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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CHICAGO, ILLINOIS Date: MAY 2 7 2010

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

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

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The record indicates that the applicant is married to a United States citizen and he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his United States citizen spouse, children, and lawful permanent resident parents.

The Field Office Director found that the applicant failed to establish that extreme hardship would be imposed on his qualifying relatives and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Field Office Director*, dated May 14, 2007.

On appeal, the applicant, through counsel, asserts that the Field Office Director "made numerous erroneous conclusions of law and erroneous statements of fact." *Form I-290B*, filed June 13, 2007.

The record includes, but is not limited to, counsel's brief; letters and affidavits from the applicant, his wife, his mother-in-law, and other family members; a family psychological evaluation; medical documents pertaining to the applicant's mother-in-law and his daughters' medical conditions; and court dispositions for the applicant's arrests and convictions. The entire record was reviewed and considered in arriving at a decision on the appeal.

In the present application, the record indicates that on March 21, 1991, the applicant's lawful permanent resident father filed a Form I-130 on behalf of the applicant. On March 27, 1991, the applicant's Form I-130 was approved. In December 1993, the applicant entered the United States without inspection. On August 1, 1996, the applicant was convicted of reckless discharge of a firearm, in violation of section 24-1.5(a) of the Illinois Compiled Statutes, and was sentenced to sixty (60) days in county jail, two (2) years probation, and court costs and fees. On October 11, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On June 1, 1999, the applicant was convicted of domestic battery, and was sentenced to twelve (12) months probation and court costs and fees. On February 26, 2001, the applicant filed a second Form I-485. On April 25, 2001, the District Director denied the applicant's first Form I-485. On November 26, 1999, the applicant's United States citizen wife filed a Form I-130 on behalf of the applicant. On April 5, 2000, the applicant's Form I-130 was approved. On December 6, 2002, the applicant, through counsel, filed a motion to reopen the denial of the applicant's first Form I-485. On April 25, 2005, the District Director denied the applicant's second Form I-485. On April 26, 2005, the District Director issued another denial of the applicant's second Form I-485. On May 24, 2005, the applicant, through counsel, filed a motion to reconsider the denial of the applicant's second Form I-485. On December 26, 2006, the District Director reopened the applicant's second Form I-485. On March 20, 2007, the applicant filed a Form I-601. On May 14, 2007, the Field Office Director denied the applicant's second Form I-485 and Form I-601, finding the applicant failed to demonstrate extreme hardship to his qualifying relatives.

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.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. 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. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, 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." *Silva-Trevino*, 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* 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.

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. *Id.* at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record shows that on August 1, 1996, the applicant was convicted of reckless discharge of a firearm, in violation of section 24-1.5(a) of Act 5 of Chapter 720 of the Illinois Compiled Statutes (720 ILCS 5/24-1.5(a)), and was sentenced to sixty (60) days in county jail, two (2) years probation, and court costs and fees. Reckless discharge of a firearm is a Class 4 felony, punishable by a term of imprisonment not less than one year and not more than three years. 730 ILCS 5/5-8-1 (West 1996).

Section 24-1.5(a) of Act 5 of Chapter 720 of the Illinois Compiled Statutes is violated when a person discharges a firearm in a "reckless" manner. At the time of the applicant's conviction, section 24-1.5(a) of the Illinois Compiled Statutes provided, in pertinent part:

> (a) A person commits reckless discharge of a firearm by discharging a firearm in a reckless manner which endangers the bodily safety of an individual.
>
> ....
>
> (c) Reckless discharge of a firearm is a Class 4 felony.
>
> ....

The AAO notes an applicant's "intent is critical to a finding of moral turpitude." *Reyes-Morales v. Gonzalez*, 435 F.3d 937, 945 (8th Cir. 2006). At the time of the applicant's conviction, Illinois defined the term "recklessness" at 720 ILCS 5/4-6, which provided:

> A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. An act performed recklessly is performed wantonly, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

In *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976), the BIA held that the reckless conduct defined by section 4-6 of Act 5 of Chapter 720 of the Illinois Complied Statutes supported a finding of moral turpitude in an aggravated assault conviction involving the use of a deadly weapon because the "definition of recklessness requires an actual awareness of the risk created by the criminal violator's action." Therefore, "moral turpitude can lie in criminally reckless conduct." 15 I&N Dec. at 613.

