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

U.S. Citizenship and Immigration Services

(b)(6)

Date: MAY 01 2015 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Applicant:

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 1182(a)(9)(B)(v)

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,

for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Nebraska Service Center director denied the waiver application and an appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before us on motion. The motion is granted, the prior AAO decision is withdrawn and the underlying appeal is sustained.

I. FACTUAL AND PROCEDURAL HISTORY

The applicant is a native and citizen of El Salvador 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 and 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 more than one year and again seeking admission within ten years of his last departure from the United States. The applicant is the spouse of a United States citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The director found that the applicant had been convicted of a violent or dangerous crime and had not established that a qualifying relative would experience exceptional and extremely unusual hardship due to the applicant's inadmissibility. *Decision of the Director*, dated December 26, 2013. On appeal, we found the record to establish that the applicant's spouse is experiencing extreme hardship resulting from her separation from the applicant and that she would experience extreme hardship if she were to relocate to El Salvador to reside with the applicant. We also found that if the applicant's spouse were to relocate to El Salvador those hardships would amount to exceptional and extremely unusual hardship. We further found, however, the record lacking in evidence that would demonstrate that the applicant's spouse would face hardship "substantially" beyond the ordinary hardship that is expected upon separation. *Decision of the AAO*, dated October 27, 2014.

On motion the applicant contends in the Notice of Appeal or Motion (Form I-290B) that we erred in determining that his crime was a violent or dangerous crime, in applying the hardship standard, and in limiting to whom hardship can be attributed. With the motion the applicant submits a statement. The record contains statements from the applicant and his spouse, letters about the spouse from a psychologist and a medical doctor, a psychological evaluation of the applicant's immediate family, a psychological evaluation of the applicant in El Salvador, letters from the applicant's children, school information for the applicant's children, letters of support for the applicant from friends and family, financial documentation, and country information for El Salvador. The entire record was reviewed and considered in rendering this decision.

II. REVIEW OF THE DIRECTOR'S DECISION

A. Law

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.

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

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

(1) . . . .

(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 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. . . . and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. . . .

8 C.F.R. § 212.7 states in pertinent part:

Waiver of certain grounds of inadmissibility.

. . . .

d) Criminal grounds of inadmissibility involving violent or dangerous crimes. The Attorney General, 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.

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

(B) Aliens Unlawfully Present.-

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

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now 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 . . . 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.

B. The Applicant is Inadmissible under Sections 212(a)(9)(B)(i)(II) and 212(a)(2)(A)(i)(I) of the Act for Unlawful Presence and Having Been Convicted of Crime Involving Moral Turpitude

The record reflects that the applicant entered the United States without inspection in 1988 and did not depart until 2012 and thus was determined to be inadmissible for accruing more than one year of unlawful presence in the United States. The record also reflects that in 1991 the applicant was convicted of Sexual Battery under California Penal Code section 243.4(b). The record shows that the applicant's conviction was for a felony and that he was sentenced to 365 days in prison, with the sentence stayed while the applicant was on probation. The director found the applicant's conviction to be for a crime involving moral turpitude, and as it was a violent or dangerous crime, the applicant must show exceptional and extremely unusual hardship to a qualifying relative. On appeal we concurred with the director's determination that the applicant was convicted for a crime involving moral turpitude and that the conviction was for a violent or dangerous crime.

C. The Applicant's Conviction is for a Violent or Dangerous Crime

The applicant has not contested that his conviction is a crime involving moral turpitude, but on motion the applicant contests the finding that he committed a violent or dangerous crime. The applicant contends that his conviction is not for a violent or dangerous crime and that our previous decision cited numerous cases with all but one falling outside the Ninth Circuit, where the applicant's conviction occurred. The applicant states that a crime of violence is defined under 18 U.S.C § 16 as an offense that has an element of the use, attempted use, or threatened use of physical force or any other offense that is a felony and that involves a substantial risk that physical force may be used, and contends on motion, as he had on appeal, that in *Lisbey v Gonzales*, 420 F.3d 930, 932 (9th Cir. 2005), the Ninth Circuit determined that sexual battery under California Penal Code section

243.4(a) is not categorically a crime of violence as it has no requirement of actual or threatened physical force. The applicant has submitted no additional evidence on motion.

As we noted in our previous decision, the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and we are aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act.

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). For example, Black's Law Dictionary, Eighth Edition (2004), defines violent as "[o]f, relating to, or characterized by strong physical force," "[r]esulting from extreme or intense force," or "[v]ehemently or passionately threatening," and dangerous as "perilous; hazardous; unsafe" or "likely to cause serious bodily harm." 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."

In *U.S. v. Wood*, 52 F.3d 272 (9th Cir. 1995) the U.S. Circuit Court of Appeals for the Ninth Circuit, applying the categorical approach, determined that although a conviction was theoretically possible under circumstances which did not end in violence under Washington's indecent liberties statute, an offense under the statute generally posed a serious potential risk of physical injury to the victim, and a conviction under the indecent liberties statute in Washington was a crime of violence under the Sentencing Guidelines (distinguishing *U.S. v. Weekley*, 24 F.3d 1125 (9th Cir. 1994)). Findings by the courts regarding what constitutes a "crime of violence" for purposes of another provision of law are, at best, persuasive authority in the discretionary determination of whether to consider a crime to be violent or dangerous under 8 C.F.R. § 212.7(d).

