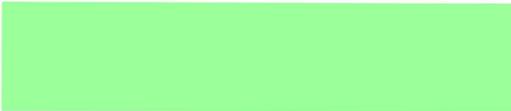




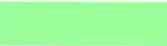
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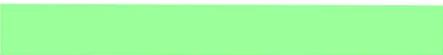
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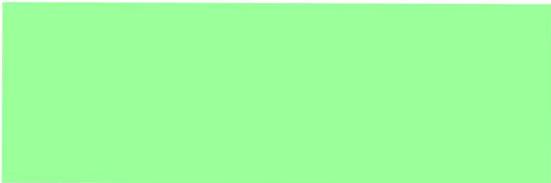
Office: NAIROBI

FILE: 

IN RE: Applicant: 

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:

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 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 with the field office or service center that originally decided your case by filing a Form I-190B, 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 a 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a citizen and national of Kenya who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i), for having been convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen. He seeks a waiver of inadmissibility pursuant to section 212(h) the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse and U.S. citizen children.

In a decision dated November 10, 2011, the field office director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly.

On appeal, counsel for the applicant contends that the field office director erred in denying the applicant's waiver application. Counsel asserts that the evidence outlining medical, financial, psychological, and emotional difficulties demonstrates extreme hardship to the applicant's qualifying relatives. Counsel submitted additional evidence on appeal to support this assertion, including evidence of the applicant's wife's financial obligations and that she is being advised to file for bankruptcy.

The record includes, but is not limited to: counsel's brief; the applicant's declaration; a declaration by the applicant's wife; psychological evaluations; medical reports and documentation; employer reference letters; divorce decrees; a marriage certificate; birth certificates; country conditions documentation; debt referral letters; debt collection letters; loan documents evidencing the applicant's wife's financial obligations; bankruptcy counseling documents; pre-school reports; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible

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

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

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

(Citations omitted.)

In *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 reflects that on [REDACTED] the applicant was convicted in the Minnesota District Court for Hennepin County of criminal sexual conduct in the fifth degree, a gross misdemeanor in

violation of Minnesota Statutes § 609.3451, subdivision 1(1). The applicant was sentenced to 364 days in jail, stayed, and two years of probation. The field office director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude.

At the time of the applicant's conviction, Minnesota Statute § 609.3451.1(1) provided that: "[a] person is guilty of criminal sexual conduct in the fifth degree if the person engages in nonconsensual sexual contact." For purposes of this section, Minnesota Statutes § 609.3451.1 defines "sexual contact" to mean "the intentional touching by the actor of the complainant's intimate parts; or the touching by the complainant of the actor's, the complainant's, or another's intimate parts effected by a person in a position of authority, or by coercion, or by inducement if the complainant is under 13 years of age or mentally impaired; or the touching by another of the complainant's intimate parts effected by coercion or by a person in a position of authority; or in any of the cases above, the touching of the clothing covering the immediate area of the intimate parts." "Intimate parts" under Minnesota Statutes § 609.341.5 is defined to mean "the primary genital area, groin, inner thigh, buttocks, or breast of a human being."

The AAO notes that in *In Re Welfare of J.J.R.*, 648 N.W.2d 739, 742 (Minn. App. 2002), the Court indicates that in the fifth degree sexual conduct statute, "sexual contact" involves various types of intimate touching when done with sexual or aggressive intent." *Id.* The Court further states that the essential elements of the offense are: "intentional touching of an intimate area, lack of consent of the victim, the touching was done with sexual or aggressive intent, and date and place of the act." *Id.* From a review of the elements of the offense, it can be concluded that the statute is intended to emphasize the sexual, involuntary and offensive nature of the touching.

The AAO is unaware of any published federal cases addressing whether the crime of "criminal sexual conduct, fifth degree" under Minnesota law is a crime of moral turpitude. However, in *Matter of S-*, 5 I&N Dec. 686 (BIA 1954), the Board held that the crime of indecent assault on a female under section 292 (a) of the Canadian Criminal Code, although not statutorily defined, involved moral turpitude because the crime denotes depravity. 5 I&N Dec. 686, 688. Furthermore, in *Matter of Z-*, 7 I&N Dec. 253, 255 (BIA 1956), the Board found indecent assault in violation of section 6052 of the General Statutes of Connecticut, Revision of 1930, involved moral turpitude. An indecent assault is described as consisting "of the act of a male person taking indecent liberties with the person of a female or fondling her in a lewd and lascivious manner without her consent and against her will, but with no intent to commit the crime of rape."

