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

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U.S. Citizenship and Immigration Services

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DATE: AUG 04 2011 OFFICE: BOISE, ID FILE: [redacted]

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Boise, Idaho and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to 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 committed crimes involving moral turpitude and section 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having accrued more than one year of unlawful presence in the United States and seeking admission within ten years of his last departure. The applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bars to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated October 30, 2009.

On appeal, counsel questions the inadmissibilities identified by United States Citizenship and Immigration Services (USCIS) and asserts that the applicant has established that the denial of the waiver application would result in exceptional and extremely unusual hardship for a qualifying relative. *Form I-290B, Notice of Appeal or Motion,* dated November 18, 2009; *see also Counsel's Brief*, dated December 18, 2009.

In support of the waiver application, the record contains, but is not limited to, counsel's brief; medical documentation relating to the applicant's spouse: W-2 forms and tax returns for the years 1998 – 2000; and court records relating to the applicant's convictions. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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-
> >
> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal
> > >
> > > (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.

In the present case, the record contains an August 8, 2001 sworn statement from the applicant that indicates he entered the United States in February 1982 without inspection and did not depart until

November 10, 1999, when he traveled to Mexico to visit his father. The applicant unlawfully returned to the United States on November 25, 1999 and has remained here since that date.

While the AAO notes that the applicant entered the United States without inspection in 1982, we also observe that on April 1, 1997, the effective date of the unlawful presence provisions under the Act, the applicant had a pending Form I-485, Application to Register Permanent Residence or Adjust Status, which was not denied until September 23, 1999. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General (Secretary of Homeland Security) as a period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, et al., Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 312(a)(9)C)(i)(I) of the Act*, dated May 6, 2009. Accordingly, the applicant did not begin to accrue unlawful presence until September 24, 1999, the day after his Form I-485 was denied. Although the applicant's departure from the United States on November 10, 1999 triggered the unlawful presence provisions of section 212(a)(9)(B)(i) of the Act, his unlawful presence totaled less than 180 days. Therefore, he is not inadmissible under either section 212(a)(9)(B)(i)(I) or (II) of the Act based on his U.S. residence prior to his November 10, 1999 departure.

Neither is the applicant subject to section 212(a)(9)(B)(i)(II) of the Act for his unlawful residence in the United States since he reentered without inspection on November 25, 1999. As he has not departed the United States since he made this entry, the provisions of section 212(a)(9)(B)(i) of the Act do not apply to him.

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

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> > (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.)

The record reflects that on August 5, 1985, the applicant was convicted of Theft of Personal Property under California (Cal.) Penal Code § 484(a), and was sentenced to three days in jail and a $180 fine. On September 16, 1985, the applicant pled guilty to Burglary under Cal. Penal Code § 459(a) and was sentenced to ten days in jail and 12 months probation. On January 9, 1986, he was convicted of Inflicting Corporal Injury on Spouse/Cohabitant under Cal. Penal Code § 273.5, and sentenced to 90 days in jail and 24 months probation.

The record also indicates that on December 20, 1991, the applicant pled guilty to Battery under Idaho Code (IC) § 18-903. On July 22, 1992, he was arrested for Failing to Provide Proof of Insurance to Arresting Officer under IC §49-1232, and Driving Under the Influence under IC §18-8004. On September 20, 1994, he was convicted on the charge of Driving Under the Influence and sentenced to 65 days in jail, 35 of which were suspended, placed on probation for two years and fined. On August 30, 1999, he was convicted of Failure to Provide Proof of Insurance and fined. On August 21, 1994, the applicant was arrested for Driving-Inattentive/Careless under IC §49-1401(3), and Driving without Privileges under IC §18-8001. On December 9, 1994, the applicant was convicted of Driving-Inattentive/Careless and sentenced to 30 days in jail, which were suspended, and fined. The applicant was also convicted of Driving Without Privileges and sentenced to 20 days in jail, 18 of which were suspended, and fined. On September 18, 1995, the applicant was arrested for violating Terms of Special-Use Authorization[1] and was subsequently sentenced to two years probation, a fined $150 and required to pay $500 in restitution. The applicant's last arrest occurred on May 17, 2006, when he was arrested for Driving Under the Influence under IC § 18-8004. On September 21, 2006, he was sentenced to 90 days in jail and fined.

