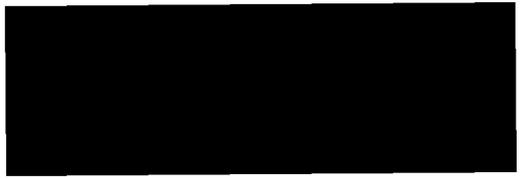


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prevent clearly unwarranted
invasion of personal privacy
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



H6

Date: **FEB 09 2012** Office: CIUDAD JUAREZ FILE:

IN RE: Applicant:

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), 1182(h)

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 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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Ciudad Juarez, Mexico, 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 been convicted of a crime involving moral turpitude. He was also found inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking readmission within 10 years of his last departure. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and children.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated June 19, 2009.

On appeal, counsel for the applicant asserts that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and that he has shown that a qualifying relative will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated August 6, 2009.

The record contains, but is not limited to: a brief from counsel; statements from the applicant's wife, mother-in-law, father-in-law, employer, brother, sister-in-law, and others in support of the application; medical documentation for the applicant's wife and son; tax and banking records for the applicant and his wife; documentation of the applicant's family's medical insurance; and documentation regarding the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

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

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(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.)

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

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on

conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

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. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record shows that, on or about February 26, 2002, the applicant was convicted for sexual battery under California Penal Code § 243.4(a). At the time of the applicant’s conviction, California Penal Code § 243.4(a) stated:

Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars (\$2,000); or by imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars (\$10,000).

In *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006), the BIA noted that, “we have recognized that assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involved aggravating factors that significantly increased their culpability.” California Penal Code § 243.4(a) includes the types of “aggravating” factors that would cause us to find that the conduct at issue represents an inherently base, vile, or depraved act. Unlawfully restraining an unwilling victim to engage in sexual acts represents a vile and depraved act. In *Matter of S-*, 5 I&N Dec. 686 (BIA 1954), the BIA held that the crime of indecent assault on a female under section 292 (a) of the Canadian Criminal Code, although not statutorily defined, involved moral turpitude because the crime denotes depravity. 5 I&N Dec. 686, 688. Furthermore, in *Matter of Z-*, 7 I&N Dec. 253, 255 (BIA 1956), the BIA found indecent assault in violation of section 6052 of the General Statutes of Connecticut, Revision of 1930, involved moral turpitude. An indecent assault is described as consisting “of the act of a male person taking indecent liberties with the person of a female or fondling her in a lewd and lascivious manner without her consent and against her will, but with no intent to commit the crime of rape.” In *People v. Chavez*, the California Court of Appeal found that the commission of the lesser culpable offense, misdemeanor sexual battery in violation of California Penal Code § 243.4(d)(1), is a crime involving moral turpitude. 84 Cal.App.4th 25 (2000). The court stated, “the degrading use of another, against her will, for one’s own sexual arousal is deserving of moral condemnation. We hold that sexual battery is a crime of moral turpitude.” 84 Cal.App.4th 25, 30. It should be noted that a conviction under California Penal Code § 243.4(a) encompasses conduct that is significantly more depraved than a conviction under

California Penal Code § 243.4(d)(1) because the statutory elements include the unlawful restraint of the victim. Accordingly, the AAO finds that the applicant's felony conviction under California Penal Code § 243.4(a) is categorically a crime involving moral turpitude.

Counsel asserts that the applicant's conviction meets the exception provided in section 212(a)(2)(A)(ii)(II) of the Act. However, as the potential sentence for an offense under the section includes incarceration in excess of one year, the requirements of section 212(a)(2)(A)(ii)(II) of the Act are not satisfied. Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and he requires a waiver under section 212(h) of the Act.

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

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The record further shows that the applicant entered the United States without inspection in or about March 1998, and he remained without a legal immigration status until or about October 2007. He accrued over nine years of unlawful presence in the United States. He now seeks admission as an immigrant pursuant to his marriage to a U.S. citizen. He was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on appeal, and he requires a waiver under section 212(a)(9)(B)(v) of the Act.

However, the AAO also finds the applicant's offense of sexual battery to be a violent or dangerous crime as contemplated by the regulation at 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*.

California Penal Code § 243.4(a) requires that the perpetrator "touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice," which we deem to be a violent act. We will assess whether "extraordinary circumstances" warrant a favorable

exercise of discretion. 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. 8 C.F.R. § 212.7(d). 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.* As this standard is more restrictive than the "extreme hardship" standard found in sections 212(a)(9)(B)(v) and 212(h) of the Act, the AAO will assess whether he meets the "exceptional and extremely unusual hardship" standard. *See Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993).

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.

In a statement dated November 16, 2007, the applicant's wife asserted that she will suffer hardship should the applicant reside outside the United States. She stated that she has family ties in the United States, including her parents and sister. She noted that she has an 11th grade education and she is a stay-at-home mother. She indicated that she and the applicant's son visited Mexico in 2007, but they returned due to their son's illness, including high fever, skin rash, diarrhea, vomiting, and asthma-related symptoms. She stated that she also had a severe allergic skin reaction and breathing problems in Mexico. She explained that she and the applicant are close, and that they are suffering emotional difficulty due to their separation. She explained that she resided with her parents and shared expenses when the applicant returned to Mexico, and that everyone in her family works. She asserted that there will be no one to care for her child should she work outside the home, and she will be unable to realize her goal of becoming a medical assistant. She indicated that the applicant will not be able to support her and their child from Mexico. She added that she takes their son for medical appointments approximately once per month, and that he is under supervision due to abnormal growth. She stated that she has health coverage for their child in the United States, and he would not have access to quality healthcare in Mexico. She asserted that her husband's family would be unable to assist him in Mexico, as they have their own families and financial concerns.