In the present case, the AAO finds that fifth degree criminal sexual conduct under Minnesota Statutes § 609.3451.1(1) is a crime involving moral turpitude. Criminal Sexual Conduct is a specific intent crime that involves unauthorized, personally-offensive sexual contact in the touching of an intimate part of another person, which is committed by the touching of the victim's intimate parts, involving an abuse of authority, coercion or inducement, including inducement of a minor under the age of 13 or a mentally impaired person. When compared with the holdings in *Matter of S-* and *Matter of Z-*, wherein indecent assault was held to involve moral turpitude; and in light of *Perez-Contreras*, wherein the Board found that moral turpitude refers to conduct that is depraved and contrary to the rules of morality and is present when knowing or intentional conduct is an element of

a crime, the AAO finds that criminal sexual conduct in the fifth degree in violation of Minnesota Statutes § 609.3451.1(1), as constituted at the time of the applicant's conviction, is a crime of depravity that necessarily involves moral turpitude. The applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. The AAO notes it would reach the same result under the modified categorical approach, as the record of conviction reflects that the applicant, employed as a nursing assistant at the time of the commission of the offense, touched the breast area of a patient impaired due to a stroke. Accordingly, the applicant's conviction reflects the type of intentional conduct that is depraved and contrary to the rules of morality. The applicant does not dispute his inadmissibility on appeal.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part, that:

(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 –

...
(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

The AAO begins its analysis by noting that a section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act is first dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member, which includes the U.S. citizen or lawfully resident spouse, child or parent of the applicant. The applicant's U.S. citizen wife and children are the qualifying relatives in these proceedings. If extreme hardship to a qualifying relative is established, USCIS then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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 the unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* 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 exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common

rather than extreme. These factors include: economic disadvantage; loss of current employment; inability to maintain one's present standard of living; inability to pursue a chosen profession; separation from family members; severing community ties; cultural readjustment after living in the United States for many years; cultural adjustment of qualifying relatives who have never lived outside the United States; inferior economic and educational opportunities in the foreign country; or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant is not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The AAO first considers the hardship claimed to the applicant's spouse if she were to remain in the United States without the applicant. The primary hardship claimed is the financial and mental health hardships the applicant's wife is experiencing as a result of the applicant's inadmissibility. The applicant provides declarations from himself and his spouse in support of the financial and mental health hardships the applicant's spouse is experiencing. In her undated statement, the applicant's wife states that the worst day of her life was when the applicant informed her that he had to leave the United States pursuant to a grant of voluntary departure. She states that since his departure, her life has taken a "downward turn that [she] is scared they may never recover without [the applicant's] return." She further states that the applicant's departure has taken a "taxing toll" on her mental and physical health. The applicant's wife indicates that she is losing control of her children and her life. She asserts that life after the birth of her third son has been a daily struggle, that their oldest son is

dealing with behavioral issues resulting from his father's departure, and that their youngest son has never met the applicant. The applicant's wife also indicates that the applicant's oldest son began treatment with a child psychologist to help him with his behavioral issues. The child's psychologist, [REDACTED] diagnosed the applicant's oldest son with an adjustment disorder exhibiting significant aggression for not being able to cope with the applicant departing the United States.

The AAO notes that the Board's decision in *Matter of Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. Therefore, the most important single factor may be family separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Beunfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422. As noted above, the record evidence shows that the applicant's qualifying relatives are experiencing emotional difficulties resulting from separation.

The applicant asserts on appeal that her wife's psychological and mental health conditions prevent her from living the United States without him. He asserts that his wife's psychological hardships have proven to be severe and have exacerbated due to his immigration situation. To support the applicant's claims with respect to the psychological hardships her wife is experiencing as a result of his inadmissibility, he submitted ample evidence demonstrating that the applicant's wife has been diagnosed with Major Depression Disorder and Generalized Anxiety Disorder, that she was also diagnosed with post-partum depression, that she was prescribed antidepressants, and that she was hospitalized as a result of an "accidental drug-overdose." The record evidence demonstrates that the applicant's wife is currently experiencing psychological illnesses caused by separation from the applicant. The AAO therefore finds the psychological hardship documentation is sufficient to demonstrate significant psychological hardship to the applicant's wife.

With regards to financial hardship, the applicant's wife indicates that she needs the applicant's income because the family is "struggling having to borrow money to survive." The applicant's wife indicates that they were able to fully provide for their family when the applicant lived in the United States, as he was gainfully employed as an adjunct professor at a university in Minnesota. The record includes an employment reference letter from [REDACTED] Academic Dean at Saint [REDACTED] corroborating that the applicant was offered the position of Adjunct Faculty Professor. The applicant's wife states that since his departure, she has been "unable to work consistently due to [her] ongoing illness and [her] inability to provide daycare for the kids." Counsel asserts that the applicant's wife is unable to support their family with only her income, given the family's monthly financial obligations. The AAO notes that documentation in the record establishes that the applicant's wife pays \$1,200 per month for their mortgage. Documentation in the record indicates that the applicant's wife has accrued significant credit card and health-care related debt, that her accounts are past due, and that state courts have already entered judgments against her based on the amounts she owes to different banks. Also, there is evidence in the record indicating that the applicant is disabled, and has been absent from her work since February 10, 2011. Further, the record includes a letter dated December 2, 2011, by [REDACTED] Esq., which shows that the applicant's wife has retained the services of the [REDACTED] for the filing of a personal bankruptcy petition. The AAO notes the applicant's wife's financial concerns.

