



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUL 18 2014 Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:  
[REDACTED]

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 waiver application was denied by Director, Nebraska Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Nicaragua 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 in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant was also found to be 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 crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and two U.S. citizen daughters.

In a decision, dated October 1, 2013 the director found the applicant inadmissible for a period of unlawful presence and for having been convicted of crimes involving moral turpitude. In his decision, the director fails to identify which of the applicant's convictions were crimes involving moral turpitude, but does state that the applicant's convictions on April 15, 2009 were violent and dangerous crimes within the meaning of 8 C.F.R. 212.7(d). The director then found that the applicant did not warrant a favorable exercise of discretion. The waiver application was denied accordingly.

On appeal, counsel states that the applicant's criminal record includes only one conviction for simple assault, that this conviction is not for a crime involving moral turpitude, and, so, 8 C.F.R. 212.7(d) does not apply to the applicant. Counsel asserts that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, but is inadmissible under section 212(a)(9)(B)(i)(II) of the Act and requires a waiver of this inadmissibility. She states that the applicant's spouse is suffering extreme hardship as a result of separation and will suffer extreme hardship as a result of relocation to Nicaragua. She submits additional hardship evidence on appeal.

Section 212(a)(2) of the Act states, in pertinent parts:

(A)(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 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 indicates that on April 29, 2008, the applicant was convicted in the District Court of [REDACTED] County, Maryland of two counts of second degree assault, one count of disorderly conduct, one count of resisting arrest, and one count of failure to obey a reasonable or lawful order. On May 29, 2008, the applicant filed a direct appeal of these convictions to the Circuit Court of [REDACTED] County, Maryland. On July 15, 2008, the Circuit Court dropped all of the charges against the applicant, but for one count of second degree assault. The applicant was convicted of second degree assault under Maryland Code Art 27, § 12A. He was sentenced to 364 days in jail for this conviction.

The AAO notes that the applicant’s conviction does not qualify for the petty offense exception because the applicant was sentenced to more than six months imprisonment and the maximum possible sentence for his conviction is ten years.

At the time of the applicant’s conviction, Maryland Code, Article 27, provided, in pertinent parts:

§ 12A Second Degree Assault.

- (a) General prohibition. -- A person may not commit an assault.

(b) Violation; penalties. -- A person who violates this section is guilty of the misdemeanor of assault in the second degree and on conviction is subject to a fine of not more than \$2,500 or imprisonment for not more than 10 years or both.

(c) Law enforcement officer.-

(1) In this subsection, "physical injury" means any impairment of physical condition, excluding minor injuries.

(2) A person may not intentionally cause physical injury to another if the person knows or has reason to know that the other is:

(i) a law enforcement officer engaged in the performance of the officer's official duties; or

...

(3) A person who violates paragraph (2) of this subsection is guilty of the felony of assault in the second degree and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding \$5,000 or both.

Section 34 of the Maryland Law Encyclopedia states that:

The Maryland Criminal Pattern Jury Instructions also define second-degree assault as attempted battery. Under this definition, second-degree assault is an attempt to cause offensive physical contact or physical harm. In order to convict the defendant of the attempted battery form of second-degree assault, the State must prove:

- (1) that the defendant actually tried to cause immediate offensive physical contact with or physical harm to the victim;
- (2) that the defendant intended to bring about offensive physical contact or physical harm; and
- (3) that the defendant's actions were not consented to by the victim or not legally justified, if the defense of legal justification is raised.

As a general rule, simple assault or battery is not deemed to involve moral turpitude. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, assault or battery offenses involving some aggravating dimension, such as the use of a deadly weapon or serious bodily harm, have been found to be crimes involving moral turpitude. *See, e.g., Matter of Goodalle*, 12 I&N Dec. 106 (BIA 1967) (finding that second degree assault with a knife is a crime involving moral turpitude);

*Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) (assault with a deadly weapon); *Matter of S-*, 5 I&N Dec. 668 (BIA 1954) (assault with a .38-caliber revolver); *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000) (intentional infliction of serious injury). The infliction of bodily harm upon a person society views as deserving of special protection, such as a child, a domestic partner, or a peace officer, is also considered an aggravating circumstance. See, e.g., *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996) (willful infliction of corporal injury on a spouse, cohabitant, or parent of the offender's child); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (aggravated assault against a peace officer).

