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

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DATE: **MAY 17 2011** OFFICE: LOS ANGELES, CA FILE:

IN RE:

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:

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

Thank you,

Michael Shumway
for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, 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 Honduras 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 committed crimes involving moral turpitude. The applicant is the spouse and mother of U.S. citizens. She seeks a waiver of inadmissibility in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated February 19, 2008.

On appeal, counsel asserts that United States Citizenship and Immigration Services (USCIS) should have requested additional evidence in the applicant's case¹ and not overlooked her son's autism and the adverse emotional and economic impacts of her inadmissibility on her spouse. *Form I-290B, Notice of Appeal or Motion*, dated March 12, 2008.

In support of the waiver application, the record contains, but is not limited to, counsel's brief; statements from the applicant and her spouse; documentation relating to the applicant's son's autism, his limitations and capabilities; support letters from two of the applicant's friends; employment letters for the applicant's spouse; tax returns for the applicant and her spouse; earnings statements for the applicant's spouse; documentation of medical prescriptions for the applicant; and online articles on Norotriptyline, Depakote and Imitrex. The entire record was reviewed and all relevant evidence considered in reaching 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-

¹ Counsel also asserts that the applicant's prior representative was not eligible to practice law at the time the applicant filed the Form I-601 and that the poor documentation of the applicant's waiver application is indicative of ineffective assistance of counsel. While the AAO notes counsel's assertions and the materials she submits from the State Bar of California in support of her claims, we find that our favorable action on the applicant's appeal moots a consideration of whether a reasonable probability exists that but for prior counsel's negligence the outcome of the proceeding might have been different. *See Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004).

(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. The methodology adopted by the Attorney General consists of a three-pronged approach. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). If a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage or “modified categorical” inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708. Finally, if review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence

deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709.

The Ninth Circuit Court of Appeals, within which the present case arises, has previously reserved judgment as to whether it would follow the ruling of the Attorney General in *Silva-Trevino* as part of the modified categorical inquiry. See *Marmolejo-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009). However, this question was implicitly addressed in *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009). In *Castillo-Cruz*, the Ninth Circuit addressed whether receipt of stolen property under Cal. Penal Code § 496(a) constitutes a categorical crime involving moral turpitude by applying the “realistic probability” test. 581 F.3d at 1161. The Ninth Circuit concluded that California courts have upheld convictions under Cal. Penal Code § 496(a) in cases where there was no intent to permanently deprive owners of their property, and as such, a conviction under the statute is not categorically a crime of moral turpitude. *Id.* The Court then held that the respondent’s conviction was not a crime involving moral turpitude under the modified categorical analysis because the government conceded that there was no evidence in the record establishing that his offense involved an intent to deprive the owner of possession permanently. *Id.* The court cited to its prior precedent that only the record of conviction may be reviewed as part of the modified categorical inquiry, and apparently reviewed only the record of conviction in making this determination. *Id.* (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)). The AAO interprets the holding in *Castillo-Cruz* as a refusal by the Ninth Circuit to accept the more expansive review allowed by the Attorney General, and will thus restrict any modified categorical inquiry in the present proceeding to the applicant’s record of conviction.

The record reflects that on August 15, 1988, the applicant was convicted of theft of personal property, California (Cal.) Penal Code § 484(a), and was sentenced to 15 days in jail and 24 months probation. On August 26, 1993, she was convicted of petit theft with prior conviction, Cal. Penal Code § 666, and received 24 months probation. On April 5, 2000 she was convicted of Fighting; Noise; Offensive Words, Cal. Penal Code § 415, and sentenced to 6 days in jail and 36 months probation. On April 18, 2000, the applicant was convicted of petit theft with prior conviction, Cal. Penal Code §666, and burglary, Cal. Penal Code § 459, and sentenced to 3 years probation.

At the time of the applicant’s 1988 conviction, Cal. Penal Code § 484 provided, in pertinent part:

- (a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

At the time of the applicant’s 2000 convictions for petit theft, Calif. Penal Code § 666 stated:

Every person who, having been convicted of petit theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, robbery, or a felony violation of Section 496 and having served a term therefore in any penal institution or having been

imprisoned therein as a condition of probation for that offense, is subsequently convicted of petit theft

The Ninth Circuit Court of Appeals in the previously discussed *Castillo-Cruz v. Holder* determined that theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). Accordingly, the AAO finds the applicant's 1988 theft offense to be a crime involving moral turpitude.

The applicant's 1993 and 2000 petit theft convictions under the sentence-enhancing provisions of Calif. Penal Code § 666 are also found to be crimes involving moral turpitude as the applicant necessarily committed the underlying offense of theft, as defined in Calif. Penal Code § 484(a), in order to have been convicted.

