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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

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Date: JUL 01 2011 Office: SAN FRANCISCO FILE: [REDACTED]

IN RE: [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:

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

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Field Office Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Tonga who was found to be inadmissible under 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 applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside in the United States with his U.S. citizen spouse and children, and lawful permanent resident parents.

The director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that the director “erred in its determination that Applicant failed to prove that his United States citizen wife, United States citizen children, and lawful permanent resident parents would suffer extreme hardship if his waiver of inadmissibility were not granted.” Counsel further asserts that the director “also erred in finding that Applicant was not deserving of a positive exercise of discretion.”

In support of the waiver application, the record includes, but is not limited to, statements from the applicant and his family members, medical documentation, financial documentation, conviction records, country condition reports, birth and marriage certificates, letters of support from the applicant’s friends and church, and evidence of the applicant’s community service. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

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). This case arises in the Ninth Circuit, and the Ninth Circuit Court of Appeals has adopted the realistic probability standard. *See Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-1007 (9th Cir. 2008).

The record reflects that on December 7, 2000 the applicant was convicted in the Superior Court of California, County of Sonoma, of carrying a loaded firearm in violation of section 12031(a)(1) of the California Penal Code. The applicant was sentenced to 30 days in jail, payment of restitution, and 24 months probation (). On November 26, 2001, the applicant was convicted in the Superior Court of California, County of Sonoma, of battery (domestic violence) in violation of

section 243(e)(1) of the California Penal Code. The applicant was sentenced to probation for 36 months, payment of restitution, and 350 days in jail, which was suspended (Case No. [REDACTED]). On April 13, 2006, the applicant was convicted in the Superior Court of California, County of Sonoma, of assault with deadly weapon or force likely to produce great bodily injury in violation of section 245(a)(1) of the California Penal Code. The applicant was sentenced to nine months in jail, payment of restitution, and probation for 36 months (Case No. [REDACTED]).

At the time of the applicant's conviction, section 245(a)(1) of the California Penal Code provided, in pertinent part:

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.

The offense underlying the applicant's crime, assault, is defined under the California Penal Code as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240 (West 2006). Section 245(a)(1) of the California Penal Code is divisible in that it can be violated by either the commission of (1) assault with a deadly weapon or instrument other than a firearm or (2) by means of force likely to produce great bodily injury. The record does not indicate the specific subpart the applicant was convicted under. We will first examine whether assault with a deadly weapon or instrument is categorically a crime involving moral turpitude.

The Ninth Circuit Court of Appeals in *Gonzales v. Barber* determined that assault with a deadly weapon under the California Penal Code is categorically a crime involving moral turpitude. 207 F.2d 398, 400 (9th Cir. 1953). The Ninth Circuit stated:

Here we are faced with the federal question of whether the crime involves such moral turpitude as to show that the alien has a criminal heart and a criminal tendency- as to show him to be a confirmed criminal. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9, 68 S.Ct. 374, 92 L.Ed. 433. In the federal law, assault with a deadly weapon is such a crime. *U.S. ex rel. Zaffarano v. Corsi*, supra; *U.S. ex rel. Mazzillo v. Day*, D.C.S.D.N.Y., 15 F.2d 391; *U.S. ex rel. Ciccereilli v. Curran*, 2 Cir., 12 F.2d 394; *Weedin v. Tayokichi Yamada*, 9 Cir., 4 F.2d 455.

207 F.2d at 400; *See Matter of O*, 3 I&N Dec. 193, 197 (BIA 1948)("But the offense here is not merely *mala prohibita*, it is inherently base, and this is so because an assault aggravated by the use of a dangerous or deadly weapon is contrary to accepted standards of morality in a civilized society."); *In re Sanudo*, 23 I&N Dec. 968 , 971 (BIA 2006)(stating, "assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude by both this Board and the Federal courts, because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the 'simple assault and battery' category). Pursuant to

the Ninth Circuit's finding in *Gonzales v. Barber*, we conclude that assault with a deadly weapon or instrument is categorically a crime involving moral turpitude.

Having established that assault with a deadly weapon or instrument is categorically a crime involving moral turpitude, we will next examine the morally turpitudinous nature of the second part of the statute: assault by any means of force likely to produce great bodily injury. In *Matter of P*, the BIA addressed whether a similar statute under the Michigan Penal Code, assault with intent to do great bodily harm less than the crime of murder, is a crime involving moral turpitude.¹ 3 I&N Dec. 5 (BIA 1947). In determining that such conduct is categorically a crime involving moral turpitude, the BIA stated:

Crimes which are accompanied by an evil intent or a depraved motive, generally connote moral obliquity. It has been said that it is in the criminal intent that moral turpitude inheres. Under this generally accepted standard, it seems clear that the offense denounced by the Michigan statute under consideration involves moral turpitude, and as stated, the absence of a showing that a dangerous or deadly weapon was used is not the operative factor in determining the presence or absence of moral turpitude. Conceivably, an assault with a dangerous weapon may be committed in such a manner as to preclude an evil intent, and therefore baseness or vileness. In short, it is the purpose or intent which accompanied the perpetration of the crime, and the manner and nature by which it is committed, which determines moral turpitude. . . . There can be little or no difference then, so far as moral turpitude is concerned, between the offense of assault with intent to do great bodily harm less than the crime of murder, and assault with a deadly weapon.

