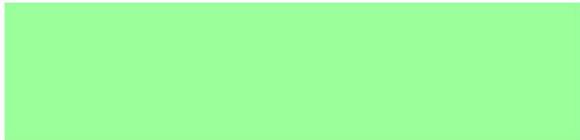


(b)(6)

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

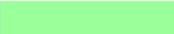


U.S. Citizenship  
and Immigration  
Services



DATE: DEC 19 2014

Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE:

Applicant: 

APPLICATION:

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

ON BEHALF OF APPLICANT:



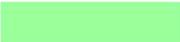
INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office



**DISCUSSION:** The application for waiver of inadmissibility was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of France who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present for one year or more and seeking readmission within 10 years of her last departure; and pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant’s spouse is a lawful permanent resident and her children are U.S. citizens. She seeks a waiver of inadmissibility in order to reside in the United States.

The Director found that the applicant was convicted of a violent or dangerous crime, and she did not establish exceptional and extremely unusual hardship to a qualifying relative. He therefore found the applicant ineligible for a waiver as a matter of discretion; and he denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Director*, dated March 24, 2014.

On appeal, counsel asserts that the applicant’s spouse and eldest daughter would experience exceptional and extremely unusual hardship if the waiver application is denied. *Brief in Support of Appeal*, dated April 24, 2014.

The record includes, but is not limited to, counsel’s brief; statements of the applicant, her spouse, and their children; educational records; medical records; psychological evaluations of the applicant’s daughters; financial documents; letters of support; and country-conditions information about France. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

- (i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

....

- (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

- (v) Waiver.-The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record reflects that applicant entered the United States in 1985 and remained in the United States until her May 9, 2012 departure.<sup>1</sup> The applicant accrued unlawful presence from April 1, 1997, the effective date of unlawful provisions under the Act, until her departure on May 9, 2012. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking readmission within ten years of her May 9, 2012 departure from the United States. The applicant does not contest this ground of inadmissibility.

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.

In assessing whether a conviction is a crime involving moral turpitude, the adjudicator must first “determine what law, or portion of law, was violated.” *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). The adjudicator engages in a categorical inquiry, considering the “inherent nature of the crime as defined by statute and interpreted by the courts,” not the underlying facts of the criminal offense. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). If the statute “defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude.” *Matter of Short, supra*, at 137.

Where the statute includes some offenses involving moral turpitude and some which do not – where there is a *realistic probability* that the statute would be applied to conduct not involving moral turpitude – the adjudicator looks to the record of conviction to determine the offense for which the applicant was convicted. *See Matter of Guevara Alfaro*, 25 I&N Dec. 417, 421 (citing *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689-90, 696-99 (A.G. 2008)); *see also Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability, as opposed to a theoretical possibility, exists where there is an actual prior case, possibly the applicant’s own case, in which the relevant

<sup>1</sup> The record does not include evidence that the applicant was admitted and inspected when she came to the United States in 1985.

criminal statute was applied to conduct that did not involve moral turpitude. *Matter of Silva-Trevino, supra*, at 708. The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Matter of Louissant, supra*, at 757; *see also Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”)

If review of the record of conviction is inconclusive, an adjudicator may consider “probative evidence beyond the record of conviction” to resolve whether the offense constitutes a crime involving moral turpitude. *Matter of Guevara Alfaro, supra*, at 422 (citing *Matter of Silva-Trevino, supra*, at 690, 699-704, 709). However, 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.” *Matter of Silva-Trevino, supra*, at 703; *see also Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 468 (BIA 2011) (An adjudicator may not “undermine plea agreements by going behind a conviction to use sources outside the record of conviction to determine that an alien was convicted of a more serious turpitudinous offense.”).

The record reflects that the applicant was convicted on April 16, 2001 of robbery in violation of Florida Statutes §812.13(2)(c). Florida Statutes §812.13 provides, in pertinent part:

(1) “Robbery” means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

....

(2)(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

As the applicant does not contest her inadmissibility on appeal, and the record does not show that determination to be in error, we will not disturb the finding of inadmissibility under section 212(a)(2)(A) of the Act.

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

The [Secretary] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .

(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,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the [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 . . .; and

(2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he 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.

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant as mentioned in section 212(h)(1)(B) of the Act. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives here are the applicant’s lawful permanent resident spouse and U.S. citizen children. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996). Similarly, a waiver under section 212(a)(9)(B)(v) of the Act is dependent upon a showing of extreme hardship to the citizen or lawfully resident spouse or parent of the applicant.

