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



H2

Date: FEB 21 2012 Office: GUATEMALA CITY

FILE: [REDACTED]

IN RE: Applicant: [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:

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,


for Perry Rhew

Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Guatemala who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside with his U.S. citizen wife and children.

The field office director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), finding that the applicant failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, that he has been rehabilitated since he committed his criminal acts, or that he warrants a favorable exercise of discretion. *Decision of the Field Office Director*, dated July 15, 2009.

On appeal, the applicant asserts that he has two U.S. citizen children in the United States, including one with autism, and one he has never met. *Statement from the Applicant with Form I-290B*, dated August 10, 2009. He contends that he has rehabilitated himself. *Id.*

The record contains, but is not limited to: statements from the applicant and his wife; documentation regarding the applicant's academic activities and professional certificates; and documentation regarding the applicant's criminal activities. The entire record was reviewed 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).

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.

The record shows that the applicant was arrested on August 18, 1988 and charged with inflicting corporal injury on a spouse under California Penal Code section 273.5, for which he was permitted to participate in a diversion program. On December 11, 1988, the applicant was again arrested and charged with inflicting corporal injury on a spouse under California Penal Code section 273.5, for which he pled guilty. For his conduct on July 19, 1990, the applicant was arrested and charged with inflicting corporal injury on a spouse under California Penal Code section 273.5(a) and threatening crime with the intent to terrorize under California Penal Code section 422. He pled guilty to both charges and was sentenced to 60 months of probation and 365 days incarceration.

At the time of the applicant’s convictions, California Penal Code § 273.5 provided, in pertinent part:

- (a) Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person of the opposite sex with whom he or she is cohabiting, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for 2, 3 or 4 years, or in the county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both.
- (b) Holding oneself out to be the husband or wife of the person with whom one is cohabiting is not necessary to constitute cohabitation as the term is used in this section.
- (c) As used in this section, “traumatic condition” means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force.

In *Morales-Garcia v. Holder*, 567 F.3d 1058, 1063-67 (9th Cir. 2009), the Ninth Circuit Court of Appeals found that all offenses under California Penal Code § 273.5 are not categorically crimes involving moral turpitude. Specifically, the Ninth Circuit found that California Penal Code § 273.5 reaches acts against individuals with a broad range of relationships to the perpetrator, some of which “are more akin to ‘strangers or acquaintances, which . . . [does] not necessarily [trigger] a crime involving moral turpitude.’” *Morales-Garcia*, 567 F.3d at 1063-67 (quoting *Grageda v. INS*, 12 F.3d 919, 922 (9th Cir. 1993)). Thus, the Ninth Circuit determined that a modified categorical inquiry is required to determine if an offense under California Penal Code § 273.5 constitutes a crime involving moral turpitude.

The records associated with the applicant’s offenses show that all of his convictions under California Penal Code § 273.5 were for incidents of violence against the same individual, who is and was the mother of two of his children. Though they were not married, in *In Re Tran*, 21 I&N Dec. 291, 294 (BIA 1996), the BIA determined that an offense under California Penal Code § 273.5 against the mother of one’s child involves moral turpitude. The BIA stated:

A person who . . . is the parent of the offender's child maintains a relationship of a familial nature with the perpetrator of the harm. This relationship is likely to be one of trust and possibly dependency, similar to that of a spousal relationship. Violence between the parties of such a relationship is different from that between strangers or acquaintances, which may or may not involve moral turpitude, depending on the nature of the offense as delineated by statute. In our opinion, infliction of bodily harm upon a person with whom one has such a familial relationship is an act of depravity which is contrary to accepted moral standards. When such an act is committed willfully, it is an offense that involves moral turpitude.

In Re Tran, 21 I&N Dec. 291, 294 (BIA 1996)(citations omitted). The Ninth Circuit affirmed the BIA's reasoning. *Morales-Garcia*, 567 F.3d at 1065. Accordingly, each of the applicant's offenses under California Penal Code § 273.5 constitute crimes involving moral turpitude.

