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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 14 2013 Office: LONG ISLAND File:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York District, denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of China who was found to be inadmissible to the United States 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 a crime involving moral turpitude. He is the beneficiary of an approved Petition for Alien Relative (Form I-130) submitted by his wife, a U.S. Citizen. He seeks a waiver of inadmissibility in order to remain in the United States with his wife and children.

The District Director concluded the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and, accordingly, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601). *Decision of District Director*, dated December 8, 2012.

On appeal, counsel for the applicant contends that the District Director erred in finding that the qualifying spouse would not suffer extreme hardship if the waiver application were denied. Counsel also asserts that the District Director failed to consider hardship to the applicant's children. Additionally, counsel claims that the applicant merits a favorable exercise of discretion.

The record includes, but is not limited to: statements from the applicant and the qualifying spouse; letters from the applicant's daughter, step-son, and mother-in-law; medical documentation relating to the qualifying spouse; a psychological evaluation of the qualifying spouse; employment records; records relating to the applicant's criminal conviction; a psychotherapy analysis report regarding the applicant; country conditions information; and letters of support from members of the applicant's church. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> Criminal and related grounds. —
>
> (A) Conviction of certain crimes. –
>
> (i) In general. – Except as provided in clause (ii), any 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.)

The record reflects that on July 12, 2001, the applicant was convicted of criminal sexual contact in violation of N.J.S.A. § 2C:14-3b. He was sentenced to a two-year suspended sentence, fines totaling $155, and psychiatric counseling.

In *Matter of Silva-Trevino*, the Attorney General expanded upon the traditional methodology for determining whether a particular offense is a crime involving moral turpitude. 24 I&N Dec. 687 (A.G. 2008). The Attorney General noted that in considering whether an offense is a crime involving moral turpitude, the first step in the analysis is to examine the elements of the statute itself, the traditional "categorical" inquiry. *Id.* at 696-97; *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990), as stating that in determining whether a conviction is for a certain type of offense, a court should normally look "not to the facts of the particular prior case," but rather to the statute defining the crime of conviction); *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (applying *Silva-Trevino* in determining whether a conviction is for a crime involving moral turpitude and confirming that "we must first engage in the traditional categorical analysis of the elements of the statute.")

The Attorney General found that the "categorical inquiry" requires an examination of the law under which an alien is convicted to determine "whether there is a 'realistic probability,' not a 'theoretical possibility,' that the . . . statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude." *Silva-Trevino*, 24 I&N Dec. at 690 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. at 193). This analysis requires asking whether "any actual (as opposed to hypothetical) case exists in which the criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any actual case (including in the alien's own case)," then there is not a "realistic probability" that the statute would be applied to conduct not involving moral turpitude and all convictions under the statute may categorically be treated as involving moral turpitude. *Id.* at 697.

However, if the language of the criminal statute "encompass[es] both conduct that involves moral turpitude and conduct that does not, *and* there is a case in which the criminal statute has been applied" to conduct that does not involve moral turpitude, then all convictions under the statute cannot categorically be treated as convictions for crimes that involve moral turpitude. *Id.* The Attorney General confirmed that if the conviction is not categorically a crime involving moral turpitude, an adjudicator proceeds to the "modified categorical inquiry." In this second step of analysis, the record of conviction is examined in order to determine whether the specific conduct for which the applicant was convicted involved moral turpitude. *Id.* at 698-99. The record of conviction consists of the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.*

Finally, the Attorney General went beyond the traditional methodology for determining whether an offense is a crime involving moral turpitude by adding a third step of analysis. The Attorney General stated that if review of the record of conviction is inconclusive, an adjudicator should then consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. *Id.* 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.' The sole purpose of the inquiry is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703 (citation omitted).

The statute under which the applicant was convicted, N.J.S.A. § 2C:14-3b, provides:

> An actor is guilty of criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in section 2C:14-2c. (1) through (4).

N.J.S.A. § 2C:14-2c provides:

> An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:
>
> (1) The actor uses physical force or coercion, but the victim does not sustain severe personal injury;
> (2) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status;
> (3) The victim is at least 16 but less than 18 years old and:
>
> (a) The actor is related to the victim by blood or affinity to the third degree; or
> (b) The actor has supervisory or disciplinary power of any nature or in any capacity over the victim; or
> (c) The actor is a resource family parent, a guardian, or stands in loco parentis within the household;

(4) The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim.