Because the applicant’s crime qualifies as violent or dangerous crime, as discussed below, she must meet the requirements of 8 C.F.R. § 212.7(d), which addresses the exercise of discretion under section 212(h)(2) of the Act. The applicant must prove “exceptional and extremely unusual hardship” to a qualifying relative, so we will evaluate whether the evidence meets this standard. In order to show “exceptional and extremely unusual hardship,” the applicant must show more than “extreme hardship.” *See Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001) (holding in cancellation of removal case that the “standard requires a showing of hardship beyond that which

has historically been required in suspension of deportation cases involving the ‘extreme hardship’ standard”). The hardship “must be substantially beyond the ordinary hardship that would be expected when a close family member leaves this country,” and is “limited to truly exceptional situations.” *Id.* (internal quotation marks omitted). However, the applicant need not show that hardship would be unconscionable. *Id.* at 60.

The regulation at 8 C.F.R. § 212.7(d) provides:

The [Secretary], 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.

We note that the words “violent” and “dangerous” and the phrase “violent or dangerous crimes” are not further defined in the regulation, and we are 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.

Counsel appears to contest that the applicant's crime is a violent or dangerous crime by calling the issue “a debatable point,” but he provides no legal authority to support his assertion. In *U.S. v. Lockley*, the 11<sup>th</sup> Circuit, the jurisdiction within which the present case arises, held that a conviction for attempted robbery under Florida Statutes § 812.13(1) is categorically a crime of violence for purposes of U.S. Sentencing Guidelines. 632 F.3d 1238 (2011), *cert. denied*, 132 S.Ct. 257 (2011). We find that a violation of Florida Statutes §812.13(2)(c), which requires using “force, violence, assault, or putting in fear,” a violent and dangerous crime within the meaning of 8 C.F.R. § 212.7(d), and the heightened discretionary standards found in that regulation apply in this case.

Accordingly, the applicant must show that “extraordinary circumstances” warrant approval of the waiver. 8 C.F.R. § 212.7(d). 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, we 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.* A finding of exceptional and extremely unusual hardship under 8 C.F.R. § 212.7(d) would satisfy the extreme hardship requirement of sections 212(a)(9)(B)(v) and 212(h) of the Act.

Although 8 C.F.R. § 212.7(d) does not specifically state to whom the applicant must demonstrate exceptional and extremely unusual hardship, we interpret this phrase to be limited to qualifying relatives described under the corresponding waiver provision of section 212(h)(1)(B) of the Act. A waiver of inadmissibility under section 212(h)(1)(B) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. The qualifying relatives in this case include the applicant’s lawful permanent resident husband and U.S. citizen children.

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.”). We note 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.

Concerning the hardship he would experience if he were to relocate to France, the applicant's spouse states that he has lived in the United States for most of his life; he has no family overseas other than the applicant; he would be separated from his mother, who currently lives with him; he also would be separated from his brother, grandmother and aunt, who he sees frequently; and his mother, who cannot work because of an injury, would suffer financially without him. In addition, the applicant's spouse states that he would lose his permanent resident status because his primary residence would be outside of the United States.

The applicant's spouse states that he would experience financial hardship if he relocated to France, because he would have to leave his job; he would barely afford the airfare for his family and storage for items they could not take with them; he does not have money saved to provide for their family while he tries to find work there; he has no job prospects in France, where the unemployment rate is high; his only skills relate to sales, which requires an ability to communicate well; and he does not speak French. He states that he has a high-school education and the applicant does not have special skills and does not know French well herself; therefore it would be difficult for them both to find work in France. The record includes an article reflecting that the jobless rate in France has increased for 19 months in a row, and the unemployment rate is over 10 percent.

The applicant states that their children do not speak French. The applicant's spouse states that he would not be able to find a suitable place for their family to live in France; their children would be affected psychologically due to a lower standard of living; their eldest daughter’s school work would suffer as she does not know French, her opportunities would decrease and her chances of becoming a lawyer would be ruined due to language issues. The record includes educational records for the applicant's two older children.

The record reflects that the applicant's spouse has close family ties in the United States, including his mother who lives with him, and he does not have family in France. Based on his level of education, the economy and his inability to speak French, his claim of being unable to find adequate employment to support his family there is reasonably likely. In addition, he and the applicant would raise three children in a foreign country, and he would experience inherent emotional hardship due to the loss of opportunity for his children and other hardship that they would experience due to their inability to speak French and their general integration into the American lifestyle. Furthermore, if he resided permanently in France he would lose his lawful permanent resident status, as he would no longer have the intention to return to the United States and reside here permanently. As the applicant's spouse has resided for most of his life in the United States, this loss would likely be particularly difficult for him. Considering the totality of the hardship factors presented, we find that the applicant's spouse would experience exceptional and extremely unusual hardship if he relocated to France.

