. Department of State's *Background Note* on Cuba from November 2007.

The AAO notes that while the current U.S. Department of State *Background Note* on Cuba does not specifically address the public school system in Cuba, it does provide information on the general political and economic conditions of the country. The report states, in pertinent parts:

Cuba is a totalitarian communist state headed by General Raul Castro and a cadre of party loyalists. Castro replaced his brother Fidel Castro as chief of state, president of Cuba, and commander-in-chief of the armed forces on February 24, 2008. Fidel Castro retains the position of First Secretary of the Cuban Communist Party (PCC). A pending Communist Party Congress, the first to have been held since 1997, has been indefinitely postponed. The Cuban Government seeks to control most aspects of Cuban life through the Communist Party and its affiliated mass organizations, the government bureaucracy, and the state security apparatus. The Ministry of Interior is the principal organ of state security and control. . . .

Living conditions in 2009 remained well below the 1989 level. Moreover, the gap in the standard of living is widening between those with access to convertible pesos and those without. Jobs that can earn salaries in convertible pesos or tips from foreign businesses and tourists have become highly desirable. It is not uncommon to see doctors, engineers, scientists, and other professionals working in restaurants or as taxi drivers. An estimated \$1 billion in yearly remittances exacerbates the gap.

Prolonged austerity and the state-controlled economy's inefficiency in providing adequate goods and services have created conditions for a flourishing informal economy in Cuba. As the variety and amount of goods available in state-run peso stores has declined and prices at convertible peso stores remain unaffordable to most of the population, Cubans have turned increasingly to the black market to obtain needed food, clothing, and household items. Pilferage of items from the work place to sell on the black market or illegally offering services on the sidelines of official employment is common. A report by an independent economist and opposition leader speculates that more than 40% of the Cuban economy operates in the informal sector. Petty theft and corruption has reached such critical proportions that (now former) President Fidel Castro acknowledged it could bring the end of the revolution. In the last few years, the government has carried out an anti-corruption campaign, including the creation of a Comptroller General's Office in 2009, repeated street-level

crackdowns, and ongoing ideological appeals. So far, these measures have yielded limited if any results.

U.S. Department of State, *Background Note: Cuba*, dated March 2010.

The AAO notes that the BIA and U.S. Courts have found extreme hardship in cases where the language capabilities of the children were not sufficient for them to have an adequate transition to daily life in the applicant's country of origin. For example, *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities 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. The BIA found that uprooting her at this 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 (5<sup>th</sup> 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.2d 87, 89 (9<sup>th</sup> Cir. 1980) the Ninth Circuit Court of Appeals found the BIA abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

While it is unknown whether the applicant's children are fluent in Spanish, the record demonstrates that they have significant family and cultural ties to the United States. The record reflects that their father (the applicant) has resided in the United States since he was two years old and their mother was born in the United States. See *New Jersey Birth Certificate of [REDACTED] Form G-361 Index Card for [REDACTED]*. The applicant's children have resided in the United States their entire lives and are entering their teenage years. The AAO finds that the applicant's children's relocation from the United States to a country such as Cuba with a vastly different political and economic culture would certainly cause them the extreme hardship demonstrated in *Matter of Kao and Lin, supra*. The question remains whether the applicant's children have shown hardship that is not only extreme, but also is "'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001). The record shows that the applicant's children have been integrated into the U.S. school system and have academic special needs that require learning accommodations – the applicant's son requires accommodations for his learning disability and the applicant's daughter requires accommodations for her above average intelligence. The applicant's children's needs appear to have been recognized and addressed by the Miami-Dade County public school system. See *Miami-Dade County Public Schools, Department of Psychological Services, Multi-Disciplinary Team Report*, dated May 20, 2003; *Psychological Evaluation from [REDACTED]*, dated June 14, 2008. The AAO finds that to uproot the applicant's children, who have special academic needs, during the formative stage of their adolescent years and to place them in a country such as Cuba, where the political and economic system are, in sharp contrast to the United States, under a totalitarian communist state, would

certainly cause them exceptional and extremely unusual hardship. *See U.S. Department of State, Background Note: Cuba*, dated March 2010.

As stated, exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request. The next issue to be addressed is whether the applicant's qualifying relatives would suffer exceptional and extremely unusual hardship if they remained in the United States separated from him.

In the brief filed with the waiver application, counsel stated that the applicant will suffer separation from his family if he is removed to Cuba. Counsel stated that the applicant will be subject to repression, persecution, and possible incarceration. Counsel noted that the applicant's wife's family is from Cuba. Counsel noted further that neither the applicant nor his spouse has any close relatives in Cuba. *See Counsel's Brief at 2-3*, dated April 15, 2008.

