



(b)(6)

[REDACTED]

Date: **MAR 18 2014**

Office: SAN BERNARDINO, CA [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (the 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. 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Bernardino, California, denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who filed an application to waive his inadmissibility under section 212(a)(2)(A)(i) of the Act for having been convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant section 212(h) of the Act in order to live with his wife and children in the United States.

The field office director found that the applicant was inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act for having unlawfully re-entered the United States after being removed and that ten years had not elapsed since the applicant's departure. The field office director denied the application accordingly.

On appeal, counsel contends the applicant is not inadmissible under section 212(a)(9)(C)(i)(II) of the Act because his re-entry into the United States was in 1992, prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). In addition, counsel contends that the applicant's 1984 conviction for burglary in violation of California Penal Code § 459 occurred prior to the date of enactment of the Anti-Drug Abuse Act of 1988 (ADAA) and, therefore, is not an aggravated felony. Furthermore, counsel contends the applicant's conviction for theft and unlawful taking or driving of a vehicle under California Vehicle Code § 10851(a) was not a theft offense.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, Ms. [REDACTED] indicating they were married on January 28, 1988; copies of the birth certificates of the couple's four U.S. citizen children; copies of [REDACTED] medical records; copies of tax returns and other financial documents; copies of conviction documents; decisions from an Immigration Judge and the Board of Immigration Appeals (BIA); and an approved Immigrant Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision.

The record shows that the applicant has been ordered deported by an Immigration Judge five times: in October 1979, March 1982, August 1983, November 1985, and November 1991. In addition, the record shows that the applicant has been arrested and convicted several times, including but not limited to: in approximately May 1978, the applicant was convicted of drunk driving on a highway in violation of California Vehicle Code § 23102(A) and sentenced to thirty days imprisonment and one year of probation; in approximately March 1984, using the name [REDACTED] the applicant pled guilty to two counts of first degree burglary, a felony, in violation of California Penal Code § 459 and was sentenced to four years imprisonment; and in approximately October 1999, using the name [REDACTED], the applicant was convicted of vehicle theft in violation of California Vehicle Code § 10851(a) and sentenced to one year imprisonment and three years of probation. Furthermore, the record indicates that as of January 2013, a warrant was issued by the State of Utah for the applicant's arrest.

With respect to inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, counsel is correct in his contention that the applicant is not inadmissible under this section of the Act. According to counsel, the applicant's last re-entry into the United States was in 1992, shortly after his last deportation. There is no suggestion in the record that the applicant re-entered the United States without admission at any time after the effective date of IIRIRA. Therefore, the applicant is not inadmissible under section 212(a)(9)(C)(i)(II) of the Act. The applicant is eligible to file an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and is eligible to apply for a waiver.

Regarding inadmissibility for a conviction for a crime involving moral turpitude, section 212(a)(2)(A) of the Act states, in pertinent part:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General 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.

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

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

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

(Citations omitted.)

The determination of whether a crime involves moral turpitude first requires the categorical inquiry set forth in *Taylor v. United States*, 495 U.S. 5750 (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). 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. *Id.* at 1004-05. A realistic probability 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*, 716 F.3d 1199, 1203 (9th Cir. 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).

In this case, beginning with the applicant's more recent conviction in 1999 for violating California Vehicle Code § 10851(a), at the time the applicant was convicted in 1999, the statute stated:

Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in the state prison for 16 months or two or three years or a fine of not more than ten thousand dollars (\$10,000), or both, or by imprisonment in the county jail not to exceed one year or a fine of not more than one thousand dollars (\$1,000), or both.

California Vehicle Code § 10851(a) (1995).¹ Counsel's contention that a conviction for violating § 10851(a), is not categorically a theft offense is correct. The Ninth Circuit Court of Appeals has held that a conviction under California Vehicle Code § 10851(a) does not categorically qualify as a theft offense because it extends liability to accessories after the fact for post-offense conduct. *Penuliar v. Mukasey*, 528 F.3d 603, 611 (9th Cir. 2008) (citing *United States v. Vidal*, 504 F.3d 1072, 1077 (9th Cir. 2007) (en banc)). The Court further held that the criminal information used to charge the defendant and the abstract of judgment were insufficient documentation to prove the defendant acted as a principal, rather than as an accessory after the fact, considering prosecutors regularly use generic language simply reciting the statutory elements of the offense. *Id.* at 613. Similar to *Penuliar*, in the instant case, there is insufficient evidence in the record showing that the applicant acted as a principal rather than as an accessory after the fact.

