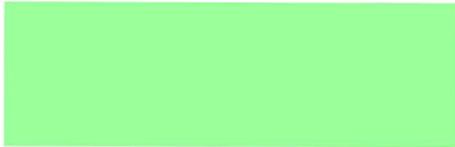


(b)(6)



U.S. Citizenship  
and Immigration  
Services



Date: **FEB 26 2013**

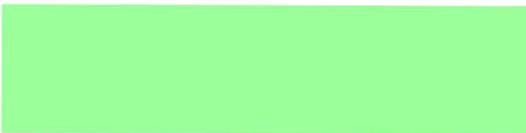
Office: SACRAMENTO, CA

FILE: 

IN RE: Applicant: 

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Michael Shumway".

f/ Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, San Bernardino, California, 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. The director stated that the applicant was inadmissible under 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 committing crimes involving moral turpitude. The director indicated that the applicant sought a waiver of inadmissibility pursuant to 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.

On appeal, counsel asserts that the director did not establish that the applicant was convicted of burglary and had not indicated earlier this ground of inadmissibility. Counsel argues that there are no records of the court proceedings for the burglary charge and the disposition of the charge. Counsel argues that the burglary was alleged to have occurred in 1981, which was when the applicant was 17 or 18 years old, and pursuant to section 212(a)(2)(A)(ii) of the Act, a conviction while a juvenile is not a ground of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Counsel declares that the Clerk of the Superior Court has no records of the burglary charge.

Counsel asserts that the applicant's conviction for assault with a deadly weapon (misdemeanor) is not a morally turpitudinous crime. Counsel contends that the record of conviction reflects that the applicant entered a plea of *nolo contendere* to assault with a deadly weapon, and the Ninth Circuit Court of Appeals held that a plea of *nolo contendere* is not an admission of guilt or of the conduct allegedly engaged in, citing *U.S. v. Vidal*, 504 F.3d 1072, 1076 (9th Cir. 2007), and *United States v. Snellenberger*, 493 F.3d 1015 (9th Cir. 2007). Counsel declares that for a finding of moral turpitude conduct must have been morally base, vile, or reprehensive, which is not established by a *nolo contendere* plea. Counsel argues that the available document of the crime does not describe the applicant's conduct, and that the Ninth Circuit and Board of Immigration Appeals have pointed out that not all assault with deadly weapon crimes involve moral turpitude.

Counsel discusses the term "moral turpitude" as applied in Board of Immigration Appeal decisions and the Immigration Judge's Bench Book. See *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988), *Matter of P*, 6 I&N Dec. 795 (BIA 1955), *Matter of E*, 2 I&N Dec. 134 (BIA 1944). Counsel argues that there are two approaches to determine whether a crime involves moral turpitude: the categorical approach and the modified categorical approach. Counsel, citing the Immigration Judge's Bench Book, asserts that where the statute includes offenses some of which do not involve moral turpitude, the record of conviction (the indictment, plea, verdict, and sentence) must be consulted to determine the offense committed.

Counsel states that California's assault statute described two methods of assault: (1) "by use of a deadly weapon or instrument" or (2) "by means of force likely to produce great bodily injury." Counsel argues that the nature of the weapon or instrument in the offense must be determined for resolving the moral turpitude question. Counsel discussed the modified categorical approach employed in *Taylor v. U.S.*, 495 U.S. 575 (1990). Counsel contends that because the Board in *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988), held that misdemeanor assault with a deadly

weapon was not a particularly serious crime, misdemeanor assault with a deadly weapon is not categorically a crime involving moral turpitude. Citing *In re Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996), counsel states that the Board recognized that “an assessment of both the state of mind and the level of harm” of assault must be made for addressing the moral turpitude question. Counsel asserts that in *Singh Uppal v. Holder*, 605, F.3d 712 (9<sup>th</sup> Cir. 2010), the Ninth Circuit noted that the Board must first analyze the statute of conviction to determine the elements required for conviction and whether they involved moral turpitude. Citing *Nunez v. Holder*, 594 F.3d 1124, 1121 (9<sup>th</sup> Cir. 2010), counsel contends that “to rise to the level of moral turpitude, an assault crime must involve a particular type of aggravating factor, one that says something about the turpitude or blameworthiness inherent in the action.” Counsel states that an aggravating factor might be the special relationship between the defendant and the victim, the level of harm, or having the specific intent to inflict a serious injury. Counsel argues that the Ninth Circuit held that “an assault statute not involving a specific intent to injure or a special trust relationship and not requiring that the assault cause death or even serious injury cannot qualify as a categorical crime involving moral turpitude.” *Id.*

