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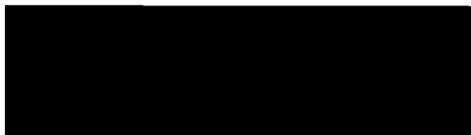
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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Date: **DEC 29 2011**

Office: ST. PAUL

FILE: 

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:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, St. Paul, Minnesota, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 a crime involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and mother.

In a decision dated November 16, 2009, the field office director indicated that though the applicant pled guilty to the lesser offense of Gross Misdemeanor Identity Theft, he was charged with Felony Identity Theft and admitted to using another's identity and committing unlawful activity on numerous occasions for approximately 9 years. The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative.

On appeal, counsel presents evidence to support that the applicant's family members will suffer extreme hardship should the present waiver application be denied. Counsel also asserts that the field office director erred in finding the applicant inadmissible, arguing that the applicant was convicted of a misdemeanor, not a felony, and that the applicant's offense of possession of another's identity document is not a crime involving moral turpitude. Counsel further contends that USCIS may not look beyond the statute and the plea petition to determine whether the applicant's offense is a crime involving moral turpitude.

The record contains, but is not limited to: documentation relating to the applicant's mother's disability; a psychological evaluation of the applicant's wife; statements from counsel, the applicant's wife, and others in support of the application; documentation relating to the applicant's wife's income; and records of the applicant's criminal conviction. The entire record was reviewed and considered in rendering this decision.

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.)

We note that in a previously submitted brief, dated January 26, 2009, counsel also argued that the applicant's conviction is not a crime involving moral turpitude, stating that simple possession of an identity document with the intent to commit, aid or abet "unlawful activity" does not involve moral turpitude. Counsel also asserted, in the alternative, that the applicant's conviction is not a crime involving moral turpitude because it falls with the petty offense exception. Counsel claimed that the maximum sentence provided under the statute of conviction was one year, and that the applicant did not serve time in jail.

This case arises within the jurisdiction of the Eighth Circuit Court of Appeals. In evaluating whether an offense constitutes a crime involving moral turpitude, the Eighth Circuit employs a traditional categorical and modified categorical approach. In *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010), the Eighth Circuit rejected the methodology adopted by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). The Eighth Circuit ruled that it is "bound by our circuit's precedent, and to the extent *Silva-Trevino* is inconsistent, we adhere to circuit law." *Id.*

(citing *Jean-Louis v. Holder*, 582 F.3d 462, 470-73 (3rd Cir. October 6, 2009), for the proposition that “deference is not owed to *Silva–Trevino’s* novel approach”).

In a prior case, the Eighth Circuit stated that “[w]hether a statute defines a crime that involves moral turpitude . . . is a question of federal law. Like the BIA, we look to state law to determine the elements of the crime. . . . [W]e do not examine the factual circumstances surrounding [a] crime.” *Franklin v. I.N.S.*, 72 F.3d 571, 572 (8th Cir. 1995)(citations omitted). The Eighth Circuit’s reference to *Jean-Louis* is instructive, as the Third Circuit discussed therein the categorical and modified categorical approach while declining to follow the new methodology set forth in *Silva-Trevino*. The Third Circuit stated that to determine whether a crime constitutes a crime involving moral turpitude, it engages in a categorical inquiry that consists of looking “to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute.” 582 F.3d at 465-66. The “inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute ‘fits’ within the requirements of a [crime involving moral turpitude (CIMT)].” *Id.* at 470. The Third Circuit continued that, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and others of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.* A narrow, specific set of documents comprises the record: “[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (2005).

Therefore, our inquiry into the applicant’s conviction is limited to ascertaining the least culpable conduct sufficient to sustain a conviction under the criminal statute. Furthermore, we will not go behind the judicial record to re-adjudicate the guilt or innocence of the applicant for the criminal offense of which the applicant was convicted, or for a different criminal offense. See *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980).

The record shows that the applicant was convicted of Identity Theft under section 609.527, subdivision 2 of the Minnesota Statutes (Minn. Stat.) for his conduct over a period from June 10, 2003 to December 15, 2004.¹ At the time of his conviction, Minnesota Statutes § 609.527 stated:

Subdivision 1. Definitions. (a) As used in this section, the following terms have the meanings given them in this subdivision.

