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

(b)(6)

U.S. Citizenship and Immigration Services

Date: OCT 2 7 2014 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Nebraska Service Center director 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 El Salvador who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude and under section 212(a)(9)(B)(i)(II) of 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 again seeking admission within ten years of his last departure from the United States. The applicant is the spouse of a United States citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The director found that the applicant had been convicted of a violent or dangerous crime and had not established that a qualifying relative would experience exceptional and extremely unusual hardship due to the applicant's inadmissibility. *Decision of the Director* dated December 26, 2013.

On appeal counsel for the applicant contends in the Notice of Appeal (Form I-290B) that the director erred by determining the applicant's crime was a violent or dangerous crime and in applying the heightened hardship standard. With the appeal counsel submits a brief. The record contains statements from the applicant and his spouse, letters about the spouse from a psychologist and a medical doctor, a psychological evaluation of the applicant's immediate family, a psychological evaluation of the applicant in El Salvador, letters from the applicant's children, school information for the applicant's children, letters of support for the applicant from friends and family, financial documentation, and country information for El Salvador. The entire record was reviewed and considered in rendering this decision.

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

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if -
>
> . . . .
>
> > (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme

> hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

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

> (B) Aliens Unlawfully Present.-
>
> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> . . . .
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now Secretary of Homeland Security] 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 . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record reflects that the applicant entered the United States without inspection in 1988 and did not depart until 2012, and the director determined that the applicant was inadmissible for accruing more than one year of unlawful presence in the United States. The record also reflects that in the applicant was convicted of Sexual Battery under California Penal Code section 243.4(b). The record shows that the applicant's conviction was for a felony and that he was sentenced to 365 days in prison, with the sentence stayed while the applicant was on probation. The director found the applicant's conviction to be for a crime involving moral turpitude and as it was violent or dangerous crime the applicant must show exceptional and extremely unusual hardship to a qualifying relative.

At the time of the applicant's conviction Cal. Penal Code § 243.4 provided in pertinent part:

> (b) Any person who touches an intimate part of another person who is institutionalized for medical treatment and who is seriously disabled or medically incapacitated, if the touching is against the will of the person touched, and if the touching is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. Such an act is punishable by either imprisonment in a county jail for not more than one year or in the state prison for two, three, or four years.

In *Matter of Sanudo*, 23 I&N Dec. 968 , 971 (BIA 2006), the BIA noted, "we have recognized that assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involved aggravating factors that significantly increased their culpability." 23 I&N Dec. at 971. Cal. Penal Code § 243.4(a) includes the types of "aggravating" factors that would cause us to find that the conduct at issue represents an inherently base, vile, or depraved act. Unlawfully restraining an unwilling victim to engage in sexual acts represents a vile and depraved act. In the present case the applicant was convicted under Cal. Penal Code § 243.4(b), which involves touching against their will a person who is institutionalized for medical treatment and who is seriously disabled or medically incapacitated. In *People v. Chavez*, the California Court of Appeal found that the commission of the lesser culpable offense, misdemeanor sexual battery in violation of Cal. Penal Code § 243.4(d)(1), is a crime involving moral turpitude. 84 Cal.App.4th 25 (2000). The court stated, "the degrading use of another, against her will, for one's own sexual arousal is deserving of moral condemnation. We hold that sexual battery is a crime of moral turpitude." 84 Cal.App.4th 25, 30. It should be noted that a conviction under Cal. Penal Code § 243.4(b) encompasses conduct that is significantly more depraved than a conviction under Cal. Penal Code § 243.4(d)(1). Accordingly, we find that the applicant's felony conviction under Cal. Penal Code § 243.4(b) is categorically a crime involving moral turpitude. Counsel has not contested that the applicant's conviction is a crime involving moral turpitude.

Now we turn to whether the applicant's conviction is a violent or dangerous crime.

8 C.F.R. § 212.7 states in pertinent part:

> Waiver of certain grounds of inadmissibility.
>
> . . . .
>
> d) Criminal grounds of inadmissibility involving violent or dangerous crimes. The Attorney General, 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.