On appeal, counsel asserts that "because the Illinois statute does not require that serious bodily injury actually be inflicted, under *Fualaau*, the offense should not be considered to be a crime involving moral turpitude." Counsel contends, "In the Illinois statute at issue, the elements include only that the person act in a 'reckless manner which endangers the bodily safety of an individual.'"

The BIA in *Matter of Fualaau*, 21 I&N Dec 475 (BIA 1996) addressed whether a conviction for assault in the third degree under the Hawaii Revised Statutes is a crime involving moral turpitude. The BIA held, "In order for an assault of the nature at issue in this case to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury." 21 I&N Dec. 475, 478. The AAO notes that the instant matter can be distinguished from *Fualaau* because it involves the aggravating factor of the use of a firearm. In *People v. Kasp,* the Appellate Court of Illinois reviewed the legislative purpose for the enactment of 720 ILCS 5/24-1.5 and noted that "the particular, underlying purpose of this particular statute is to target the issue of drive-by shootings." 815 N.E.2d 809, 817 (2004). The Illinois Appellate Court further stated, "the reckless discharge statute 'was intended to clarify a 'loophole' then existing in Illinois law, where an individual could escape felony charges for his involvement in a drive-by shooting simply because he was acting recklessly, rather than knowingly.'" *Id.* (citation omitted). A violation of the statute requires the perpetrator to "discharge a weapon in such a way as to place a person in danger" of bodily harm. *Id.*

The AAO finds that the alien's discharge of a firearm in a manner that endangers the bodily safety of the public with "an actual awareness of the risk created by [his] action" constitutes a crime involving moral turpitude. *Matter of Medina*, 15 I&N Dec. 611, 614. The fact that the statute does not require an actual or intended injury does not alter this determination, as serious bodily injury and even death are foreseeable consequences of discharging of a firearm in a manner that endangers the bodily safety of an individual. The alien's "willingness to commit the act in disregard of the perceived risk," which includes endangerment of the bodily safety of an individual renders it a morally turpitudinous offense.

Id. Therefore, the AAO finds that the applicant's conviction for reckless discharge of a firearm in violation of 720 ILCS 5/24-1.5(a) is categorically a crime involving moral turpitude.

The record reflects that on June 1, 1999, the applicant was convicted of domestic battery, and sentenced to 12 months conditional discharge and payments of fines and fees. The director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for this conviction.

At the time of the applicant's conviction, 720 ILCS 5/12-3.2 provided:

> (a) A person commits domestic battery if he intentionally or knowingly without legal justification by any means:
>
> (1) Causes bodily harm to any family or household member as defined in subsection (3) of Section 112A-3 of the Code of Criminal Procedure of 1963, as amended;
>
> (2) Makes physical contact of an insulting or provoking nature with any family or household member as defined in subsection (3) of Section 112A-3 of the Code of Criminal Procedure of 1963, as amended.
>
> (b) Sentence. Domestic battery is a Class A Misdemeanor. Domestic battery is a Class 4 felony if the defendant has any prior conviction under this Code for domestic battery (Section 12-3.2) or violation of an order of protection (Section 12-30). In addition to any other sentencing alternatives, for any second conviction of violating this Section within 5 years of a previous conviction for violating this Section, the offender shall be mandatorily sentenced to a minimum of 48 consecutive hours of imprisonment. The imprisonment shall not be subject to suspension, nor shall the person be eligible for probation in order to reduce the sentence.

On appeal, counsel asserts, "In *Matter of Sanudo* (23 I&N Dec. 968 (BIA 2006)), the BIA found that not all statutes involving domestic violence inherently involve moral turpitude." Counsel further asserts, "no analysis has been provided regarding the Illinois statute under which Mr. Michel-Flores was convicted, and there has been no analysis regarding whether he was convicted under the subsection that involved causing bodily harm (720 ILCS § 5/12-3.2(A)(1)) or the subsection that merely involves making physical contact of an insulting or provoking nature (720 ILCS § 5/12-3.2(A)(2))."

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. 968, 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.*

Section 12-3.2 of Act 5 of Chapter 720 of the Illinois Compiled Statutes is violated by "caus[ing] bodily harm to any family or household member" or "mak[ing] physical contact of an insulting or provoking nature with any family or household member." Thus, based solely on the statutory language, it appears that 720 ILCS 5/12-3.2 encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not.