¹ A criminal complaint in the record indicates that the applicant was charged with Felony Identity Theft, designated as within the penalty provision of Minnesota Statutes § 609.527, subdivision 3(4). However, a court disposition in the record states that the applicant was charged with a Gross Misdemeanor and the applicant’s plea agreement indicates that the applicant pled guilty and was convicted of identity theft under the lesser penalty provision of Minnesota Statutes § 609.527, subdivision 3(2). Irrespective of the penalty provision applied to the applicant’s conduct, the essential elements of identity theft are the same, as provided in Minnesota Statutes § 609.527, subdivision 2.

(b) "Direct victim" means any person or entity described in section 611A.01, paragraph (b), whose identity has been transferred, used, or possessed in violation of this section.

(c) "Identity" means any name, number, or data transmission that may be used, alone or in conjunction with any other information, to identify a specific individual, including any of the following:

(1) a name, social security number, date of birth, official government-issued driver's license or identification number, government passport number, or employer or taxpayer identification number;

(2) unique electronic identification number, address, account number, or routing code; or

(3) telecommunication identification information or access device.

(d) "Indirect victim" means any person or entity described in section 611A.01, paragraph (b), other than a direct victim.

(e) "Loss" means value obtained, as defined in section 609.52, subdivision 1, clause (3), and expenses incurred by a direct or indirect victim as a result of a violation of this section.

(f) "Unlawful activity" means:

(1) any felony violation of the laws of this state or any felony violation of a similar law of another state or the United States; and

(2) any nonfelony violation of the laws of this state involving theft, theft by swindle, forgery, fraud, or giving false information to a public official, or any nonfelony violation of a similar law of another state or the United States.

Subd. 2. Crime. A person who transfers, possesses, or uses an identity that is not the person's own, with the intent to commit, aid, or abet any unlawful activity is guilty of identity theft and may be punished as provided in subdivision 3.

Subd. 3. Penalties. A person who violates subdivision 2 may be sentenced as follows:

- (1) if the offense involves a single direct victim and the total, combined loss to the direct victim and any indirect victims is \$250 or less, the person may be sentenced as provided in section 609.52, subdivision 3, clause (5);
- (2) if the offense involves a single direct victim and the total, combined loss to the direct victim and any indirect victims is more than \$250 but not more than \$500, the person may be sentenced as provided in section 609.52, subdivision 3, clause (4);
- (3) if the offense involves two or three direct victims or the total, combined loss to the direct and indirect victims is more than \$500 but not more than \$2,500, the person may be sentenced as provided in section 609.52, subdivision 3, clause (3);
- (4) if the offense involves more than three but not more than seven direct victims, or if the total combined loss to the direct and indirect victims is more than \$2,500, the person may be sentenced as provided in section 609.52, subdivision 3, clause (2)

The AAO is not aware of any federal court or administrative decisions addressing whether an offense under Minn. Stat. § 609.527 constitutes a crime involving moral turpitude. The elements of the applicant's offense of identity theft are provided in Minn. Stat. § 609.527, subdivision 2. This section is divisible. The section reaches "[a] person who transfers, possesses, or uses an identity that is not the person's own," yet it does not address whether the identity is transferred, possessed, or used without the consent of the true owner. Indeed, the term "identity" refers to identifying information which is, in most cases, known by some individuals close to the identity's owner. While the offense is titled "identity theft," an act of theft or nonconsensual use is not required as an element of subdivision 2. This subdivision also does not require that the perpetrator knew the identity in question related to a real person. When read in conjunction with the penalty provisions of subdivision 3, Minn. Stat. § 609.527 appears to encompass offenses resulting in actual financial harm to "victims," but specific intent to harm the victims is not an element, only the intent "to commit, aid, or abet any unlawful activity."² Many of the unlawful activities defined are crimes that have been found to be crimes involving moral turpitude. Nevertheless, the definition of unlawful activities is broad, extending to any crime classified as a felony regardless of type, as well as to broad classes of nonfelonies under Minnesota law or the law of any other state defined only by general type rather than by specific elements.

