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FILE:



Office: SANTA ANA

Date: APR 28 2010

IN RE:



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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

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.

Perry Rhew
Chief, Administrative Appeals Office

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

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 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 U.S. citizen children.

The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an underlying Petition for Alien Relative (Form I-130). The applicant also filed an Application for Waiver of Ground of Excludability (Form I-601) on August 8, 2005. The director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. The applicant timely appealed the denial to the AAO. On December 3, 2009, the AAO issued the applicant a Notice of Intent to Dismiss the appeal. On February 1, 2010, the applicant responded with a brief and additional evidence of hardship.

In support of the application, the record contains, but is not limited to, attestations from the applicant's spouse and children, medical documentation, financial documentation, photographs, court dispositions, the applicant's marriage certificate, the applicant's children's birth certificates, the applicant's wife's naturalization certificate, the applicant's children's school records, an employment verification letter, a letter from the applicant's spouse's pastor, and evidence of the applicant's family ties in the United States. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

(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 reflects that the applicant was convicted in the Municipal Court of Los Angeles, California on May 1, 2000 of "Violence Used Against Former Spouse" in violation of Cal. Penal Code §§ 242 and 243(e). The applicant was placed on summary probation for a period of 36 months on the condition that he pay various fines, participate in specified community service, and enroll in a batterer's counseling program [REDACTED]

Cal. Penal Code § 242 (West 2000) defines battery as, "any willful and unlawful use of force or violence upon the person of another."

Cal. Penal Code § 243(e) (West 2000) provides:

When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment. If probation is granted, or the execution or imposition of the sentence is suspended, it shall be a condition thereof that the defendant participate in, for no less than one year, and successfully complete, a batterer's treatment program, as defined in Section 1203.097, or if none is available, another appropriate counseling program designated by the court. However, this provision shall not be construed as requiring a city, a county, or a city and county to provide a new program or higher level of service as contemplated by Section 6 of Article XIII B of the California Constitution.

On appeal, counsel asserted that the applicant's conviction for domestic battery in violation of Cal.

Penal Code §§ 242 and 243(e) is not a crime involving moral turpitude. Counsel stated that the applicant was convicted of an act similar to the respondent in *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006). Counsel stated that the minimal conduct necessary to complete an offense under Cal. Penal Code §§ 242 and 243(e) is simply an intentional touching of another without consent. Counsel noted that one may be convicted of battery in California without using violence and without injuring or even intending to injure the victim. Counsel stated that such an offense is in the nature of a simple battery, as traditionally defined, and on its face it does not implicate any aggravating dimension that would lead to the conclusion that it is a crime involving moral turpitude.

In *Sanudo*, the BIA analyzed whether domestic battery in violation of Cal. Penal Code §§ 242 and 243(e) constitutes a crime involving moral turpitude. 23 I&N Dec. at 969. First, the BIA assessed the manner in which California courts have applied the “use of force or violence” clause of Cal. Penal Code § 242. *Id.* The BIA noted that courts have held that “the force used need not be violent or severe and need not cause pain or bodily harm.” *Id.* at 969 (citing *Gunnell v. Metrocolor Labs., Inc.*, 112 Cal. Rptr. 2d 195, 206 (Cal. Ct. App. 2001)). Second, the BIA assessed the situations in which assault and battery offenses may be classified as crimes involving moral turpitude. The BIA noted that those offenses include assault and battery coupled with aggravating factors such as the use of deadly weapon, the intentional infliction of serious bodily injury, and bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer. 23 I&N Dec. at 971-72. The BIA also held that “the existence of a current or former ‘domestic’ relationship between the perpetrator and the victim is insufficient to establish the morally turpitudinous nature of the crime,” and, therefore, a conviction for domestic battery does not qualify categorically as a crime involving moral turpitude. *Id.* at 972-73. The BIA further held that under the modified categorical analysis, the admissible portion of the respondent’s conviction record failed to reflect that “his battery was injurious to the victim or that it involved anything more than the minimal nonviolent ‘touching’ necessary to constitute the offense.” *Id.*