3 I. & N. Dec. 5, 8; *See People v. Elwell*, Cal.App.3d 171, 177 (1988)(holding that assault by means of force likely to produce great bodily injury under the California Penal Code was a crime of moral turpitude which could be used for impeachment purposes.). Accordingly, AAO finds that the applicant's conviction under Cal. Penal Code § 245(a)(1) is categorically a crime involving moral turpitude, and the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.²

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 Section 750.84 of the Michigan Penal Code provides, “Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars.”

² The AAO notes that because the applicant's conviction for assault with deadly weapon or force likely to produce great bodily injury has been found to be a crime involving moral turpitude, it is unnecessary to determine if his other convictions also involved moral turpitude.

(1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that—

(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 and children.

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 conviction indicates that he is 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). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or* any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependant on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous". The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). 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." 67 Fed. Reg. at 78677-78.

As stated, the offense underlying the applicant's crime, assault, is defined under the California Penal Code as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240. Therefore, the AAO finds that the applicant's conviction under California Penal Code § 245(a)(1) is a violent crime, and the heightened discretionary standard of 8 C.F.R. § 212.7(d) is applicable in this case.

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 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.

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.”).

On appeal, the applicant asserts that he is the primary wage earner, and his spouse is not working. He states that he would not be able to financially support his family if he is in Tonga because it will be difficult to find employment. He states that he is close with his children and does not want his children to grow up without a father. He contends that his spouse takes medication for depression

and anxiety. He states that his spouse has not been able to sleep or eat. *Applicant Declaration*, dated September 2, 2008.

The applicant's spouse asserts in her declarations dated August 27, 2008 and March 24, 2008 that she suffers from morbid obesity and depression. She states that she meets with a psychologist and takes medication for her depression. She states that she suffers from insomnia because of stress about the applicant's inadmissibility. She notes that she takes medication to treat her insomnia. She states that she started suffering from panic attacks and takes medication to treat her anxiety. She states that he was laid off from her job and has been unable to find employment for one year. She notes that if the applicant returns to Tonga, she will be unable to support her family if she cannot find employment. She states that she needs the applicant's help to support and guide their children. She contends that it would be extremely difficult for her to become accustomed to the way of life in Tonga. She states that she is third generation Mexican American, and leaving her family would cause depression because she is very close to her family. She asserts that she would be unable to take her daughter, [REDACTED] to Tonga because of a custody agreement with [REDACTED] father. She states that she will be undergoing bariatric surgery to treat her morbid obesity, and would not be able to receive adequate medical care in Tonga. She states that the applicant's immediate family members are in the United States, and he has no family connections in Tonga to help him find employment and housing.

The AAO notes that the applicant's parents, [REDACTED] and [REDACTED] are lawful permanent residents. The applicant's mother asserts in her letter dated September 2, 2008 that she is not in good health, and she contacts the applicant when she needs help. The applicant's stepmother asserts in her undated letter that the applicant's father had a stroke, is in the process of recovery. She states that the applicant has provided support to them. The AAO will consider hardship to the applicant's parents as they are qualifying relatives. However, the applicant's parents have not submitted letters in plain language from medical professionals discussing their current medical conditions, treatment plans, and prognosis. The AAO is not in a position to make determinations of medical hardship based on the results of medical tests and laboratory reports. Moreover, the applicant's parents have not discussed the possibility of returning to their native country of Tonga to maintain family unity with the applicant. The burden of proof in this proceeding lies with the applicant, and "while an analysis of a given application includes a review of all claims put forth in light of the facts and circumstances of a case, such analysis does not extend to discovery of undisclosed negative impacts." *Matter of Ngai*, 19 I&N Dec. at 247. Accordingly, this decision will focus on the hardship the applicant's spouse and children will suffer if the applicant's waiver application is denied.

Nevertheless, upon review of the record, the AAO finds that the applicant's spouse would suffer exceptional and extremely unusual hardship if she were separated from the applicant.

The AAO acknowledges that the applicant's spouse and children will experience emotional hardship if they are separated from the applicant as a result of his inadmissibility. This case arises under the jurisdiction of the Ninth Circuit Court of Appeals. 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 significant weight to the emotional hardship the applicant’s spouse and children will experience as a result of their separation from the applicant.

The letters from [REDACTED] dated July 15, 2008 and [REDACTED] dated August 18, 2008 reflect that the applicant’s spouse has been diagnosed with Major Depressive Disorder and generalized anxiety disorder, and is attending therapy with a psychologist and taking medication to treat her conditions. The applicant’s spouse’s psychologist, [REDACTED] states that the applicant, “is markedly impaired in her activities of daily living, is often unable to sleep through the night, is fatigued nearly all day ever[y] day, is diminished in her ability to think and to concentrate and has recurrent thoughts of suicide.” Both the applicant’s primary care physician and psychologist link the applicant’s spouse psychological conditions to the applicant’s inadmissibility and possible removal from the United States.