Counsel contends that in *Matter of Baker*, 15 I&N Dec. 50 (BIA 1974), the Board found assault involved moral turpitude where the victim was seriously injured from being struck with a bottle. Counsel states that *Matter of Baker* was overruled by *Matter of Perez Contreras*, 20 I&N Dec. 615 (BIA 1992), where the Board held that an offender must engage in intentional conduct designed to produce injury, or consciously disregard whether his actions pose a substantial or unjustifiable risk to the victim. Counsel asserts that in *In re Solon*, 24 I&N Dec. 239 (BIA 2007), the Board examined whether assault constituted a crime involving moral turpitude and noted that “intent is a crucial element in determining whether a crime involves moral turpitude.” Counsel states that the Board observed that assault with a deadly weapon in California does not require a battery, but the offender “must have the ability to inflict injury on another and make an attempt to do so with the intent that another person be injured.” 24 I&N Dec. 239 at 619-620. Counsel asserts that under California law “intent to commit a violent injury is a necessary part of an assault,” citing *People v. Alexander*, 106 P.2d 450 (Cal. App. 3d Dist. 1940). Counsel states that assault “is a specific intent crime and there must be an intent to injure the victim,” citing *People v. Fanning*, 71 Cal. Rptr. 641, 644 (Cal. App. 2d Dist. 1968). Counsel argues that the aforementioned cases establish that assault with a deadly weapon is not categorically a crime involving moral turpitude, so the modified categorical approach must be employed to determine whether the applicant’s offense involves moral turpitude.

We will first address whether the applicant was convicted of crimes involving moral turpitude that render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

[A] formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

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.)

The criminal docket reflects that on May 10, 1988, the applicant plead *nolo contendere* to assault with a deadly weapon or instrument in violation of Cal. Penal Code § 245(a)(1), and the judge imposed a suspended sentence and placed the applicant on formal probation for 18 months.

Cal. Penal Code § 245(a)(1) 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.

Cal. Penal Code Ann. § 240 defined assault as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Assault requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another. *People v. Williams*, 26 Cal.4th 779, 790, 111 Cal.Rptr.2d 114, 29 P.3d 197 (2001) (assault with a firearm under Cal Penal Code § 245(a)(2)).

Counsel asserts that the applicant plead *nolo contendere* to assault with a deadly weapon and in *Vidal* and *Snellenberger*, a plea of *nolo contendere* is neither an admission of guilt or of alleged conduct. However, *Vidal* and *Snellenberger* are not relevant to our moral turpitude inquiry because they address the issue of pleas in the context of sentence enhancement. For example, in *Snellenberger* the Court analyzed whether a minute order and charging document established a prior crime of violence for purposes of sentence enhancement. Regardless, the record does not show that adjudication was withheld. The applicant's conviction is a conviction for immigration purposes based on a formal judgment by the court. Even were that not the case, section 101(a)(48)(A) of the Act also defines the term "conviction" to include *nolo contendere* pleas followed by "some form of punishment, penalty, or restraint on the alien's liberty." Section § 1101(a)(48)(B), in turn, provides that "[a]ny reference to a term of imprisonment or a sentence ... is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." From the record the applicant was convicted within the meaning of section 1101(a)(48)(A) of the Act.

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 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. As stated by counsel, 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. As 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 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 observed 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 stated 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*, 16 Cal.2d 449, 106 P.2d 907, 131 A.L.R. 226. However, there 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, that “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*. 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 probably approach by viewing whether a case existed in which a conviction for "assault with a deadly weapon" was applied to conduct not involving moral turpitude. 207 F.2d at 400. We 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.).

The cases cited by counsel in support of the contention that assault with a deadly weapon is not a crime involving moral turpitude do not compel such a determination in this case. In *In Re Fualaau*,

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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."

the Board affirmed that “assault with a deadly weapon has been held to be a crime involving moral turpitude. 21 I&N Dec. 475 at 477. The Board in *Matter of Juarez* did not address whether misdemeanor assault with a deadly weapon was a crime involving moral turpitude in the context of inadmissibility and is therefore not relevant in this determination. As stated earlier, the Ninth Circuit in *Gonzales v. Barber* determined that assault with a deadly weapon under the California Penal Code is categorically a crime involving moral turpitude. 207 F.2d 398, 400.