A finding of moral turpitude may also involve “an assessment of both the state of mind and the level of harm required to complete the offense.” *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007). Crimes committed intentionally or knowingly with the specific intent to inflict a particular harm, and with a resulting meaningful level of harm, constitute crimes involving moral turpitude, but “as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required” for a finding of moral turpitude. *Id.* “[W]here no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.” *Id.*; see also *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) (finding that third-degree assault under section 9A.36.031(1)(f) of the Revised Code of Washington is not a crime involving moral turpitude because neither intent nor recklessness is required for a conviction); *Matter of Fualaau*, 21 I&N Dec. at 478 (third-degree assault in Hawaii, an offense that involves recklessly causing bodily injury to another person, is not a crime involving moral turpitude); *Matter of P-*, 3 I&N Dec. 5, 8-9 (BIA 1947) (finding that assault without a deadly weapon but with the intent to cause great bodily harm is a crime involving moral turpitude).

In addition, assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault involves some additional aggravating factor, such as bodily injury to the officer. See *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond “simple” assault); *Matter of Logan*, 17 I&N Dec. 367, 368-69 (BIA 1980) (holding that a conviction for interference with a law enforcement officer rose above the level of simple assault because the defendant had “knowingly threatened to employ deadly physical force” by pulling a knife on the officer.); *Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (finding that violation of a German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engaged in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (*as modified by Matter of Danesh*, 19 I&N Dec. at 672-73.) (concluding that assault on prison guard was not a crime involving moral turpitude because offense charged appeared to be only “simple” assault and no bodily injury was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (finding that assault on an officer was not a crime involving moral turpitude in spite of fact that defendant was armed with a razor because the razor was not used in the assault). The Board found in *Matter of B-* that a defendant who was convicted of assaulting a prison guard with knowledge that the guard was engaged in his lawful duties had not been convicted of a crime involving moral turpitude because

the offense was similar to simple assault and did not involve the use of a weapon. 5 I&N Dec. at 541.

Although the Hearing Transcript from July 15, 2008 indicates that the applicant's assault was committed against a police officer and that the applicant's actions resulted in scrapes and bruises to the police officer, the Hearing Transcript states that the applicant was convicted of a misdemeanor and not a felony. Thus, the applicant was clearly convicted of simple assault under Maryland Code Art 27, § 12A(a) and (b), and not assault involving an aggravated dimension like assault on a police officer, under Maryland Code Art 27, § 12A(c). Furthermore, assault crimes involving aggravating factors in Maryland are generally covered by first degree assault, which includes assaults causing or attempting to cause serious bodily injury and assaults with a firearm. See Maryland Code, Criminal Law, §3-202. Upon reviewing the record and the statute of conviction, we find that the applicant's conviction was for simple assault and it is not a crime involving moral turpitude that renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Moreover, because the applicant's conviction is not a crime involving moral turpitude, 8 C.F.R. 212.7(d) is not applicable to his case.

However, the applicant is inadmissible under section 212(a)(9) of the Act.

Section 212(a)(9) of the Act provides:

**(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 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 Attorney General 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

In the present case, the record reflects that the applicant entered the United States on September 16, 1998 and did not depart until April 27, 2010. The applicant is therefore inadmissible under

section 212(a)(9)(B)(i) of the Act for having been unlawfully present in the United States. The applicant's qualifying relative is his U.S. citizen spouse.

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 an 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 v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (9th Cir. 1998) (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 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 record contains references to hardship the applicant's children would experience if the waiver application were denied. It is noted that Congress did not include hardship to an applicant's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative and hardship to the applicant's children will not be separately considered, except as it may affect the applicant's spouse.

The record of hardship includes: a statement from the applicant's spouse; numerous medical documents concerning both physical and mental health problems suffered by the applicant's spouse; a letter recommending the applicant's daughters attend mental health counseling; medical document concerning the applicant's spouse's mother; financial documentation; and several reports regarding country conditions in Nicaragua.