The Ninth Circuit Court of Appeals addressed whether Cal. Penal Code §§ 242 and 243(e) constitutes a crime involving moral turpitude in the case *Galeana-Mendoza v. Gonzalez*, 465 F.3d 1054 (9th Cir. 2006). The Ninth Circuit noted agreement with the BIA’s decision in *Sanudo*. 465 F.3d at 1062. The court followed the “categorical” and “modified categorical” approach, as then defined, to determine whether the conviction was a crime involving moral turpitude. The Ninth Circuit theorized that, “throwing a cup of cola on the lap of someone to whom one is or had been engaged, slighting shoving a cohabitant, or poking the parent of one’s children rudely with the end of a pencil are all ‘offensive touching[s]’ of qualifying individuals and can constitute domestic battery under section 243(e).” *Id.* at 1061. The Ninth Circuit determined that since the full range of conduct proscribed by the statute at hand did not categorically involve moral turpitude, the court would conduct a modified categorical analysis and look “beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings to determine whether the applicant was convicted of a crime involving moral turpitude.” *Id.* at 1057-1058 (citations omitted).

Since its opinion in *Galeana-Mendoza*, the Ninth Circuit has adopted the “realistic probability” approach, as articulated by the U.S. Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), to determine whether or not the elements of a statute categorically render the offense a crime

involving moral turpitude. *See Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008). In defining this approach, the U.S. Supreme Court explained:

[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic possibility, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Duenas-Alvarez, 549 U.S. at 193.

Duenas-Alvarez did not involve the determination of whether the alien was convicted of a crime involving moral turpitude, but rather, whether he was convicted of an aggravated felony under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G). As stated above, the Ninth Circuit has applied the “realistic probability” test as part of the categorical analysis for determining if a conviction is a crime of moral turpitude. *See Nicanor-Romero*, 523 F.3d at 1004-1007. Likewise, the Attorney General in *Matter of Silva-Trevino* found that the question presented in *Duenas-Alvarez* is similar to the question of whether a crime constitutes moral turpitude, and adopted the “realistic probability” standard articulated in *Duenas-Alvarez* as an approach for determining inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. *See* 24 I&N Dec. 687, 698 (A.G. 2008).

The methodology adopted by the Attorney General consists of a three-pronged approach. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). If a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage or “modified categorical” inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708. Finally, if review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709.

The Ninth Circuit Court of Appeals had previously reserved judgment as to whether it would follow the ruling of the Attorney General in *Silva-Trevino* that adjudicators may look beyond the record of conviction as part of the modified categorical inquiry. *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009). However, this question was implicitly addressed in the recent case *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009). In *Castillo-Cruz*, the Ninth Circuit addressed whether receipt of stolen property under Cal. Penal Code § 496(a) constitutes a categorical crime involving moral turpitude by applying the “realistic probability” test. 581 F.3d at 1161. The

Ninth Circuit concluded that California courts have upheld convictions under Cal. Penal Code § 496(a) in cases where there was no intent to permanently deprive owners of their property, and as such, a conviction under the statute is not categorically a crime of moral turpitude. *Id.* The Court then held that the respondent's conviction was not a crime involving moral turpitude under the modified categorical analysis because the government conceded that there was no evidence in the record establishing that his offense involved an intent to deprive the owner of possession permanently. *Id.* The court cited to its prior precedent that only the record of conviction may be reviewed as part of the modified categorical inquiry, and apparently reviewed only the record of conviction in making this determination. *Id.* (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)). The AAO interprets the holding in *Castillo-Cruz* as a refusal by the Ninth Circuit to accept the more expansive review allowed by the Attorney General, and will thus restrict its review in this case to only the record of conviction.