The AAO shall, under the modified categorical approach, review the record of conviction to determine if the applicant's conviction under 720 ILCS 5/12-3.2 was for morally turpitudinous conduct. 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. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 698, 704, 708. However, the record of proceedings in the instant case only contains a "criminal and traffic case history" report from the Winnebago County Circuit Clerk, which states that he was convicted of "Battery/Domestic" on June 1, 1999. The applicant failed to submit any court records related to his domestic battery conviction. The burden of proof in these proceedings is on the applicant to establish his admissibility for admission to the United States to the satisfaction of the Secretary of Homeland Security. *See* Section 291 of the Act, 8 U.S.C. § 1361. Thus, pursuant to *Matter of Silva-Trevino*, *supra*, the AAO must find that the applicant has not met his burden of proof, and that the applicant's conviction under 720 ILCS 5/12-3.2 constitutes a crime involving moral turpitude.

In sum, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of reckless discharge of a firearm and domestic battery, crimes involving moral turpitude.

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

> (h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in [her] discretion, waive the application of subparagraphs (A)(i)(I)...of subsection (a)(2) if—
>
> > (1) (A) in the case of any immigrant it is established to the satisfaction of the [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 established to the satisfaction of the [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...
>
> (2) the [Secretary], in [her] discretion, and pursuant to such terms, conditions and procedures as [she] 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.

The applicant is seeking a section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act. A waiver under section 212(h) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. Hardship the alien himself experiences upon removal is irrelevant to section 212(h) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's United States citizen spouse, children, and lawful permanent resident parents.

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996). In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957). However, the AAO cannot find, 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's convictions indicate that he may be subject to the heightened discretion standard of 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.

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.*

The AAO acknowledges that since the applicant's conviction for domestic battery in violation of 720 ILCS 5/12-3.2 could be for "caus[ing] bodily harm to any family or household member" or "mak[ing] physical contact of an insulting or provoking nature with any family or household member," it is not categorically a violent crime. However, the AAO finds that the applicant's conviction for reckless discharge of a firearm

in violation of 720 ILCS 5/24-1.5(a) is categorically a dangerous crime. A conviction under 720 ILCS 5/24-1.5(a) requires, "discharging a firearm in a reckless manner which endangers the bodily safety of an individual." 720 ILCS 5/24-1.5(a). Recklessness under Illinois criminal law "requires an actual awareness of the risk created by the criminal violator's action." *Matter of Medina*, 15 I&N Dec. 611, 614. In *People v. Kasp*, the Illinois Appellate Court noted that a violation of 720 ILCS 5/24-1.5 requires that the perpetrator "discharge a weapon in such a way as to place a person in danger." 815 N.E.2d 809, 817. The AAO can therefore conclude that the applicant's conviction for reckless discharge of a firearm renders him subject to the heightened discretion standard of 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.*

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 to his qualifying relatives 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's father, , and his mother, , are U.S. Lawful Permanent Residents. The applicant wed a U.S. citizen, on January 16, 1998. The applicant and his spouse have five U.S. citizen children, a 15-year-old daughter, a 12-year-old daughter, a 10-year-old daughter, , a 8-year-old son, , and a 6-year-old daughter, The applicant's spouse, children and parents are qualifying family members in these proceedings.

The AAO notes that the director's decision provides a fairly lengthy discussion of the hardship factors presented in this case. On appeal, counsel addresses the director's findings and asserts that the denial of the waiver "was based on impermissible and unfounded assumptions." Counsel contends that the decision "never addresses the fact that each of the factors in combination add up to a showing of extreme hardship" to the applicant's qualifying relatives and "impermissibility shifts the burden to [the applicant] to prove a negative, rather than weighing the hardship factors as required." In addition, counsel contends that the decision "mischaracterizes the evidence provided on numerous occasions" and fails to "consider any positive equities." *See Appeal Brief*, filed July 13, 2007. Instead of offering a full recount of the director's findings and counsel's rebuttal, the AAO will review the record of proceedings and issue a *de novo* determination on the applicant's eligibility for a waiver.

Counsel asserts that the applicant's spouse "has never been to Mexico and knows very little about the country and its culture." Counsel states that the applicant's spouse was "raised in northern Illinois and southern Wisconsin and has never lived anywhere else." Counsel contends that the applicant's five children "speak only very basic Spanish, enough to converse only with their grandparents, and the do not read or write in Spanish." Counsel states that the applicant does not have ties to Mexico because his parents are permanent residents and four of his five siblings are permanent residents or citizens. *Appeal Brief*, filed July 13, 2007.