At the time of the applicant's conviction for threatening crime with the intent to terrorize, California Penal Code § 422 provided, in pertinent part:

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

The AAO is not aware of a federal court or administrative decision that addresses whether offenses under California Penal Code § 422 constitute crimes involving moral turpitude. In *Matter of Ajami*, the BIA concluded that an aggravated stalking offense under Mich. Comp. Laws Ann. § 750.411i(1)(e) constitutes a crime involving moral turpitude. 22 I&N Dec. 949, 952 (BIA 1999). The BIA found it determinative that “[a] violator of the statute must act willfully, must embark on a course of conduct, as opposed to a single act, and must cause another to feel great fear.” *Id.* The BIA concluded that “the intentional transmission of threats is evidence of a vicious motive or a corrupt mind,” and a crime encompassing such conduct involves moral turpitude. *Id.*

California Penal Code § 422 does not require a course of conduct or multiple threats. However, the AAO finds the decision of the Eighth Circuit Court of Appeals in *Chanmouny v. Ashcroft* 376 F.3d 810 (8th Cir. 2004), instructive. The Eighth Circuit concluded that an offense for terroristic threats under Minnesota Statutes Annotated § 609.713 is a crime involving moral turpitude if the criminal act falls within the first of two clauses, that read: “Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another.” *Chanmouny v. Ashcroft*, 376 F.3d at 813-15. The Eighth Circuit noted that in *Matter of Ajami* the BIA found it significant that an

aggravated stalking offense under Mich. Comp. Laws Ann. § 750.411i(1)(e) requires a course of conduct. *Id.* at 815. The Eighth Circuit stated:

[A]lthough aggravated stalking required the defendant to engage in a “course of conduct, as opposed to a single act,” we do not see a material distinction between the two for purposes of determining whether a defendant acted with vicious motive. We believe that the crime at issue in this case - threatening a crime of violence against another person with the purpose of causing extreme fear - likewise falls within the category of offenses requiring a vicious motive or evil intent.

Id. at 815 (citation omitted).

California Penal Code § 422 not only requires the intentional transmission of threats, but also contemplates a degree of threat that causes another person to feel sustained fear. The reasoning in *Chanmouny v. Ashcroft* supports that an offense under California Penal Code § 422 requires the perpetrator to act with a vicious motive or corrupt mind, such that it constitutes a crime involving moral turpitude.

The AAO has also examined whether an offense for threatening crime with the intent to terrorize under California Penal Code § 422 is analogous to simple assault, which has been found to not be a crime involving moral turpitude. Again, the reasoning of the Eighth Circuit in *Chanmouny v. Ashcroft* is instructive. The Eighth Circuit stated:

Th[e] requisite intent to terrorize [in Minnesota Statutes Annotated § 609.713] also serves to distinguish [the petitioner’s] offense from simple assault, which the BIA and various courts have declined to classify as a crime of moral turpitude. Simple assault typically is a general intent crime, and it is thus different in character from those offenses that involve “a vicious motive, corrupt mind, or evil intent.”

376 F.3d 810 (citing *Matter of O-*, 3 I. & N. Dec. 193, 194-95 (BIA 1948)).

The elements of an offense under California Penal Code § 422 and the clause of Minnesota Statutes Annotated § 609.713 under consideration in *Chanmouny v. Ashcroft* are similar. California Penal Code § 422 requires the “specific intent” that a statement made is taken as a threat that causes the victim reasonably to be in sustained fear for his or her own safety or for his or her immediate family’s safety. Offenses under California Penal Code § 422 are not general intent simple assault crimes.

Based on the foregoing, the AAO finds ample support that the applicant’s conviction for threatening crime with the intent to terrorize under California Penal Code § 422 constitutes a crime involving moral turpitude. In that the applicant’s convictions under California Penal Code sections 273.5(a) and 422 involve moral turpitude, he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

As noted by the field office director, the applicant is not eligible for the exception to inadmissibility provided in section 212(a)(2)(A)(ii)(II) due to the fact that he has been convicted of multiple crimes involving moral turpitude and he has been sentenced to over six months of incarceration. The

applicant does not contest his inadmissibility on appeal, and he requires a waiver under section 212(h) of the Act.