Having established the methodology followed by the Ninth Circuit Court of Appeals in determining whether a conviction is a crime involving moral turpitude, the AAO will now apply the “realistic probability” standard to the instant case. The record reflects that the applicant was convicted on May 1, 2000 of “Violence Used Against Former Spouse” in violation of Cal. Penal Code §§ 242 and 243(e). Although not explicitly applying the “realistic probability” test, the Ninth Circuit in *Galeana-Mendoza* engaged not only in assessing the theoretical possibility but also the realistic probability that Cal. Penal Code § 242 is a categorical crime involving moral turpitude. 465 F.3d 1054. The Ninth Circuit stated that in looking at California court decisions involving Cal. Penal Code § 242, “the phrase ‘use of force or violence’ . . . is a term of art, requiring neither a force capable of hurting or causing injury nor violence in the usual sense of the term.” *Id.* at 1059 (citing *Ortega-Mendez v. Gonzalez*, 450 F.3d 1010, 1016 (9th Cir. 2006)). The Ninth Circuit noted that the domestic relationship factor delineated in Cal. Penal Code § 243(e) is not, alone, sufficient to render every offense under this statute as one that is categorically grave, base, or depraved, and as such, the full rage of conduct proscribed by section 243(e) does not involve moral turpitude. 465 F.3d at 1059-60. The Ninth Circuit held that since Cal. Penal Code § 243(e) “lacks an injury requirement and includes no other inherent element evidencing ‘grave acts of baseness or depravity,’” it is not categorically a crime involving moral turpitude. *Id.* at 1061. The Ninth Circuit further held that the government failed to carry its burden under the modified categorical approach.¹ *Id.* at 1062.

Since a conviction for domestic violence under Cal. Penal Code §§ 242 and 243(e) is not categorically a crime involving moral turpitude, we apply the modified categorical approach and “consider whether any of a limited, specified set of documents—including the state charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment

¹ The AAO notes that, unlike a removal hearing in which the government bears the burden of establishing a respondent's removability, the burden of proof in the present proceedings is on the applicant to establish his admissibility for admission to the United States “to the satisfaction of the Attorney General [Secretary of Homeland Security].” *See* Section 291 of the Act, 8 U.S.C. § 1361. The AAO notes that the burden of proof was also on the alien in *Castillo-Cruz*, as the issue under consideration by the court was his application for cancellation of removal, a form of relief from removal requiring an applicant to demonstrate that he or she is not inadmissible under section 212(a)(2) of the Act and therefore not ineligible for cancellation of removal under sections 240A(b)(1)(C), (d)(1), of the Act, 8 U.S.C. §§ 1229b(b)(1)(C), (d)(1). *See* 581 F.3d at 1157; *see also* sections 240(c)(2)(A), (c)(4)(A), of the Act, 8 U.S.C. §§ 1229a(c)(2)(A), (c)(4)(A).

(sometimes termed ‘documents of conviction’)” reflect that the applicant’s conviction involved an admission to, or proof of, morally turpitudinous conduct. *Fernando-Ruiz*, 466 F.3d at 1132 (citation omitted). As previously discussed, the BIA in *Sanudo* determined that bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer, constitutes morally turpitudinous conduct. 23 I&N Dec. 968, 971-72 (BIA 2006).

In the instant case, counsel has asserted that the conviction record does not reflect that the applicant was convicted under Cal. Penal Code §§ 242 and 243(e) for causing bodily harm to his former spouse. The AAO notes, however, that the applicant has failed to submit the documents comprising the record of conviction. In response to a request by the director for the dispositions of the applicant’s convictions, the applicant submitted copies of the court dockets, which contain a procedural record of the criminal proceedings for his two convictions. The docket for the conviction under Cal. Penal Code §§ 242 and 243(e) does not include any record of factual findings made by the court, but it does indicate that a complaint was filed in the court, a copy of the complaint and arrest report were provided to applicant’s defense counsel, the applicant pled nolo contendere, and the court found a factual basis for the plea and accepted it. The AAO acknowledges that the director did not specifically request that the applicant submit a copy of the complaint, or any other document that is part of the record of conviction, and that the docket is sufficient evidence of the conviction itself. *See* section 240(c)(3)(B) of the Act, 8 U.S.C. § 1229a(c)(3)(B). Nevertheless, counsel’s assertions on appeal demonstrate awareness that the applicant has the burden to demonstrate that he is not inadmissible, and that this is accomplished by showing that the record of conviction fails to reflect that the conviction was based on the applicant inflicting bodily harm on his former spouse.

On December 3, 2009, the AAO issued a notice of intent to dismiss providing the applicant the opportunity to submit the complaint and any other available documents that comprise the record of conviction and show that these documents fail to establish that his conviction was based on conduct involving moral turpitude. The AAO noted that to the extent such documents are unavailable, the applicant must establish this fact pursuant to the requirements in 8 C.F.R. § 103.2(b)(2).