The criminal complaints, dated March 30, 2001, indicate that the applicant committed criminal sexual contact against two women with physical force. Therefore, the record establishes that the applicant was convicted under N.J.S.A. § 2C:14-2c(1), which prohibits sexual assault through the use of physical force or coercion. The AAO is unaware of any published federal cases addressing whether the crime of "criminal sexual contact" under New Jersey law is a crime of moral turpitude. However, in *Matter of S-*, 5 I&N Dec. 686 (BIA 1954), the Board held that the crime of indecent assault on a female under section 292(a) of the Canadian Criminal Code involved moral turpitude because the crime is "a sex offense against a woman without her consent" and the term "'indecent' . . . denotes depravity." 5 I&N Dec. 686, 687-88. The Board noted that "an evil intent distinguishes an indecent assault from a common assault . . . ." *Id.* at 688. Furthermore, in *Matter of Z-*, 7 I&N Dec. 253, 255 (BIA 1956), the Board found indecent assault in violation of section 6052 of the General Statutes of Connecticut, Revision of 1930, to involve 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." *Id.* In this case, the applicant was convicted of sexual contact with two women against their will through the use of force. We find that there is no reasonable possibility that N.J.S.A. § 2C:14-2c(1) would be applied to conduct that did not involve moral turpitude. Therefore, the applicant's conviction for criminal sexual contact under N.J.S.A. § 2C:14-3b, which is a form of sexual assault pursuant to N.J.S.A. § 2C:14-2c, is categorically a crime involving moral turpitude. The applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. He does not contest the finding of inadmissibility on appeal.

Section 212(h) states, 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 -

. . .

(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 . . . .

The AAO also finds that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year. 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.
>
> . . .
>
> (v) Waiver.- The Attorney General 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 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 regarding a waiver under this clause.

The record reflects that the applicant entered the United States without inspection in 1994 and has remained in the country since that date. Therefore, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The applicant is eligible to apply for a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(h) of the Act. A waiver under section 212(h) is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. However, a waiver under section 212(a)(9)(B)(v) cannot be based on extreme hardship to the applicant's children. Because the applicant requires a waiver under both sections, the AAO will determine the applicant's eligibility for a waiver under the more restrictive section 212(a)(9)(B)(v). Therefore, the applicant's U.S. citizen spouse is the only qualifying relative in this case. Hardship to the applicant's children will be considered only to the extent that it results in hardship to his spouse. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

However, a favorable exercise of discretion is limited in the case of an applicant who has been

convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d) states:

> 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 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. 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 (Dec. 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.

We find that the applicant's conviction for criminal sexual contact is a violent crime as it involves sexual assault against another through the use of force. Therefore, the applicant is subject to the heightened discretionary standard under 8 C.F.R. § 212.7(d). Accordingly, to demonstrate that he merits a waiver in the exercise of discretion, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 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. Finding no evidence of foreign policy, national security, or other extraordinary equities in this case, 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."

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 63 (BIA 2001), the Board stated that in assessing exceptional and extremely unusual hardship, it would be useful to consider the factors considered in determining extreme hardship. Accordingly, we will first consider the applicant's waiver application under the extreme hardship requirement of section 212(h) of the Act. Should the record establish that the hardship resulting from the applicant's inadmissibility satisfies section 212(h) of the Act, we will proceed with a consideration of whether such hardship also meets the heightened standard imposed by 8 C.F.R. § 212.7(d).

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 U.S. 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. *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 v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (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 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.

