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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED] Office: LOS ANGELES, CA

Date: **APR 09 2010**

IN RE: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Michael Hummer

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California. An appeal was subsequently dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted and the appeal will be sustained. The waiver application will be approved.

The applicant is a native and citizen of El Salvador who first entered the United States in or around 1973. The applicant was convicted of petty theft in 1979, of burglary in 1985 and 1986, and of making a false claim to United States citizenship in 1989. The applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure admission to the United State through fraud or misrepresentation. The applicant also is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for his convictions for crimes involving moral turpitude. The applicant is married to a U.S. citizen, and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his spouse and oldest son.

The District Director, addressing the applicant's request for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), concluded that the applicant failed to establish extreme hardship to a qualifying relative, and denied the application. *See Decision of the District Director*, dated Feb. 15, 2007. The applicant did not request, and the District Director did not address, the applicant's eligibility for a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i).

On appeal, the applicant, through his former counsel, asserted that the District Director should have granted a waiver under section 212(h)(1)(A) of the Act because his last conviction was more than 15 years ago, he has shown rehabilitation, and his admission would not be contrary to U.S. safety, security, or the national welfare. The applicant further contended that the District Director erred in denying a waiver under section 212(h)(1)(B) because he established extreme hardship to his U.S. citizen spouse and son. *See Brief in Support of Appeal*, dated Apr. 5, 2007.

The AAO determined under its de novo review that the applicant is inadmissible under sections 212(a)(6)(C)(i) and 212(a)(2)(A)(i)(I) of the Act.¹ The AAO concluded that the applicant failed to establish extreme hardship to his spouse if he is refused admission to the United States, and dismissed the appeal accordingly. *See Decision of the Acting Chief, Administrative Appeals Office*, dated April 30, 2009.

¹ Although the applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act was not addressed by the District Director, the AAO maintains plenary power to review this appeal on a de novo basis. *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The federal courts have long recognized the de novo authority of the AAO. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Additionally, there is no harm to the applicant because the proffered evidence regarding extreme hardship to his spouse is equally applicable to a waiver request under section 212(i) of the Act.

On the present motion, the applicant, through his current counsel, asserts that he has provided evidence of hardship to his wife if his waiver is denied. The applicant contends that the AAO violated his right to due process by applying the 212(i) hardship standard without prior notification. He states that if his spouse accompanies him to El Salvador, she would have to break her strong family ties and suffer an extreme financial loss. He notes that El Salvador is unstable and crime is endemic throughout the country. The applicant states that if his spouse remains in the United States without him she will lose the major source of support in her life. *See Motion to Reconsider and Reopen*, dated May 28, 2009.

In support of the motion, the applicant submitted medical documentation, financial records, country conditions reports, and letters from his spouse, sister-in-law and friend. The entire record was reviewed and considered in arriving at a decision on the appeal.²

Section 212(a)(6)(C) of the Act provides, in pertinent part:

Misrepresentation

(i) In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

(ii) Falsely claiming citizenship

(I) In general

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.

* * *

Section 212(i) of the Act provides:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully

² On appeal, the applicant submitted letters from his wife and son, a psychological evaluation of the applicant, his spouse and son, letters in support of the waiver application, and evidence that two of his convictions have been set aside or expunged.

admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

Because section 212(a)(6)(C)(ii) of the Act only applies to false claims of citizenship on or after September 30, 1996, the applicant's inadmissibility will be analyzed under the general misrepresentation ground in section 212(a)(6)(C)(i). *See* Memo. from Joseph R. Greene, Acting Assoc. Commr., Office of Programs, Immig. and Naturalization Serv., *Section 212(a)(6)(C)(ii) Relating to False Claims to U.S. Citizenship* 2-3 (Apr. 8, 1998).

The record reflects that on January 16, 1989, the applicant "applied for entry at the San Ysidro Port of Entry, claiming United States citizenship to the Primary Inspector." *See Form I-213, Record of Deportable Alien*, dated Jan. 16, 1989. The applicant was charged with making a False Claim to U.S. Citizenship (Felony) under 18 U.S.C. § 911, and Disrupting the Performance of Official Duties (Misdemeanor), under 40 U.S.C. § 486(c) and 41 C.F.R. §§ 101-20.305 and 101-20.315. The applicant's false claim to U.S. citizenship was made to a U.S. government official, the misrepresentation was related to a material fact, and it was made to procure admission to the United States. Accordingly, the applicant is inadmissible for fraud or willful misrepresentation. *See* Section 212(a)(6)(C)(i) of the Act.

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

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.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

The director found the applicant inadmissible for having been convicted of three crimes involving moral turpitude. The applicant has not disputed this determination on appeal.

The record reflects that on May 14, 1979, the applicant was convicted in the Glendale Municipal Court of misdemeanor theft in violation of section 484 of the California Penal Code (Cal. Penal Code). On June 14, 1985 he was convicted in the Superior Court of California, County of Los

Angeles, for Burglary of the Second Degree, a felony, in violation of Cal. Penal Code § 459. On April 16, 1986 he was again convicted in the Superior Court of California, County of Los Angeles, of Burglary of the Second Degree, a felony, in violation of Cal. Penal Code § 459.

At the time of the applicant's conviction, Cal. Penal Code § 484 provided, in pertinent part:

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009).

At the time of the applicant's conviction, Cal. 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, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

At the time of the applicant's conviction, Cal. Penal Code § 460 provided, in pertinent part:

1. Every burglary of an inhabited dwelling house or trailer coach as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.
2. All other kinds of burglary are of the second degree.

The Board of Immigration Appeals (BIA) has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). For example, the BIA has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). The Ninth

Circuit Court of Appeals, under which this case arises, has similarly held that burglary with the intent to commit theft is a crime involving moral turpitude. *See Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005) (“Because the underlying crime of theft or larceny is a crime of moral turpitude, unlawfully entering a residence with intent to commit theft or larceny therein is likewise a crime involving moral turpitude.”). Conversely, the Second Circuit Court of Appeals held in *Wala v. Mukasey* that burglary with intent to commit larceny is not a crime involving moral turpitude where there was no intent to deprive the victim permanently of his property. 511 F.3d 102, 110 (2^d Cir. 2007). Thus, based solely on the statutory language, it appears that Cal. Penal Code § 459 encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not.

However, in accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which Cal. Penal Code § 459 was applied to conduct that did not involve moral turpitude. The applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under Cal. Penal Code § 459 for conduct not involving moral turpitude. Further, the record does not establish that this statute was applied to conduct not involving moral turpitude in the applicant’s own criminal case. The AAO notes that the applicant has not submitted court records pertaining to either of his convictions. Therefore, the AAO must find the applicant’s convictions for burglary of the second degree under Cal. Penal Code § 459 to be crimes involving moral turpitude, and the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Sections 212(i) and 212(h) waivers of the bar to admission are dependent upon a showing that the bar imposes an extreme hardship on a qualifying family member. The qualifying family member in this case is the applicant’s spouse, [REDACTED]. Extreme hardship to a qualifying family member must be established in the event that the family member remains in the United States without the applicant, and in the event that he or she accompanies the applicant to the home country. However, a qualifying relative is not required to reside outside of the United States based on a denial of an applicant’s waiver request. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

The concept of extreme hardship “is not . . . fixed and inflexible,” and the determination is based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a non-exhaustive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include: the presence of family ties to U.S. citizens or lawful permanent residents in the United States; family ties outside the United States; country conditions where the qualifying relative would relocate and family ties in that country; the financial impact of departure; and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. Family separation is also an important calculation in the extreme hardship analysis. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (“When the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.”); *Matter of Lopez-Monzon*, 17 I&N Dec. 280 (Comm. 1979) (noting in the context of a waiver under section 212(i) of the INA that the intent of the waiver is to provide for the unification of families and to avoid the hardship of separation).

Additionally,

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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, e.g., economic detriment due to loss of a job or efforts ordinarily required in relocating or adjusting to life in the native country. Such ordinary hardships, while not alone sufficient to constitute extreme hardship, are considered in the assessment of aggregate hardship.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (internal quotation and citation omitted). However, “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that mere economic detriment and emotional hardship caused by severing family and community ties are common results of deportation and do not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit held that economic hardship and adjustment difficulties did not constitute hardship that was unusual or beyond that which would normally be expected upon deportation. In *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968), the BIA held that separation of family members and financial difficulties alone do not establish extreme hardship unless combined with more extreme impact. In *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), the U.S. Supreme Court held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The record reflects that the applicant is a 54-year-old native and citizen of El Salvador who has resided in the United States since 1973. The applicant and his wife [REDACTED], a 54-year-old native of Honduras and citizen of the United States, have been married for 14 years. See *Marriage Certificate* (indicating marriage on March 4, 1996). The applicant and his wife reside in Los Angeles, California. The applicant has a 27-year-old U.S. citizen son, [REDACTED] from a previous relationship. See *Psychosocial Report by [REDACTED]* dated Sept. 20, 1998. [REDACTED] is a qualifying family member for sections 212(i) and 212(h) of the Act extreme hardship purposes.

The AAO determined on appeal that given [REDACTED] equities in the United States, it appears that relocation to El Salvador could cause financial, professional and psychological difficulties for her. However, the applicant did not present specific evidence that the hardship his wife would face would be extreme. See *Decision of the Acting Chief, Administrative Appeals Office*, dated April 30, 2009.

In the motion to reopen, [REDACTED] states that the severity of her elderly parents’ fragile health and safety needs has created a significant hardship for her family. She states that she provides her parents with daily support. See *Letter from [REDACTED]* dated May 26, 2009.

The applicant submitted with the motion a letter from his mother-in-law's psychiatrist, [REDACTED]. [REDACTED] states in her letter that she has been treating [REDACTED] 81-year-old mother, [REDACTED] since June 28, 2003 for major depression with psychosis and for agitation and psychosis due to dementia. [REDACTED] notes that [REDACTED], who lives less than one mile from her mother, has accompanied her mother to nearly every appointment since the initial evaluation.

She further notes:

[REDACTED] has severe diabetes and is blind; she has high blood pressure and is physically quite frail, and has quite severe dementia that leaves her agitated, occasionally physically assaultive, and quite psychotic with paranoid delusions. She is quite uncooperative with medications, following directions, and maintaining her personal safety. Her husband is eighty-two years old and suffers from severe Parkinson's disease which prevents him from being able to help his wife with physical tasks such as transfers, bathing; even helping her feed herself is not possible for him due to his severe tremor. [REDACTED] essentially manages her mother and father's daily care. She monitors her mother's blood glucose and administers insulin twice each day; she helps her father with meal preparation and helps her mother with bathing and puts her to bed each day. . . . [REDACTED] accompanies her parents to all their medical appointments and attends those appointments with them. Her help is essential when we have to make difficult treatment decisions, balancing costs and benefits of a particular treatment, as her parents are not capable of understanding some of the complicated side effects of medications.

See Letter from [REDACTED] dated May 13, 2009.

[REDACTED] further states that if she moved to El Salvador she would suffer personal and professional consequences because she would have to terminate her successful career as a social worker with Los Angeles County where she has been employed for 31 years. She states that she would suffer a loss of income and benefits, giving up pay increases and promotional opportunities and compromising her pension. She states that she is not fluent in Spanish and she would not be able to find employment as a social worker in El Salvador. [REDACTED] notes that El Salvador is economically and politically unstable and dangerous. She states that she would fear for her personal safety in El Salvador. See Letter from [REDACTED] dated May 26, 2009.

The AAO notes that the Secretary, Department of Homeland Security, has extended Temporary Protected Status (TPS) for nationals of El Salvador until September 9, 2010. The Secretary, after consultation with appropriate government agencies, may designate a country for TPS under the following conditions:

There is an ongoing armed conflict within the state and, due to that conflict, return of nationals to that state would pose a serious threat to their personal safety;

The state has suffered an environmental disaster resulting in a substantial, temporary disruption of living conditions, the state is temporarily unable to handle adequately the return of its nationals, and the state has requested TPS designation; or

There exist other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless the Secretary finds that permitting nationals of the state to remain temporarily is contrary to the national interest of the United States.

Section 244(b)(1) of the Act, 8 U.S.C. § 1254a(b)(1).

The U.S. Department of State's profile on El Salvador states that the country has suffered a number of catastrophic natural disasters. The profile provides in part:

In 1998, Hurricane Mitch killed 10,000 in the region Major earthquakes in January and February of 2001 took another 1,000 lives and left thousands more homeless and jobless. El Salvador's largest volcano, Santa Ana (also known by its indigenous name Ilamatepec), erupted in October 2005, spewing sulfuric gas, ash, and rock on surrounding communities and coffee plantations, killing two people and permanently displacing 5,000. Also in October 2005, Hurricane Stan unleashed heavy rains that caused flooding throughout El Salvador. In all, the flooding caused 67 deaths and more than 50,000 people were evacuated at some point during the crisis.

U.S. Department of State, *Background Note: El Salvador*, September 2009.

Further, the U.S. Department of State's description of travel conditions in El Salvador warns that the country is considered a "critical crime-threat country" with one of the highest homicide rates in the world. The travel advisory provides in part:

Random and organized violent crime is endemic throughout El Salvador. . . . Many Salvadorans are armed, and shootouts are not uncommon. . . . Armed holdups of vehicles traveling on El Salvador's roads are increasing, and U.S. citizens have been victims in various incidents. In one robbery, an American family was stopped by gunmen while driving during the day on the Pan American highway in the Santa Ana Department. In another incident, an American citizen passenger was robbed after the van in which she was riding was carjacked by armed men. The van was stopped at a traffic light on the busy road between Comalapa International Airport and San Salvador shortly after dark. . . .

[V]iolent crimes, as well as petty crimes are prevalent throughout El Salvador, and U.S. citizens have been among the victims. The Embassy is aware of at least five American citizens who were murdered in El Salvador during the last year, and also has confirmed reports of at least two attempted sexual assaults against American citizens. . . . Armed assaults and carjackings take place both in San Salvador and in the interior of the country, but are especially frequent on roads outside the capital where police patrols are scarce. Criminals have been known to follow travelers from

the international airport to private residences or secluded stretches of road where they carry out assaults and robberies. Armed robbers are known to shoot if the vehicle does not come to a stop. Criminals often become violent quickly, especially when victims fail to cooperate immediately in surrendering valuables. Frequently, victims who argue with assailants or refuse to give up their valuables are shot.

U.S. Department of State, *Country Specific Information: El Salvador*, March 25, 2009.

The AAO finds that the designation of El Salvador for TPS indicates that [REDACTED] would likely face economic challenges there consistent with her claims. Furthermore, the designation of El Salvador as a “critical crime-threat country” indicates that if [REDACTED] moved to El Salvador, she would likely suffer hardship in the form of threats to her welfare and safety. Further, [REDACTED] has established that she has significant family obligations in the United States, which include caring for her mother, who has severe dementia, diabetes and blindness, and her father, who has severe Parkinson’s disease. The hardships [REDACTED] would suffer if she departed the United States and relocated to El Salvador are beyond the hardships typically experienced upon relocation to another country, and they cumulatively rise to the level of extreme hardship. It has therefore been established that [REDACTED] would suffer extreme hardship if the applicant’s waiver is denied and she relocated with him to El Salvador.

As noted, extreme hardship to a qualifying family member must also be established in the event that the qualifying family member remains in the United States, as he or she is not required to reside outside of the United States based on a denial of an applicant’s waiver request.

In denying the appeal, the AAO determined that given their long and supportive marriage, the applicant’s evidence regarding the emotional hardship to his wife as a result of family separation is not minimal. Similarly, the input of a mental health professional is respected and valued in assessing a claim of emotional hardship. The AAO determined, however, that the evidence in the record did not appear to establish that the emotional difficulties the applicant’s wife would experience are more serious than the type of hardship a family member would normally suffer when faced with the prospect of a spouse’s removal. For instance, the record does not reflect ongoing consultation between a mental health professional and the applicant’s wife, or any history of treatment for anxiety or any other condition. Although the distress caused by the prospect of being separated from one’s spouse is not in question, a waiver of inadmissibility is only available where the resulting hardship would be unusual or beyond that which would normally be expected upon removal. *See Perez*, 96 F.3d at 392; *Matter of Pilch*, 21 I&N Dec. at 631. Additionally, the evidence does not show that the applicant’s spouse would suffer significant economic detriment or medical concerns as a result of the denial of a waiver. *See Matter of O-J-O-*, 21 I&N Dec. at 383 (requiring consideration of the cumulative impact of hardships). *See Decision of the Acting Chief, Administrative Appeals Office*, dated April 30, 2009.