In sum, AAO finds that the applicant’s conviction under Cal. Penal Code § 245(a)(1) is categorically a crime involving moral turpitude. The applicant’s conviction for “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” renders him inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act as an alien having been convicted of a crime involving moral turpitude.

Counsel asserts that there are no criminal records of the burglary proceedings, the director failed to establish that the applicant was convicted of burglary, and had not informed the applicant that he would be inadmissible for having committed burglary. These assertions are not persuasive. The record contains a letter dated December 15, 2010, addressed to the applicant from the director. The letter stated that U.S. Citizenship and Immigration Service (USCIS) records reflected that the applicant was arrested and convicted of burglary. The record also contains a letter from the manager of the Record Access and Security Program of the Bureau of Criminal Information and Analysis for the State of California Department of Justice dated September 28, 2010 and addressed to the applicant. The manager provided an attached printout of the applicant’s criminal history in California, which reflected that on January 15, 1982 and January 29, 1982, the applicant was arrested for burglary. On March 31, 1982, the applicant was convicted of two counts of second-degree burglary in violation of Cal. Penal Code § 459 at the County of Los Angeles, Pomona Courthouse (case numbers A528167 and A528167). For each conviction the judge sentenced the applicant to serve 36 months’ probation and 270 days in jail.

Counsel argues that the applicant was 17 or 18 years old at the time of the burglary and pursuant to section 212(a)(2)(A)(ii) of the Act, a conviction while a juvenile is not a ground of inadmissibility under the Act. Section 212(a)(2)(A)(ii) of the Act states that an alien is not inadmissible for the crimes committed when the alien was under 18 years of age. The record reflects that the applicant was born on December 11, 1963 and arrested for burglary on January 15, 1982 and January 29, 1982. The applicant, therefore, was 18 years old at the time of his arrest. As the applicant has not provided any evidence establishing he was not 18 years old when he committed the burglaries, he is not eligible for the exception to inadmissibility.

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 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). For example, the Board 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 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 (9<sup>th</sup> 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.”).

Thus, we will review the applicant’s record of conviction from which we may determine whether the applicant’s intent in entering a structure was with the intent to commit a crime involving moral turpitude. The applicant has not provided his entire record of conviction, which might describe the basis for the conviction. Additionally, the applicant has not established in accordance with the requirements of 8 C.F.R. § 103.2(b)(2) that the documents comprising the record of conviction are unavailable. In proceedings 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. The applicant has the burden of demonstrating by means of the record of conviction that his crime did not involve moral turpitude. The record, as such, does not demonstrate that the applicant’s burglary offense is not morally turpitudinous. Accordingly, based on the record, we cannot find that the burglary conviction is not for a crime involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Even if we determined that the applicant’s burglary offenses were not crimes involving moral turpitude, his assault with a deadly weapon conviction renders him inadmissible to the United States.

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

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in [her] discretion, waive the application of subparagraphs (A)(i)(I)...of subsection (a)(2) if—

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

(i)...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,

(b)(6)

(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 established to the satisfaction of the [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien...

(2) the [Secretary], in [her] discretion, and pursuant to such terms, conditions and procedures as [she] may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Assault with a deadly weapon is a violent crime which may subject the applicant to the heightened discretion standard of 8 C.F.R. § 212.7(d). The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. §

16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms “violent or dangerous crimes” and “crime of violence” are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not 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). 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 assault with a deadly weapon is a violent crime. In the instant case, there are no national security or foreign policy considerations that would warrant a favorable exercise of discretion. We will therefore consider whether denial of admission would result in exceptional and extremely unusual hardship.

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.*

We note that 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 the precedent decision issued the following year, *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 Board 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.

In regards to *Rivera-Peraza*, the Ninth Circuit agreed with the Board of Immigration Appeals (Board) that the heightened standard set forth in 8 C.F.R. § 1212.7(d) encompasses hardship to the alien and to his or her relatives. 684 F.3d 906, 910-911. Accordingly, on appeal we will consider all relevant hardship to the applicant himself, as well as to his relatives.

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.”).

