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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: APR 18 2013 Office: TEGUCIGALPA FILE [redacted]

IN RE: Applicant: [redacted]

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

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 AAO inappropriately applied the law 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 with the field office or service center that originally decided your case by filing a Form I-190B, 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 a 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a citizen and national of Nicaragua who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i), for having been convicted of a crime involving moral turpitude. The applicant was further found to be inadmissible to the United States pursuant to 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 more than one year and seeking admission within 10 years of his last departure. The applicant is married to a U.S. citizen. On November 8, 2010, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). He seeks waivers of inadmissibility pursuant to sections 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h) and (a)(9)(B)(v), in order to reside in the United States with his U.S. citizen spouse and U.S. citizen children.

In a decision dated December 19, 2011, the field office director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601 waiver application accordingly.

On appeal, counsel for the applicant contends that the field office director erred in denying the applicant's waiver application. Counsel contends that the field office director's Form I-601 denial notice contains erroneous statements of fact that, in her opinion, reveal that the field office director did not engage in a meaningful analysis of the submitted evidence. Counsel asserts that the evidence outlining psychological, financial, and emotional difficulties, together with the poor and dangerous living conditions in Nicaragua demonstrates extreme hardship to the applicant's qualifying relative. Counsel submitted additional evidence on appeal to support these assertions, including evidence of the applicant's wife's current living conditions and psychological evaluations of the applicant's wife and their children.

The record includes, but is not limited to: counsel's brief; the applicant's wife's undated declarations; psychological evaluations; medical reports and documentation; copies of prescription letters; employer reference letters; a marriage certificate; birth certificates; country conditions documentation; a letter from the applicant's pastor; financial documentation; documentation regarding the applicant's removal proceeding; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

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

> (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 Board of Immigration Appeals (Board) 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 reflects that on July 21, 2002, and June 2, 2009, the applicant was convicted in Texas of driving while intoxicated contrary to section 49.04 of the Texas Penal Code (PC). For the first offense, the applicant was sentenced to 60 days in jail and was ordered to pay court costs. For the June 2, 2009 offense, the applicant was sentenced to three days in jail, one year of probation, was fined and ordered to pay court costs. The record further reflects that on May 16, 2005, the applicant was convicted of driving while license invalid in violation of section 521.457 of the Texas Transportation Code (TC). The applicant was sentenced to three days in jail, was fined and ordered to pay court costs.

Texas P.C. § 49.04 provides that:

> (a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.
> (b) Except as provided by Subsections (c) and (d) and Section 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.
> (c) If it is shown on the trial of an offense under this section that at the time of the offense the person operating the motor vehicle had an open container of alcohol in the person's immediate possession, the offense is a Class B misdemeanor, with a minimum term of confinement of six days.
> (d) If it is shown on the trial of an offense under this section that an analysis of a specimen of the person's blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed, the offense is a Class A misdemeanor.

Texas TC § 521.457 provides, in pertinent part, that:

> A person commits an offense if the person operates a motor vehicle on a highway: (1) after the person's driver's license has been canceled under this chapter if the person does not have a license that was subsequently issued under this chapter; (2) during a period that the person's driver's license or privilege is suspended or revoked under any law of this state; (3) while the person's driver's license is expired if the license expired during a period of suspension; or (4) after renewal of the person's driver's license has been denied under any law of this state, if the person does not have a driver's license subsequently issued under this chapter.

The AAO has reviewed the elements of the above-mentioned driving offenses and finds that none of them are crimes involving moral turpitude. Driving with a suspended license is a regulatory offense, which generally is not a crime involving moral turpitude. *See Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1999) (regulatory offenses are not generally considered turpitudinous); *Cf. Cuevas-Gaspar v.*

Gonzales, 430 F.3d 1013, 1018 (9th Cir. 2005) ("Where an act is only statutorily prohibited, rather than inherently wrong, the act generally will not involve moral turpitude."); *Benitez v. Bunevant*, 198 Ariz. 90, 95 (2000) ("[O]ffenses similar in quality to driving on a suspended license have been found lacking moral turpitude.").