On February 1, 2010, the AAO received a response from counsel, which reiterates that the applicant’s conviction for domestic battery in violation of Cal. Penal Code §§ 242 and 243(e) is not a crime involving moral turpitude. Counsel further asserts, “our office never received any copies of the police report or complaint as stated by the Chief, of the AAO, if a copy was sent to our office it was never received.” Counsel states, “Our office attempted to obtain a copy of the police report however, it was not available because the case was too old and only the agency requesting the records can make the request, in this case the Service.” Counsel furnished a letter from the Los Angeles County Sheriff’s Department Headquarters, which states in part, “local police agency records of investigations are exempt from release; therefore, the Los Angeles County Sheriff’s Department does not release crime reports or booking jacket records.” Counsel also furnished a letter from the applicant’s spouse dated December 18, 2009, which states that the applicant’s domestic battery conviction stemmed from a verbal argument she had with the applicant.

The AAO notes first that it will decline to address counsel’s assertion that the applicant’s conviction for domestic battery is not a crime involving moral turpitude since this claim has already been addressed by the AAO in detail. Second, the AAO has not indicated that the copy of the complaint was provided to the applicant’s immigration counsel; the AAO simply stated that it was provided during the applicant’s criminal proceedings to the defense counsel. Third, the AAO contacted the

criminal misdemeanor office of Los Angeles County Central Arraignment Court and learned that the complaint from the applicant's conviction record is readily available to the applicant upon request and payment of a fee. Fourth, the applicant has not submitted documentation pursuant to 8 C.F.R. § 103.2(b)(2) to explain his failure to submit a copy of the complaint or other existing documents that comprise the record of conviction. Finally, the AAO cannot give any weight to the applicant's spouse's claim that the applicant's actions did not involve physical violence as the modified categorical inquiry is limited to the record of conviction in Ninth Circuit cases. Given the applicant's failure to meet his burden of proof by submitting the documents that comprise the record of conviction or other documentation pursuant 8 C.F.R. § 103.2(b)(2), the AAO cannot find that the applicant's conviction under Cal. Penal Code §§ 242 and 243(e) is not a crime involving moral turpitude.

The record further reflects that on December 9, 1997, the applicant was convicted in the Municipal Court of Downey Judicial District, County of Los Angeles, California, of misdemeanor theft of property (petty theft) in violation of section 484(a) of the California Penal Code. The applicant was placed on summary probation for a period of 36 months on the condition that he serves one day in jail and pay a \$540.00 fine (Case No. 7DW10021).

Cal. Penal Code § 484(a) (West 1997) provides:

- (a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, "It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, "Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].") However, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

The Ninth Circuit Court of Appeals addressed the issue of whether Cal. Penal Code § 484(a) constitutes a crime involving moral turpitude in *Castillo-Cruz*. See 581 F.3d at 1157. The Ninth Circuit reviewed lower court case law on convictions under Cal. Penal Code § 484(a), and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to deprive the victim of his or her property permanently. *Id.* at 1160 (citations omitted). The Ninth Circuit cited to the Second District Court of Appeal's opinion in *People v. Albert*, which held that the act of robbery, defined by the court as "larceny aggravated by use of force or fear," requires an intended permanent taking. *Id.* (citing 47 Cal.App.4th 1004, 1007 (1996)). The Second District Court of Appeal emphasized that absent this specific intent, the taking of the property of another is not theft. 47 Cal.App.4th at 1008. Therefore, the AAO finds that a conviction for theft under Cal. Penal Code § 484(a) is categorically a crime involving moral turpitude because it requires the permanent intent to deprive the victim of his or her property.

In conclusion, the AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act as a consequence of his convictions for theft and domestic battery.

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 –

....

(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

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. Hardship to the applicant himself is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative.

Once extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. 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 "Violence Used Against Former Spouse," 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 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.*

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), merely showing extreme hardship under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship. Therefore, the AAO will at the outset determine whether the applicant meets this standard.

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The 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 record reflects that the applicant wed [REDACTED] a native of El Salvador and naturalized U.S. citizen, on April 23, 2001. The applicant and his spouse have a ten-year-old U.S. citizen child, [REDACTED] and a seven-year-old U.S. citizen child, [REDACTED]. The applicant's spouse and children are qualifying family members for purposes of determining exceptional and extremely unusual hardship under 8 C.F.R. § 212.7(d).

