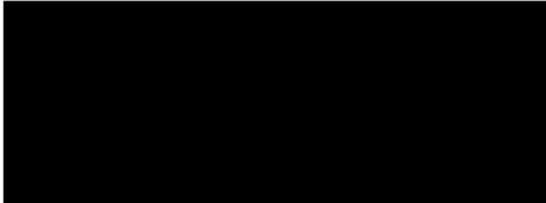


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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals
20 Massachusetts Avenue, N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H6

Date: **AUG 13 2012**

Office: SAN DIEGO

FILE: 

IN RE: Applicant: 

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

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Diego, California, 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 under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude; and section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year. The director stated that the applicant seeks a waiver of inadmissibility pursuant to sections 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(h) and 8 U.S.C. § 1182(a)(9)(B)(v), respectively. The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel contests the director's finding that the applicant did not meet the burden of establishing statutory eligibility for a section 212(h) waiver, and was inadmissible under section 212(a)(9)(B)(i)(I) of the Act. Counsel contends that the applicant is not inadmissible under section 212(a)(9)(B)(i)(I) of the Act because the applicant's last departure from the United States was in December 1997 for a short visit to Mexico, and that the applicant is not seeking admission within three years of his departure from the United States. Citing *Matter of Rainford*, 20 I&N Dec. 598, 601 (BIA 1992), counsel asserts that an applicant for adjustment of status is assimilated to the same position as that as an applicant for admission; and the applicant sought admission into the United States on April 27, 2008, upon the filing of the adjustment of status application. Counsel argues that because the applicant is not seeking admission within three years of the date of the applicant's departure from the United States, the applicant is not inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

The AAO will first address the finding of inadmissibility for unlawful presence, which is under section 212(a)(9)(B) of the Act. That section provides, in 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, or

(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.

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant claimed to have entered the United States without inspection with his parents in 1974, and to have left the country in December 1997 and reentered without inspection a day or two later. The applicant thus began to accrue unlawful presence from April 1, 1997, the date on which the unlawful presence provisions went into effect, until December 1997, and when the applicant left the country in December 1997, he triggered the three-year bar, rendering him inadmissible under section 212(a)(9)(B)(i)(I) of the Act. As stated, the applicant returned without inspection in December 1997. He filed an adjustment of status application on April 27, 2008.

It is well settled that when construing a statute, an agency must first look at the language and design of the statute as a whole in order to ascertain the manner in which Congress intended to implement it. *See Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (“In expounding a statute, we [are] not ... guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy”); *K-Mart Corporation v. Cartier*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”); *FDIC v. McSweeney*, 976 F.2d 532, 537 (9th Cir.1992) (“Our goal in construing a statute is to ascertain the intent of Congress in order to give effect to its legislative will.”).

Section 301(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, produced the grounds of inadmissibility under section 212(a)(9) of the Act for aliens previously removed and unlawfully present. Under the plain language of the statute, for inadmissibility under section 212(a)(9)(B)(i) to attach, three elements must be met: a specified period of unlawful presence, departure from the United States and a subsequent application for admission within either three or ten years. The instant matter involves inadmissibility under section 212(a)(9)(B)(i)(I) of the Act, which applies to an alien who was unlawfully present for more than 180 days but less than one year and again seeks admission within three years of the date of his or her departure. The applicant does not dispute that he was unlawfully present for more than 180 days but less than one year, or that he departed the United States following this period of unlawful presence. The issue is whether the three years of inadmissibility have “run” and the applicant is no longer inadmissible.