Nonetheless, this case is distinguishable from *Penuliar*. In *Penuliar*, the petitioner was a lawful permanent resident in removal proceedings. The burden of proof in removal proceedings lies with the Government. In contrast, in this case, for an application for a waiver of inadmissibility, the burden is on the applicant, not the Government. The plain language of the Act clearly places the burden of proving eligibility for entry or admission to the United States on the applicant. See Section 291 of the Act, 8 U.S.C. § 1361 ("Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document . . ."); see also *Nadal-Ginard v. Holder*, 558 F.3d 61, 66 (1st Cir. 2009) ("an alien who is an applicant for admission has the burden of establishing that he 'is clearly and beyond

¹ The current version of California Vehicle Code § 10851(a) is, for our purposes, virtually identical to the prior version.

doubt entitled to be admitted and is not inadmissible under section [212 of the INA].”); *Kirong v. Mukasey*, 529 F.3d 800, 804 (8th Cir. 2008) (explaining that an applicant for adjustment of status is in a similar position as an alien seeking entry into the United States and, as such, must prove clearly and beyond doubt that he was admissible and, therefore, eligible for adjustment of status); *Pichardo v. INS*, 216 F.3d 1198, 1200 (9th Cir. 2000) (applicant has the burden of establishing that he is “clearly and beyond doubt entitled to be admitted and is not inadmissible”); *Guillen-Garcia v. INS*, 60 F.3d 340, 343-44 (7th Cir. 1995) (“the applicant seeking a waiver of inadmissibility has the burden of proving that he merits the waiver by showing his rehabilitation and other favorable factors”) (citing *Palmer v. INS*, 4 F.3d 482, 487 (7th Cir. 1993)). As the Ninth Circuit Court of Appeals has stated in the context of cancellation of removal, where the applicant also bears the burden of proof:

In the removal context, the government bears the burden of establishing deportability. When the record of conviction is inconclusive, “the government has not met its burden of proof, and the conviction may not be used for purposes of removal.” It makes equal sense that when the burden rests on the alien to show eligibility for cancellation of removal, an inconclusive record similarly is insufficient to satisfy the alien’s burden of proof

Applying that rule to this case, it is clear that Petitioner has failed to meet his burden of demonstrating eligibility for cancellation of removal. The record of conviction, as discussed above, is inconclusive, because Petitioner pleaded guilty to a charging document alleging 14 different theories of how he could have violated California Health & Safety Code section 11352(a), some—but not all—of which would qualify as aggravated felonies. It is possible that Petitioner’s prior conviction constitutes an aggravated felony; it is also possible that it does not. But Petitioner bears the burden of demonstrating that he was *not* convicted of an aggravated felony, and he has failed to do so.

Young v. Holder, 697 F.3d 976, 989-90 (9th Cir. 2012) (citations omitted). Similarly, in the instant case, the applicant was convicted of California Vehicle Code § 10851(a), which may or may not be a theft offense and, thus, may or may not be a crime involving moral turpitude. The applicant has not met his burden of proving he was an accessory after the fact rather than a principal. In other words, the applicant has not met his burden of proving he was *not* convicted of a theft offense, a crime involving moral turpitude.