The record establishes that the applicant's spouse is suffering extreme hardship as a result of separation and would suffer extreme hardship as a result of relocation to Nicaragua. The record indicates that the applicant's spouse is suffering extreme physical, emotional, and financial hardship as a result of being separated from the applicant. The record indicates that the applicant's spouse is on disability benefits for her medical ailments and physical restrictions, receiving \$674 per month in benefits. Documentation in the record indicates that the applicant's spouse suffers from chronic and debilitating lower back pain, osteoarthritis, degenerative joint disorder, heel spurs, and uterine fibroids and cysts which cause her pelvic pain. The applicant's spouse states that she requires surgery to alleviate some of her discomfort, but she cannot have surgery until the applicant is in the United States because she will need help with everyday activities and with caring for her children. The record states that the applicant's spouse's mental health problems of depression and generalized anxiety disorder have become exacerbated by the applicant's absence, requiring her to now take medication. In addition, financial documentation in the record indicates that the applicant's spouse and children were homeless for one year as a result of her husband's absence and were forced to relocate to West Virginia from Maryland. Moreover, the record shows that the applicant's two daughters were referred to mental health counseling and therapy in 2009 due to behavioral issues and problems coping with their father's absence. The applicant's spouse states that when the applicant was in the United States he provided emotional support, helped care for their children, and helped with household chores. The record also indicates, through court transcripts, that while in the United States, the applicant was employed as a mechanic. Thus, the record establishes that taking the applicant's spouse's psychological, physical, and financial hardships in the aggregate, she is suffering extreme hardship as a result of separation.

Furthermore, the applicant's spouse would suffer extreme hardship as a result of relocating to Nicaragua with her two children. The Department of Homeland Security (DHS) has granted temporary protected status (TPS) to nationals of Nicaragua residing in the United States through January 5, 2015. This TPS designation was granted to Nicaraguan nationals due to the conditions in the country following a 1998 hurricane. Numerous extensions of TPS have been granted after DHS made the determination that conditions in Nicaragua were still too poor to absorb the return of their nationals. Countries are designated for TPS in situations where: there is an ongoing armed conflict within the state and due to that conflict, return of nationals to that state would pose a serious threat to their personal safety; the state has suffered an environmental disaster resulting in a substantial, temporary disruption of living conditions, the state is temporarily unable to handle adequately the return of its nationals, and the state has requested TPS designation; or there exist other extraordinary and temporary conditions in the state that prevent nationals from returning in safety.

In addition to conditions in the country warranting a continued TPS designation, the record also includes numerous country conditions reports indicating that Nicaragua is the second poorest country in the Western Hemisphere. These reports also indicate that medical care is very limited in the country, there is a lack of educational opportunities for children, and that, although discrimination against person with disabilities was outlawed, it remained widespread in many parts of society. Given the current country conditions in Nicaragua combined with the particular medical, psychological, and financial aspects of the applicant's case, the record shows that the applicant's U.S. citizen spouse would suffer extreme hardship upon relocation. The record also fails to support a determination that relocating to Spain would be a realistic option for the applicant's spouse and children. The record indicates that the applicant's mother has a type of residency status in Spain, but does not indicate that the applicant, his wife, and/or his children are in a position to benefit from this residency.

Considered in the aggregate, the applicant has established that his U.S. citizen spouse would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). 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. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his 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.

The AAO notes 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.

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 in the applicant's case include: the extreme hardship his spouse and two children would face as a result of his inadmissibility and the emotional and physical support the

applicant provided for his family while in the United States. The record also indicates that the applicant entered the United States less than one month before the hurricane which caused the TPS designation for Nicaragua struck land and remained in the United States for 12 years. During his stay in the United States he was employed as a mechanic for nine years. Finally, following his voluntary departure, the applicant has had no other criminal record in Spain where he has been residing. The unfavorable factors in the applicant's case include: his criminal record in the United States and his unlawful presence in the United States.

Although the applicant's violations of immigration law are serious, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

**ORDER:** The appeal is sustained.