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

U.S. Citizenship and Immigration Services

DATE: JAN 2 2 2014 OFFICE: LAS VEGAS, NEVADA FILE:

IN RE:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Michael Shumway

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Las Vegas, Nevada. The applicant, through counsel, appealed the District Director's decision, and the Administrative Appeals Office (AAO) rejected the appeal as improperly filed. On motion, counsel requests the AAO to reopen and to reconsider the rejection of his appeal. The motion to reopen and to reconsider will be granted, our previous decision rejecting the appeal will be withdrawn, and the appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), for having been removed from the United States and seeking admission within the proscribed period.[1] The record also reflects the applicant is inadmissible 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.[2] The District Director concluded that the applicant failed to establish extreme hardship would be imposed upon a qualifying relative, and denied his Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The AAO rejected the appeal as improperly filed because it did not receive a timely response to its request that forward a properly completed new Notice of Entry of Appearance as Attorney or Representative (Form G-28) within 15 days. *See* 8 C.F.R. §§ 292.4, 103.3(a)(2)(v)(A)(2).

On motion, counsel contends the AAO erred in determining that did not timely respond to the request for Form G-28, and that evidence in the record demonstrates the AAO already had the previously submitted Form G-28. Additionally, counsel asserts the AAO should reconsider its decision and reopen the applicant's case to properly adjudicate his appeal and to refund his filing fee as its rejection of the appeal was in error.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that

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[1] The AAO notes the District Director's decision references section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), but it does not make a specific finding whether the applicant is inadmissible under this provision of the Act. The AAO finds the record does not support a finding of inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act.

[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). It is further noted that the applicant indicated on Form I-601 that his criminal conviction is the basis for filing the present waiver application, and counsel concedes that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act due to having committed a crime involving moral turpitude.

the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In a Notice of Intent to Dismiss, we found that the record was sufficient to establish that, on August 27, 2012, counsel timely responded to the AAO's request for Form G-28 demonstrating his appearance as the attorney of record for applicant's appeal by providing the Form G-28 he previously submitted on March 20, 2012 to USCIS. Accordingly, the AAO's previous decision to reject the applicant's appeal is withdrawn, and the AAO will address the merits of the applicant's appeal.

The record includes, but is not limited to: briefs, motions, and correspondence from current and previous counsel; letters of support; identity, medical, employment, and financial documents; documents on conditions in Mexico; and criminal history documents. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (i) … any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, ... is inadmissible.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> …
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> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

> [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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals employs the categorical approach set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). *See Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas–Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005), *abrogation on other grounds recognized by Holder v. Martinez-Gutierrez*, 132 S.Ct. 2011, 2020-21 (2012). If the statute "criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied." *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); *see also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude." *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). To demonstrate a "realistic probability," the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probably also exists where the statute expressly punishes conduct not involving moral turpitude. *See U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the "limited, specified set of documents" that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz,* 466 F.3d at 1132-33); *see also Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas–Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. *See Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

The record shows the applicant was convicted by the Superior Court of Washington State for County of indecent liberties pursuant to the Wash. Rev. Code (RCW) § 9A.44.100(1)(c), for which

he was sentenced to confinement for one year and one day. The record also shows that he was ordered to make restitution in the amount of $70 to the victim and assessed court costs. Although the District Director did not analyze the applicant's inadmissibility pursuant to his criminal conviction, counsel concedes, in his brief dated April 28, 2010, that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude, and the AAO concurs. The applicant requires a waiver under section 212(h) of the Act.

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

> The Attorney General [now the Secretary of Homeland Security (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 if –
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> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [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 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 . . .; and
>
> (2) the Attorney General [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.

The applicant's conviction for indecent liberties occurred on July 12, 1988, for actions that occurred on October 8, 1987. The applicant, therefore, is eligible to seek a waiver of his 212(a)(2)(A)(i)(I) inadmissibility under section 212(h)(1)(A) of the Act as the events that led to his conviction took place more than 15 years ago. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. However, in a Notice of Intent to

Dismiss, dated June 21, 2013, we found that even if the applicant establishes that he meets the requirements of section 212(h)(1)(A), the Secretary may not favorably exercise discretion in the applicant's case except in extraordinary circumstances. *See* 8 C.F.R. § 212.7(d).

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

> The Attorney General [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.

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). For example, Black's Law Dictionary, Eighth Edition (2004), defines violent as "[o]f, relating to, or

characterized by strong physical force," "[r]esulting from extreme or intense force," or "[v]ehemently or passionately threatening," and dangerous as "perilous; hazardous; unsafe" or "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.

At the time of the applicant's conviction, RCW § 9A.44.100(1)(c) provided:

> (1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:
>
> > (a) By forcible compulsion; or
> >
> > (b) When the other person is less than 14 years of age; or
> >
> > (c) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.
>
> (2) For purposes of this section, "sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.

In our Notice of Intent to Dismiss, we cited *U.S. v. Wood*, 52 F.3d 272 (9th Cir. 1995), a decision in which a crime under this statute was found to be a "crime of violence." . The U.S. Circuit Court of Appeals for the Ninth Circuit, applying the categorical approach, determined that although a conviction was theoretically possible under circumstances which did not end in violence under Washington's indecent liberties statute, an offense under the statute generally posed a serious potential risk of physical injury to the victim, and a conviction under the indecent liberties statute in Washington was a crime of violence under the Sentencing Guidelines (*distinguishing U.S. v. Weekley*, 24 F.3d 1125 (9th Cir. 1994)).