In *Lisbey v. Gonzales* the court noted that all of the circuits to address this question have similarly concluded that sexual battery is a "crime of violence" under 18 U.S.C. § 16(b). In *Zaidi v. Ashcroft*, 374 F.3d 357 (5th Cir. 2004), the Fifth Circuit had "little difficulty in concluding" that an offense

under a similar sexual battery statute created a substantial risk that physical force may be used. *Id.* at 361. The court viewed the non-consent of the victim as the touchstone for its conclusion that the offense involves substantial risk of the use of physical force. *Id.* The Second and Tenth Circuits have reached the same conclusion, using similar reasoning. *Sutherland v Reno*, 228 F.3d at 176–77; *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir.1993).

In *United States. v. Romero-Hernandez,* 505 F.3d 1082 (10th Cir. 2007) the Tenth Circuit found that misdemeanor unlawful sexual contact in violation of Colorado law was a "forcible sex offense," thus qualifying as a "crime of violence". The court noted that the Colorado unlawful sexual contact statute prohibited nonconsensual sexual contact, so the forcible requirement did not mandate physical compulsion sufficient to overcome resistance, as long as defendant had sufficient control or power to overcome victim's free will, and an offense involving nonconsensual sexual contact would necessarily be forcible, even without physical violence. *U.S. v Romero-Hernandez*, 505 F.3d 1082 (2007 Tenth Circuit). The court held that violation of the Colorado statute is categorically a "forcible sex offense" and thus a "crime of violence," even if not committed by means of actual physical compulsion. "When an offense involves sexual contact," we wrote, "it is necessarily forcible when that person does not consent." *Id.* at 1089.

The inclusion of the term "dangerous" further signals that even crimes not marked by actual or physical force against the victim, but that may cause serious harm or are otherwise unsafe or hazardous, also trigger the requirements of 8 C.F.R. § 212.7(d). As stated above, in considering whether a crime is violent or dangerous, we will interpret these terms in accordance with other 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). Here we find that the applicant's conviction for sexual battery under Cal. Penal Code § 243.4(b), which involves sexual contact against the will of an incapacitated or disabled victim, is a violent or dangerous crime as it involves a substantial risk of the use of physical force, and we therefore find that the applicant is subject to 8 C.F.R. § 212.7(d).

D. The Applicant has Established Extreme Hardship to a Qualifying Relative Pursuant to Sections 212(a)(9)(B)(v) and 212(h) of the Act

On motion the applicant contends that we erred in considering only the hardship to his spouse and not his children. Although the applicant's children are qualifying relatives for a waiver under section 212(h) of the Act, the applicant requires a waiver under section 212(a)(9)(B)(v) due to his unlawful presence accrued in the United States. 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. The applicant's spouse is the only qualifying relative for a waiver under 212(a)(9)(B)(v) due to the applicant's inadmissibility for unlawful presence in the United States. 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).

We previously found the record to establish that the applicant's spouse is experiencing extreme hardship resulting from her separation from the applicant and that she would experience extreme hardship if she were to relocate to El Salvador to reside with the applicant. As nothing in the record supports revisiting the issue of extreme hardship to the applicant's spouse, we will not disturb this finding on motion.

E. The Applicant Has Established that he Merits a Waiver as a Matter of Discretion

As noted above, we previously determined that the applicant's spouse suffers extreme hardship due to separation and would experience extreme hardship if she were to relocate. However, once extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). However, we cannot find, based on the facts of this particular case, that the applicant merits a favorable exercise of discretion solely on the balancing of favorable and adverse factors. The applicant has been convicted of sexual battery and, accordingly, the applicant must show that "extraordinary circumstances" warrant approval of the waiver. 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. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, we 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.*

In our previous decision we found that if the applicant's spouse were to relocate to El Salvador, the resulting hardship would amount to exceptional and extremely unusual hardship due to the cumulative effect of her family ties to the United States, her length of residence in the United States of more than 25 years, and her safety concerns for herself and her children as well as her financial well-being were she to relocate to El Salvador. We found, however, that the applicant did not demonstrate that his spouse would face hardship "substantially" beyond the ordinary hardship that is expected upon separation that would rise to the level of exceptional and extremely unusual hardship.

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

The applicant contends on motion that we erred by not factoring the hardship to him, and refers to a May 27, 2003, memorandum from the Department of Homeland Security, Bureau of Citizenship and Immigration Services, citing the Attorney General opinion in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002) finding that as the attorney general made no mention of a qualifying relative when discussing hardship under 8 C.F.R. § 212.7(d) that hardship to the applicant is also a factor. Although 8 C.F.R. § 212.7(d) does not specifically state to whom the applicant must demonstrate exceptional and extremely unusual hardship, we interpret this phrase to be limited to qualifying

relatives described under the corresponding waiver provision of section 212(h)(1)(B) of the Act. A waiver of inadmissibility under section 212(h)(1)(B) 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, parent, son or daughter of the applicant.