Further, the record reflects that the applicant and his spouse are the parents of two minor children, 12-year-old [REDACTED] and nine-year-old [REDACTED]. The record contains a wage and tax statement and tax return from 2006, which show that the applicant’s spouse was employed with [REDACTED] Inc. and financially supporting her children and spouse with her income. According to the declaration from the applicant’s spouse, she was laid off from her position in 2007, and has been unable to find employment. The applicant’s mother-in-law asserts in her letter dated August 15, 2008 that the applicant’s spouse is unemployed and “her car is being repossessed, groceries at her house are scarce and they never know whether or not they can pay the PG&E or the water bill.” Although the applicant’s spouse has not provided an employment termination letter or other evidence of unemployment (such as receipt of unemployment benefits), we will still give some weight to her claim of financial hardship should the applicant be compelled to depart the United States.

All hardship factors to the applicant’s spouse and children, should they remain in the United States separated from the applicant, have been considered in the aggregate. The record reflects that the applicant’s spouse would suffer emotional, psychological and financial hardships if she is separated from the applicant. The AAO finds that these hardships, when considered in the aggregate, are substantially beyond ordinary hardship and rise to the level of exceptional and extremely unusual hardship.

The applicant has also demonstrated that his spouse and children will suffer exceptional and extremely unusual hardship should they relocate to Tonga to maintain family unity.

The applicant and his spouse assert in their declarations that the applicant does not have immediate family members in Tonga, and he would face hardships with employment and housing. The AAO acknowledges that unemployment in Tonga is, according to the Central Intelligence Agency’s (CIA) *The World Factbook*, at 13%. *The World Factbook* further states, “High unemployment among

the young, a continuing upturn in inflation, pressures for democratic reform, and rising civil service expenditures are major issues facing the government.” The AAO will give weight to the financial hardships the applicant’s spouse and children will suffer upon relocation to a country with high unemployment.

The applicant’s spouse asserts that she will be undergoing bariatric surgery to treat her morbid obesity, and would not be able to receive adequate medical care in Tonga. The record contains a physician’s letter from [REDACTED] dated July 18, 2008 stating that the applicant’s spouse is “undergoing evaluation and preparation for major bariatric surgery.” It further states that the applicant’s spouse “will need ongoing support for driving, meal preparation and emotional support” during her recuperation. The letter notes that she will have to attend “follow-up appointments and labs” during the first year after surgery and periodically thereafter. The AAO notes that the current U.S. Department of State’s travel advisory for Tonga provides “Medical facilities, including medications, in Tonga are extremely limited. The cities of [REDACTED] and [REDACTED] have hospitals with limited emergency and outpatient facilities. Local residents and visitors with serious medical problems are often referred to New Zealand for treatment.” The AAO recognizes that the applicant’s spouse has suffered from obesity, and will consider the limited medical resources in Tonga as an additional hardship related to relocation.

The applicant’s spouse asserts that she is a third generation Mexican-American, and leaving her family would cause depression because she is very close to her family. She further asserts that she would be unable to take her daughter (the applicant’s stepdaughter), [REDACTED] to Tonga because of a custody agreement with [REDACTED] father. A custody agreement in the record from the Superior Court, County of Sonoma dated July 8, 1996 reflects that joint legal custody of [REDACTED] was given to the applicant’s spouse and [REDACTED] father. The agreement provides that “neither party is to remove the minor child from the State of California without prior written consent of the other parent or court order.” However, the record reflects that [REDACTED] is now an adult at almost 20 years old. The AAO acknowledges that the applicant’s spouse has family ties in the United States, including her adult daughter, [REDACTED] and her mother, who has written a letter in support of the applicant’s waiver application. These family ties will be given weight in an aggregate assessment of hardship to the applicant’s spouse and children.

All elements of hardship to the applicant’s spouse and children, should they relocate to Tonga to maintain family unity has been considered in the aggregate. The AAO has considered their family ties in the United States, the claims of medical and financial hardships, and the factors involved with relocation to a country that has a different culture, including adjustment to a new school system for the applicant’s children. The AAO finds that these hardships, when considered in the aggregate, are substantially beyond ordinary hardship and rise to the level of exceptional and extremely unusual hardship.

Additionally, the AAO finds that the gravity of the applicant’s offense does not override the extraordinary circumstances in the applicant’s case. In determining the gravity of the applicant’s offense, the AAO must not only look at the criminal act itself, but also engage in a traditional discretionary analysis and “balance the adverse factors evidencing an alien’s undesirability as a

permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996)(Citations omitted).

The unfavorable factors presented in the application are the applicant's convictions for carrying a loaded firearm, domestic battery and assault, and any periods of unauthorized presence and employment.

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 has expressed his remorse for his convictions in his declaration. He explains that he has changed and become involved in his church. The applicant notes that he serves as a youth mentor within his church. The record contains several letters of support reflecting that the applicant is involved with his community and church. We note that the record before us reflects that applicant has not been charged with any crimes since his last conviction.

The AAO finds that the crimes and immigration violations 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.