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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: MAR 2 7 2014 Office: NEBRASKA SERVICE CENTER [redacted]

IN RE: Applicant: [redacted]

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico who filed an application to waive his inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and 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, has a mother who is a lawful permanent resident, and has a father who is a U.S. citizen. The applicant seeks a waiver of inadmissibility pursuant sections 212(a)(9)(B)(v) and 212(h) of the Act in order to live with his wife, children, and family in the United States.

The director found that the applicant was convicted of a violent or dangerous crime and that he did not establish exceptional and extremely unusual hardship to a qualifying relative. The director denied the application accordingly.

On appeal, counsel contends that USCIS erroneously determined that the applicant's negative factors outweighed the positive factors and that the applicant failed to establish extreme hardship.[1]

The record includes, but is not limited to, the following documents: a letter from the applicant; a copy of the marriage certificate of the applicant and his wife, indicating they were married on September 20, 2001; copies of the birth certificates of the couple's U.S. citizen son and the applicant's stepson, Student Assessment Report and other school documents; letters from medical records; a copy of a child custody and visitation agreement; letters from the applicant's children, parents, siblings, and other relatives; letters of support; copies of tax returns and other financial documents; copies of arrest and conviction documents; a letter from the applicant's employer; a decision by an Immigration Judge; and an approved Immigrant Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

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

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

[1] Although counsel indicated on the Form I-290B that he would file a detailed brief, to date, the AAO has not received a brief or any additional documents related to the appeal. In addition, although counsel indicated on the Form I-290B that the appeal was of both the Form I-601 and the Form I-212, the record shows that only one fee was paid. Therefore, this decision addresses only the denial of the Form I-601. The applicant still requires an approved Form I-212.

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

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 --
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> (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.

In this case, the record shows that the applicant entered the United States without inspection in February 1983 when he was a child. The record also shows that the applicant was convicted of the following: in January 1999, the applicant was convicted in juvenile court of engaging in an act of unlawful sexual intercourse in violation of California Penal Code section 261.5(c); in November 2001, the applicant was convicted of inflicting corporal injury on a spouse in violation of California Penal Code section 273.5; and in June 2002, the applicant was again convicted of inflicting corporal injury on a spouse in violation of California Penal Code section 273.5. The applicant's Form I-485 was denied as abandoned on January 13, 2009, and the applicant was removed from the United States on February 1, 2010. Therefore, the applicant accrued unlawful presence of over one year, from January 13, 2009, when his Form I-485 was denied, until his removal on February 1, 2010. Accordingly, he is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking admission to the United States within ten years of his last departure.

Regarding inadmissibility for a conviction for a crime involving moral turpitude, 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 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*, 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).

At the time of the applicant's convictions in 2001 and 2002, California Penal Code section 273.5 stated:

> (a) Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person with whom he or she is cohabiting, or any person who willfully inflicts upon any person who is the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000) or by both that fine and imprisonment.

The Ninth Circuit Court of Appeals, within which the present case arises, has held that spousal abuse under California Penal Code section 273.5(a) is a crime of moral turpitude. *Grageda v. INS,* 12 F.3d 919, 922 (9th Cir. 1993) ("Because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements, we hold that spousal abuse under section 273.5(a) is a crime of moral turpitude."), *superseded on other grounds, Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011); *see also In re Tran*, 21 I&N Dec. 291 (BIA 1996) (holding that a conviction for willful infliction of corporal injury on a spouse, co-habitant, or parent of the perpetrator's child, in violation of section 273.5(a) of the California Penal Code, constitutes a crime

involving moral turpitude). Therefore, the applicant's convictions under California Penal Code section 273.5 are for crimes involving moral turpitude and counsel does not contend otherwise.

The applicant is seeking a waiver pursuant to sections 212(a)(9)(B)(v) and 212(h) of the Act. A waiver is dependent first upon a showing that the bar imposes an extreme hardship to a qualifying relative. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996). 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, the AAO cannot find, based on the facts of this particular case, that the applicant merits a favorable exercise of discretion solely on the balancing of favorable and adverse factors. As the director found, the applicant's conviction for willfully inflicting corporal injury on his spouse indicates that he is subject to the heightened discretion standard of 8 C.F.R. § 212.7(d) as this crime is a violent and/or dangerous crime.

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 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. 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). 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.

Using the above definitional framework, the AAO finds the offense punished under California Penal Code § 273.5 to be a violent or dangerous crime for the purposes of 8 C.F.R. § 212.7(d). We also find instructive that in *U.S. v. Laurico-Yeno*, 590 F.3d 818, 821 (9th Cir. 2010), the Ninth Circuit Court of Appeals found that because a person cannot be convicted without the intentional use of force under California Penal Code § 273.5, a conviction for inflicting corporal injury on a spouse or cohabitant categorically falls within the scope of a crime of violence. Because the record does not include 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.*

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 a qualifying relative under section 212(h) of the Act is insufficient.