This conclusion is supported by the Ninth Circuit Court of Appeals recent case, *Duenas-Alvarez v. Holder*, 733 F.3d 812, 814-15 (9th Cir. 2013), which specifically addressed California Vehicle Code § 10851(a). Stating that the statute “is divisible in that it imposes criminal liability in the alternative on principals as well as on accessories after the fact,” the Court applied the modified categorical approach to determine whether the petitioner was convicted as a principal, instead of as an accessory after the fact. *Duenas-Alvarez*, 733 F.3d at 814-15. The Court relied on Count 1 of the Information which specified that the petitioner “did willfully and unlawfully drive or take” a 1992 Honda Accord belonging to someone else “without the consent of and with the intent to permanently or temporarily

deprive the said owner of title to and possession of” it and found that “Count 1 clearly and unambiguously charged Petitioner as a principal who personally drove or took the vehicle of another, without consent and with the intent to deprive the owner of it.” *Id.* As such, the Court held the petitioner had committed a theft offense that qualified as an aggravated felony, upholding the removal order of the immigration judge and the Board of Immigration Appeals. *Id.*

In this case, although the applicant submitted the Information for his burglary conviction, he has not submitted the Information related to his conviction under California Vehicle Code § 10851(a). It is uncontested that the applicant was convicted under California Vehicle Code § 10851(a), which may or may not be a crime involving moral turpitude. As such, the applicant has not met his burden of proving he was not convicted of a crime involving moral turpitude. Therefore, the applicant is inadmissible under section 212(a)(2)(A)(i) of the Act.

We now turn to the applicant’s 1984 conviction for burglary in violation of California Penal Code § 459. At the time of the applicant’s conviction, California Penal Code § 459 provided, in pertinent part:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach . . . mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. . . .

The Ninth Circuit Court of Appeals has held that when the underlying crime in a burglary is theft (*i.e.*, a crime involving moral turpitude), burglary is also a crime involving moral turpitude. *Mendoza v. Holder*, 623 F.3d 1299, 1301 n.4 (9th Cir. 2010) (“This court has held that when the underlying crime in a burglary is theft (a CIMT), burglary is also a CIMT.”) (citing *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005)); *see also Marmolejo-Campos v. Holder*, 558 F.3d 903, 933 (9th Cir. 2009) (burglary offenses “may or may not involve moral turpitude, the determinative factor being whether the crime intended to be committed at the time of entry . . . involves moral turpitude.”) (quoting *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946)); *Matter of Leyva*, 16 I&N Dec. 118, 120 (BIA 1977) (burglary with intent to commit theft is a crime involving moral turpitude). As the Board of Appeals has held, “moral turpitude is inherent in the act of burglary of an occupied dwelling itself, and that the respondent’s unlawful entry into the dwelling of another with the intent to commit *any crime* therein is a crime involving moral turpitude.”).

In this case, according to the Information contained in the record, the applicant was charged with, and convicted of, two counts of “willfully and unlawfully enter[ing] the residence[s] and building[s] occupied by [two different individuals], with the intent to commit larceny and a felony.” Therefore, the applicant’s burglary convictions also render him inadmissible for committing a crime involving moral turpitude under section 212(a)(2)(A)(i) of the Act.

Counsel contends the applicant’s burglary conviction is not an aggravated felony because the temporal limitation on aggravated felony removals remained intact even after the effective dates of the Immigration Act of 1990 (IMMACT) and IIRIRA. Counsel’s contention is misplaced. Although a

conviction for an aggravated felony may be dispositive in a removal proceeding, whether or not the applicant's conviction is an aggravated felony is not dispositive in the context of a waiver application. Rather, the relevant issue in this case is whether the applicant is subject to the heightened discretion standard of 8 C.F.R. § 212.7(d) for violent or dangerous crimes. In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States which are not outweighed by adverse factors. See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). However, based on the facts of this particular case, the record does not support a favorable exercise of discretion based solely on the balancing of favorable and adverse factors. Whether or not the applicant's burglary conviction qualifies as an aggravated felony as defined by the statute, the conviction does subject the applicant to the heightened discretion standard of 8 C.F.R. § 212.7(d).