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Since the criminal convictions for which the applicant was found inadmissible occurred more than 15 years ago, he is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. However, even if the applicant establishes that he meets the requirements of section 212(h)(1)(A), we cannot favorably exercise discretion in the applicant's case except in an extraordinary circumstance. *See* 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 dependent 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). Black’s Law Dictionary, Seventh Edition (1999), defines violent as “of, relating to, or characterized by strong physical force” and dangerous as “likely to cause serious bodily harm.” 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.

Because the applicant’s crime of “Inflicting Corporal Injury on a Spouse” qualifies as a violent and dangerous crime within the meaning of 8 C.F.R. § 212.7(d), the heightened discretionary standards found in that regulation are applicable in this case. Accordingly, the applicant must show that “extraordinary circumstances” warrant approval of the waiver. 8 C.F.R. § 212.7(d). We note that the discretionary standard at 8 C.F.R. § 212.7(d) was not previously addressed in these proceedings. However, as the applicant has had the opportunity to submit evidence of any and all hardship to meet the “extreme hardship” standard, we can determine without additional submission whether the hardship demonstrated also meets the higher “exceptional and extremely unusual hardship” standard. Furthermore, an application that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office or service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.*

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 of the United States based on the denial of the applicant’s waiver request.

In a statement submitted with the Form I-290B appeal, the applicant asserts that he has attempted to pay for his past mistakes and conduct himself well. He explains that he wishes to return to the United States for the welfare of his children and immediate family. He provided that he has his children from his current marriage with him in Guatemala, but that he has two children in the United States. He asserts that one of his children in the United States is a boy with autism. He provided that the other is a girl who he has never met, but learned about several months before departing the United States. In a letter dated September 1, 2008, the applicant provided that he can give his family a better quality of life if he can return to the United States.

In a letter dated September 2, 2008, the applicant’s wife asserted that it will be extremely difficult for her without the applicant in the United States. She explained that she and the applicant had been married for over 11 years, and that being without him will be emotionally difficult for her and their two U.S. citizen children. She added that the applicant is a devoted father and husband, and that they maintain a close relationship.

Upon review, the applicant has not shown that his wife or children will face exceptional and extremely unusual hardship should he continue to reside outside the United States. The applicant has submitted little evidence or explanation to describe the challenges his family members are facing. He indicates that his wife and their children are currently residing with him in Guatemala, yet the record contains no indication that they are experiencing hardship. The applicant’s general statement that his family can have a better way of life in the United States is not sufficient to show that they are experiencing significant challenges in Guatemala, such that they will endure exceptional and extremely unusual hardship should they remain there. The applicant’s wife’s assertion that she was

experiencing hardship in the United States without the applicant appears to no longer apply to their present circumstances, due to the fact that she now resides with the applicant in Guatemala. The record lacks sufficient evidence or explanation to show that the applicant's wife would face difficulty should she return to the United States without the applicant. In the absence of clear assertions regarding hardship the applicant's family members would face, the AAO may not speculate regarding their challenges. In proceedings regarding a 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 asserts that he has two additional children in the United States, one of who has autism. However, the applicant has not submitted evidence of these children, such as birth certificates. He has not provided any medical documentation to support that one of these children has autism and related needs. Further, the applicant has not asserted or shown that he has assisted these children in the past such that his absence creates a change in circumstances for them. The applicant indicates that he has not met one of the children, which suggests that he provides no emotional support for her. The applicant has not established that these children have unmet needs that he would be willing and able to meet should he reside in the United States.

The AAO has examined the documentation of the applicant's academic and professional training submitted with the appeal. However, the applicant has not shown that he has used this training to support his family, and he has not established a link between his professional certification and difficulty his family members may endure. The AAO recognizes that the applicant submits evidence of his pursuit of education and professional certification, in part, as evidence that he has made efforts to reform himself since his criminal acts. The AAO finds these efforts to reflect positively on the applicant. However, without showing that his family members will endure exceptional and extremely unusual hardship, the AAO is unable to favorably exercise discretion in this matter.

In conclusion, the record does not reflect that the applicant's wife or children would suffer exceptional and extremely unusual hardship upon separation from the applicant or upon residing in Guatemala. The AAO therefore finds that the applicant has failed to establish that he warrants a favorable exercise of discretion for a waiver of inadmissibility under section 212(h) of the Act.

As noted above, the applicant bears the burden of establishing that the application merits approval in proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.