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[1] The record provides insufficient information on this offense for the AAO to determine the section of the Idaho Code under which the applicant was convicted.

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. The methodology adopted by the Attorney General consists of a three-pronged approach. 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. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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 or "modified categorical" inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. 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. Finally, if review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709.

The Ninth Circuit Court of Appeals, within which the present case arises, has adopted the "realistic probability" test, but has reserved judgment as to whether it will follow the ruling of the Attorney General in looking beyond the record of conviction in connection with the modified categorical inquiry. *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009). However, this question was implicitly addressed in *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009). In *Castillo-Cruz,* the Ninth Circuit addressed whether receipt of stolen property under Cal. Penal Code § 496(a) constitutes a categorical crime involving moral turpitude by applying the "realistic probability" test. 581 F.3d at 1161. The Ninth Circuit concluded that California courts have upheld convictions under Cal. Penal Code § 496(a) in cases where there was no intent to permanently deprive owners of their property, and as such, a conviction under the statute is not categorically a crime of moral turpitude. *Id.* The Court then held that the respondent's conviction was not a crime involving moral turpitude under the modified categorical analysis because the government conceded that there was no evidence in the record establishing that his offense involved an intent to deprive the owner of possession permanently. *Id.* The court cited to its prior precedent that only the record of conviction may be reviewed as part of the modified categorical inquiry, and apparently reviewed only the record of conviction in making this determination. *Id.* (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006). The AAO interprets the holding in *Castillo-Cruz* as a refusal by the Ninth Circuit to accept the more expansive review allowed by the Attorney General, and will thus restrict any modified categorical inquiry in the present proceeding to the applicant's record of conviction.

At the time of the applicant's 1985 conviction for Theft, 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 recently determined that 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. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160 (9th Cir. 2009). Accordingly, the AAO finds the applicant's 1988 theft offense to be a crime involving moral turpitude.

At the time of the applicant's 1986 conviction for Inflicting Corporal Injury on Spouse/Cohabitant, Cal. Penal Code § 273.5 stated:

> (a) Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person of the opposite sex with whom he or she is cohabiting, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for 2, 3 or 4 years, or in the county jail for not more than one year.
>
> (b) Holding oneself out to be the husband or wife of the person with whom one is cohabiting is not necessary to constitute cohabitation as the term is used in this section.
>
> (c) As used in this section, 'traumatic condition' means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force.

In *Gregeda v. INS,* 12 F.3d 919 (9th Cir. 1993), the Ninth Circuit Court of Appeals held that spousal abuse under section 273.5(a) is a crime of moral turpitude because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements. Therefore, the applicant's conviction for inflicting corporal injury on a spouse or cohabitant is a crime involving moral turpitude.

The AAO notes that while the applicant has also been convicted of Burglary, Cal. Penal Code § 459, and Battery, IC § 18-903, both of which may in certain circumstances be crimes involving moral turpitude, the record does not provide sufficient evidence on which to base a determination regarding the nature of these offenses. However, as the record already establishes that the applicant has been convicted of two crimes involving moral turpitude, we find no need to address the applicant's burglary and battery convictions. The applicant is inadmissible to the United States pursuant to section 212(a)(2)(i)(I) of the Act[2] and must seek a waiver under section 212(h), which states:

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[2] The AAO also notes that in filing his first Form I-485 on February 7, 1997, the applicant indicated that he had never been arrested or convicted of any criminal offense. In his September 23, 1999 decision denying the Form I-485, the District Director, Helena, Montana found the applicant's failure to disclose his criminal history on the Form I-485 to

> (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 –
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> (1)(A) [I]t is established to the satisfaction of the Attorney General that-
>
> (i) [T]he activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
>
> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
>
> (iii) the alien has been rehabilitated; or
>
> (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 . . . .