Considering the applicant's spouse's mental health issues, the applicant's son behavioral challenges, the qualifying relatives' significant financial difficulties, and the normal effects of separation of a loved one, the AAO finds the record to establish that the applicant's husband and children would face extreme hardship if they remained in the United States in his absence.

With regards to hardship upon relocation to Kenya, the record evidence reflects that the applicant's wife's immediate family members all reside in Minnesota, where she was raised and presently resides. The applicant's wife states that relocation to Kenya would signify separation from her family and friends, and would cause a disruption in the lives of their children. Additionally, the record reflects that the applicant's mother-in-law resided in the same household as the applicant's wife to assist in the daily care of their children. However, she developed breast cancer and died on October 29, 2011. Here, the AAO acknowledges that the applicant's wife and children are native and citizens of the United States and that they may experience hardship in relocating to Kenya. The record reflects the applicant's wife's lack of ties to Kenya, and relocation to that country would likely signify her separation from her family after dealing with the recent loss of her mother to cancer, while severing ties with the mental health professionals who are treating her psychological conditions. Additionally, relocation would sever the children's ties to family members in the United States as well as their medical and community ties, particularly the oldest son's relationship with Dr. [REDACTED] who is helping with his behavioral problems.

The AAO acknowledges that the unavailability of suitable medical care in the country to which the qualifying relative would relocate is a factor to be considered in determining extreme hardship. *See Matter of Cervantes*, 22 I&N Dec. at 566. The record reflects that the applicant's wife has been diagnosed with major depression disorder, post-partum depression, and generalized anxiety disorder. The record further reflects that she has been prescribed antidepressants and endured what her attending physicians referred to as "an accidental drug overdose." Additionally, the applicant's wife lost her mother to cancer recently, which likely exacerbated her mental health conditions. Counsel asserts that the applicant's immediate family health care expenses are covered by the applicant's wife's employer-sponsored health plan. Counsel claims that the applicant's wife and children would not have comparable medical care in Kenya. Counsel further argues that if the applicant's wife and their children relocated to Kenya, they would be unable to afford medical care "because most doctors and hospitals in Kenya expect prepayment in cash." However, the record does not contain country conditions documentation corroborating counsel's assertions. Nevertheless, the AAO notes that the applicant's immediate family has sufficient medical care in the United States, and acknowledges the claims made regarding the medical difficulties the applicant's family would face in relocating to Kenya.

Therefore, the record reflects that the applicant's wife has been residing in Minnesota all her life, suggesting relocation would require significant adjustment. The applicant's spouse would have to leave her community, her employment and profession as a nurse, the psychologist familiar with her diagnosis and treatment, the psychologist familiar with their oldest son's conditions, and her family. She would experience concern for their children's well-being, particularly because of the general safety concerns documented in the country conditions evidence submitted in support of the waiver application. The applicant's wife likely would not be able to maintain her current standard of living, and it is unclear whether she would be able to fulfill her financial obligations to U.S. creditors.

Furthermore, the country conditions information reflect poor economic conditions and safety issues in Kenya. The record evidence also indicates that the applicant's wife is experiencing Major Depressive Disorder and Chronic Anxiety as a direct result of the applicant's departure and the responsibilities of being a single mother of three. Based on the foregoing, the AAO finds that the applicant's qualifying relatives would suffer extreme hardship if they were to join the applicant in Kenya.

However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. In discretionary matters, the alien bears the burden of proving eligibility in terms of 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).

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "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." *Id.* at 300.

The favorable factors in this matter are the extreme hardship the applicant's wife and children would face if the applicant were to reside in Kenya, regardless of whether they accompanied the applicant or stayed in the United States; the applicant's stable employment as an adjunct professor at a university in Minnesota; the applicant's apparent lack of arrests and criminal convictions since the year 2000; and support letters from the applicant's husband's family, friends, and community members. The unfavorable factors in this matter are the applicant's criminal conviction and any periods of unlawful presence while in the United States.

It is noted that the criminal convictions and immigration violations committed by the applicant are serious in nature and cannot be condoned. The applicant's criminal conviction in particular is a significant negative factor in this case. However, we believe that the record shows rehabilitation in the form of no further criminal record and positive contributions to his family and society. The AAO finds that the applicant has established that the favorable factors in her application outweigh

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the unfavorable factors. Therefore, a favorable exercise of the Secretary of Homeland Security's discretion is warranted.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the applicant's appeal is sustained.

ORDER: The appeal is sustained.