Additionally, in *Matter of Torres-Varela*, the Board held that simple driving under the influence of alcohol does not constitute a crime involving moral turpitude, as it is a marginal crime that does not include aggravating factors. 23 I&N Dec. 78, 85 (BIA 2001); *see also Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) (simple driving while intoxicated would not likely be a crime involving moral turpitude). The Board in *Torres-Varela* clarified that nonturpitudinous conduct is not rendered turpitudinous through multiple convictions for the same offense. 23 I&N Dec. at 85. As such, the Board noted in that case that a driving under the influence conviction (DUI) with 2 or more prior DUI convictions is not a crime involving moral turpitude. Furthermore, in *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989), the Board stated that where each crime individually does not involve moral turpitude, two offenses cannot be combined to create a crime involving moral turpitude. Accordingly, the AAO cannot find that the applicant's convictions for driving while intoxicated and driving while license invalid render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Nevertheless, the record reflects that the applicant is inadmissible under section 212(a)(9)(B)(i)(II), which provides, in pertinent part, that:

(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.
>
> (ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

The record shows that the applicant entered the United States without inspection in March 1998, and remained in the United States until October 7, 2009, when the applicant was removed to Nicaragua by agents of the U.S. immigration and Customs Enforcement (ICE). The applicant was granted Temporary Protected Status (TPS) form September 2, 1999 to July 5, 2006. On March 27, 2008, it was determined that the applicant no longer met the requirements for a grant of TPS and was placed in removal proceedings. On April 7, 2009, an immigration judge granted the applicant voluntary departure until June 6, 2009, with an alternate order of removal. The applicant failed to voluntarily

depart by the required date and he was removed to Nicaragua by ICE agents on October 7, 2009. The AAO finds that the applicant thus accrued unlawful presence in the United States in excess of one year. As the applicant accrued unlawful presence of more than one year and is seeking admission within 10 years of her 2009 departure, he is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest his inadmissibility on appeal.

Section 212(a)(9)(B)(v) of the Act provides that:

> Waiver.-The Attorney General [Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary of Homeland Security] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General [Secretary of Homeland Security] regarding a waiver under this clause.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or other family members can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

Here, the record reflects that the applicant is married to a U.S. citizen. The applicant also has three U.S. citizen children. The applicant's spouse meets the definition of a qualifying relative. The applicant's children are not qualifying relative for purposes of the waiver sought and, therefore, any hardship they might experience as a result of the applicant's inadmissibility will be considered only to the extent it results in hardship to the applicant's spouse.

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang,* 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals (Board) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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 the unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* 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 exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage; loss of current employment; inability to maintain one's present standard of living; inability to pursue a chosen profession; separation from family members; severing community ties; cultural readjustment after living in the United States for many years; cultural adjustment of qualifying relatives who have never lived outside the United States; inferior economic and educational opportunities in the foreign country; or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant is not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The AAO now turns to the issue of whether the applicant has established that a qualifying relative would experience extreme hardship as a result of his inadmissibility.

The asserted hardship factors to the qualifying relative are the poor living conditions in Nicaragua, as well as the emotional, financial, and psychological hardships the applicant's wife currently experiences as a result of relocation. In her undated statement submitted on appeal, the applicant's wife asserts she is experiencing anxiety and stress from her current living conditions. The applicant's wife indicates that their family of five shares a two-bedroom home with the applicant's

sister and her son. She indicates that she shares one of the bedrooms with the applicant and their three children. She states that she had never lived in such poverty, and that before the applicant's removal to Nicaragua, the family used to own a house and live comfortably in Texas.

The record includes a psychological evaluation prepared by in February 2012, which indicates that the applicant's wife has been diagnosed with depression. In her letter, Dr. attributes this diagnosis to the feeling of helplessness associated with their 2010 relocation to Nicaragua as a result of the applicant's removal. The evaluation reflects that the applicant's wife has not been able to adapt to Nicaraguan society and its customs and that she has been unable to deal with the emotional and behavioral reactions of her three young children, whom are affected by the relocation to that country. indicates that the applicant's wife displays contained aggressiveness, anxiety, intellectual frustration, and emotional distress. Significantly, explains that the emotional distress exhibited by the applicant's wife is being perceived by the applicant's children. She further notes that after interviewing the applicant's children, it can be concluded that their mother's emotional distress is affecting them emotionally. This evaluation corroborates the applicant's wife's assertions that she began experiencing psychological difficulties and depression around the time the family relocated to Nicaragua in February 2010 to reunite with the applicant, and that the effect of relocation upon her children is causing her emotional and psychological hardship.

