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



H2

DATE **MAY 03 2011** Office: MEXICO CITY (CIUDAD JUAREZ)

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v), of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v); section 212(h) of the Immigration and Nationality Act; 8 U.S.C. § 1182(h); and section 212(a)(2)(B) of the Immigration and Nationality Act, 8

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting District Director, Mexico City, Mexico, 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 under section 212(a)(9)(B)(i)(II), of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year; section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude; and section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B), for having been convicted of two or more offenses. The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

In the letter submitted on appeal, the applicant's wife contends that in Mexico her children are not receiving the education they require, and that she was tired of crossing the border for work and leaving her children with a babysitter. She indicates that her husband's job had cut-backs and that they do not earn enough money to support their family. The applicant's wife asserts that in September 2007 she and her children moved to the United States. She states that they share a one-bedroom apartment with her sister-in-law, cannot afford childcare and depend on an after-school program. She avers that whenever her children are sick she must stay home and miss work. She indicates that she is pregnant and her delivery date is in one week, and that she is on the verge of applying for social services. The applicant's wife declares that her children are struggling in school in the United States because they attended school in Mexico. She indicates that she also attends school and is having a difficult time because of her pregnancy. She states that her oldest daughter is stressed and has headaches, and her youngest daughter is rebellious because of separation from the applicant.

We will first address the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing a crime involving moral turpitude.

In 1997, the applicant was convicted of two counts of violation of Cal. Penal Code § 245(a)(1), "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." Moreover, the document by the Court of Appeal of the State of California in the Fifth Appellate District suggests that the applicant may also have been convicted of assault with a firearm in violation of Cal. Penal Code § 245(a)(2); and assault with a deadly weapon, a pipe, also in violation of Cal. Penal Code § 245(a)(1). The applicant was sentenced to seven years in prison.

In 1996, the applicant was convicted of willful discharge of firearm in a negligent manner in violation of Cal. Penal Code section 246(3), and possession/sell switch-blade knife contrary to Cal Penal Code section 653(k). The applicant's sentence of 36 months in jail was suspended, and he served 60 days in jail and 36 months of probation.

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

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists

of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

Section 245 of the California Penal Code provides:

(a) (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.

(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) 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 1997). 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 Board in *Matter of G-R-*, engaged not only in assessing the theoretical possibility but also the realistic probability that assault with a deadly weapon in violation of Cal. Penal Code § 245 would be applied to conduct not involving moral turpitude. 2 I&N Dec. 733 (BIA 1946). The Board first reviewed California court decisions on convictions for assault with a deadly weapon in violation of Cal. Penal Code § 245 and noted that “the crime is . . . limited to intentional acts and does not include the inflicting of injuries by accident.” 2 I&N Dec. 733, 736 (BIA 1946). The Board further noted that “[t]here must be actual use or attempt to use the deadly weapon.” 2 I&N Dec. at 738. However, the Board found one case, *In re Rothrock*, 16 Cal.2d 449 (1940), in which assault with a deadly weapon in violation of Cal. Penal Code § 245 was applied to conduct that did not involve moral turpitude. 2 I&N Dec. at 739. *In re Rothrock* involved a disbarment proceeding under the California Business and Professions Code where a conviction for a crime involving moral turpitude constituted cause for disbarment or suspension of an attorney. *Id.* at 739-40. The Board noted that the court in *Rothrock* “held that assault with a deadly weapon in California does not as a matter of law always involve moral turpitude.” *Id.* at 740. The Board concluded after having “carefully studied the California cases interpreting sections 240 and 245 of the Penal Code,” the facts rendered

the alien inadmissible for a crime involving moral turpitude. *Id.* at 739-40.

*Matter of G-R-* indicated that assault with a deadly weapon in violation of the California Penal Code is not categorically a crime involving moral turpitude pursuant to the holding in *Rothrock*. However, the Ninth Circuit Court of Appeals in *Gonzales v. Barber* later distinguished the holding in *Rothrock* and determined that assault with a deadly weapon under the California Penal Code is categorically a crime involving moral turpitude. 207 F.2d 398, 400 (9<sup>th</sup> Cir. 1953). The Ninth Circuit stated:

In the *Matter of Disbarment of Rothrock* . . . the California court was concerned with whether the crime involved such moral turpitude as to reflect upon the attorney's moral fitness to practice law, a state question. 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. Ciccirelli 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”).

The Ninth Circuit in *Carr v. INS* determined that “assault upon the person of another with a firearm” in violation of Cal. Penal Code § 245(a)(2) is not a crime involving moral turpitude. 86 F.3d 949, 951 (9<sup>th</sup> Cir. 1996). However, unlike the decision in *Gonzales v. Barber*, the Ninth Circuit provided no analysis for its decision. Moreover, *Carr v. INS* was decided before the Ninth Circuit adopted the “realistic probability” approach articulated in *Silva-Trevino*, supra. The AAO notes that although not explicitly applying the “realistic probability” test, the Board in *Matter of G-R-* and the Ninth Circuit in *Gonzales v. Barber* followed the realistic probability approach by viewing whether a case exists in which a conviction for “assault with a deadly weapon” was applied to conduct not involving moral turpitude. 207 F.2d at 400. The AAO will therefore accept the Ninth Circuit’s finding in *Gonzales v. Barber* and 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 Board 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.<sup>1</sup> 3 I&N Dec. 5 (BIA 1947). In determining that such conduct is categorically a crime involving moral turpitude, the Board 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 convictions under Cal. Penal Code § 245 are categorically crimes involving moral turpitude.