The terms “admission” and “admitted” mean, with respect to an alien, the “lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” Section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A). However, regarding aliens who enter the United States without inspection, Section 235(a)(1) of the Act, 8 U.S.C. § 1225(a)(1), as amended by section 302(a)(1) of IIRIRA, provides:

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) *shall be deemed for purposes of this Act an applicant for admission.* (emphasis added)

Counsel has asserted that an alien seeking adjustment of status is regarded as being in the position of a person who seeks to enter the United States. *See* 20 I&N Dec. 598 at 601. Consequently, counsel argues, as it has been more than three years since the applicant's departure in 1997, he is no longer inadmissible. A plain reading of section 235(a)(1) of the Act indicates that the applicant has been an applicant for admission from the date he illegally reentered the United States, and we acknowledge that the Board of Immigration Appeals (Board) has held that the "the term "admission" generally refers to adjustment of status from within the United States, as well as a lawful entry at the border." *Matter of Rodarte-Roman*, 23 I&N Dec. 905, 908 (2006) (citations omitted).

However, counsel's argument fails to account for the significance of departure as the trigger for inadmissibility under section 212(a)(9)(B)(i) of the Act. *See Rodarte-Roman, supra*, 23 I&N Dec. at 910. The fact that inadmissibility under this section attaches only upon departure, rather than by virtue of the offending conduct (unlawful presence), reflects that Congress intended this section to prevent aliens outside the United States from reentering within the specified period. It reflects that what may seem to be the third and consummating element of inadmissibility under section 212(a)(9)(B)(i), can also, and perhaps more accurately, be described as the consequence Congress attached to unlawful presence: absence from the United States. Regardless of whether the term admission, as used in section 212(a)(9)(B)(i) and elsewhere in the Act, can be construed more broadly than its statutory definition, we do not believe that Congress intended to create a penalty for unlawful presence that can be circumvented by yet another violation of the law.

In *Rodarte-Roman*, the Board sought to refute the respondent's argument that he was not inadmissible under section 212(a)(9)(B)(i)(II) because that section applies only to aliens seeking admission at the border and not to aliens (such as himself) seeking adjustment of status after reentering unlawfully:

If the term "admission" did not include "lawful admission to permanent residence" by means of adjustment of status, then section 212(a)(9)(B)(i)(II) would preclude an alien from acquiring lawful permanent residence through admission as an immigrant at the border, but would permit the very same alien to evade this preclusion by simply entering the United States unlawfully and applying for adjustment. We do not believe that Congress intends the Immigration and Nationality Act to be interpreted in a manner that would give aliens an incentive to enter the United States illegally.

Id.

The argument made by the respondent in *Rodarte-Roman* is similar to that of the applicant in this case in that both have sought to use a subsequent illegal reentry as a shield to the consequences of inadmissibility under section 212(a)(9)(B)(i), which the Board found repugnant to the congressional intent.

Thus, although the applicant is considered an applicant for admission by virtue of his application for adjustment of status, this does not excuse him from the consequences imposed by the three-year bar in section 212(a)(9)(B)(i)(I) of the Act. To read the statute as providing an exception to the bar by virtue of subsequent illegal entry and unlawful presence in the United States would be to allow one to avoid the punitive effects of a law by violating the law anew, an absurd result contrary to well-established principles of statutory construction. *See Armstrong Paint & Varnish Works v. Nu-*

Enamel Corporation, 305 U.S. 315, 333 (1938) (“[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where...the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law.”); *U.S. v. McKeithen*, 822 F.2d 310, 315 (2nd Cir. 1987) (quoting *United States v. About 151.682 Acres of Land*, 99 F.2d 716, 721 (7th Cir.1938)) (“[A]ll laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose.”). We therefore hold that the inadmissibility under section 212(a)(9)(B)(i) of the Act, which is triggered upon departure, remains in force until the alien has been absent from the United States for three years under section 212(a)(9)(B)(i)(I) and ten years under section 212(a)(9)(B)(i)(II).

We are mindful that a separate provision of law, section 212(a)(9)(C) of the Act, renders aliens who are unlawfully present for an aggregate period of more than one year, and who subsequently enter or reenter the United States without being admitted, but this does not preclude our interpretation of section 212(a)(9)(B)(i) as pertaining to aliens who reenter without admission. Inadmissibility under section 212(a)(9)(C)(i) of the Act is permanent, except, as provided under section 212(a)(9)(C)(ii), to an alien “seeking admission more than 10 years after the date of the alien’s last departure if, prior to the alien’s reembarkation at a place outside the United States. . . , the Secretary of Homeland Security has consented to the alien’s reapplying for admission.” The Board has held that the exception authorized by provision is unavailable unless the alien has remained outside the United States for ten years. *See Matter of Torres-Garcia*, 23 I&N Dec. 866, 876 (BIA 2006).

