

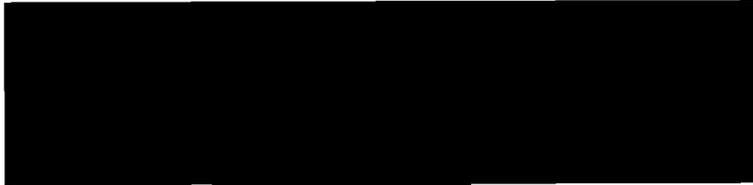
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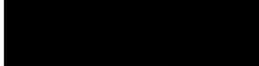
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MAR 22 2010

FILE:



Office: MEXICO CITY (SAN SALVADOR)

Date:

IN RE:

Applicant:



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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador. He was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), in order to return to the United States to join his U.S. citizen parents and children.

The District 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 Ground of Excludability (Form I-601) accordingly.

On appeal, counsel asserts that the applicant's mother is suffering extreme hardship as a result of the applicant's inadmissibility. In support of the application, the record contains, but is not limited to, a brief from counsel and a declaration from the applicant's mother. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

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

....

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

....

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

The record reflects that the applicant entered the United States without inspection in 1982. The applicant remained in the United States until his removal on October 26, 1998. The director found that the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until October 26, 1998, when the applicant departed the United States. Therefore, the applicant accrued unlawful presence in the United States for a period of more

than one year. The applicant does not dispute these facts on appeal.

On April 12, 2000, the applicant's mother filed a Petition for Alien Relative (Form I-130) on the applicant's behalf, which was approved on August 19, 2003. The applicant subsequently filed an Application for Immigrant Visa and Alien Registration (Form DS-230) with the U.S Embassy in San Salvador, El Salvador. The applicant's immigrant visa interview with a consular officer was on February 9, 2006. At the time of the applicant's immigrant visa interview, he was seeking admission to the United States within ten years of his October 26, 1998 departure from the United States. He was, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

As of the date of the decision on this appeal, more than ten years have passed since the applicant's departure from the United States. A clear reading of the statute reveals that the applicant is no longer inadmissible based on his prior unlawful presence, as the ten-year period for which he was barred from admission has passed. Therefore, the applicant is no longer inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

However, beyond the decision of the director, the AAO finds under its de novo review that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude.¹

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 on April 4, 1994, the applicant was convicted in the Superior Court of California, County of Los Angeles () of conspiracy to commit criminal kidnapping, a felony, in violation of Cal. Penal Code §§ 182(a)(1) and 207(a) and sentenced to three

¹ The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

years imprisonment. The applicant's prison sentence was enhanced by one year pursuant to Cal. Penal Code § 12022(a)(1) because his conspiracy involved the use of a firearm.

Cal. Penal Code § 207(a) (West 1994) provides, "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping."

The Board of Immigration Appeals (BIA) has noted that kidnapping is a crime involving acts of baseness and depravity even without the explicit element of evil intent. *See Lopez-Meza*, 22 I. & N. Dec. 1188, 1193 (BIA 1999). In *Matter of C-M-*, 9 I&N Dec. 487 (BIA 1961), the BIA recognized kidnapping under the California Penal Code as a crime involving moral turpitude. The applicant in the present case was convicted of the conspiracy to commit kidnapping. However, this factor does not lessen the depraved nature of his crime. It is well settled that a conspiracy to commit a certain crime involves moral turpitude if the underlying crime involves moral turpitude. *See Matter of P-*, 5 I. & N. Dec. 444, 446 (BIA 1953). Therefore, the AAO finds under its de novo review that the applicant is inadmissible under section 212(a)(2)(A)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(I), for having committed a crime involving moral turpitude.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . 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, the inadmissibility 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 applicant has submitted no documentation to demonstrate that he satisfies these requirements. The AAO acknowledges that the applicant has not been found inadmissible under section 212(a)(2)(A)(i)(I) of the Act previously, and thus has not been provided with notice and opportunity to present such evidence.

However, even if the applicant were able to satisfy the requirements of section 212(h)(1)(A) of the Act, his waiver application would not be granted as the AAO finds that he is not deserving of a favorable exercise of the Secretary's discretion. For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The discretionary standard for violent or dangerous crimes was first articulated by the Attorney General in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002). The respondent in *Matter of Jean* was convicted of second-degree manslaughter in connection with the death of a nineteen-month-old child. The Attorney General noted:

It would not be a prudent exercise of the discretion afforded to me by this provision to grant favorable adjustments of status to violent or dangerous individuals 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 status adjustment would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, such a showing might still be insufficient. From its inception, the United States has always been a nation of immigrants; it is one of our greatest strengths. But aliens arriving at our shores must understand that residency in the United States is a *privilege*, not a *right*. For those aliens, like the respondent, who engage in violent criminal acts during their stay here, this country will not offer its embrace.