In support of the Form I-601 waiver application, counsel filed a brief detailing the hardship the applicant's spouse and children would suffer if the waiver is denied. Counsel asserted that the applicant's spouse's entire family, including her parents, siblings and children, are U.S. citizens and reside in the United States. Counsel stated that if the applicant's spouse moves with her husband to El Salvador, she will be cut off from her parents and siblings. Counsel stated that the applicant's children will be cut off from their grandparents. Counsel asserted that the applicant's spouse is a U.S. citizen who has lived most of her life in the United States and she does not have immediate family in El Salvador. Counsel stated that the applicant's children have never visited El Salvador. Counsel states that the applicant's spouse is no longer familiar with the lifestyle of El Salvador. Counsel stated that the applicant's spouse and children would be isolated in El Salvador. Counsel stated that the applicant's spouse speaks halting Spanish and her children, who were born in the United States, only speak and understand English. Counsel stated that the applicant's children would face a severely substandard education system in El Salvador. Counsel stated that the secondary effects from the 1980s civil war in El Salvador are clearly present in the country. Counsel noted that civil rights violations, violence against women and poverty are prevalent in El Salvador.

In the December 3, 2009 NOID, the AAO noted that the record did not contain evidence of the applicant's spouse's family ties in the United States. In response to the request for evidence, counsel submitted a letter from the applicant's mother-in-law and a copy of her U.S. naturalization certificate. The letter from the applicant's mother-in-law, [REDACTED] states:

I [REDACTED] moved in with my daughter after my divorce in 2007. Since that time my daughter has supported me in every way possible. She has taken it upon herself to pay for all of my expenses. I in return take care of my grandchildren since I no longer am able to work for a living.

The AAO finds that this document demonstrates that the applicant's spouse and children have a strong family bond with [REDACTED] because she resides with them and is involved in managing the

household. Therefore, the AAO can conclude that the applicant's spouse and children would likely suffer emotional hardship if they were separated from [REDACTED] and relocated to El Salvador.

Further, the AAO finds that the record demonstrates that the suffering the applicant's children would experience due to separation from their grandmother would be compounded by the hardship they would suffer during their transition to residence in El Salvador. The record shows that ten-year-old [REDACTED] and seven-year-old [REDACTED] have resided their entire lives in the United States. In response to the request for evidence, counsel submitted school transcripts from the applicant's children's elementary school, Lake Los Angeles School, in California, showing their integration into the U.S. public school system.

The AAO notes that BIA and U.S. Court decisions 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, in *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, and the BIA found that uprooting her at that stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the Fifth Circuit Court of Appeals stated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether "extreme hardship" has been shown. In *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit Court of Appeals found the BIA abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

The applicant's children have resided in the United States their entire lives and are integrated into the U.S. school system. They have family ties in the United States, including their U.S. citizen grandmother, who resides with them and is involved in raising them. The AAO finds that the applicant's children's relocation to El Salvador would cause them the extreme hardship demonstrated in *Matter of Kao and Lin*, *supra*.

Additionally, the AAO finds that the hardships the applicant's children would suffer upon their departure from the United States and integration into a new culture would be exacerbated by the current country conditions in El Salvador. The Secretary of the Department of Homeland Security has extended Temporary Protected Status (TPS) for nationals of El Salvador until September 9, 2010. The Secretary, after consultation with appropriate government agencies, may designate a country for TPS under the following conditions:

There is an ongoing armed conflict within the state and, due to that conflict, return of nationals to that state would pose a serious threat to their personal safety;

The state has suffered an environmental disaster resulting in a substantial, temporary disruption of living conditions, the state is temporarily unable to handle adequately the return of its nationals, and the state has requested TPS designation; or

There exist other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless the Secretary finds that permitting nationals of the state to remain temporarily is contrary to the national interest of the United States.

Section 244(b)(1) of the Act, 8 U.S.C. § 1254a(b)(1).

