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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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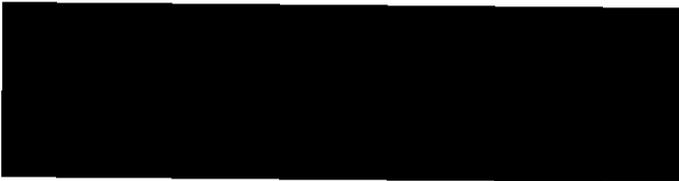
FILE: [REDACTED] Office: LOS ANGELES, CA

Date: **SEP 16 2010**

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:



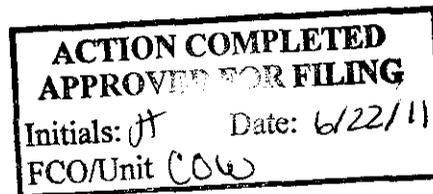
INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office



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

The applicant, a native and citizen of Mexico, 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 a crime involving moral turpitude. The record indicates that the applicant has a U.S. citizen spouse and three U.S. citizen children. He seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

In his decision dated July 19, 2007, the Field Office Director found the applicant inadmissible for being convicted of assault with a deadly weapon on June 23, 1995. The Field Office Director then found that there was no evidence in the record to support a finding that the applicant's spouse and children would experience extreme hardship upon his removal from the United States. The application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated August 14, 2007, counsel states that evidence already in the record and documents submitted on appeal unequivocally establish the extreme nature of hardship to the applicant's spouse in the event the applicant's waiver application is denied. Counsel states that the applicant has met the standard set forth by the courts by presenting substantial evidence in support of his hardship claim.

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.

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 AAO notes that 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 indicates that on February 23, 1981 in Los Angeles County, California the applicant was convicted of burglary for events that occurred on January 27, 1981. He was sentenced to 30 days confinement. The applicant, who was born on June 4, 1962, was 18 years old at the time he was arrested.

The record indicates that on March 29, 1995 in Los Angeles County, California the applicant was arrested for acts which led to his conviction on June 23, 1995 for Assault with a Deadly Weapon, other than a firearm or by any means of force likely to produce great bodily injury under California Penal Code Section 245(a)(1). The applicant was sentenced to 3 years in jail and 270 days probation.

The AAO finds that the applicant’s conviction for Assault with a Deadly Weapon is a crime involving moral turpitude.

Section 245(a) of the California Penal Code states:

(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

In *Matter of O-*, 3 I&N Dec. 193 (BIA 1948) and *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992), the Board of Immigration Appeals (BIA) held that assault with a weapon is a crime involving moral turpitude. It is noted that as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon.... See, e.g., *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). Given that this aggravating factor is an element of the offenses enumerated in C.P.C. § 245(a)(1), and that the AAO is unaware of any prior case in which a court has applied C.P.C. § 245(a)(1) to conduct not involving moral turpitude, the AAO must find that the applicant's conviction for violation of C.P.C. § 245(a)(1) is a crime involving moral turpitude.

We note that as the applicant has been found to be convicted of at least one crime involving moral turpitude, which does not meet any of the exception requirements, we will not discuss whether his 1981 conviction for burglary is also a crime involving moral turpitude.

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

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

The applicant's conviction was based on actions taken by the applicant in March 1995. The AAO finds that when adjudicating issues of admissibility the date of application is ongoing and admissibility is determined based on the facts and law at the time the application is considered as

opposed to at the time the application is filed. The BIA has found in *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992) that “*admissibility* is determined on the basis of the facts and the law at the time the application is finally considered.” 20 I.&N. Dec. at 562 (citations omitted, emphasis added).

The AAO notes that 8 C.F.R § 103.2(b)(1) states, in pertinent part, “An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition.” The AAO finds that the decision by the BIA in *Matter of Alarcon* creates an exception to 8 C.F.R § 103.2(b)(1) when adjudicating issues of admissibility. The AAO notes that *Matter of Alarcon* deals specifically with admissibility and does not necessarily apply to other adjustment eligibility criteria or to other adjudications. *See, e.g., Cuadra v. Gonzales*, 417 F.3d 947 (8th Cir. 2005); *Robledo v. Chertoff*, 658 F.Supp.2d 688 (D.Md. 2009).

The applicant, as of today, is still seeking admission by virtue of adjustment from his current status. It has now been more than 15 years since the actions that made the applicant inadmissible occurred. The AAO finds that the applicant is eligible for a waiver under section 212(h)(1)(A) of Act.

The AAO notes that although the applicant has a significant criminal record including two convictions and an arrest which did not result in a conviction (on December 17, 1997 in Los Angeles, California for Infliction of Corporal Injury to a Spouse), the applicant has not been arrested since 1997.¹ In addition, the record indicates through letters of recommendation that the applicant has been an active member of the church in his community since 1998, that he volunteers with youth in his community at the LA Boxing Club, that he has been employed full time as a salesperson since 2004, and that he has a record of paying his federal income taxes. Furthermore, his spouse submitted a statement attesting to the applicant being a supportive and loving father and spouse. Thus, the AAO finds that the record establishes that the applicant has been rehabilitated and the record does not establish that the admission of the applicant to the United States would be “contrary to the national welfare, safety, or security of the United States.” Therefore, the AAO finds that the record reflects that the applicant meets the requirements for a waiver under section 212(h)(1)(A) of the Act.