The AAO acknowledges that the applicant and his qualifying family members will experience emotional hardship if they are separated as a result of his inadmissibility. 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 applicant's separation from his spouse and children constitutes emotional suffering for his qualifying family members.

Permanent family separation of a spouse from each other and parents from children is a scenario often resulting in the extreme hardship. However, the AAO finds that the facts of this particular case also meet the significantly higher exceptional and extremely unusual hardship standard. Country condition reports indicate that the political conditions in Cuba may cause significant hardships for the applicant's children should they decide to visit their father in Cuba. The U.S. Department of State's travel advisory on Cuba warns that, "The Government of Cuba does not recognize the U.S. nationality of U.S. citizens who are born in Cuba and may not recognize the U.S. nationality of those born in the U.S. to Cuban parents. These individuals will be treated solely as Cuban citizens and may be subject to a range of restrictions and obligations, including military service." *See U.S. Department of State, Country Specific Information: Cuba*, August 14, 2009.

Further, the initial psychological evaluation of the applicant's son, [REDACTED], instructs that, "Both parents should be actively involved with discipline, structure, emotional support, building of esteem, and overall treatment to insure an easy transition to new school as well as long term improvement." The report further instructs, "Patient's needs are extreme and it is clear that the constant hands on support of both parents is required." *See Report from the Institute For Child and Family Health, Inc.*, dated November 19, 2007. The subsequent psychological evaluation of [REDACTED] states that he "appears to be experiencing tension, anxiety, and feelings of inadequacy and insecurity the origins of which are not exactly known." The evaluation recommends individual and family therapy to assist

██████████ with adjusting to living with ADHD, developing improved impulse control skills and developing more effective attention and concentration skills. *See Psychological Evaluation from ██████████*, dated June 14, 2008. These reports illustrate that the applicant's presence in the United States is an integral part of his son's emotional and social well-being.

Finally, the applicant submitted with his expedite request, documentation related to his health insurance coverage, which shows that his children, ██████████ and ██████████, were included as dependents on his health insurance through the University of Miami Group Health Plan. *See Certificate of Health Insurance Coverage*, dated March 4, 2010. He furnished the notification he received regarding the termination of his health insurance coverage on February 18, 2010, the date he was terminated from employment as clinical research coordinator because he had not renewed his employment authorization. *See Notice of Right to Elect Continuation Coverage*, dated March 4, 2010. The letter from the applicant's spouse states that since the termination of the applicant's employment, ██████████ "has not been able to take his meds for 2 weeks since we cannot afford it." She further states that they cannot afford to elect the continuance of their health insurance through COBRA. *See Letter from ██████████* dated March 23, 2010. As evidence of financial hardship, the applicant submitted a copy of his recent home mortgage statement showing that he owed a minimum payment of \$820.26 on February 25, 2010. The record contains the applicant and his spouse's W-2 Forms from 2006 and 2007 that were previously filed with the waiver application. These documents show the applicant's spouse's annual salary as approximately \$45,000. The applicant's annual salary in 2006 was \$38,333 and in 2007 it was \$33,716.76. While the record does not contain updated documentation regarding the applicant and his spouse's current earnings, it does show that the applicant's employment has contributed significantly to the household income and provided his dependent children with the benefit of health insurance.

As stated in *Matter of Monreal-Aguinaga*, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship. 23 I& N Dec. 56, 64. The AAO finds that given the country conditions in Cuba that may hinder the applicant's children from visiting him, the applicant's son's documented emotional conditions and developmental needs, the documented financial hardships experienced by the applicant's qualifying family members, and the emotional suffering that he applicant's family members would experience as a result of separation, the applicant has established that his separation from his qualifying family members would result in exceptional and extremely unusual hardship.

Additionally, the AAO finds that the gravity of the applicant's offense does not override the extraordinary circumstances in the applicant's case. In determining the gravity of the applicant's offense, the AAO must not only look at the criminal act itself, but also engage in a traditional discretionary analysis and "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 300 (BIA 1996)(Citations omitted).

The adverse factors in the present case are the applicant's March 27, 1995 convictions for "aggravated assault with deadly weapon" and "criminal mischief over \$1,000." The favorable

factors in the present case are the applicant's family ties in the United States, the exceptional and extremely unusual hardship to the applicant's spouse and children, his history of gainful employment in the United States, and the passage of fifteen years since he was convicted of the aforementioned offenses. The applicant has resided in the United States since April 11, 1969. He does not appear to have been convicted of any other criminal offenses and he has not been charged with any immigration violations.

The AAO finds that the crimes committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted. Therefore, the applicant has established his eligibility for sections 212(h) of the Act waivers.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained and the waiver application is approved. The Director is instructed to reopen and continue processing the applicant's Form I-485 adjustment application.