The U.S. Department of State's profile on El Salvador states that the country has suffered a number of catastrophic natural disasters. The profile provides in part:

In 1998, Hurricane Mitch killed 10,000 in the region Major earthquakes in January and February of 2001 took another 1,000 lives and left thousands more homeless and jobless. El Salvador's largest volcano, Santa Ana (also known by its indigenous name Ilamatepec), erupted in October 2005, spewing sulfuric gas, ash, and rock on surrounding communities and coffee plantations, killing two people and permanently displacing 5,000. Also in October 2005, Hurricane Stan unleashed heavy rains that caused flooding throughout El Salvador. In all, the flooding caused 67 deaths and more than 50,000 people were evacuated at some point during the crisis.

U.S. Department of State, *Background Note: El Salvador*, September 2009.

The U.S. Department of State's description of travel conditions in El Salvador warns that the country is considered a "critical crime-threat country" with one of the highest homicide rates in the world. The travel advisory provides in part:

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. In one robbery, an American family was stopped by gunmen while driving during the day on the Pan American highway in the Santa Ana Department. In another incident, an American citizen passenger was robbed after the van in which she was riding was carjacked by armed men. The van was stopped at a traffic light on the busy road between Comalapa International Airport and San Salvador shortly after dark. . . .

[V]iolent crimes, as well as petty crimes are prevalent throughout El Salvador, and U.S. citizens have been among the victims. The Embassy is aware of at least five American citizens who were murdered in El Salvador during the last year, and also has confirmed reports of at least two attempted sexual assaults against American citizens. . . . Armed assaults and carjackings take place both in San Salvador and in the interior of the country, but are especially frequent on roads outside the capital where police patrols are scarce. Criminals have been known to follow travelers from the international airport to private residences or secluded stretches of road where they carry out assaults and robberies. Armed robbers are known to shoot if the vehicle does not come to a stop. 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.

U.S. Department of State, *Country Specific Information: El Salvador*, March 25, 2009.

All hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship. *See Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 64 (BIA 2001). The AAO concludes that given the Secretary's renewal of TPS for nationals of El Salvador, the designation of El Salvador as a "critical crime-threat country," the applicant's spouse and children's family ties in the United States, and the applicant's children's integration into the U.S. school system, the applicant has established that his qualifying family members would suffer exceptional and extremely unusual hardship if they relocated to El Salvador due to his inadmissibility.

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.

The applicant's spouse asserted in a letter dated July 13, 2005 that she cannot put into words the pain and heartbreak that her family would suffer if the applicant was not with them. She stated that it is very important for her children to have their father in their lives so that they may grow up to be great citizens. She stated that it is extremely important for her to keep her family together.

The AAO acknowledges that the applicant's spouse and three children will experience emotional hardship if they remain in the United States without the applicant. This case arises in the Ninth Circuit. 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).

Similarly, in *United States v. Arrieta*, the Ninth Circuit assessed the factors to be considered in a section 212(h) waiver and stated:

Of particular importance is the evidence [REDACTED] produced of the effect that separation from him would have on his immediate family members, as to whom he provided essential emotional and other non-economic familial support. We have previously explained that "preservation of family unity" may be a central factor in an extreme hardship determination. *See Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir.1987). We based this determination not only on the United States' international human rights commitments, but on "[t]he importance and centrality of the family in American life [which] is firmly established both in our traditions and in our jurisprudence." *Id.* Unlike in *Arce-Hernandez*, where we explained that it was not clear whether the alien's family would accompany him back to Mexico, (and did not consider the issue of family separation or emotional and other non-economic familial support,) in this case [REDACTED] has documented that his deportation would deprive his family of various forms of non-economic familial support and that it would disrupt family unity.

224 F.3d 1076, 1082 (9th Cir. 2000).

Whereas inadmissibility for unlawful presence under section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), is temporary, and inadmissibility for crimes involving moral turpitude that are not violent or dangerous can be waived under the 212(h)(1)(A) standard after 15 years, inadmissibility for violent or dangerous crimes involving moral turpitude is permanent. Therefore, the applicant's qualifying family members face the prospect of permanent separation from the applicant, a scenario generally resulting in extreme hardship.

The question to now be addressed is whether the applicant's qualifying family members would suffer hardship that is not only extreme, but is hardship that is "substantially" beyond the ordinary hardship that would be expected when a close family member leaves this country." 23 I& N Dec. 56, 62 (BIA 2001).