23 I&N Dec. at 383-84.

The Department of Justice (DOJ), through its rule making authority, codified the discretionary standard for violent or dangerous crimes set forth in *Matter of Jean*. The regulation at 8 C.F.R. § 212.7(d) provides:

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

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). It provides that a "crime of violence," as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, "crime of violence" is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any crime involving violence, as that term may be commonly defined. That the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in promulgating 8 C.F.R. § 212.7(d) indicates that "violent or dangerous crimes" and "crime of violence" are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

[I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Therefore, the fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not dispositive. Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." The AAO interprets the phrase "violent or dangerous crimes" in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*.

In the instant case, the applicant was convicted of conspiracy to commit criminal kidnapping, a felony, in violation of Cal. Penal Code §§ 182(a)(1) and 207(a). The record of conviction contains the Information of the charges against the applicant filed by the Los Angeles County District Attorney. The Information, in pertinent part, states:

On or about July 13, 1993, in the County of Los Angeles, the crime of CONSPIRACY TO COMMIT A CRIME, in violation of PENAL CODE SECTION 182(a)(1), a Felony, was committed by [redacted] [names omitted], who willfully and unlawfully conspire together and with another person and persons whose identity is unknown to commit the crime of KIDNAPPING, in violation of Section 207 of the Penal Code, a felony; that pursuant to and for the purpose of carrying out the objects and purposes of the aforesaid conspiracy, the said defendants committed the following overt act and acts at an in the County of Los Angeles : overt act 1 drove a van to victim's location on [redacted] between [redacted] and [redacted]. Overt act 2 obtained a van with handguns inside of it.

It is further alleged that in the commission and attempted commission of the above offense, the said defendant(s), [redacted], personally used a firearm(s), to wit: 9MM Baretta, within the meaning of Penal Code sections 1203.06(a)(1) and 12022.5(a) also causing the above offenses(s) to become a serious felony pursuant to Penal Code section 1192.7(c)(8).

A violation of Cal. Penal Code § 207(a) requires a finding that the applicant used or threatened the use of physical force against the victim. To prove the crime of kidnapping under Cal. Penal Code § 207(a), a prosecutor must prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance. *People v. Jones*, 133 Cal. Rptr.2d 358, 362 (Cal. Ct. App. 2003)(citation omitted). The AAO finds that the first element of Cal. Penal Code § 207(a) – use of physical force or fear – falls within commonly accepted definitions of violence. Webster's New College Dictionary (3rd ed. 2008), defines violence as “physical force employed so as to violate, damage, or abuse” and “abusive or unjust use of power.” The charging document in the instant case reveals that the applicant conspired to complete the first element of the crime with the use or threatened use of a firearm, placing himself in a position of power and control over the victim with the means to employ force to harm the victim.

The AAO notes that the fact that the applicant was convicted of a conspiracy to commit this crime does not lessen its significance. The Ninth Circuit Court of Appeals in *United States v. Mendez*, 992 F.2d 1488 (9th Cir. 1993), discussed whether conspiracy to interfere with interstate commerce by robbery in violation of 18 U.S.C. § 1951 is a “crime of violence” under 18 U.S.C. § 924(c)(1). The Ninth Circuit noted:

The existence of a criminal grouping increases the chances that the planned crime will be committed beyond that of a mere possibility. Because the conspiracy itself provides a focal point for collective criminal action, attainment of the conspirators' objectives becomes instead a significant *probability*. Thus, ascribing an ordinary meaning to the words, a conspiracy to commit an act of violence is an act involving a

“substantial risk” of violence. Moreover, it was not the aim of Congress to enable a person charged with conspiracy to commit a crime of violence to avoid the strictures of [18 U.S.C. § 3156(a)(4)], simply because his arrest prevents the bringing about of the conspiracy’s objectives.

United States v. Mendez, 992 F.2d at 1491 (citation omitted).

Moreover, U.S. courts have found the conspiracy to commit a violent crime to be subject to the additional discretionary hurdles of 8 C.F.R. § 212.7(d). For example, in an unpublished decision, *Togbah v. Ashcroft*, the Third Circuit Court of Appeals discussed the application of this regulation in a case involving the conspiracy to commit armed robbery. 104 Fed. Appx. 788 (3rd Cir. 2004). While the Court did not explicitly address the reasoning behind the determination that the appellant’s crime was one of violence, it did relay the facts of the case. The court stated:

The incident leading to his arrest and conviction involved an armed robbery and is described at various places in the record. ██████ was in a car with three of his friends when they decided to commit a robbery to obtain money for gas. They followed a woman in her car, and, when she parked in her driveway, two of ██████ friends got out of the car to rob her. One carried a BB gun, and the other had a baseball bat. They took money from her and assaulted her, hitting her with the bat and the gun. Then the two young men returned to the car, leaving the woman on the ground, and they drove away. ██████ did not physically participate in the robbery or the assault, nor did he attempt to prevent it; he simply stayed in the car with the fourth young man. When his friends drove away, ██████ did not know the extent of the victim’s injuries, but he did not call for help.