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 spouse's birth certificate reflects that she was born in The applicant's spouse notes that her "last name is of some Hispanic culture but [her] family dates back to the early 19th century in the United States." *Letter from* , filed July 17, 2007. She states that none of her five children can read or write in Spanish and "[a]cademically, it would be impossible for us to transition the kids into a whole different country." *Affidavit of* , dated March 17, 2007. The applicant furnished copies of his parents and sibling's permanent resident cards and an affidavit from his mother. The applicant's mother states that the applicant has resided in the United States since he was 15 years old, his parents and siblings reside in the United States, and he would be unable to connect with his aunts and uncles who reside in Mexico. *Affidavit of* dated March 17, 2007. The applicant's children have resided in the United States their entire lives, have family ties in the United States, are not proficient in Spanish, and are integrated into the U.S. school system. Therefore, 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.*

The question remains whether the applicant's children would suffer hardship that is not only extreme, but also is "'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001). The applicant's spouse states that her daughter, "has a learning disability and Attention Deficit Disorder (ADD)." She states that her son, and daughter, suffer from asthma and the poor air quality in Mexico "would aggravate their conditions worse." *Affidavit of* dated March 17, 2007. As corroborating evidence, the applicant furnished reports on asthma in Mexico and a letter from his children's pediatrician stating, "My patients and have some medical problems that require treatment and medication. . . . My patient also has medical problems with her teeth and gums and requires medical treatment from a dentist." *Letter from* , dated July 13, 2007. The pediatrician attached handwritten reports entitled "permanent problem list" and "acute problem list" for Although these reports are difficult to decipher, as they are written in physician shorthand using medical terminology, the report for shows that she was diagnosed with ADHD in 2005 and received medication to treat the disorder. *See* *Permanent Problem List/Acute Problem List.*

The record reflects that 15-year-old is the applicant's child from a prior relationship. *See Petition for Adoption*, filed May 31, 2002; *Affidavit of* dated March 17, 2007. The applicant's spouse states that was placed in foster care after she was abused by her mother's boyfriend. *Affidavit of* dated March 17, 2007. The applicant and his spouse adopted on May 3, 2002. *See Petition for Adoption*, filed May 31, 2002. The applicant's spouse notes that adoption resulted in separation from her five siblings and "is still trying to adjust with them gone from her life." *Affidavit of* dated March 17, 2007. The AAO finds that the situation presented for indicates that if she relocated to Mexico she would be uprooted from a now stable environment and suffer hardship that is substantially beyond the usual hardship that would occur when a child relocates to a foreign country.

Finally, the applicant's spouse asserts that her children would suffer financially if they relocated to Mexico. *Affidavit of* dated March 17, 2007. A review of the record shows that the applicant has supported his household through gainful employment in the United States as a hammer operator with since April 1, 1996.. *See Letter from* dated March 19, 2007; *Letter from* dated June 28, 2007; *Applicant's Biographic Information Sheet (Form G-325A)*, dated January 2, 2001; *2002 Form W-2 (Wage and Tax Statement)*. The most recent Form W-2 in the record is from 2002 and reflects that the applicant earned $38,266.72, which is above the U.S. Department of Health and Human Service's 2002 federal measure of poverty for a family of seven.[1] The applicant's spouse states that she has obtained her GED but she has "always been a stay at home mom, it is really hard for [her] to find work." *Affidavit of* , dated March 17, 2007. In addition, the applicant's mother notes the applicant "is the only one in their home that works; his wife...has only worked occasionally since they have been together. They have 5 children so she takes care of the little ones, takes the older kids to school and picks them up." *Affidavit of* , dated March 17, 2007. The AAO observes that if the applicant's spouse and five children relocated with him to Mexico, he would have to find employment in Mexico that would enable him to support a household of seven.

In sum, the applicant's five U.S. citizen children do not speak Spanish, are integrated into the U.S. school system, and have family ties in the United States. The applicant's child, has been diagnosed with ADHD and has suffered from a previously unstable home environment. The applicant would have to find employment in Mexico to support a household of seven, possibly causing financial hardship to this spouse and children. Considering the weight of these factors in the aggregate, the AAO finds that the relocation of the applicant's spouse and children to Mexico would cause them exceptional and extremely unusual hardship.