At the time of the applicant's 2000 conviction for burglary, Cal. Penal Code § 459 provided, in pertinent part:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

The Board of Immigration Appeals (BIA) has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). It has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). The Ninth Circuit Court of Appeals, under which this case arises, has similarly held that burglary with the intent to commit theft is a crime involving moral turpitude. *See Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005) ("Because the underlying crime of theft or larceny is a crime of moral turpitude, unlawfully entering a residence with intent to commit theft or larceny therein is likewise a crime involving moral turpitude."). In the present case, the offense that resulted in the applicant's April 18, 2000 conviction for burglary also resulted in her conviction for petit theft under Cal. Penal Code § 666. Therefore, the AAO finds the applicant to have committed burglary with the intent to commit petit theft, a crime involving moral turpitude, and that her conviction for burglary is, therefore, a conviction for a crime involving moral turpitude.

The AAO notes that the record also indicates that the applicant was arrested on July 5, 2000 for Assault with Deadly Weapon, Not a Firearm: Great Bodily Harm Likely, Cal. Penal Code § 245(a)(1), which at that time provided:

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

In his decision, the Field Office Director stated that the applicant had been convicted of assault on July 5, 2000. While the documentation of the applicant's criminal history that is found in the record does not support the Field Office Director's conclusion, the AAO, nevertheless, observes that the applicant in a March 10, 2008 statement confirms her conviction for assault. Accordingly, the AAO finds the applicant to have been convicted of assault under Cal. Penal Code § 245(a)(1).

In *Gonzales v. Barber*, the Ninth Circuit Court of Appeals determined that assault with a deadly weapon, the first prong of Cal. Penal Code § 25(a)(1), 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. Ciccerelli 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).

Previously, the Ninth Circuit in *Carr v. INS* had determined that “assault upon the person of another with a firearm” in violation of Cal. Penal Code § 245(a)(2) was not a crime involving moral turpitude. 86 F.3d 949, 951 (9th 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. The AAO notes that although not explicitly applying the “realistic probability” test, the Ninth Circuit in *Gonzales v. Barber* followed the realistic probability approach by considering whether a case existed in which a conviction for “assault with a deadly weapon” had been applied to conduct not involving moral turpitude. 207 F.2d at 400. The AAO will, therefore, rely on the Ninth Circuit's finding in *Barber* and finds 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 nature of the second prong 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. 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 a conviction under either prong of Cal. Penal Code § 245(a)(1) is a conviction for a crime involving moral turpitude.

Based on the record, the applicant has been convicted of multiple crimes involving moral turpitude and must seek a waiver under section 212(h) of the Act, which states:

(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—

(1)(A) [I]t is established to the satisfaction of the Attorney General that—

(i) [T]he activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it 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 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 experiences upon removal is not directly relevant to section 212(h) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's U.S. citizen spouse or child.

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 for Assault with a Deadly Weapon, Not a Firearm: Great Bodily Harm Likely indicates that she may be subject to the heightened hardship 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 did not 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.

Using the above definitional framework, the AAO finds the assault offense punished under Cal. Penal Code § 245(a) to be a violent crime for the purposes of 8 C.F.R. § 212.7(d). As the record does not include 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 a qualifying relative under section 212(h) of the Act is not sufficient. She 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.

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the BIA noted that, “the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face.” 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent’s minor children was demonstrated by evidence that they “would suffer hardship of an emotional, academic and financial nature,” and would “face complete upheaval in their lives and hardship that could conceivably ruin their lives.” *Id.* at 321 (internal quotations omitted). The BIA viewed the evidence of hardship in the respondent’s case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The BIA noted:

While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former “extreme hardship” standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher “exceptional and extremely unusual hardship” standard.

23 I&N Dec. at 324.

However, the BIA in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that “the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief.” 23 I&N Dec. 467, 470 (BIA 2002). The BIA found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The BIA noted that these factors included her heavy financial and familial burden, lack of support from her children’s father, her U.S. citizen children’s unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The BIA stated, “We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met.” *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. See *Gonzalez Recinas*, 23 I&N Dec. at 469 (“While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship.”). The AAO notes that exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside the United States based on the denial of the applicant’s waiver request. Should the applicant in the present matter demonstrate exceptional and extremely unusual hardship to a qualifying relative, she will establish waiver eligibility in connection with all of her criminal convictions not just that for assault.

The record establishes that the applicant’s 16-year-old son is autistic and has been receiving special education services since 1997. A January 30, 2007 Individual Program Plan (IPP), prepared by the Frank D. Lanterman Regional Center that has provided services to the applicant’s son since 1998, reports that he requires constant supervision and monitoring and that he needs assistance with such basic activities as tying his shoes, bathing and using the toilet. It also indicates that he has sensory issues, including the flicking of his fingers as a self-stimulating behavior and a sensitivity to noise, and that he has tantrums two to three times a week. The IPP also reports that the applicant is involved in the care and well-being of her son and that he feels safe in her care and is dependent on her. The IPP further indicates that the applicant’s son has chronic asthma and allergies for which he takes prescribed medications, information that is also documented by medical reports in the record.