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

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

The 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). It provides that a "crime of violence," as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, "crime of violence" is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any crime involving violence, as that term may be commonly defined. That the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in promulgating 8 C.F.R. § 212.7(d) indicates that "violent or dangerous crimes" and "crime of violence" are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

[I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense,

this might “still be insufficient” to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

The fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not dispositive. 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.” The AAO interprets the phrase “violent or dangerous crimes” in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

Using the above definitional framework, the record establishes that the applicant's felony conviction for burglary in violation of California Penal Code § 459 is a violent or dangerous crime for the purposes of 8 C.F.R. § 212.7(d). The record shows the applicant willfully and unlawfully entered the residences and buildings occupied by two different individuals with the intent to commit larceny and a felony. As the BIA noted:

the conscious and overt act of unlawfully entering or remaining in an occupied dwelling with the intent to commit a crime is inherently “reprehensible conduct” committed “with some form of scienter” By breaking into a dwelling of another for an illicit purpose, the burglar tears away the resident's justifiable expectation of privacy and personal security and invites a violent defensive response from the resident. As the United States Supreme Court has found, “The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate.”

Matter of Louissaint, 24 I&N Dec. at 758-59; cf. *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir. 2011) (“We hold that a conviction for residential burglary under California Penal Code § 459 constitutes a crime of violence because it is a felony ‘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.’ Thus, a conviction under California Penal Code § 459 is a ‘particularly serious crime.’”) (citations omitted). Using the plain and common meaning of the terms violent or dangerous, the record shows the applicant's burglary conviction is for an inherently violent or dangerous crime, subjecting the applicant to the heightened discretion standard of 8 C.F.R. § 212.7(d).

Under 8 C.F.R. § 212.7(d), the applicant must show that “extraordinary circumstances” warrant approval of the waiver. 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. 8 C.F.R. § 212.7(d). 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] would result in exceptional and extremely unusual hardship” to a qualifying relative. *Matter of Jean*, 23 I&N Dec. at 383.

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to his qualifying relatives under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship. Therefore, the AAO will determine whether the applicant meets this heightened standard.

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 exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean*, *supra*, and codified at 8 C.F.R. § 212.7(d).

The 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 63-64.

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 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.

After a careful review of the record, there is insufficient evidence to show that the hardship the applicant’s wife or children will suffer would be exceptional and extremely unusual if the applicant’s waiver application was denied. Significantly, there are no statements or letters in the record from the applicant, his wife, or any of the couple’s four children who are currently between seventeen and twenty-four years old. Therefore, neither the applicant nor any qualifying relative has specifically addressed how the denial of the applicant’s waiver application will cause exceptional and extremely unusual hardship. Furthermore, neither the applicant nor any qualifying relative discuss the possibility of relocating to Mexico to avoid the hardship of separation and whether such a move would amount to the heightened standard of exceptional and extremely unusual hardship. Although the record contains documentation showing that the applicant’s wife has a permanent disability of 32% due to injuries to her neck, right arm, and right shoulder sustained as a medical records clerk, and suffers from bilateral carpal tunnel, rotator cuff disease, and tendinitis, many of the documents in the record are approximately ten years old and, in any event, indicate that the applicant’s wife is able to work with restrictions. *See, e.g., Agreed Medical Examiner’s Report* at 2 dated February 14, 2005 (indicating the applicant’s wife “is capable of working as a smog technician”); *Agreed Medical Examiner’s Report* at 12 dated November 1, 2004 (indicating the applicant’s wife needs some work restrictions, including avoiding heavy lifting, repetitive pushing and pulling, repetitive grasping, pinching, twisting, etc.); *Requested Initial Orthopedic/Neurologic Consultation and Report* at 6, dated March 7, 2002 (indicating the applicant’s wife may continue working with the restriction of no pushing, pulling, or lifting over 5 lbs.). Without more recent and detailed information, such as a letter in plain language from a health care professional addressing the prognosis, treatment, and severity of the applicant’s wife’s medical problems, the AAO is not in the position to reach conclusions regarding the severity of any medical condition or the treatment and assistance needed. Even considering all of the evidence in the aggregate, the record does not show that the hardships the applicant’s wife or children will suffer produce a “truly exceptional situation” that would meet the exceptional and extremely unusual hardship standard. *See Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 at 62. Accordingly, the applicant failed to demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d), and the appeal will be dismissed.

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 not been met.

ORDER: The appeal is dismissed.