The applicant's wife indicates that she is experiencing extreme emotional difficulties because her children are "constantly sick" in Nicaragua. The applicant's wife indicates, and the medical documentation in the record corroborates that their children have been prescribed medication for fever, diarrhea, vomiting, and skin infections. She states that as a mother, it pains her to see her children suffer. The record evidence also indicates that two of the applicant's three children, display emotional difficulties parallel with a depression diagnosis. The record contains psychological evaluations prepared by in February 2012, indicating that the two children display symptoms of anxiety, aggressiveness, frustration, and shyness. concludes that the children have weak social skills, and both speak of "homesickness while [expressing their desire] to return [to the United States]" with their parents. states that the emotional effects of relocation on the applicant's children are evident, and she recommends family therapy and that the children return to their home country with their family.

Here, the AAO notes that Board and U.S. Courts decisions have found extreme hardship in cases where the limitations of the children impeded an adequate transition to daily life in the applicant's country of origin. In *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the Board concluded that the language abilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life style, and the Board found that uprooting her at that stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the Fifth Circuit Court of Appeals stated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether "extreme hardship" has been shown. In *Prapavat v. INS*, 638 F.

2nd 87, 89 (9th Cir. 1980) the Ninth Circuit Court of Appeals found the Board abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her. Though the AAO recognizes that the applicant's children are not qualifying relative in these proceedings, it notes there is evidence in the record indicating that relocating to Nicaragua resulted in the applicant's young children exhibiting psychological and emotional difficulties, which, in turn, is causing emotional difficulties to the applicant's spouse, as she is concerned about their transition to a different culture and society.

The applicant's wife further indicates that relocation to Nicaragua has caused her emotional difficulties related to the lack of educational opportunities for their children in that country. The applicant's wife states in her declaration that the family presently resides in the which she describes as one "[without] a public school nearby." She asserts that the applicant's children are receiving private classes at a home-based school center in The applicant indicates that her emotional difficulties concerning this issue relate to the fact that in Texas, their children were attending and were doing well academically. The applicant's wife states her concern about the type of education they are now receiving and asserts her desire to have her children study in the United States. The AAO notes the applicant's wife's concern about their U.S. citizen children's educational opportunities in Nicaragua.

The record evidence also reflects that the applicant's wife has significant family ties in the United States. Firstly, the applicant's wife is a U.S. citizen who was born and raised in Texas. Secondly, the applicant's wife's immediate family members, including her mother and siblings all reside in the United States. Her family reunites for special events and it is asserted that these immediate family members constitute her support network. The record further reflects that the applicant's wife's only family ties in Nicaragua are the applicant and his sister and nephew. The applicant's wife's family is from Mexico and she does not have any social ties to Nicaragua. The applicant's wife relocated to Nicaragua in February 2010 and the psychological evaluation submitted on appeal indicates that she is still having difficulties adjusting to life in that country.

The applicant's wife also states she constantly worries about the safety of the applicant and her children, as they currently reside in the . The applicant's wife states that the applicant barely takes the children outside because it is dangerous. She states that she is constantly worried when the children are outside their house, as she is afraid "something terrible will happen to them." The AAO notes that on January 11, 2013, the United States Department of State updated its Nicaragua Country Specific Information report. The report indicates that:

> While less than in neighboring countries, violent crime in Managua exists and petty street crimes are common. Gang activity exists, but also remains less prevalent than in neighboring Central American countries. Pick-pocketing and occasional armed robberies occur on crowded buses, at bus stops and in open markets like the Oriental and Huembes Markets. Violence, robbery, assault and

> stabbings are mostly confined to poorer neighborhoods, including the area around the Ticabus terminal, a major arrival and departure point for tourist buses. However, in recent months acts of petty crime have taken place in more upscale neighborhoods and near major hotels, including the Zona Hippos, Galerias Mall, Santo Domingo and Las Colinas neighborhoods.