The applicant provided a letter from a physician, dated August 5, 2008, regarding his son's diagnosis of "failure to thrive," which consists of a low growth rate but without other stated complications. The applicant also submitted medical records for his wife, dated in 2008 and earlier, that support that she suffered diarrhea and related symptoms in Mexico, and note dermatitis on her hands. A letter from a physician for the applicant's wife, dated August 30, 2007, explains that she suffers from a skin condition that affects her hands, and that at times she needs assistance doing normal tasks such as washing dishes, changing diapers, and cleaning.

Upon review, the applicant has shown that his wife will suffer exceptional and extremely unusual hardship should the present waiver application be denied. The record supports that the applicant's wife and son both have health concerns that require consistent care. While the applicant's wife's skin condition does not appear to prohibit her from living independently, medical documentation supports that she sometimes requires assistance with common tasks, and that her condition is a source of physical and emotional difficulty. The AAO acknowledges that the applicant's son's low growth rate and need for monitoring causes further emotional hardship for his wife. The record supports that the applicant's wife and son have medical insurance in the United States and relationships with medical professionals. It is evident that the applicant's wife would endure physical, emotional, and financial consequences should they relocate to Mexico and lose access to their current medical care. The applicant provided evidence that his wife and son resided with him in Mexico in a rural area for approximately six months in 2008, and that they both endured health complications that prompted them to return to the United States.

The applicant's wife would face other difficulties should she relocate to Mexico, including separation from her close family members with whom she resides in the United States, separation from her country and culture, and disruption of her academic and professional goals. Counsel

referenced the significance of conditions in the country of relocation, and the AAO takes notice that the United States Department of State issued a Travel Warning for Mexico, warning that crime and violence are serious problem and can occur anywhere. *United States Department of State Travel Warning: Mexico*, dated April 22, 2011. Considering all stated elements of hardship in aggregate, the AAO finds that the applicant's wife would suffer exceptional and extremely unusual hardship should she reside in Mexico.

The applicant's wife and son presently reside with his wife's parents in the United States, and she receives assistance from them through sharing expenses. However, the AAO acknowledges that the applicant's wife faces significant physical and emotional difficulty as a result of separation, and likely will face more economic hardship over time should she need to establish her own household as a single parent with a small child and limited education.

The applicant and his wife have mostly resided apart since his departure in October 2007. The record supports that his wife has endured substantial emotional difficulty due to this separation, as evidenced by her willingness to join the applicant in Mexico for a six month period despite associated health complications. The AAO has carefully examined the letters from the applicant's relatives who attests to his close relationship with his wife and son, and his involvement with his family. It is evident that his absence is resulting in significant psychological hardship for his wife.

Considering all elements of hardship in aggregate, the AAO finds that the applicant has also shown that his wife will suffer exceptional and extremely unusual hardship should she remain in the United States without him. The applicant has satisfied the requirement of the regulation at 8 C.F.R. § 212.7(d) to show that denial of his waiver application will result in exceptional and extremely unusual hardship.

However, the AAO must assess the gravity of the applicant's offense, and also other negative and positive factors in his case to determine if he warrants a favorable exercise of discretion. The traditional discretionary analysis requires the AAO to "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 negative factors in this case consist of the following:

The applicant entered the United States without inspection, and remained for a lengthy duration without a legal immigration status. The applicant has been convicted of the crime involving moral turpitude, sexual battery, for his conduct on or about January 2, 2002. The applicant was convicted of driving without a license for his actions on or about June 6, 2006. The applicant has not expressed remorse for his serious criminal conduct including a violent or dangerous offense.

The positive factors in this case include:

The applicant's U.S. citizen wife will suffer exceptional and extremely unusual hardship should the applicant reside outside the United States. The applicant's U.S. citizen son will face hardship should he relocate to Mexico or reside in the United States without the applicant. The applicant has provided emotional and financial support for his U.S. citizen wife and son. The applicant engaged his community while in the United States through the participation in religious activities.

The AAO has discussed the applicant's wife's hardship at length, and his family's challenges constitute significant positive factors in this case. The applicant is not without examples of good conduct, such as his support of his family. However, the applicant's criminal conviction for sexual battery serves as a strong negative factor. The applicant claimed that he was prosecuted for having sexual intercourse with a minor due to the fact that his underage girlfriend became pregnant and her mother filed a complaint with police. This indication suggests that the applicant is asserting that he only engaged in what is commonly referred to as "statutory rape," a consensual act that is prohibited by criminal statute only because of the age of the sexual partner. However, the applicant was not prosecuted for an age-based statutory sexual offense, but for sexual battery involving non-consensual sexual conduct and unlawful restraint. As discussed above, sexual battery under California Penal Code § 243.4(a) requires that the perpetrator "touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and . . . the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse." The AAO finds the applicant's characterization of his act shows a lack of remorse and/or acceptance of responsibility for serious criminal conduct.

The applicant's act of sexual battery occurred approximately 10 years ago, yet the AAO is not persuaded that he has rehabilitated himself since that time. The applicant was convicted in 2006 for driving without a license, and the record indicates that this offense was in connection with a hit-and-run resulting in property damage, raising concern for the applicant's respect for the laws of the United States and safety of others.

The AAO acknowledges that the applicant's wife and son face medical challenges and other difficulties, and they will greatly benefit from the applicant's residence in the United States. However, the strong negative factors in this case outweigh the positive factors, such that the applicant does not warrant a favorable exercise of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden that he merits approval of his application.

ORDER: The appeal is dismissed.