Since the applicant is inadmissible for his conviction under section 245(a)(1) and (2) of the California Penal Code, we need not address whether his other convictions involve moral turpitude.

Lastly, the applicant was also found inadmissible under section 212(a)(2)(B) of the Act, for having been convicted of two or more offenses.

Section 212(a)(2)(B), multiple criminal convictions, provides:

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

The record shows that the applicant was convicted of two offenses and sentenced to serve seven years in prison. Thus, the applicant is inadmissible under section 212(a)(2)(B) of the Act for having two or more convictions for offenses (other than purely political offenses), for which the aggregate sentences to confinement were 5 years or more.

The applicant was convicted of assault with a deadly weapon. The regulation at 8 C.F.R. § 212.7(d)

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<sup>1</sup> 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."

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.

The AAO finds that the conduct of which the applicant was convicted, assault with a deadly weapon, is a violent crime. In the instant case, as we find that there are not national security or foreign policy considerations that would warrant a favorable exercise of discretion, the applicant must, in addition to the statutory requirement of proving extreme hardship, demonstrate that denial of admission

would result in exceptional and extremely unusual hardship, to a qualifying relative, who in the instant case are the applicant's U.S. citizen spouse and U.S. citizen daughters.

In rendering this decision, the AAO will consider all of the evidence in the record including birth certificates, school records, letters, and other documentation. We note that the progress report of the applicant's youngest child is entirely in Spanish and does not have an English language translation. The regulation at 8 C.F.R. § 103.2(b)(3) states:

(3) Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Since the progress report is written completely in Spanish and has no translation, it will carry no weight in this proceeding.

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board 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 Board 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 Board 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 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 an exclusive list. *Id.*

In *Monreal*, the Board 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 *Matter of Andazola-Rivas*, the Board 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 Board 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 Board 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 Board 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 Board 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 Board 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 applicant states in the letter dated August 11, 2006, that he has learned different trades since he returned to Mexico, and avers that he is a type "B" welder for international elevators. He states that he wants his daughters to live in the United States, where their quality of life will be better. He describes the hardships of his wife and daughters in Mexico, such as their having a muddy road outside his house. He indicates that his mother, siblings, and extended family members in the United States could use his help. He states that his wife leaves work in an old car and comes home as late as midnight. The applicant's wife describes in the letter submitted on appeal the hardship of working and raising two minor children in an apartment with her sister-in-law, not being able to afford childcare and depending on an after-school program, expecting another child, and having to consider applying for social services. Furthermore, she describes how her children are struggling academically in the United States due to their schooling in Mexico, and how her daughters are stressed and rebellious because of separation from their father.

If the applicant's wife and children remain in the United States without him, the asserted hardship factors are the emotional and financial impact to them. We recognize the emotional hardship of family separation on the applicant's wife, who is expecting another child, and the applicant's two minor children. Though we also recognize that the applicant's wife asserts that she has financial hardship, we take notice that no documentation such as wage statements and household expenses were submitted to corroborate their hardship; in the absence of such documentation we are unable to give full weight to this hardship factor. In addition, although the applicant's wife contends that her children are struggling scholastically, the progress report of the applicant's daughter states that she has made good progress academically, though she struggles with writing and grade-level reading. We observe that we cannot make a determination of the academic performance of the applicant's youngest child as the California English Language Development Test indicates that testing was not done for reading and writing because the applicant's child is either in kindergarten or first grade, which grade levels are not tested. When the asserted hardship factors are considered collectively, we find the applicant has not demonstrated the hardship that his wife and two minor children will experience as a result of remaining in the United States without him would be exceptional and extremely unusual.

With regard to living in Mexico, the asserted hardships are not having enough income to support the family, having a lower standard of living, attending schools that are inferior to the schools they now attend, and leaving her children with a babysitter. We note that the record indicates that the applicant has been employed in Mexico, and no documentation has been provided in which to show that the income of the applicant and his wife is insufficient to meet their household expenses. Moreover, no documentation has been furnished in which to demonstrate that the education of the applicant's children in Mexico is significantly inferior to what they now have in the United States. When the asserted hardship factors are considered collectively, the AAO finds that the applicant has not demonstrated the hardship that his wife and two minor children will experience as a result of joining him to live in Mexico would be exceptional and extremely unusual.

Consequently, based upon the record before the AAO, the applicant in this case fails to establish exceptional and extremely unusual hardship to a qualifying family member for purposes of discretionary relief under section 212(h) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.