The AAO therefore notes the risks U.S. citizens face when traveling to certain areas of Nicaragua, the department in which the applicant's spouse and children presently resides, as well as the emotional and psychological hardship the applicant's wife is experiencing as a result of these conditions.

Accordingly, when looking at the aforementioned factors in the aggregate, particularly the documented emotional difficulties of the applicant's wife, the applicant's wife's depression and the emotional distress she exhibits due to the relocation, as well as her family ties to the United States, her long residence in the United States, the unsafe conditions in and the emotional difficulties to the applicant's wife resulting from her children's psychological and educational difficulties, the AAO finds that the applicant has demonstrated extreme hardship to his wife if she were to remain in Nicaragua with him.

With regard to separation from the applicant, the applicant's wife asserts that separation from her husband impacted her emotionally and financially. The applicant's wife states in her undated declaration that after the applicant's removal in October 2009, she experienced difficulty in dealing with her three children, two of whom began to exhibit behavioral issues at home and in school. The applicant's wife further indicates that both her and her children missed the applicant tremendously and were anxious and sad in his absence. The children cried constantly whenever they would find pictures of the applicant. Also, the children's sudden behavioral changes impacted the applicant's wife emotionally, and she decided to relocate to Nicaragua, leaving behind all of her immediate family members. The AAO notes the emotional hardships the applicant's wife experienced as a result of separation from her husband. The AAO further notes that separation from the applicant brought upon their children emotional and behavioral challenges, as corroborated by the psychiatric evaluations submitted on appeal. Though we once again acknowledge that the children are not qualifying relatives in these proceedings, the record evidence demonstrates that the children's behavioral issues caused by the separation from their father emotionally affected the applicant's wife.

Courts have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted).

The applicant's wife further asserts that she experienced financial hardship as a result of the separation from the applicant. In her undated declaration, the applicant's wife indicates that she was

unemployed at the time of the applicant's removal and that she was left to care for their three children without the economic support of the applicant. The record reflects that, while in the United States, the applicant worked at [redacted] and earned close to $30,000 per year. The applicant's wife asserts that her husband's yearly income was sufficient to support a household of five in [redacted] and that she began experiencing financial difficulties when the applicant was removed from the United States. The applicant's wife indicates that she lost the house they purchased together in February 2010 because she could not make the monthly mortgage payments. The applicant's wife indicates that she felt desperate without him because she could not fulfill her monthly financial obligations. The AAO notes that separation from the applicant resulted in financial hardship to his wife, as she was unable to make monthly mortgage payments and lost their house as a result.

The factors as presented reveal that the applicant's wife will experience extreme hardship if she remains in the United States without the applicant. The applicant's wife would have to care for three children exhibiting behavioral problems without her husband's help. Further, the applicant's wife would have to move with the children to the United States without the applicant, which is precisely the cause of their behavioral issues. Moreover, the separation affected the family's finances in such a way that the applicant's wife was unable to continue making mortgage payments on their house. When looking at the aforementioned factors in the aggregate, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to return to the United States without the applicant.

However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

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

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "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." *Id.* at 300.

The favorable factors in this matter are the extreme hardship the applicant's wife would face if the applicant were to reside in Nicaragua, regardless of whether they accompanied the applicant or stayed in the United States; the applicant's stable employment as an electrician in Texas; and support letters from the applicant's husband's family, friends, and community members. The unfavorable factors in this matter are the applicant's criminal convictions and any periods of unlawful presence while in the United States.

On appeal, the applicant has submitted a police clearance letter from the National Police of the Republic of Nicaragua, indicating that the applicant has no criminal record in that country. The record reflects that the applicant is employed in Nicaragua as a driver. The applicant also submitted a letter from a Pastor at the indicating that the applicant is a member of the congregation and that he is a person who wishes to do well and succeed in life, that he possesses a positive attitude and the courage to improve his quality of life. The applicant's wife asserts that the applicant is a "hard-working gentleman" and is "very good with the kids." She further states that the applicant is a good and responsible father, and that the children are emotionally attached to the applicant.

It is noted that the immigration violations and crimes committed by the applicant are serious in nature and cannot be condoned. While the applicant's criminal record is a matter of significant concern, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary of Homeland Security's discretion is warranted.

In proceedings for an 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, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the applicant's appeal is sustained.

ORDER: The appeal is sustained.