The AAO must also find that the applicant merits a waiver of inadmissibility as a matter of discretion. In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). However, the AAO cannot find, based on the facts of this particular case, that the applicant merits a favorable exercise of discretion solely on the balancing of favorable and adverse factors. The applicant’s conviction for assault with a deadly weapon indicates 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:

¹ The AAO notes that the record indicates that this charge was dismissed.

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 finds that the applicant’s conviction for assault with a deadly weapon under C.P.C. § 245(a)(1) is categorically a dangerous crime. A conviction under C.P.C. § 245(a)(1) requires that the means of force used be likely to produce great bodily injury.” The AAO can therefore conclude that the applicant’s conviction for assault with a deadly weapon 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 indicates that the applicant’s spouse suffers from rheumatoid arthritis and depression. A doctor’s certificate dated September 24, 2004 states that the applicant’s spouse has severe, erosive, rheumatoid arthritis and depression. The certificate states that the applicant’s spouse is taking the prescription drugs methotrexate and Zoloft. The AAO also notes that the applicant has four children, ages eleven, fourteen, sixteen, and eighteen. Counsel states in his brief dated September 11, 2007 that the applicant’s spouse’s depression is a result of her suffering from rheumatoid arthritis and that the added economic and emotional strain the applicant’s departure from the United States would cause would be mentally and physically devastating to the applicant. Counsel also states that the applicant’s children would suffer immense hardship in the event of the applicant’s relocation because they would be deprived of their father’s affection or be forced to live in conditions that were far from adequate. In her undated statement the applicant’s spouse states that she is suffering emotionally as a result of having to deal with her depression, arthritis, and separation from the applicant.

The AAO notes that the U.S. Department of State has issued a travel warning regarding U.S. citizens traveling to Mexico. The warning dated July 16, 2010 states that since 2006 the Mexican government has engaged in an extensive effort to combat drug-trafficking organizations (DTOs) which have been engaged in a vicious struggle with each other for control of trafficking routes. The warning states that according to published reports, 22,700 people have been killed in narcotics-related violence since 2006. The warning states specifically that recent violent attacks and persistent security concerns have prompted the U.S. Embassy to urge U.S. citizens to defer unnecessary travel to several areas of Mexico, including Tamaulipas. The AAO notes that the record indicates that Tampico, Tamaulipas Mexico is where the applicant was born and is likely the area of Mexico where he would relocate to after his departure from the United States.

The warning states that the U.S. consular agency in Reynosa, Tamaulipas was closed temporarily in February 2010 in response to firefights between police and DTOs and between DTOs and that in April 2010, a grenade thrown into the consulate compound in Nuevo Laredo, Tamaulipas.

The warning states further that since 2006, large firefights have taken place in towns and cities in many parts of Mexico, often in broad daylight on streets and other public venues. The warning states that many of the firefights occur in northern Mexico which includes numerous parts of Tamaulipas states. The AAO notes that although the Tampico is not listed specifically in the travel warning, many areas in the same region as Tampico are listed and the travel warning states that the situation in northern Mexico remains fluid, the location and timing of future armed engagements cannot be predicted, and that U.S. citizens are urged to exercise extreme caution when traveling throughout the region.

The AAO finds that due to the current situation in the applicant's last place of residence in Mexico and likely area of relocation, his U.S. citizen spouse and children would face exceptional and extremely unusual hardship as a result of relocation. The AAO notes that relocating to Tamaulipas, Mexico cannot be compared to the typical experience of a relocating family who experiences a lower standard of living and/or adverse country conditions upon relocation. The degree of violence being experienced in certain areas of Mexico, including Tamaulipas, as listed in the U.S. Department of State Travel Warning is so severe, that it could be stated that relocation to this part of Mexico is a great safety risk for the applicant's family. In addition to the troubling violence that is occurring in certain parts of Mexico and the very serious safety risks this violence poses for the applicant's spouse and four children upon relocation, the record supports a finding that the applicant's spouse would face mental health problems upon relocation given that she already suffers from depression. 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 AAO also finds that the hardships related to separation presented in this case rise to the level of exceptional and extremely unusual hardship. 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 suffers from rheumatoid arthritis and depression; she would alone have to financially support three minor children; and the applicant's spouse would be the sole parental figure providing emotional support to four teenage children. Furthermore, the applicant's spouse and children would suffer the exceptional and extremely unusual emotional hardship that would come with having your spouse and father return to a country where violence is such a very serious problem.

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 factor in the present case is the applicant’s criminal record. The favorable factors in the present case are the hardship the applicant’s spouse and children would suffer as a result of his inadmissibility; the support the applicant provides to his spouse, who suffers from rheumatoid arthritis and depression; the presence of four U.S. citizen children; a consistent record of employment and payment of taxes; a record of being involved with his church and community; and no criminal record for thirteen years.

The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.