In the brief filed with the waiver application, counsel asserted that the applicant and the applicant's spouse use their combined income to pay for their home mortgage and medical and auto insurance policies. Counsel stated that if the applicant is deported to El Salvador, the applicant's wife and children would be plunged into poverty. Further, the applicant's spouse asserted in her July 13, 2005 letter that the applicant supports his children financially and emotionally. She stated that they recently purchased a home to give their children a better life. She stated that she would not be able to pay for their house, bills and medical insurance if she is separated from the applicant. She stated that she would have no other choice but to go on welfare.

In the December 3, 2009 NOID, the AAO noted that the record did not contain documentation of the applicant's spouse's monthly mortgage payments and other recurrent expenses. The AAO concluded that a finding of financial hardship to the applicant's spouse could not be made without corroborating evidence. In response to the request for evidence, counsel submitted copies of the applicant's and his spouse's home mortgage statement, checking account statements and property tax statement. Counsel also submitted a document entitled "monthly bills" itemizing the applicant's household monthly expenses. As evidence of the applicant and his spouse's income, counsel furnished copies of their Wage and Tax Statements (Forms W-2) and tax returns for 2008, 2007, 2006 and 2005.

The financial documentation submitted by counsel reflects that the applicant's spouse is now the financial head of the household, earning \$43,040.68 in 2008 as an employee of [REDACTED]. However, the documentation also shows that the applicant has over the past three years contributed significantly to the total household income. The applicant's 2008 Form W-2 reflects that he earned \$13,613.67 for his employment with [REDACTED]; his 2007 Forms W-2 reflect that he earned \$18,324.04 for his employment with [REDACTED] and \$9,380.00 for his employment with [REDACTED]; and his 2006 Forms W-2 reflect that he earned \$16,732.62 for his employment with [REDACTED] and \$12,710.00 for his employment with [REDACTED]. Although the applicant's income decreased significantly in 2008, it still constituted 24% of the combined household income.

As noted, counsel also submitted documentation demonstrating the applicant and his spouse's financial expenses. The documentation includes: a copy of a Bank of America home loan statement reflecting that the applicant and his spouse owed a mortgage payment of \$817.62 on March 1, 2010;

a document entitled "Verification of Pregnancy" from [REDACTED], stating that the applicant's spouse is pregnant with an expected due date of March 10, 2010; and a letter from the applicant's U.S. citizen mother-in-law, which states that she resides with the applicant's family in exchange for providing childcare for her grandchildren. The AAO finds that the loss of the applicant's income would create a significant financial hardship on the applicant's spouse, who would have to pay her mortgage and other major household expenses while supporting her three minor children and mother on her income alone.

Finally, the AAO notes that the U.S. Department of State's designation of El Salvador as a "critical crime threat country" indicates that the applicant's qualifying family members could experience serious threats to their safety and welfare if they visited the applicant in the country. As stated in the report, "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." U.S. Department of State, *Country Specific Information: El Salvador*, March 25, 2009.

The AAO has carefully considered the facts of this particular case and finds that the hardship demonstrated is similar to the hardship discussed in *Matter of Gonzalez Recinas, supra*. The BIA in *Gonzalez Recinas* found that the alien's 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, resulted in exceptional and extremely unusual hardship. 23 I&N Dec. 467, 472. Here, the emotional suffering the applicant's qualifying relatives would experience from the applicant's permanently inadmissibility to the United States, the possible danger involved with visiting the applicant in El Salvador, and the financial hardship that would result from the loss of the applicant's income while his spouse is financially supporting four dependent family members, similarly rise to the level of 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-Morales*, 21 I&N Dec. 296, 300 (BIA 1996)(Citations omitted).

The adverse factors in the present case are the applicant's May 1, 2000 conviction for "Violence Used Against Former Spouse," his December 9, 1997 conviction for misdemeanor theft of property, and his entry into the United States without inspection on May 14, 1994 and subsequent period of unlawful presence. The favorable factors in the present case are the extreme hardship to the applicant's spouse and children, his payment of taxes and employment in the United States, and the passage of almost ten years since his last criminal conviction. The applicant's does not appear to have been arrested for any other criminal offenses and he has not been charged with any other 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. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained.