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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

H5

FILE: [REDACTED] Office: LOS ANGELES, CA

Date: **SEP 10 2010**

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California. 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 was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation on October 15, 1992. The applicant is married to a U.S. citizen and has two U.S. citizen children. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated December 11, 2007, the field office director found the applicant inadmissible for attempting to enter the United States on October 15, 1992 by presenting a fraudulent permanent resident card. The field office director found that the record failed to establish extreme hardship to the applicant's qualifying relative and denied the application accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated January 9, 2008, counsel states that the field office director erred in finding that the applicant's U.S. citizen spouse would not suffer extreme hardship as a result of his inadmissibility. He states that based on the facts the hardship to the applicant's spouse rises to the level of extreme hardship. He submits a brief with further details.

The record indicates that on or about October 15, 1992 the applicant attempted to enter the United States with a fraudulent social security and lawful permanent resident card.

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

- (i) 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 Act is inadmissible.

Section 212(i) of the Act provides that:

- (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 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.

The AAO notes that the record also indicates that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir.2008)). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero*, *supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination 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. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

If the crime does not categorically involve moral turpitude, then the modified categorical approach is applied. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). This approach requires looking to the "limited, specified set of documents" that comprise what has become 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 necessary elements of a crime involving moral turpitude. *Id.* at 1161 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)).

The record shows that the applicant was arrested in Orange County, California on April 30, 2003 and charged with driving under the influence of alcohol under California Vehicle Code (C.V.C.) § 23152(A) and (B). On May 8, 2003 the applicant pled guilty to both charges and was sentenced to three years informal probation.

The record shows that the applicant was arrested in Los Angeles County, California on September 13, 1998 and was charged with assault with a deadly weapon under California Penal Code (C.P.C.) § 245(a)(1). On October 5, 1998 the applicant was convicted of the charge and placed on summary probation for three years. The applicant, who was born on December 23, 1969, was 28 years old at the time he committed the acts that resulted in this arrest.

At the time of the applicant's conviction C.V.C. § 23152 stated, in pertinent part:

- (a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.
- (b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

The AAO notes that the BIA has held that a simple DUI conviction does not constitute a crime involving moral turpitude. *In Re Lopez-Meza, Id.* 3423 (BIA Dec. 21, 1999). *See also, Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001). Thus, the applicant's conviction for driving under the influence is not a crime involving moral turpitude, but his conviction for assault with a deadly weapon is a crime involving moral turpitude.

At the time of the applicant's conviction C.P.C. § 245(a)(1) stated:

(a) (1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

In *Matter of O-*, 3 I&N Dec. 193 (BIA 1948) and *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992), the Board of Immigration Appeals (BIA) held that assault with a weapon is a crime involving moral turpitude. It is noted that as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, this general rule does not apply where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon.... *See, e.g., Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). The AAO notes that the Ninth Circuit Court of Appeals has specifically addressed the statute at issue, and has held that violation of C.P.C. § 245(a)(2) (Assault with a Firearm) is not a crime involving moral turpitude. *See Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996) (citing *Komarenko v. INS*, 35 F.3d 432, 435 (9th Cir. 1994)). However, the Ninth Circuit did not provide a rationale for this finding in either *Carr* or *Komarenko*, and it did not engage in an analysis of the statute consistent with the methodology that has subsequently been adopted by the Ninth Circuit. As stated above, the BIA has found that the use of a deadly weapon in the commission of an assault is an aggravating factor that renders the offense a crime involving moral turpitude. Given that this aggravating factor is an element of the offenses enumerated in C.P.C. § 245(a), and that the AAO is unaware of any prior case in which a court has applied C.P.C. § 245(a) to conduct not involving moral turpitude, the AAO must find that the applicant's conviction for violation of C.P.C. § 245(a) is a crime involving moral turpitude.

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

A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C)(i) of the Act is dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse and/or parent of the applicant. A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A) of the Act is dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse, parent and/or child of the applicant. Hardship the applicant experiences due to separation is not considered in section 212(h) and section 212(i) waiver proceedings unless it causes hardship to the applicant's spouse. The AAO notes that the applicant has two U.S. citizen children and hardship to these children is considered in section 212(h) waiver proceedings, but is not considered in section 212(i) waiver proceedings unless it is shown that the hardship to his children is causing hardship to his spouse.

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. The applicant's conviction for assault with a deadly weapon indicates that he may be subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

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

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

The 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, 8 U.S.C. § 1101(a)(43)(F). It provides that a "crime of violence," as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, "crime of violence" is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any

crime involving violence, as that term may be commonly defined. That the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in promulgating 8 C.F.R. § 212.7(d) indicates that “violent or dangerous crimes” and “crime of violence” are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

[I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

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

Therefore, the fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not dispositive. Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual “case-by-case basis.” The AAO interprets the phrase “violent or dangerous crimes” in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*.

The AAO finds that the applicant’s conviction for assault with a deadly weapon under C.P.C. § 245(a)(1) is categorically a dangerous crime. A conviction under C.P.C. § 245(a)(1) requires that the means of force used be likely to produce great bodily injury.” The AAO can therefore conclude that the applicant’s conviction for assault with a deadly weapon renders him subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

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, 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 his qualifying relatives under

section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship. Therefore, the AAO will at the outset determine whether the applicant meets this standard.

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that “must be ‘substantially’ beyond the ordinary hardship that would be expected when a close family member leaves this country.” However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes 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."). The AAO notes 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 record of hardship contains a brief from counsel, a statement from the applicant's wife, an affidavit from the applicant's wife, country conditions information for Mexico, and a letter from the applicant's employer in Mexico.