Counsel states that the applicant is 48 years old and has lived in the United States since he was 11 years old and is the father of five children who were born in the United States. Counsel declares that the applicant is married to a Mexican citizen spouse, who is the mother of their two youngest children who are 11 years old and three years old. Counsel states that the applicant’s U.S. citizen mother and his 20-year-old daughter live with them, and the applicant’s wife does not work but manages the household and children. Counsel indicates that the applicant has a strong relationship with his oldest adult children, who live in California. Counsel declares that the applicant has a sister living in Ontario, California, and an aunt in Moreno Valley, which is where the applicant lives. Counsel states that the applicant has had little contact with his father, who lives in Mexico. Counsel conveys that the applicant has been employed in the compressed air industry for ten years and works as a field technician earning \$65,000 per year, which supports his six family members. Counsel states that the applicant and his wife are buying a house, and the applicant’s wife does not work outside the home, is not fluent in English, and has no significant employment skills. Counsel argues that if the applicant leaves the United States, the applicant’s wife would not be able to obtain any job that would enable her to earn enough to maintain their home.

Counsel states that even if the applicant is able to find a job in Mexico, he is 48 years old and not able to do serious physical labor and will have difficulty finding a job in which he is an expert, and even if he did, the pay for comparable work in Mexico is much less than in the United States so the applicant would not be able to send money to his family. Counsel indicates that the applicant’s 11-year-old daughter would have some difficulty with the Spanish language in Mexico. Counsel argues that the applicant’s 3-year-old son would not be fluent in English and would have a severe cultural, economic, and social disadvantage if he returned to live in the United States after growing up in Mexico. Counsel contends that the educational system, and health and water quality standards are not equal to those in the United States. Counsel asserts that there is a war in Mexico between the government and criminals, making it dangerous throughout Mexico and this would potentially create a hardship to the applicant’s family.

Counsel conveys that the applicant’s mother was diagnosed with breast cancer in 2007, and her cancer spread to her bones. Counsel states that she receives medical treatment and is unable to fully care for herself and must depend on the applicant and his wife for essential services such as doctor visits, preparing meals, obtaining medicine, and providing a home and encouragement. Counsel states that the applicant’s mother does not have the financial means for a full-time caregiver. Counsel contends that if the applicant leaves the United States, his wife will have to work, which will deprive the applicant’s mother of her caregiver. Counsel argues that the applicant’s mother requires a stress-free environment.

(b)(6)

Counsel contends that the applicant's mother and two U.S. citizen children will experience extreme hardship if the waiver is denied and that the director failed to consider their hardship and explain why it did not meet the standard of extreme hardship.

The asserted hardship factors in remaining in the United States while the applicant lives in Mexico are loss of financial support and separation from family members. Income tax records for 2010 support the claim that the applicant is the primary financial provider for his wife and three young children, as they show his wife earned \$5,270 providing child care services, while the applicant had \$64,891 in wages. The record contains a mortgage statement reflecting a monthly payment of \$1,773.75. Birth certificates show the applicant has U.S. citizen children who were born on April 23, 2000, April 20, 2006, and December 29, 2007. The assertion that the applicant's mother receives treatment for breast cancer, which has metastasized to her bones, is consistent with the letter from Dr. [REDACTED] dated February 8, 2011. The invoice from [REDACTED] dated November 30, 2010 shows the applicant's mother has insurance, and has the same residential address as her son. When the asserted hardship factors are considered together, the loss of emotional support and of the primary source of income needed for a household of three young children, we find that the applicant's spouse and young children will experience exceptional and extremely unusual hardship in remaining in the United States while the applicant lives in Mexico.

The conditions in the country to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries must be assessed in the exceptional and extremely unusual determination. The claimed hardships are not being able to obtain a job in Mexico that will pay a comparable income to what the applicant earns in the United States, risk to personal safety due to crime, having to endure a lower educational standard and inferior health and water quality standards, difficulty transitioning to the Spanish language, and lack of preparation to return to the United States. The applicant claims that his income will be lower in Mexico, they will have inferior health and water standards, and the quality of his children's education will decline, but has not provided any information about the economy, educational system, and living conditions in Mexico in agreement with that claim.. The applicant contends that it would be dangerous to live in Mexico, but has not provided any documentation consistent with that contention. Accordingly, when the asserted hardships are considered together, they fail to demonstrate that the applicant's spouse and young children will experience exceptional and extremely unusual hardship in joining the applicant to live in Mexico.

In sum, the applicant has established "exceptional and extremely unusual hardship" if his wife and children remain in the United States without him, but has not demonstrated "exceptional and extremely unusual hardship" if they joined him to live in Mexico. We therefore find that there are not extraordinary circumstances warranting a favorable exercise of discretion in this case.

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

**ORDER:** The appeal is dismissed.