104 Fed. Appx. 788, 791.

The AAO finds that the applicant’s criminal conduct is proportionate in magnitude to the incident described in *Togbah*. The record of conviction reflects that the applicant drove to the victim’s home with the intent to kidnap him while using a 9MM Baretta handgun. Not only was the applicant involved in a conspiracy to commit a violent crime, he also aggravated the underlying offense with the use of a firearm. It can therefore be concluded that the applicant has been convicted of a violent crime, and is thus subject to the heightened discretionary standard under 8 C.F.R. § 212.7(d).

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

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the 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 extreme 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.

As evidence of hardship, counsel furnished an undated declaration from the applicant’s U.S. citizen mother, [REDACTED] filed June 22, 2007. The applicant’s mother states in her declaration that she has undergone great emotional and financial hardship as a result of the applicant’s absence from the United States. She states that she is raising the applicant’s teenage children, [REDACTED] and [REDACTED]. She states that the children’s mother, [REDACTED], only earns minimum wage working at a Target store and does not have time or money to support them. She states that [REDACTED] rents a room in an over-crowded house where the children do not have a supportive environment to live. She states that she earns \$550 per month as a building manager and her husband earns \$1800 per month as a packer. She states that they use this money to provide financial support for her grandchildren. She states that she has no health insurance because she is supporting her grandchildren. She states that she suffers from arthritis and high cholesterol, but cannot afford medication. She states that she takes high doses of Advil to cope with pain and her husband shares his Lipitor to help reduce her high cholesterol. She states that she suffers from a great deal of stress worrying about her grandchildren because they have reached the age when her son, the applicant, began having problems. She states that if the applicant returns to the United States, he would help raise his children. She states that if the applicant does not return, she fears that she may become very sick with sacrificing her health for her grandchildren’s well-being.

The AAO has reviewed the record and finds that the applicant has failed to submit any documentary

evidence to support his mother's assertions. The record does not contain medical documentation to demonstrate the severity of the applicant's mother's medical conditions. Nor does it contain the applicant's parents' financial records as evidence of their income and expenses. Further, the record does not contain the applicant's children's birth certificates and evidence of their residence in the Los Angeles metropolitan area. Finally, the applicant has not submitted an affidavit from the mother of his children, [REDACTED], to corroborate her need for additional financial and emotional support for their children. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). While the applicant's mother's unsupported assertions are relevant and have been considered, they are of little weight in the absence of supporting evidence. The applicant has not addressed whether the qualifying relatives would experience hardship if they relocated to El Salvador. Therefore, the record does not show that the difficulties, considered in the aggregate, would rise beyond the common results of removal or inadmissibility to the level of exceptional and extremely unusual hardship. *Matter of Monreal-Aguinaga*, 23 I&N Dec. at 62.

In sum, the applicant has submitted no documentation to demonstrate that he satisfies the section 212(h)(1)(A) waiver requirements. Even if the applicant had satisfied these requirements, his waiver application would not be granted as the AAO finds that he did not demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d).

Furthermore, the applicant's crime renders him inadmissible as an aggravated felon under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A).² The record reflects that a final order for the applicant's removal was issued under section 241(a)(1)(B) of the Act, 8 U.S.C. § 1231(a)(1)(B), on June 2, 1997. The alien was removed from the United States on October 26, 1998. Section 212(a)(9)(A)(ii) of the Act provides that an alien who has been ordered removed who departed the United States while an order of removal was outstanding and who seeks admission at any time in the case of an alien convicted of an aggravated felony is inadmissible. The applicant must file a Form I-212, Application for Permission to Reapply for Admission After Deportation or Removal, to waive this ground of inadmissibility under section 212(a)(9)(A)(iii) of the Act.

Finally, the record reflects that the applicant may also be inadmissible under section 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for a controlled substance conviction. A Federal Bureau of Investigation (FBI) record based upon the applicant's fingerprints reveals that on January 5, 1989, he was arrested by the Los Angeles Police Department for transporting and selling controlled

² Section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F), provides that the term "crime of violence," as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. In *United States v. Patino*, 962 F.2d 263, 267 (2nd Cir. 1992), the Second Circuit Court of Appeals addressed whether a defendant's conviction for conspiracy to kidnap in violation of 18 U.S.C. § 1201(c) (1988) qualifies as a "crime of violence." The Second Circuit first addressed whether kidnapping itself is a crime of violence and determined that since it involves the threatened use of physical force against a person it is unquestionably a crime of violence under the statute. *Id.* Second, the Court addressed whether the inchoate crime of conspiracy can be considered a crime of violence. The Court reasoned that a conspiracy, which it defined as a collective criminal effort where a common goal unites two or more criminals, exists to commit a crime of violence, the conspiracy itself poses a "substantial risk" of violence, qualifying it as a crime of violence. *Id.*

substances in violation of Cal. Health & Safety Code § 11352. The record does not contain the disposition of this charge. There is no other waiver available to an alien inadmissible under section 212(a)(2)(A)(i)(II) of the Act except for a single offense of simple possession of 30 grams or less of marijuana. *See* Section 212(h) of the Act. Should the applicant reapply for an immigrant visa, he must submit the final disposition of this arrest, and the record of conviction if he was convicted, to establish that he is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.