Counsel asserts that the applicant's conviction is not a violent or dangerous crime. Counsel contends that the director finds the applicant's conviction to include penetration and that such an assault on a

disabled victim without her consent is considered violent, but that the director uses the allegation in the indictment when the applicant was actually convicted of a lesser offense. Counsel contends that a crime of violence is defined under 18 U.S.C § 16 as an offense that has an element of the use, attempted use, or threatened use of physical force or any other offense that is a felony and that involves a substantial risk that physical force may be used. Counsel asserts that in *Lisbey v Gonzales,* 420 F.3d 930, 932 (9th Cir. 2005), the Ninth Circuit determined that sexual battery under California Penal Code section 243.4(a) is not categorically a crime of violence as it has no requirement of actual or threatened physical force. Counsel asserts that subsection (a) differs from subsection (b) as it requires unlawful restraint and that (b) requires no additional touching or restraint. Counsel further asserts that the director's argument that penetration is included in the offense is illogical as to finding a crime violent or dangerous and that penetration is not per se violent or dangerous. Counsel notes that the director finds an assault on a disabled victim without her consent is considered violent, but counsel asserts that this does not change the level of violence or danger in the crime, as the actions required are the same regardless of the victim. Counsel concludes that the applicant was convicted of sexual battery that criminalizes touching, but that simple touching is not violent or dangerous and that the indictment alone cannot be used to support a broader reading.

We note that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and we are aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. See 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous". The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). For example, Black's Law Dictionary, Eighth Edition (2004), defines violent as "[o]f, relating to, or characterized by strong physical force," "[r]esulting from extreme or intense force," or "[v]ehemently or passionately threatening," and dangerous as "perilous; hazardous; unsafe" or "likely to cause serious bodily harm." Decisions

to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." 67 Fed. Reg. at 78677-78.

In *U.S. v. Wood*, 52 F.3d 272 (9th Cir. 1995) the U.S. Circuit Court of Appeals for the Ninth Circuit, applying the categorical approach, determined that although a conviction was theoretically possible under circumstances which did not end in violence under Washington's indecent liberties statute, an offense under the statute generally posed a serious potential risk of physical injury to the victim, and a conviction under the indecent liberties statute in Washington was a crime of violence under the Sentencing Guidelines (distinguishing *U.S. v. Weekley*, 24 F.3d 1125 (9th Cir. 1994)). Findings by the courts regarding what constitutes a "crime of violence" for purposes of another provision of law are, at best, persuasive authority in the discretionary determination of whether to consider a crime to be violent or dangerous under 8 C.F.R. § 212.7(d).

In *Lisbey v. Gonzales*, 420 F.3d 930, 932 (9th Cir. 2005) the court noted that all of the circuits to address this question have similarly concluded that sexual battery is a "crime of violence" under 18 U.S.C. § 16(b). In *Zaidi v. Ashcroft*, 374 F.3d 357 (5th Cir. 2004), the Fifth Circuit had "little difficulty in concluding" that an offense under a similar sexual battery statute created a substantial risk that physical force may be used. *Id.* at 361. The court viewed the non-consent of the victim as the touchstone for its conclusion that the offense involves substantial risk of the use of physical force. *Id.* The Second and Tenth Circuits have reached the same conclusion, using similar reasoning. *Sutherland v Reno*, 228 F.3d at 176–77; *United States v. Reyes–Castro*, 13 F.3d 377, 379 (10th Cir.1993).

In *United States. v. Romero-Hernandez,* 505 F.3d 1082 (10th Cir. 2007) the Tenth Circuit found that misdemeanor unlawful sexual contact in violation of Colorado law was a "forcible sex offense," thus qualifying as a "crime of violence". The court noted that the Colorado unlawful sexual contact statute prohibited nonconsensual sexual contact, so the forcible requirement did not mandate physical compulsion sufficient to overcome resistance, as long as defendant had sufficient control or power to overcome victim's free will, and an offense involving nonconsensual sexual contact would necessarily be forcible, even without physical violence. *U.S. v Romero-Hernandez*, 505 F.3d 1082 (2007 Tenth Circuit). The court held that violation of the Colorado statute is categorically a "forcible sex offense" and thus a "crime of violence," even if not committed by means of actual physical compulsion. "When an offense involves sexual contact," we wrote, "it is necessarily forcible when that person does not consent." *Id.* at 1089.