In his brief dated January 9, 2008, counsel states that the applicant and his spouse have a very loving and supportive relationship. He states that the applicant's spouse came from a poor family and her marriage to the applicant freed her from her family obligations and allowed her to pursue her dreams. Counsel states that an abrupt and permanent separation will cause the applicant's spouse untold distress and trauma.

Counsel also states that relocation would be an extreme hardship for the applicant's spouse in that she has never been to Mexico and would not be able to find employment in Mexico. Counsel states that the applicant's spouse lacks the education, skill, and experience to find employment in Mexico. He also states that the minimum daily wage in Mexico, if a worker is even paid the minimum daily wage, ranges from \$4.19 to \$4.46 per hour and that this wage is not sufficient to support a family.

In a statement dated January 9, 2008, the applicant's spouse states that if she were separated from the applicant that she and her children would suffer morally and emotionally. She states that relocation to Mexico would be difficult because the children are in school in the United States and it would be hard to find employment in Mexico. The applicant's spouse states further that the applicant is the only person in charge of the monthly expenses and that it would be very hard for her to keep up with their expenses if the applicant returns to Mexico.

In an affidavit dated July 9, 2004, the applicant's spouse states that the applicant is very close to their children and that he is a wonderful husband and good example for their children.

The AAO notes that the record also includes a letter from the applicant's former employer in Mexico, Plastijay Industries. The letter, dated June 23, 2004, states that the applicant was laid off from his job due to an unemployment crisis affecting local communities in Gomez Palacio, Durango, Mexico. The letter also seems to state that the unemployment situation in the applicant's field remains the same.

The AAO also notes that the record contains two reports from the World Bank concerning the economic instability and poverty in Mexico. In addition, the record includes a 2006 U.S. Department of State Country Report on Human Rights Practice in Mexico which states that although the government generally respected human rights many human rights problems were reported.

The AAO notes further that the U.S. Department of State has issued a travel warning regarding U.S. citizens traveling to Mexico. The warning dated May 6, 2010, states that since 2006 the Mexican government has engaged in an extensive effort to combat drug-trafficking organizations (DTOs) which have been engaged in a vicious struggle with each other for control of trafficking routes. The warning states that according to published reports, 22,700 people have been killed in narcotics-related violence since 2006. The warning states specifically that recent violent attacks and persistent security concerns have prompted the U.S. Embassy to urge U.S. citizens to defer unnecessary travel to Durango, as well as other areas of Mexico.

The warning states further that between 2006 and 2009, the number of narcotics-related murders in the state of Durango increased ten-fold and that the cities of Durango and Gomez Palacio have experienced sharp increases in violence. The warning also states that in late 2009 and early 2010, four visiting U.S. citizens were murdered in Gomez Palacio, Durango and that these are among several unsolved murders in the state of Durango that have been cause for particular concern. The AAO notes that the record indicates that the applicant worked in Gomez Palacio, Durango when he last resided in Mexico. The record also indicates that Gomez Palacio, Durango is the applicant's place of birth. The AAO finds that due to the current situation in the applicant's last place of residence in Mexico and likely area of relocation, his U.S. citizen spouse and children would face exceptional and extremely unusual hardship as a result of relocation. The AAO notes that relocating to Durango, Mexico cannot be compared to the typical experience of a relocating family who experiences a lower standard of living and/or adverse country conditions upon relocation. The degree of violence being experienced in certain areas of Mexico, including Durango, as listed in the U.S. Department of State Travel Warning is so severe that it could be stated that relocation to Durango, Mexico would be placing the applicant's family at risk of death. In addition to the troubling violence that is occurring in certain parts of Mexico and the very serious safety risks this violence poses for the applicant's spouse and two children upon relocation, the record supports a finding that the applicant's spouse would also face economic problems upon relocation. Considering the weight of these factors in the aggregate, the AAO finds that the relocation of the applicant's spouse and children to Mexico would cause them exceptional and extremely unusual hardship.

The AAO finds that the hardships related to separation presented in this case rise to the level of exceptional and extremely unusual hardship. The determining and unusual factors that set this case apart and raise the hardship to the level of exceptional and extremely unusual hardship are that the applicant's spouse and children would be faced with the prospect of permanent separation from the applicant; the applicant's spouse would alone have to financially support two minor children, without having the education and work history to find gainful, stable employment; and the applicant's spouse would be the sole parental figure providing emotional support to these children. Furthermore, the applicant's spouse and children would suffer the exceptional and extremely unusual emotional hardship that would come with having a spouse and father return to a country where violence is such a serious problem.

Additionally, the AAO finds that the gravity of the applicant's offense does not override the extraordinary circumstances in the applicant's case. In determining the gravity of the applicant's offense, the AAO must not only look at the criminal act itself, but also engage in a traditional discretionary analysis and "balance 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." *Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996)(Citations omitted).

The favorable factors presented by the applicant are the exceptional and extremely unusual hardship to his United States citizen spouse and children, who depend on him for emotional and financial support; the applicant's stable work history in the United States; and the lack of any other criminal convictions since 2003, when he was convicted of driving under the influence of alcohol.

The unfavorable factors presented in the application are the applicant's convictions for driving under the influence of alcohol and assault with a deadly weapon, the applicant's fraudulent entry into the United States, and any periods of unauthorized presence and employment. The AAO notes that the applicant has not been charged with any crimes since his last conviction and that the applicant's fraudulent entry occurred more than fifteen years ago when the applicant was 22 years old.

The AAO finds that the crimes and 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. The AAO also finds that as the applicant has met his burden in regards to a waiver for exceptional and extremely unusual hardship to his U.S. citizen spouse and children, he has also met his burden in regards to a waiver for his 1992 fraudulent entry under section 212(i) of the Act in showing extreme hardship to his U.S. citizen spouse. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 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.