We do not find that our interpretation of section 212(a)(9)(B)(i) of the Act renders superfluous section 212(a)(9)(C). In general, a “statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void, or insignificant.” *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A Singer, *Statutes and Statutory Construction* § 46.06, pp. 181-186 rev. 6th ed. 2000). We note, however, that section 212(a)(9)(C) applies to aliens unlawfully present for an *aggregate* period of one year or more, while unlawful presence from multiple stays in the United States is not aggregated in determining inadmissibility under section 212(a)(9)(B). Thus, consistent with what the BIA has referred to as the congressional intent “to compound the adverse consequences of immigration violations,” section 212(a)(9)(C) imposes penalties on aliens who accrue more than one year of unlawful presence during multiples stays in the United States, even if time in unlawful presence accrued during any single stay would not render them inadmissible under section 212(a)(9)(B)(i). 23 I&N Dec. at 909.

Furthermore, we are not aware of any authority precluding an interpretation of the various grounds of inadmissibility in the INA such that these grounds overlap, as many clearly do, or holding that section 212(a)(9)(C) provides an exclusive basis of inadmissibility in cases involving reentry without admission after a period of unlawful presence. We do not believe that in creating section 212(a)(9)(C), Congress intended to limit the scope of inadmissibility under section 212(a)(9)(B)(i).

In speaking to the congressional intent of section 212(a)(9) in general, the Board stated:

The unifying theme of section 212(a)(9) is that all its subparagraphs seek to compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing such violations to be lawfully readmitted

thereafter. We deem it evident that Congress made departure (rather than commencement of unlawful presence) the event that triggers inadmissibility or ineligibility for relief, because it is departure which marks the culmination of the alien's prior immigration violation and which makes the alien a potential *recidivist*. It is recidivism, and not mere unlawful presence, that section 212(a)(9) is designed to prevent.

23 I&N Dec. 905, 909 (BIA 2006).

An alien who reenters the United States before the specified period of time has elapsed defeats the punitive and preventive intent of the law. The alien commits another immigration violation by the act of illegal reentry; is immediately inadmissible under section 212(a)(6)(A) of the Act, 8 U.S.C. § 1182(a)(6)(A), as an alien present in the United States without being admitted or paroled; and commences another period of unlawful presence that may serve as an additional basis for inadmissibility under section 212(a)(9)(B) of the Act. Allowing an alien to meet the time requirement of the bar to his admission while simultaneously accruing additional unlawful presence in the United States is incongruent and rewards recidivism, which we deem contrary to the congressional intent underlying the creation of section 212(a)(9) of the Act. Thus, we find the applicant inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

The applicant was found to be inadmissible for having been convicted of crimes 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.

The record reflects that, in California, on April 26, 1982, the applicant was convicted of arson and placed on probation. The judge later revoked the applicant's probation and sentenced the applicant to serve 16 months in prison. On September 7, 1982, the applicant was convicted of possession of a dangerous weapon and sentenced to serve two years in prison. On August 12, 1985, the applicant was convicted of shoplifting and sentenced to serve 12 months of probation and 5 days in jail. On June 28, 1988, the applicant was convicted of robbery (used a weapon), second degree, and was sentenced to serve 11 years in prison. On October 10, 1997, the applicant was convicted of selling liquor to a minor and was sentenced to serve three years of probation and ordered to pay a fine.

The director found that the applicant was convicted of crimes involving moral turpitude, but did not specify which of the crimes involved moral turpitude. However, as the applicant has not disputed inadmissibility on appeal, and the record does not show the finding of inadmissibility to be erroneous, we will not disturb the finding of the director.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(ii) 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 . . .