The inclusion of the term "dangerous" further signals that even crimes not marked by actual or physical force against the victim, but that may cause serious harm or are otherwise unsafe or hazardous, also trigger the requirements of 8 C.F.R. § 212.7(d). As stated above, in considering whether a crime is violent or dangerous, we will interpret these terms in accordance with other plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Here we find that the applicant's conviction for sexual battery under Cal. Penal Code § 243.4(b), which involves sexual contact against the will of an incapacitated or disabled victim, is a violent or dangerous crime as it involves a substantial risk of the use of physical force, and we therefore find that the applicant is subject to 8 C.F.R. § 212.7(d).

Although the applicant's children are qualifying relatives for a waiver under section 212(h) of the Act, the applicant requires a waiver under section 212(a)(9)(B)(v) due to his unlawful presence accrued in the United States. A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

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. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (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.

Counsel asserts that the applicant's spouse has been diagnosed with adjustment disorder with mixed anxiety and depression and that her children suffer weight loss due to anxiety and depression and have experienced academic shortcoming caused by separation from the applicant. The applicant's spouse states that she is brokenhearted and that it affects the children from her first marriage, as they treat the applicant like their dad. She states that there is sadness in the children's faces and a lack of interest in playing with friends and doing family activities, and that their suffering makes her sadder. The spouse states that the applicant helped the children with homework, and the emotional effect of his absence has a negative impact on their grades, as they have gone from advanced classes to regular classes. The spouse states that she has insomnia thinking about how to guide the family forward and then is tired and cannot concentrate, which is affecting her productivity, and that her boss has told her seek professional help. The spouse states that she has blackouts because she is fatigued, feels stressed, and fears she will lose her job. The spouse states that people at her church ask about the applicant, causing her to cry.

The applicant's daughter and stepson write about how they miss the applicant, and the stepson writes that he cannot concentrate at school so his education has suffered.

A letter from the spouse's medical doctor states that she has hypertension and depression with anxiety, is on medication, and was referred to a psychologist. A letter from a psychologist states that after being seen for three sessions the spouse was diagnosed with adjustment disorder with depressed mood and the psychologist believes the symptoms are directly related to separation from the applicant. The letter states that the spouse has increased sleeping to avoid pain and has feelings of hopelessness. The letter also states that the spouse's children have difficulty in school without the applicant, that the family has moved out of their home to stay with a family member, and that financial stress is another trigger for spouse's depression.

An evaluation of the family by a licensed certified social worker states that the spouse's stress affects her job and that she missed work for three months due to an unstable emotional state. The evaluation states that the spouse is concerned for her children and that her daughter is so stressed

that she is losing hair, has lost weight due to decreased appetite, and experiences insomnia, anger, and a decrease in academic performance. The evaluation states that the spouse's son has also lost weight, is depressed and anxious, and has decreased academic performance. The evaluation also states that due to a lack of financial support from the applicant the family now lives in one room.

Counsel asserts that the applicant's spouse cannot pay her utility bills and that the spouse and her children have gone from a house to a one-bedroom apartment or living with other family members, which constitutes financial stress. The applicant's spouse states that with the applicant in the United States they were able to pay their mortgage, but now she struggles and had to give up their floor installation business that the applicant took care of because she works full-time as a nurse's assistant and is unable to look after the business. The spouse states that she has started to work overtime to make up for the money that the applicant was making but has fallen behind on payments. She states that she has now rented out her house and moved to a one-bedroom apartment.

The spouse's niece states that the spouse and her children now live with the niece's family, where they share a bedroom and bath. The niece states that she sees the children cry for their father and there is despair throughout the family. The spouse's sister states that the spouse and her children are struggling and that the sister is trying to help support them.

Financial documentation submitted to the record shows that the applicant's spouse is behind on car payments, health insurance, and homeowners insurance; has had utilities disconnected; and has received letters from a debt collector.

Having reviewed the evidence in the record we find it to establish that the applicant's spouse is experiencing extreme hardship resulting from her separation from the applicant. In reaching this conclusion, we note the spouse's emotional condition and her financial status. We find that the applicant's emotional hardship, her concern for her children's emotional state, and her financial situation without the applicant's contributions, in the aggregate, amount to extreme hardship.