² The BIA has often treated an accessory the same as the principal for the crime of moral turpitude inquiry. See *In re Short*, 20 I. & N. Dec. 136, 138 n. 1 (BIA 1989); accord *State v. Smolin*, 221 Kan. 149, 557 P.2d 1241, 1245 (Kan.1976)("By statute and case law this jurisdiction [has] long held that any person who counsels, aids or abets in the commission of any offense may be charged, tried and convicted in the same manner as if he were a principal."). Thus, it is inconsequential whether the applicant intended to commit unlawful activity himself, or to aid or abet such activity.

The Board of Immigration Appeals (BIA or Board) has addressed the issue of the possession and/or use of false identity documents. In *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992), the BIA held that “possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude.” 20 I&N Dec. 579, 586 (BIA 1992). The BIA noted that “criminal possession is a crime involving moral turpitude when accompanied by the intent to commit a crime involving moral turpitude.” *Id.* at 584. However, the BIA agreed with its holding in *Matter of Flores*, stating that the use of an altered visa would be morally turpitudinous. *Id.* at 582 (citing 17 I&N Dec. 225, 230 (BIA 1980)). In *Flores*, the BIA held that uttering and selling false or counterfeit paper related to the registry of aliens was a crime involving moral turpitude, even though intent to defraud was not an explicit statutory element. 17 I&N Dec. at 230. *See also Omagah v. Ashcroft*, 288 F.3d 254, 262 (5th Cir. 2002) (finding that crimes that do not involve fraud, but that include “dishonesty or lying as an essential element” also tend to involve moral turpitude); *see also Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) (“Generally a crime involving dishonesty or false statement is considered to be one involving moral turpitude.”).

Therefore, as the minimal conduct required for conviction under Minn. Stat. § 609.527 is mere possession of another person’s identity (essentially personal identifying information), accompanied by the intent to commit, aid or abet unlawful activity that may or may not involve moral turpitude itself, a conviction under this statute is not categorically a crime involving moral turpitude. However, in accordance with the BIA’s decisions in *Flores* and *Serna*, we find that the actual use of another person’s identity with intent to commit, aid or abet unlawful activity, would be an inherently false act manifesting sufficient evil intent to constitute a crime involving moral turpitude.

As the statute contains disjunctive elements, the AAO must turn to a modified categorical analysis and review the record of conviction to determine if the applicant was convicted under a portion of Minn. Statutes § 609.527 that reaches only moral turpitudinous conduct. The complaint in the applicant’s criminal case reflects that the applicant was convicted under the subpart of the statute addressing use of another person’s identity, as the applicant was charged not only with possessing another person’s identity in the form of that person’s identifying information, but of actually employing that information for the purpose of assuming and using that person’s identity as his own. Although the applicant pled to a “lesser” charge, the plea agreement only affected the classification of the crime as a misdemeanor and the applicable penalty provision of the statute (subdivision 3), which is based on the number of victims and the amount of loss to the victims, not on basic elements of the crime of identity theft. The applicant was charged with, pled guilty to, and was convicted of violation of subdivision 2 of Minn. Stat. § 609.527, and we find that the complaint is reliable for revealing the subpart(s) of that section of law violated by the applicant, particularly the use (in addition to possession) of another’s identity. Accordingly, we find that the applicant was convicted under a subpart of Minn. Stat. § 609.527 that reaches only crimes involving moral turpitude, and we affirm that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

We also find that the applicant’s inadmissibility under this section is not excused by the petty offense exception. Even accepting that the maximum penalty possible for the applicant’s conviction was imprisonment of one year (the penalty provided in the section of law cited in applicant’s plea

agreement – subdivision 4 of Minn. Stat. § 609.52(3)), the record contains a document entitled “Terms and Conditions of Sentence” showing that the applicant was given the maximum sentence, but that 275 days were stayed based on certain conditions being met over a two-year probationary period.

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

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

....

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

The applicant listed only his U.S. citizen wife as a qualifying relative on his Form I-601, but has now submitted evidence showing that his mother is also a U.S. citizen.

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment,

inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In support of hardship to his mother, the applicant has submitted Form N-648, Medical Certification for Disability Exceptions, which indicates that the applicant's mother has mild mental retardation. The purpose of Form N-648 is to establish that an alien requires an exception to the English and/or civics requirements for citizenship. The examining medical professional indicates that the applicant's mother is impaired in some normal functions, "never travels alone and requires assistance from friends and family with activities of daily living." However, there is no indication as to what assistance the applicant provides his mother, or what the impact his departure would have on her. Neither is there any indication of what specific hardship the applicant's mother would experience if she returned to Mexico. We note that other evidence shows that the applicant's mother lives with him and his spouse, but there is no further evidence showing her level of dependency on

him or the impact his departure would have on her. Consequently, the applicant has not met his burden in demonstrating that denial of admission would result in extreme hardship to his mother.