Addressing the hardship the applicant's spouse would experience if he were to stay in the United States without the applicant, the applicant states that she stayed at home while her spouse provided for their family; her spouse's health, work, and relationships with her and their children are affected by stress he is experiencing as a result of their separation. The applicant's spouse states that they were a loving family and describes their social activities. He states that he used to be happy but now all he does is think about the applicant and their situation; the children always ask for the applicant; and he cries for long periods during the night. He is exhausted in the morning and he helps the children with their homework at night.

Addressing the hardship the applicant's spouse would experience due to their children's hardship, counsel states that the applicant's three children reside with her spouse; separation from the applicant has been extremely difficult for their eldest daughter, who has many behavioral and functional issues that have worsened since the applicant left; and she is physically and mentally in jeopardy if she is not reunited with the applicant. Counsel states that it would be an "almost an unthinkable burden" for the applicant's spouse to handle the duties associated with their eldest daughter's problems. The applicant's two older children were evaluated by a psychologist. The psychologist states that the applicant's eldest daughter presents with mostly depressive symptoms based on poor coping skills; her symptoms include withdrawing from others, feelings of insecurity and suicidal ideation; she has difficulty controlling her anger; her depressive symptoms will increase if she continues to be separated from the applicant; and she would benefit from individual therapy and a psychiatric evaluation. The psychologist diagnosed her with major depressive disorder, recurrent, severe without psychotic features; oppositional defiant disorder; and parent-child relational problem. The applicant's spouse states that their eldest child cries all of the time for the applicant; she yells at him when he tries to correct her behavior; and she blames him for the applicant's absence. Counsel states that the applicant's second child is having difficulty concentrating and focusing on her tasks, and she has a multitude of behavioral concerns that have worsened since separating from the applicant. The psychologist states that the applicant's second child described depressed mood, crying spells, insomnia and isolation from friends; and her depressive and anxiety-related will increase upon continued separation from the applicant. The psychologist diagnosed her with adjustment disorder

mixed anxiety and depressed mood and parent-child relational problem. The two older children in their statements express the emotional difficulty they are experiencing without the applicant.

Counsel states that the applicant's spouse is experiencing financial hardship, because he is responsible for two households; he earns \$53,000 per year; his monthly rent is \$1,300; he pays the applicant's monthly rent and her living expenses; he owes money for utility, credit card and medical bills; he struggles to keep the utilities on and provide enough food for their children to eat. The applicant's spouse states that he works as a used-car salesman; he pays for his rent and living expenses and the applicant's rent and living expenses that amount to about \$1,000 per month; he juggles bills so that his services are not get cut off; and water and light services have been cut off twice since the applicant left. According to his employer, the applicant's spouse's productivity has dropped drastically since the applicant left the United States; the applicant's spouse has missed work to attend to his children meetings about the applicant's legal issues; the applicant's absence affects her spouse deeply; and her spouse has lost the enthusiasm and dedication that he had for his job. His landlord states that the applicant's spouse does not always pay his rent on time. These claims of hardship are corroborated by copies of several credit card bills, final notices for electric bills and other bills. The record also includes the applicant's spouse's earnings record, 2012 tax transcript reflecting his income of about \$57,000, his lease agreement and evidence of money transfers to the applicant.

Counsel states that the emotional strain of separation has taken a significant toll on the applicant's spouse's health; and he went to a hospital emergency room with chest pains. The applicant's spouse states that he suffers from extreme stress since he has no option but to struggle and support the applicant and their children; he has suffered from chest pain; and he is constantly nervous, becomes agitated easily and cannot sleep. The applicant submits medical records reflecting that her spouse was seen for chest pain and cough-related rib fractures in October 2011.

The record reflects that the applicant's spouse is raising their three children without the applicant and that he is experiencing significant emotional hardship due to separation from the applicant and from the hardship that his children are experiencing. The record reflects that his employment has been negatively affected, and the record includes evidence of significant financial hardship. Considering the totality of the hardship factors presented, we find that the applicant's spouse would experience exceptional and extremely unusual hardship if he remained in the United States without the applicant.

We will now address whether the applicant is eligible for a waiver as an overall matter of discretion. For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on her behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

We note that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

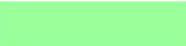
*Matter of Mendez-Moralez* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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).

*Id.* at 301 (citation omitted).

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional



adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the applicant's spouse's exceptional and extremely unusual hardship finding, hardship to her children, the lack of a criminal record in nearly 15 years and statements in support of her good character, including numerous statements from friends of the applicant describing her as a good wife and parent. The unfavorable factors include the applicant's unlawful presence and criminal conviction.

We find that the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In application proceedings it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

**ORDER:** The appeal is sustained.