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.

Monreal-Aguinaga, 23 I&N Dec. at 63-64.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 323 (BIA 2002), 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." 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.

Andazola-Rivas, 23 I&N Dec. at 324.

However, the BIA in *Matter of Gonzalez Recinas*, 23 I&N Dec. 467, 470 (BIA 2002), 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." 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. *Gonzalez Recinas*, 23 I&N Dec. at 472. The BIA stated, "[w]e 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.

In this case, the applicant's wife, states that she and her husband have a son together and that she has an older son, , from a previous relationship. According to is mentally challenged and suffers from seizures. She states that her husband has raised since he was 1½ years old. She contends has been devastated since her husband departed the United States and that she cannot work full-time because she needs to be with when he is not at school. She states that she cannot relocate to Mexico to be with her husband because she is prohibited by court order from taking out of California. contends that her husband had been the sole financial provider for their family and since his departure, she has lost everything, has had to move back in with her mother, and has gotten government assistance. She also contends she suffers from high blood pressure, anxiety, and was recently diagnosed with polycystic ovary syndrome (POCS). According to even though she and her husband have had problems in the past, he is her life and she cannot make it without him.

The applicant's parents state that they miss their son dearly and need him to be around. They state their family is very close and that it is hard for them to visit him in Mexico.

After a careful review of the record, the AAO finds that if decides to remain in the United States, she would suffer exceptional and extremely unusual hardship as a result of separation. The record contains ample documentation corroborating claims regarding her son, The record shows that is currently fifteen years old and that for most of his life, he has faced significant challenges in school, including a possible diagnosis of ADHD, global developmental delays with a severe impairment in language skills, and that he has been placed in special education classes. A Student Assessment Report in the record states that medical history [is] significant," indicating has suffered from seizures, has a history of asthma, was delayed in walking and toilet training, and underwent eye surgery. His test scores on intelligence scales and other areas were at less than the 0.1 percentile and the Report identifies his "primary disability" as mental retardation. The most recent Individualized Education Plan in the record indicates that at the age of thirteen, could write his first and last name, recite the alphabet, and could tell time on-the-hour. The AAO acknowledges the difficulties and challenges faces as a single parent to a child with special needs. In addition, the record contains a copy of a court order prohibiting from removing from California, and the record shows that she has been receiving food stamps and other government benefits. In addition, the record shows that Ms. has been diagnosed with POCS, and letters of support in the record corroborate the contention that the applicant takes good care of his family and is the only father has ever known. Considering the unique factors of this case and all of the evidence cumulatively, the record establishes that the hardship Ms. would experience if she remains

in the United States and separated from the applicant rises to the level of exceptional and extremely unusual hardship.

The AAO also finds that if Ms. relocated to Mexico to be with her husband, she would suffer exceptional and extremely unusual hardship. As stated above, the record shows Ms. is prohibited by law from removing from the State of California. In addition, relocating to Mexico would disrupt the continuity of health care Ms. is receiving in relation to her diagnosis of POCS. Moreover, the U.S. Department of State has issued a Travel Warning for parts of Mexico, including Tijuana, where the applicant was born and currently resides. *U.S. Department of State, Travel Warning, Mexico,* dated January 9, 2014. Considering all of these factors cumulatively, particularly Kaleb's special needs, the record establishes that the hardship Ms. would experience if she relocated to Mexico to be with her husband produces a "truly exceptional situation" that meets the exceptional and extremely unusual hardship standard. *See Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 at 62.

Moreover, the record contains numerous letters of support showing that the applicant has turned his life around, is a hard worker, is dedicated to his family, and is a great father. Letters also describe the applicant's participation in volunteer and fundraising events, and that he helps others with his expert computer skills. The applicant has not been arrested or convicted of any other offenses for more than eleven years. Though the applicant's past convictions are serious, the positive factors in this case outweigh the negative. Therefore, the applicant has met his burden of establishing exceptional and extremely unusual hardship to a qualifying relative and that he merits a favorable exercise of discretion. Because the applicant demonstrated that he merits a favorable exercise of discretion under the heightened hardship standard set forth in 8 C.F.R. § 212.7(d), the applicant also meets the extreme hardship standard for a waiver under section 212(h)(1)(B) of the Act and section 212(a)(9)(B)(v) of the Act.

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

ORDER: The appeal is sustained.