A March 7, 2008 letter from [REDACTED], a Service Coordinator [REDACTED], states that the Center has treated the applicant’s son for Autism Disorder with associated language delay, Attention Deficit Hyperactivity Disorder and a mild range of mental retardation since August 24, 1998. [REDACTED] reports that the applicant’s son has a history of being “hyperactive, impulsive and wandering off” and requires close supervision at all times. She states that the applicant and her spouse are his only family and that if he is separated from the applicant, there will be “dire consequences.” Such a separation, she asserts “will have a huge impact on his emotional state as well as his developmental progress and may lead [to] inappropriate behaviors.”

In a second March 7, 2008 letter, [REDACTED] who has had the applicant’s son in his classroom at [REDACTED] for one and one-half years, states that the applicant’s son’s autism “impacts his ability to acquire new information, develop social skills, and transition from one environment to another.” He states that the applicant’s son, like any autistic child, thrives in a “consistent, secure and reliable environment both at home and . . . at school.” [REDACTED] states that he and the applicant work “as partners” to provide the support necessary to teach the applicant’s son the social and vocational skills he needs. He states that “the structure, routine and traditions that have been established at home have been crucial to the gains that have been made by the applicant’s son over the past 20 months.

The record also contains a series of reports on the applicant’s son’s progress under the Individual Educational Program (IEP) established to help him academically and behaviorally, the most recent of which was prepared in 2007. The applicant’s son’s 2007 IEP indicates that he, at 12 years of age, is reading at the 3rd to 4th grade level but continues to have difficulty comprehending the written

word. The report also indicates that the applicant's son struggles with comprehending what he hears, has trouble adapting to change and has difficulty in engaging socially and establishing peer relationships.

In a March 11, 2008 statement submitted in support of the appeal, the applicant's spouse states that his son is a special needs child and that it very hard for him to tie his shoes or brush his teeth by himself. He asserts that his son's doctors have told him that his son will always need to live with him and the applicant.

Based on the record before us, the AAO finds the record to establish that the applicant's son would suffer exceptional and extremely unusual hardship whether he relocates to Honduras with the applicant or remains in the United States as his autism makes it extremely difficult for him to adapt to change. In either scenario, the AAO concludes, the applicant's son's life would undergo significant alteration.

Relocation to Honduras would place the applicant's son in unfamiliar home, cultural and educational environments, undermining the security and consistency that the record indicates is required for an autistic child's well-being. Further, while the record does not include evidence that establishes the applicant's son would be unable to find assistance to help him deal with his autism in Honduras, relocation would remove him from the care and guidance of the healthcare and educational professionals who have nearly 15 years of experience in meeting his physical, mental and educational needs, and disrupt the programs that have resulted in his academic and social progress. The AAO also notes that Honduras continues to be designated for Temporary Protected Status (TPS), which allows citizens of that nation to defer departure from the United States due to the infrastructure damage suffered during Hurricane Mitch. When conditions in Honduras and the emotional and educational impacts of relocation on the applicant's autistic son are considered in the aggregate, the record demonstrates that he would suffer exceptional and extremely unusual hardship if he moved to Honduras with the applicant.

We also conclude that the applicant's son would suffer exceptional and extremely unusual hardship if the applicant's waiver application is denied and he remains in the United States without her. The record establishes that the applicant is actively involved in her son's education and medical care, that he is dependent on her for basic daily activities and emotional support, and that her removal would result in a significant and potentially devastating disruption in his daily life. Although we note that the applicant's spouse could potentially provide some of the support now provided by the applicant, we, nevertheless, find the significant negative impact of the applicant's removal on her son's ability to function physically and emotionally to establish that he would experience exceptional and extremely unusual hardship if she is removed and he remains in the United States without her.

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

The adverse factors in the present case are the applicant's convictions for theft, burglary and assault, as well as her 1988 unlawful entry to the United States, and her periods of unlawful residence and employment in the United States. The mitigating factors in the present case are the applicant's U.S. citizen spouse and son; the exceptional and extremely unusual hardship to her son if the waiver application is denied; the absence of any arrest or conviction since 2000; her payment of taxes; her lawful employment beginning in 1996; and the extent to which she has devoted herself to improving her son's life. The AAO also notes the applicant's claims that she was sexually abused as a child, that her criminal offenses were, in part, the result of that abuse and that she has been in therapy since 2000. While no documentary evidence in the record specifically supports the applicant's assertions, the applicant's son's IPP does report that the applicant is under psychiatric treatment for paranoia and depression at Amanecer Community Counseling Services where she receives individual therapy. Copies of drug prescriptions in the record also indicate that the applicant is taking medication for depression and manic behavior, as well as migraine headaches. We further note that the record contains a 1999 booking report completed at the time of the applicant's arrest on theft and burglary charges that reflects she was taking Prozac for profound depression.

The AAO finds that the crimes committed by the applicant, are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted. Therefore, the applicant has established her eligibility for a section 212(h) waiver.

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. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.