We also find the record to establish that the applicant's spouse would experience extreme hardship if she were to relocate to El Salvador to reside with the applicant. Counsel notes that Temporary Protected Status is for nationals from areas of ongoing armed conflict, natural disaster, or extraordinary and temporary conditions preventing safe return, and that El Salvador has had TPS for more than 12 years.

The spouse states that she has visited the applicant in El Salvador and that there are few possibilities for people to find good jobs. She states that the infrastructure is horrible and healthcare has very basic facilities. She states that the applicant lives with his brother, suffers ear infections, cannot find work, and stays in a violent neighborhood, Soyapango. She states that she feared for her life while visiting there and that although conditions are bad, she is unable to send money for the applicant to find a home in a better neighborhood. She states that moving to El Salvador is not an option for her and her children because of the violence and gangs that recruit in schools, where those who resist get killed. She states that gangs control neighborhoods through extortion. The spouse also states that her parents live near her in the United States and they are elderly and sick and need her constant attention.

The psychological evaluation of the spouse states that she came to the United States when she was 16 years old and has no family remaining in El Salvador, as her parents and four sisters live in the United States. It also asserts that if the applicant's spouse relocated, she would be in an impoverished climate in El Salvador, where she would not have an occupational network in which to thrive.

Country information submitted to the record shows that the location and timing of criminal activity in El Salvador is unpredictable and that crime rates are critical and significantly higher than international rates, with some areas effectively controlled by gangs.

We note that the U.S. Department of State warns U.S. citizens that crime and violence levels in El Salvador remain critically high, and crime and violence are serious problems throughout the country. A travel warning lists Soyapango, where the record indicates that the applicant lives, as among departments with chronic, high levels of reported criminal activity. The Department of State also notes that there are few private and no public hospitals that meet commonly-accepted standards in the United States. *See* Travel Warning - U.S. Department of State, dated April 25, 2014.

We find that the record reflects that the cumulative effect of the spouse's family ties to the United States, her length of residence in the United States of more than 25 years, and her safety concerns for herself and her children as well as her financial well-being were she to relocate to El Salvador, rises to the level of extreme hardship were she to relocate abroad to reside with the applicant due to his inadmissibility. Considered in the aggregate, the applicant has established that his spouse would face extreme hardship if the applicant's waiver request is denied.

Once extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. 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, we 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. The applicant has been convicted of sexual battery and, accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, we will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative. *Id.*

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 under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship.

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. We note that 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 63-4.

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

conceivably ruin their lives." *Id.* at 321 (internal quotations omitted). The BIA viewed the evidence of hardship in the respondent's case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The BIA noted:

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

23 I&N Dec. at 324.

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

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. *See Gonzalez Recinas*, 23 I&N Dec. at 469 ("While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship."). We note that exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The question to now be addressed is whether the applicant's qualifying family member would suffer hardship that is not only extreme, but that is "'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." 23 I& N Dec. 56, 62 (BIA 2001). Although we do find the applicant's spouse would experience extreme hardship if the waiver application is denied, we do not find, given the criteria noted above, that the record demonstrates that the hardship rises to the heightened level of exceptional and extremely unusual hardship to a qualifying relative, a standard more restrictive than the extreme hardship standard. Although we give considerable weight to factors here, we find that the applicant's spouse has been able to continue working, providing for her children, and has significant extended family nearby for emotional and financial support. We therefore find the record lacking in evidence that would

demonstrate that the applicant's spouse would face hardship "substantially" beyond the ordinary hardship that is expected upon separation.

We find however that if the applicant's spouse were to relocate to El Salvador the hardships as detailed above show that she would experience exceptional and extremely unusual hardship. Although the record shows that the applicant's spouse would experience hardship by relocating to remain with the applicant, we will find exceptional and extremely unusual hardship warranting a waiver of inadmissibility only where an applicant has demonstrated such hardship to a qualifying relative in the scenario of separation and the scenario of relocation. To relocate and suffer exceptional and extremely unusual hardship, where remaining in the United States and being separated from the applicant would not result in exceptional and extremely unusual hardship is a matter of choice and not the result of inadmissibility. *Matter of Ige*, 20 I&N Dec. at 886.; also *cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated exceptional and extremely unusual hardship from separation, we will not find that refusal of admission would result in extraordinary circumstances of exceptional and extremely unusual hardship.

Accordingly, the applicant does not warrant a favorable exercise of discretion 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.