On appeal, counsel for the applicant contends that the qualifying spouse will suffer extreme hardship regardless of whether she is separated from the applicant or relocates to China with him. Counsel explains that the qualifying spouse suffers from health problems, including anemia, depression, anxiety disorder, and mood disorder. Counsel asserts that the qualifying spouse's anemia results in fatigue, has caused her to faint, and has required her to undergo a blood transfusion. Accordingly, counsel claims that the qualifying spouse relies on the applicant for daily assistance, would be unable to care for her young children on her own, and would be unable to receive safe treatment for her anemia in China, where blood transfusions are dangerous. Counsel also states that the qualifying spouse needs family support to manage her depression and anxiety and that she would be unable to function without the applicant. Furthermore, counsel contends that the qualifying spouse relies on the applicant for financial assistance because her health conditions prevent her from working full-time. Additionally, counsel states that the qualifying spouse is close to her mother and her brother in the United States and would suffer hardship if she were separated from them and unable to provide them

with support. Finally, counsel claims that the applicant provides necessary support to his two children and to his mother-in-law and that his entire family would suffer in his absence.

We find that the qualifying spouse would suffer extreme hardship if separated from the applicant. Medical documentation in the record indicates that the qualifying spouse has been diagnosed with severe anemia, which caused her to require emergency treatment and a blood transfusion after fainting. The qualifying spouse's doctor recommends that she not live alone due to the risk of fainting as a result of her anemia. The qualifying spouse also states that the applicant monitors her health and is available to take her to the hospital in an emergency, but that her two young children would be unable to do so. She also notes that she is sometimes unable to care for her children due to her illness, so the applicant's assistance in the household is necessary.

Additionally, Ph.D., has diagnosed the qualifying spouse with major depression, anxiety disorder, and mood disorder, for which she has received regular treatment since May 2010. Psychological evaluations in the record indicate that the qualifying spouse's mental health difficulties have interfered with her relationships with her husband and children, caused insomnia, and inhibited her ability to care for her family and to carry out her daily responsibilities. Additionally, the evaluations demonstrate that the qualifying spouse's mental health has worsened due to the stress caused by the applicant's immigration situation and that the applicant's support is important in managing the qualifying spouse's mental health. The qualifying spouse states that she cannot drive due to her health conditions, so the applicant drives her to her appointments. He also encourages her to attend her appointments with her psychiatrist when she feels too tired and depressed to attend. Furthermore, the psychological evaluations indicate that the applicant attends the qualifying spouse's therapy sessions and understands the importance of her mental health treatment.

The record also demonstrates that the qualifying spouse would face financial hardship if the applicant were removed. Employment records indicate that the qualifying spouse works part time for approximately $1,290 per month while the applicant earns approximately $2,150 per month. Other documentation supports the qualifying spouse's claim that the family's mortgage payment is $2,878 per month (reduced by $1,500 per month from a tenant) and that their other basic expenses total approximately $1,150. The qualifying spouse is unable to work full time due to her health issues, so without the applicant's financial support, the qualifying spouse would likely struggle to meet her basic financial obligations and to support her family.

We also find that the qualifying spouse would experience extreme hardship if she were to relocate to China with the applicant. In a letter dated December 30, 2012, Dr. indicates that the qualifying spouse must receive ongoing treatment for her anemia to prevent serious complications, and she has an established relationship with her doctors to receive the necessary care. Country conditions information submitted by the applicant also indicates that the qualifying spouse would be unable to receive safe emergency care for her anemia in China. The record contains significant evidence that undergoing a blood transfusion in China carries a high

risk of infection with HIV due to corruption in the collection and sale of blood and the lack of government oversight. In 2010, an official with the Chinese Ministry of Health announced that "blood transfusions should be avoided unless completely necessary" due to the risks involved. Apr. 16, 2010;[1] *see also China:* Apr. 19, 2010.[2] In a letter dated August 2, 2012, Dr. specified that the qualifying spouse has been in his care for anemia, gastritis, and irregular menstruation for six years and that she requires regular medical treatment in his office. A report from Dr. dated April 28, 2010, shows that the qualifying spouse has been treated for stomach ulcers.

Additionally, the record indicates that the qualifying spouse relies on her doctors in the United States for mental health treatment and that she would likely be unable to receive necessary mental health care in China. Country conditions information submitted by the applicant indicates that the majority of people with mental illness in China do not receive treatment due to an extreme shortage of mental health professionals and cultural stigmas relating to mental illness.

In the aggregate, the AAO finds that the difficulties the qualifying spouse would face if the waiver application were denied would amount to extreme hardship. *See Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996); *see also Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 566 (BIA 1999).