On appeal, counsel contends that "given the decades that have elapsed since [the applicant] was convicted, and given that he has never had any related crimes since, the interest[s] of justice and equity would not be served should these convictions be held against him." While neither statute nor regulation give USCIS the authority to ignore criminal offenses based on the passage of time, section 212(h)(1)(A) does allow for a waiver based on a different standard for individuals whose offenses were committed more than 15 years prior to their application for adjustment of status. Should an applicant satisfy section 212(h)(1)(A) requirements, the Attorney General (Secretary of Homeland Security) then assesses whether a favorable exercise of discretion is warranted.

On appeal, counsel asserts that the applicant has demonstrated reform of character that would warrant a favorable exercise of discretion. Counsel states that the applicant has several incidents on his record, but only two may be considered crimes involving moral turpitude and that these crimes occurred 25 years ago. The applicant's other convictions, counsel states, are for minor incidents, mostly traffic citations, that were either resolved or dismissed. Counsel also contends that the applicant's convictions for driving under the influence occurred years apart, in 1992, 1994 and 2006. He further states that the applicant's offenses do not show a pattern, but are random, unrelated incidents that have occurred sporadically over the course of 25 years. He contends that the fact that the applicant has not committed any crimes involving moral turpitude since 1985 "shows reform."

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constitute the willful misrepresentation of a material fact and to bar the applicant's admission to the United States under section 212(a)(6)(C)(i) of the Act. In the present matter, however, the AAO need not address the applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act. Should the applicant establish eligibility for a section 212(h) waiver in this proceeding, he will also satisfy the waiver requirements for willful misrepresentation under section 212(i) of the Act.

While the record establishes that the applicant's convictions for theft and infliction of corporal injury to a spouse or cohabitant occurred more than 15 years ago and does not indicate that his admission would be contrary to the welfare, safety, or security of the United States, it fails to demonstrate the applicant's rehabilitation. Counsel's assertions that the random, sporadic nature of the applicant's offenses and the absence of any recent convictions for crimes involving moral turpitude are proof of the applicant's reform are not persuasive. The absence of a pattern in the applicant's criminal history and the lack of recent criminal activity does not necessarily demonstrate his rehabilitation and the applicant has submitted no affirmative evidence to establish it. Such evidence could include, for example, a statement(s) from the applicant expressing his remorse for his actions; statements from the applicant's family, friends and employers attesting to his rehabilitation; proof of participation in any rehabilitative or treatment programs, proof of the applicant's efforts to obtain education or training; or statements offering proof of the applicant's support of community or religious organizations. In that the record lacks more affirmative evidence of rehabilitation, the AAO does not find the applicant to have established that he is rehabilitated. Accordingly, he is not eligible for a waiver under section 212(h)(1)(A) of the Act.

However, even had the applicant demonstrated eligibility under section 212(h)(1)(A) of the Act, the AAO would not find him to warrant a favorable exercise of the Attorney General's (Secretary's) discretion.

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, in the present case, the AAO cannot find that the applicant merits a favorable exercise of discretion solely on the balancing of favorable and adverse factors. The applicant's conviction for Inflicting Corporal Injury on a Spouse or Cohabitant indicates that he may be subject to the heightened hardship 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).

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 did not 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 dependant on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous." The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." 67 Fed. Reg. at 78677-78.

Using the above definitional framework, the AAO finds the offense punished under Cal. Penal Code § 273.5 to be a violent crime for the purposes of 8 C.F.R. § 212.7(d). We also note that the Ninth Circuit in *U.S. v. Laurico-Yeno* found that, as a person cannot be convicted without the intentional use of force under Cal. Penal Code § 273.5, a conviction for inflicting corporal injury on a spouse or cohabitant categorically falls within the scope of a crime of violence. 590 F.3d 818, 821 (9th Cir. 2010). As the record does not include evidence of foreign policy, national security or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative. *Id.*

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to a qualifying relative under section 212(h) of the Act is not sufficient.[3]

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.

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[3] In that the applicant is subject to the hardship standard set forth in the regulation at 8 CF.R. § 212.7(d), the AAO will not evaluate separately his eligibility for a waiver under section 212(h)(1)(B) of the Act, which requires a waiver applicant to meet the lower standard of extreme hardship to a qualifying relative.