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 notes that her children's separation from the applicant would be especially hard on her adopted daughter, because the applicant "is the one person who is her 'real' family who

[1] http://aspe.hhs.gov/poverty/02poverty.htm

has not left her." *Affidavit of* dated March 17, 2007. The applicant's spouse asserts that the applicant "is [her] life, [her] kids life, [her] support system." She states that the applicant "is a father, a husband, and a great employee to his job." *Letter from* filed July 17, 2007. Further, the record reflects that the applicant's departure would cause emotional hardship for his mother, who states that "it would kill [her]" if the applicant returned to Mexico. She states that she "would not want to live without having [the applicant] nearby." She notes that the applicant "is very special" to her. *Affidavit of* dated March 17, 2007. The AAO acknowledges that the separation of the applicant from his qualifying family members "would deprive his family of various forms of non-economic familial support and that it would disrupt family unity." *United States v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000). In *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and that "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted). The AAO will therefore give consideration to the emotional hardship the applicant's qualifying relatives would suffer as a result of their separation from the applicant.

The record also demonstrates that the applicant's qualifying family members would suffer financially if they were separated from the applicant. As discussed, the applicant's spouse asserts that because she does not have education beyond her GED and she has "always been a stay at home mom," it is difficult for her to find employment. She contends that it is "especially hard for [her] to find work that will pay enough so that [she] can find daycare." She notes in the summer of 2006 when she and the applicant temporarily separated, she found employment earning only $6.25 an hour as a housekeeper at a hotel. She states that she "couldn't make enough and still be there for the kids." *Affidavit of* dated March 17, 2007. Moreover, the applicant's mother states that the applicant supports her and her husband financially by giving her $50 to $100 per week to help with their bills. She notes that her 22-year-old son and three minor grandchildren are residing in her home and the applicant's financial support is "important." She states that she sometimes cannot work because she has diabetes. *Affidavit of* dated March 17, 2007. The applicant furnished medical reports indicating that his mother was diagnosed with diabetes in 1997. The record shows that the applicant has been employed with as a machine operator since April 1996; therefore, he has a history of stable, long-term employment with the company. *See* *Biographic Information Sheet* (Form G-325A), dated January 2, 2001; *Letter from* dated March 19, 2007; *Letter from* dated June 28, 2007. The applicant has demonstrated that he is the financial head of his household, earning a sufficient income to support his spouse and five children while also assisting his mother. The AAO finds that the applicant's removal from the United States would leave his spouse and children without any source of financial support, causing them significant economic hardship.

The AAO finds that the hardships related to separation presented in this case rise to the level of exceptional and extremely unusual hardship; however this case is "on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." *Matter of Gonzalez Recinas*, 23 I&N Dec. 467, 470 (BIA 2002). While the emotional and financial hardships the applicant's qualifying relatives would suffer if separated from the applicant are extreme, the AAO acknowledges that they are, on the surface, among the more "usual" hardships presented in

most waiver cases. The determining and unusual factors that set this case apart and raise the hardship to the level of exceptional and extremely unusual hardship are that the applicant's spouse and children would be faced with the prospect of permanent separation from the applicant; the applicant's spouse would alone have to financially support five minor children, ages 15, 12, 10, 8 and 6 years old, without having the education and work history to find gainful, stable employment; and the applicant's spouse would be the sole parental figure providing emotional support to her five children, including her adopted daughter, [redacted] who has special needs and has already experienced the trauma of family separation. Therefore, the AAO finds that the applicant has established that his qualifying family members will experience exceptional and extremely unusual hardship if his waiver application is denied.

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

The favorable factors presented by the applicant are the exceptional and extremely unusual hardship to his United States citizen spouse and children, who depend on him for emotional and financial support; the applicant's stable work history in the United States; the applicant's history of paying his federal income taxes; and the lack of any other criminal convictions since his last conviction in 1999.

The unfavorable factors presented in the application are the applicant's convictions for reckless discharge of a firearm on August 1, 1996 and domestic battery on June 1, 1999, and any periods of unauthorized presence and employment. The AAO notes that the applicant has not been charged with any crimes since his last conviction and the applicant's crime occurred more than 10 years ago, demonstrating the applicant's rehabilitation.

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.