Counsel argues that the applicant is eligible for a waiver under section 212(h)(1)(A) of the Act since the activities rendering the applicant inadmissible occurred more than 22 years ago. However, the applicant was convicted of the crime of robbery in the second degree (used weapon). 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 declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms “violent or dangerous crimes” and “crime of violence” are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

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

The AAO finds that the applicant’s robbery conviction is a violent crime. In the instant case, as we find that there are no national security or foreign policy considerations that would warrant a favorable exercise of discretion, we will consider whether denial of admission would result in exceptional and extremely unusual hardship.

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the Board 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 Board 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 Board 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 Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

We note that in *Monreal*, the Board 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 Board 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 Board 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 Board 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 Board 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 Board found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The Board 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 Board 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 evidence in this case includes photographs, birth certificates, a marriage certificate, medical records, letters, and other documentation.

In the declarations dated September 15, 2008 and July 6, 2010, the applicant states that he has a close relationship with wife and nine-year-old son. The applicant asserts that he earns \$22 per hour as a construction worker and is the sole financial support for his wife (who is not legally in the United States) and child. The applicant contends that his lawful permanent resident mother has health problems from an automobile accident, in August 2008, in which she injured her leg. The applicant declares that his mother has lived with them since 2005 and that he takes care of her and provides financial support. He states that of his six siblings, only one is not legally in the United States; and that he has been the only one of his siblings taking care of his mother as they not able to help. The applicant asserts that his son does not speak Spanish and has never been to Mexico and would be disoriented there. The applicant claims that his son takes medication for asthma. The applicant contends that he has not seen his aunts and uncles in Mexico since 1984. The applicant declares that he has never worked in Mexico and "would probably be out on the street in no time"; and would not take his mother and son to live there. The applicant asserts that if he relocated to Mexico and his son remained in the United States, he would most likely only see his son during school breaks.

Letters by the applicant's wife, mother, and relatives, and friends are in accord with the applicant's claim of having a strong relationship with his family members. The birth certificate stated that the applicant's son was born on [REDACTED]. The letter from [REDACTED] dated September 2, 2008 is in accord with the applicant's claim of employment as the letter stated that the applicant had been working for [REDACTED] for approximately a year as a carpenter. Medical records are consistent with the assertion that the applicant's mother had health problems. Kaiser Permanente records dated July 29, 2008 reflect that, due to a foot fracture, the applicant's wife was unable to return to work for three weeks. The letter dated September 9, 2008 from a physician with Kaiser Permanente reflected that the applicant's mother was treated with anticoagulation for six months, starting in September 2008, for a pulmonary embolism; and would require assistance with daily activities for several months. The record reflects that the applicant's wife is not legally in the United States. Thus, in consideration of the hardship factors, we find that the applicant's minor son would experience exceptional and extremely unusual emotional hardship if he remained in the United States without the financial and emotional support of his father.

The asserted hardships in relocation to Mexico are the applicant's son's not speaking Spanish, his having to live in poverty in Mexico, and requiring medical care for asthma. However, the applicant

has not submitted any documentation consistent with the assertion that he would not be able to obtain employment or access to healthcare such that his wife and son would experience extreme hardship in Mexico. The applicant has relatives in Mexico, and even though the applicant asserts that he has not had contact with them, it has not been demonstrated that they are unable or unwilling to assist the applicant and his family in relocation to Mexico. We acknowledge that the applicant's son will have difficulties adjusting to life in Mexico, particularly as to his education. However, in consideration of the asserted hardships and the evidence before the AAO, we find that the applicant has not established that his son would experience exceptional and extremely unusual emotional hardship if he relocated with his father to Mexico.

In conclusion, the applicant has not demonstrated that the hardships meet the "exceptional and extremely unusual hardship" standard as required in 8 C.F.R. § 212.7(d), and we therefore find that there are no extraordinary circumstances warranting a favorable exercise of discretion in this case.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed and the waiver application will be denied.

ORDER: The appeal is dismissed.