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, "[w]e consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." *Id.* at 470.

On appeal, counsel contends that the applicant's waiver application should be granted because the applicant would be eligible for cancellation of removal should he file for this relief. He states that the applicant can demonstrate exceptional and extremely unusual hardship to himself, his U.S. citizen spouse and his niece for whom he provides care.

While the AAO notes counsel's assertions regarding the hardship that would result for the applicant and his niece, the only qualifying relative in this proceeding is the applicant's spouse. Although 8 C.F.R. § 212.7 does not specify who must experience exceptional and extremely unusual hardship, it is a discretionary standard related to section 212(h) of the Act, which requires a showing of extreme hardship to certain qualifying relatives, and is clearly intended to create a more exacting standard for applicants who have committed violent or dangerous crimes. To allow an applicant to meet this higher standard by showing hardship to himself or any relative would potentially defeat the purpose underlying the regulation. Consequently, we interpret 8 C.F.R. § 212.7(d) as merely raising the level of hardship, with the implicit requirement that the hardship be to a qualifying relative as defined in section 212(h) of the Act. *See In re Jean*, 23 I&N Dec. 373, 383-84 (BIA 2002). The AAO will, therefore, limit our consideration of hardship to the impacts of the applicant's inadmissibility on his spouse. Hardships to the applicant or his niece will be considered only to the extent the record establishes how they would affect the applicant's spouse.

Counsel asserts that the applicant's spouse is completely dependent on the applicant for financial and physical support. Counsel states that as a result of her age and health, the applicant's spouse relies on the applicant for everything. He also states that the applicant's spouse is disabled and on Social Security, and that it is the applicant's insurance through his employment that covers her substantial medical costs. Counsel reports that the applicant's spouse has a history of kidney disease; is a diabetic, requiring insulin shots four times a day; and that her medications costs between $1,000 to $1,200 each month. He also states that she has a history of blood clots and has had two stents placed in her heart. Should the applicant be returned to Mexico, counsel asserts, it would be very difficult for him to earn enough money to support his wife, given his age and the poor economic conditions in Mexico. Counsel also contends that the applicant's return to Mexico would divide his family and

that his marriage would be torn apart because the applicant's spouse could not move to Mexico as a result of her health.

In support of counsel's claims, the record contains medical documentation that establishes the applicant's spouse suffers from a range of medical conditions, including coronary artery disease, congestive heart failure, dyslipidemia, systemic hypertension, carotid artery disease and Type II diabetes. However, while these records demonstrate that the applicant's spouse suffers from serious health problems, they do not support counsel's claims regarding her financial and physical dependence on the applicant. The record contains no documentary evidence that establishes that the applicant's spouse's healthcare costs are covered by the insurance the applicant receives through his employment. Neither does the record contain any documentary evidence that proves the applicant's spouse is dependent on his income or that indicates he plays any role in providing whatever healthcare assistance she may require. It also fails to provide any country conditions materials on Mexico that support counsel's claims regarding the applicant's inability to obtain employment in Mexico in order to financially assist his spouse in the United States. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the record does not establish that the difficulties that would be faced by the applicant's spouse as a result of his inadmissibility, even when considered in the aggregate, would rise beyond the common results of removal or inadmissibility to the level of exceptional and extremely unusual hardship. *Matter of Monreal-Aguinaga*, 23 I&N Dec. at 62.

The AAO also observes that a number of the applicant's spouse's medical records identify her as separated, in the process of obtaining a divorce or divorced from the applicant. Such evidence not only challenges the applicant's claims of hardship, but also raises questions as to whether the applicant currently has a qualifying relative on which to base a waiver application under section 212(h) of the Act.

The applicant has submitted insufficient documentation to demonstrate that he satisfies the rehabilitation requirement under section 212(h)(1)(A) of the Act. Even had the applicant satisfied this requirement, his waiver application would not be granted as the AAO finds that he has failed to establish that he merits a favorable exercise of discretion under the regulation at 8 C.F.R. § 212.7(d).

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.