The applicant asserts that this spouse will experience both financial and emotional hardship. The applicant's spouse states in an undated letter that she has no job or income and the applicant pays for all the utilities and the mortgage. Although the record does contain some utility bills in the applicant's name, it also contains evidence that the applicant's spouse has been employed. The applicant's spouse submitted a Form I-864, Affidavit of Support Under Section 213A of the Act, in support of the applicant's adjustment application indicating that she was then employed as a "Sales/Teller" at Guaranty Bank.

In an evaluation by clinical therapist [REDACTED] indicates that the applicant's spouse reported that she is unemployed after quitting her job following a miscarriage. [REDACTED] states that the applicant's spouse reported that she has only a high school education and desires to obtain a college education. [REDACTED] also states that the applicant's spouse is financially dependent on the applicant and "would not be able to maintain their home or support herself" in his absence. As the record indicates that the applicant's spouse has prior work experience and earning capacity that may be sufficient to support herself, [REDACTED] conclusion appears to be based on her assessment that the applicant's spouse is severely depressed, and will be so incapacitated in the applicant's absence that she will "become dependent on family for financial support." While the AAO respects the input of any mental health profession, we note that [REDACTED] assessments are based on limited interaction with the applicant's spouse, and on conditions, financial and otherwise, as reported by the applicant and the applicant's spouse during a single visit. Furthermore, although it is unclear what support the applicant's spouse could expect from her family, [REDACTED] evaluation suggests that the applicant's spouse believes that her financial hardship would be mitigated by support from her family. The record does not contain independent evidence of the applicant's current income, though tax records from 2007 show an annual income in excess of \$23,000, similar to the \$21,000 of income report by the applicant's spouse on the Form I-864 filed that year. [REDACTED] indicates that the applicant's mother lives with them and that they purchased the home with her support, suggesting that the applicant's income is not the sole household income.

In assessing the applicant's psychological condition, [REDACTED] reports that the applicant's spouse is experiencing extreme anxiety in connection with several circumstances: her miscarriage, illnesses in her family, inability to obtain career and other life goals, and her husband's immigration situation. [REDACTED] indicates that the applicant's spouse reported that she has isolated herself and receives most of her emotional support from her husband. Although we do not doubt that separation from the applicant will likely exacerbate the applicant's spouse's psychological condition, the evaluation suggests that much of her emotional difficulties will persist regardless of the applicant's presence and emotional support. There is no indication that the applicant's spouse has sought treatment or how her condition would improve with therapy. Also, given that the evaluation is based a single interview and conditions reported by the applicant's spouse, rather than extensive interaction and observation, we give it less weight as evidence of the psychological impact of separation on the applicant's spouse. We acknowledge the brief letters purportedly from friends of the applicant and

his wife that attest to the strength of their relationship and how difficult separation would be for them. However, while the evidence in the record does indicate that separation from the applicant would result in hardship to the applicant's spouse, we do not find that it shows uncommon hardship rising to the level of extreme hardship.

As to any hardship the applicant's spouse would experience upon relocation to Mexico, the record contains only [REDACTED] statement that the applicant's spouse does not speak Spanish, "would have to adapt to a different culture and probably would not have access to mental health services." There is no basis to believe that [REDACTED] has expertise regarding the availability of mental health services in Mexico for the applicant's spouse, or evidence concerning the applicant's access to mental health services if she remains in the United States, other than her seeking an evaluation for purposes of the waiver application. We acknowledge that the applicant's spouse is native to the United States, has significant family ties here and no prior ties to Mexico, and that adapting to different language and culture would likely be a significant, if not uncommon, hardship. However, there is no evidence in the record to indicate the specific conditions the applicant's spouse would face if she relocated with the application to Mexico, and the applicant's spouse has not herself asserted that she would experience hardship there. Consequently, we do not find that the applicant has demonstrated that his spouse will experience extreme hardship upon relocation.

The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* 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.