In the motion to reopen, [REDACTED] states that the applicant provides her father with social and emotional support, giving her father respite from the ongoing stress and secondary trauma of residing with her mother. She states that the applicant responds to emergencies when she is not able to, helps control her mother when she becomes agitated, and assists in transporting her parents to

medical appointments. She states that the applicant repairs and safeguards her parents' home. She states that the applicant cares for her emotionally, treats her secondary stress by providing distraction, and cooks, cleans and cares for their pets. She states that without the applicant's support, her ability to care for her parents would be severely compromised. [REDACTED] states that without her and the applicant's assistance, her parents would have to rely on public assistance to keep them at home or to place them in institutional care. *See Letter from [REDACTED]*, dated May 26, 2009.

The applicant submitted a psychiatric evaluation of [REDACTED] from [REDACTED], with the present motion. The evaluation states, [REDACTED] psychological testing suggests that he has symptoms of major depression due to the life stressors of her husband being deported and caring for her mother." The evaluation recommends that "since there is evidence that she has the clinical picture of depression, she should have a psychiatric referral for treatment with medication and psychotherapy." *See Psychiatric Report from [REDACTED]*, dated May 26, 2009. Further, the letter from [REDACTED] states that [REDACTED] "is at high risk of developing a depressive illness." *See Letter from [REDACTED]*, dated May 13, 2009.

The AAO acknowledges that [REDACTED] will experience emotional hardship if she remains in the United States without the applicant. This case arises in the Ninth Circuit. In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and that "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted). The applicant's separation from his spouse constitutes emotional suffering for his qualifying family member.

Whereas inadmissibility for unlawful presence under section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), is temporary, and inadmissibility for a crime involving moral turpitude under section 212(a)(2)(A)(i) of the Act can be waived under the 212(h)(1)(A) standard after 15 years, inadmissibility for a material misrepresentation is permanent. Therefore, [REDACTED] faces the prospect of permanent separation from her husband, a scenario generally resulting in extreme hardship. Furthermore, the emotional suffering experienced by [REDACTED] surpasses the hardship typically encountered in instances of separation because of her reliance on the applicant to assist her in coping with the difficulties that arise from caring for her elderly and incapacitated parents. The AAO has carefully considered the facts of this particular case and finds that the emotional hardship suffered by [REDACTED] rises to the level of extreme hardship. The AAO therefore concludes that the applicant has established that his spouse would suffer extreme hardship if his waiver of inadmissibility is denied.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of 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).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996).

The AAO must then, “[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant’s May 14, 1979 conviction for theft, his June 14, 1985 and April 16, 1986 convictions for burglary of the second degree, his willful misrepresentation before a U.S. government official on January 16, 1989, and his entry into the United States without inspection in May 1989 and subsequent period of unlawful presence. The favorable factors in the present case are the extreme hardship to the applicant’s spouse, his payment of taxes and employment in the United States, the passage of 24 years since his last criminal conviction, and the passage of 21 years since he was apprehended for making a false claim to U.S. citizenship.

The AAO finds that the crimes and immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

The AAO notes that Section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G), provides that a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year, is an aggravated felony. Section 212(a)(9)(A)(ii) of the Act provides that an alien convicted of an aggravated felony who has been ordered removed or departed the United States while an order of removal was outstanding and who seeks admission at any time is inadmissible. The record reflects that the applicant was convicted on April 16, 1986 for burglary of the second degree and sentenced to two years imprisonment. An order of deportation was issued against the applicant under section 241(a)(1) of the Act, 8 U.S.C. § 1231(a)(1), on April 12, 1989. The applicant was removed from the United States on April 18, 1989. The applicant must file a Form I-212, Application for Permission to Reapply for Admission After

Deportation or Removal, to apply for permission to reapply for admission to the United States. *See* Section 212(a)(9)(A)(iii) of the Act.”

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) and 212(i) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained. The waiver application is approved. The applicant’s Form I-485 adjustment application, which was denied on the basis of the applicant’s inadmissibility and the erroneous finding that the applicant had not filed an appeal from the denial of his waiver application, shall be reopened.