In that the applicant has established that the bars to his admission would result in extreme hardship to a qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion. As we mentioned above, the applicant is subject to the heightened discretionary standard of 8 C.F.R. § 212.7(d) and must establish exceptional and extremely unusual hardship in order to qualify for a waiver. In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board determined that exceptional and extremely unusual hardship "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 60-61. A review of the factors considered in determining extreme hardship is relevant in this context. *Id.* at 63. Those factors include, but are not limited to, a qualifying relative's family ties in the United States and in the country to which he or she would relocate; the conditions in the country of relocation; the financial consequences of departing the United States; and significant medical conditions, especially where appropriate health care services would be unavailable in the country of relocation. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999); *see also Matter of Anderson*, 16 I&N Dec. 596, 597-98 (BIA 1978).

In *Monreal-Aguinaga*, the Board provided additional examples of the hardship factors it deemed relevant for meeting the higher standard of 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 63-64. The Board has also 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." *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 323 (BIA 2002). Even where an Immigration Judge has found that a respondent's children "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, the Board has held that such hardships "are simply not substantially different from those that would normally be expected upon removal to a less developed country." *Id.* at 324.

However, in *Matter of Gonzalez Recinas*, the Board 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—including her "heavy financial and familial burden . . . the lack of support from her children's father, [her U.S.] citizen children's unfamiliarity with the Spanish language, the lawful residence in this country of all of [her] immediate family, and the concomitant lack of family in Mexico"—cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. *Id.* at 472. The Board emphasized that the case was "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 in this case. *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.").

We find that the qualifying spouse would also suffer exceptional and extremely unusual hardship if the waiver application were denied. As discussed in detail above, the qualifying spouse's

physical and mental health conditions significantly limit her ability to care for herself and her children. She requires regular assistance and monitoring in order to maintain her health and address emergencies, and she cannot drive or work full time. As a result, she relies on the applicant for financial support as well as daily assistance in caring for her young children, attending doctor's appointments, maintaining the household, and other basic tasks. Furthermore, the qualifying spouse would be unable to obtain necessary medical care in China due to the health risks involved in blood transfusions and the unavailability of mental health treatment in that country.

The qualifying spouse's serious medical and psychological conditions, her reliance on regular medical care and her inability to receive such care in China, her need for physical and financial support from the applicant, the difficulties she would face in caring for her children alone in the United States, and the emotional hardships that relocation or separation would cause for her, when considered in the aggregate, would result in hardship that is "substantially beyond the ordinary hardship that would be expected when a close family member leaves this country." *Monreal-Aguinaga*, 23 I&N Dec. at 62 (quotation omitted). Therefore, we conclude that the applicant has demonstrated that a denial of his waiver application would result in exceptional or extremely unusual hardship, as required by 8 C.F.R. § 212.7(d).

Additionally, we find that the negative factors, such as the gravity of the applicant's offense, do not outweigh the extraordinary circumstances and other positive equities. The AAO must "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-Moralez*, 21 I&N Dec. at 300. Although the applicant's criminal conviction was very serious, the conviction records indicate that in sentencing the applicant, the court noted that the applicant was under psychiatric care at the time of sentencing and that the applicant claimed to "suffer from severe anxiety and blackouts as a result of childhood trauma." The court also required, as a condition of sentencing, that the applicant undergo psychiatric treatment. Furthermore, in concluding that the applicant would not serve time in prison, the court found a mitigating factor to be that "[t]he defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense." The applicant also claims that the behavior which led to his conviction was caused by extreme and unusual mental stress leading to a breakdown. The court's findings during sentencing, as well as the fact that the applicant was under psychiatric care at the time he committed the offense for which he was convicted, support his claim. Furthermore, the applicant has expressed deep regret for his actions and there is no indication that he has engaged in any similar conduct since 2001.

Additionally, the record indicates that the applicant has a close relationship with his two young children and that he provides them with important emotional and financial support. The applicant's mother-in-law also states that she relies on monthly financial support from the applicant. Furthermore, letters of support indicate that the applicant is active in his church and is

respected by his friends. The applicant has also resided in the United States since 1994, has stable employment, owns a home with the qualifying spouse, and has paid taxes.

Although the applicant's criminal conviction and his violation of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here that burden has been met.

ORDER: The appeal is sustained.