In his response to our Notice of Intent to Dismiss, counsel asserts that the applicant is not subject to the heightened discretionary standard in 8 C.F.R. § 212.7(d) because the commission of the crime does not require the use of force. Counsel argues that the *Wood* decision is not relevant to the applicant's case because *Wood* involved statutory rape and the applicant's case involves sexual contact with a person incapable of consent by reason of being mentally incapacitated or physically helpless.

Counsel cites to *United States v. Beltran-Munguia*, 489 F. 3d 1042 (9th Cir. 2007), asserting that the applicant's conviction is not a crime of violence because the use of force is not an element of the crime. However, as stated above, findings by the courts regarding what constitutes a "crime

of violence" for purposes of another provision of law are, at best, persuasive authority in the discretionary determination of whether to consider a crime to be violent of dangerous under 8 C.F.R. § 212.7(d).

As stated above, the statutory term "crime of violence" is not synonymous with "violent or dangerous crimes" in 8 C.F.R. § 212.7(d), and we are not limited by the categorical determinations concerning whether a statutory crime is 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).

The inclusion of the term "dangerous" further signals that even crimes not marked by actual or physical force against the victim, but that may cause serious harm or are otherwise unsafe or hazardous, also trigger the requirements of 8 C.F.R. § 212.7(d). As stated above, in considering whether a crime is violent or dangerous, we will interpret these terms in accordance with other 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).

The Complaint and Statement of Plea in the applicant's case, indicates that the applicant caused sexual contact between himself and a person incapable of consent by reason of being mentally incapacitated or physically helpless.

RCW § 9A.44.010 states, in pertinent part:

> ...
>
> (4) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.
>
> (5) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The record does not reflect, and the applicant has not revealed, which subsection is relevant to his conviction, or the exact nature of this crime. As stated above, our inquiry pursuant to 8 C.F.R. § 212.7(d) is not a categorical inquiry into whether a crime is a crime of violence and therefore an aggravated felony. It is the applicant's burden to demonstrate that he warrants a favorable exercise of discretion, and the applicant has not presented facts or controlling legal authority to show that his crime was not a violent or dangerous crime. From the statute itself, there is ample reason to conclude that the applicant's conviction was, at a minimum, a dangerous offense. The statute requires a physical, sexual violation, and such an act could result in both physical and/or emotional harm, which the incapacitated or helpless victim would be unable to prevent or adequately communicate to the perpetrator. Further, given that the statute encompasses some forms of incapacitation or helplessness that are short-term in nature, there is the risk of physical

force if the victim regains capacity. Therefore, we find that the applicant is subject to 8 C.F.R. § 212.7(d).

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, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative. *Id.*

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61

The BIA stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

In *Monreal-Aguinaga*, the BIA provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

> [T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-4.

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

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

23 I&N Dec. at 324.

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

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. *See Gonzalez Recinas*, 23 I&N Dec. at 469 ("While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship."). The AAO notes that exceptional and extremely unusual hardship must be established in the event that the applicant's family members accompany him or in the event that they remain 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.

The record contains briefs from counsel; country conditions information for Mexico; a letter from the applicant's son; and employment, financial, and medical documents, attesting to the applicant's rehabilitation and good moral character as well as evidencing the hardship his family would suffer because of his inadmissibility.

New evidence submitted with counsel's response to the Notice of Intent to Dismiss includes: affidavits from the applicant and his spouse, a lawful permanent resident card for the applicant's mother, and the applicant's birth certificate.

We find that although the record indicates that the applicant has established, pursuant to section 212(h)(1)(A) of the Act, that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, he has not shown that he warrants a favorable exercise of discretion. We find that the applicant meets the requirements of section 212(h)(1)(A) of the Act because he has had no criminal record since 1988, he has been employed and a member of the bricklayers union since 1999, and the record indicates he is a supportive and loving husband and father.

In regards to the exercise of discretion, the applicant claims that his spouse, children, and mother will suffer financial hardship as a result of separation and the loss of his employment because he is the sole income earner for the family and his mother relies on his sending her $500 per month. The record establishes that the applicant has steady employment earning $45 per hour. We acknowledge this loss of income would be a hardship to the applicant's family, but the record fails to show that this hardship would rise to exceptional or extremely unusual. The record fails to show that the applicant's wife or his adult children would not be able to find work to support themselves. Similarly, the applicant's mother has seven siblings who are all U.S. citizens. The record fails to show that the applicant's siblings could or would not help to support the applicant's mother in the applicant's absence. We also acknowledge the hardship caused by potentially separating a husband and wife after over 26 years of marriage, but the record fails to provide details that would warrant a finding of hardship rising to the level of exceptional or extremely unusual hardship.

In regards to possible relocation, the record indicates that the applicant's family members do not intend to relocate. The record indicates that the applicant's children will not relocate to Mexico because of concerns over drug violence in parts of the country. The record also indicates that the applicant's mother cannot relocate for medical reasons. In addition, the applicant's mother and spouse state that they do not want to abandon their U.S. lawful permanent residency by relocating. As a consequence, we find that the current record fails to indicate that the applicant's family would suffer exceptional or extremely unusual hardship in the event of relocation. The current record lacks details as to the situation the applicant's family would find themselves in upon relocation. The record fails to indicate where in Mexico the family would relocate, whether the applicant and/or his spouse would be likely to find employment in their field; and/or whether the applicant's mother would have access to the appropriate health care. We find that the current documentation in the record fails to indicate that the applicant's family would suffer exceptional

or extremely unusual hardship as a result of his inadmissibility. The AAO therefore finds the applicant has failed to establish that he warrants a favorable exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the motion is granted and the appeal dismissed.

ORDER: The motion is granted. The appeal is dismissed.