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. We note 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."). We note 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.

As noted above, we interpret the phrase exceptional and extremely unusual hardship to be limited to qualifying relatives described under the corresponding waiver provision of section 212(h)(1)(B) of the Act, in this case the applicant's U.S Citizen spouse and children.

On motion the applicant refers to cases cited in our previous decision and asserts that the most similar to his situation is *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002), where the BIA found

exceptional and extremely unusual hardship to the children of a single mother who had no financial support from their father, and the applicant asserts that in *Matter of Recinas* hardship was met due to economic hardship and family ties, not health issues. The applicant states that his spouse has two U.S. citizen children and has been diagnosed with serious medical conditions, adjustment disorder with depressed mood, depression with anxiety, and hypertension. He states that his two children suffer depression, anxiety, weight loss, and insomnia, and have been suffering academically. The applicant states that his spouse and children are living in one room at a family member's house, previously had their utilities disconnected, and are behind on financial obligations. The applicant states that he cannot find work in El Salvador to help his family and that the spouse's medical and psychological conditions cause her to be unable to work for periods of time.

In her statement the applicant's spouse states that she is brokenhearted and that it affects the children from her first marriage, as they treat the applicant like their dad. The spouse states that the emotional effect of the applicant's absence has a negative impact on the children's grades, that there is sadness in their faces and a lack of interest in friends and family activities, and that their suffering makes her sadder. The spouse states that she has insomnia thinking about how to guide the family forward and then is tired and cannot concentrate, which is affecting her productivity. The spouse states that she has blackouts because she is fatigued, feels stressed, and fears she will lose her job.

The applicant's daughter and stepson write about how they miss the applicant, and the stepson writes that he cannot concentrate at school, so his education has suffered.

A letter from the spouse's medical doctor states that she has hypertension and depression with anxiety, is on medication, and was referred to a psychologist. A letter from a psychologist states that the spouse was diagnosed with adjustment disorder with depressed mood and the psychologist believes the symptoms are directly related to separation from the applicant. The letter states that the spouse has increased sleeping to avoid pain and has feelings of hopelessness. The letter also states that without the applicant the spouse's children have difficulty in school, that the family has moved out of their home to stay with a family member, and that the financial stress is another trigger for the spouse's depression.

An evaluation of the family by a licensed certified social worker states that the spouse's stress affects her job and caused her to miss work for three months. The evaluation states that the spouse is concerned for her children and that her daughter's stress is causing her to lose hair, lose weight due to decreased appetite, and experience insomnia, anger, and a decrease in academic performance. The evaluation states that the spouse's son has also lost weight, is depressed and anxious, and has decreased academic performance.

The applicant's spouse states that with the applicant in the United States they were able to pay their mortgage, but now she struggles and had to give up their floor installation business that the applicant operated because she works full-time as a nurse's assistant and is unable to look after the business. The spouse states that she has started to work overtime to make up for the money that the applicant was making but has fallen behind on payments, and she has now rented out her house and moved to a one-bedroom apartment.

The spouse's niece states that the spouse and her children now live with the niece's family, where they share a bedroom and bath, and that she sees the children cry for their father. The spouse's sister states that the spouse and her children are struggling and that the sister is trying to help support them. Financial documentation submitted to the record shows that the applicant's spouse is behind on car, health insurance, and homeowners insurance payments; has had utilities disconnected; and has received letters from a debt collector.

The question to now be addressed is whether the applicant's qualifying family member would suffer hardship that is not only extreme, but that is "'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *See Monreal, supra*, at 62. On motion the applicant compares his situation to that of the respondent in *Matter of Recinas* where, the applicant points out, the BIA found exceptional and extremely unusual hardship to the children of a single mother due to economic hardship and family ties, not any health issues, which he asserts affect his spouse. In *Recinas* the Board considered that the respondent's four U.S. citizen children, who at the time were aged 12, 11, 8, and 5, were entirely dependent on their single mother, the respondent, for support. The Board emphasized that "the respondent is a single parent who is solely responsible for the care" of her children. *Id.* at 471.

The record shows that because of separation from the applicant, his children suffer anxiety affecting them physically, academically, and socially. Due to the loss of the applicant's income, his spouse and children have suffered economically and have been forced to move out of their house and to share a room with relatives, also affecting them emotionally, even though the applicant's spouse has been able to continue working and providing for her children.

Here, the emotional suffering the applicant's spouse and children experience due to separation from him, their concern for their safety were they to visit the applicant in El Salvador, and the financial hardship they experience from the loss of the applicant's income, rise to the level of exceptional and extremely unusual hardship.

Additionally, we find that the gravity of the applicant's offense does not override the extraordinary circumstances in this case. In determining the gravity of the applicant's offense, we must not only look at the criminal act itself, but also engage in a traditional discretionary analysis and "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. 296, 300 (BIA 1996)(Citations omitted).

The adverse factors in the present case are the applicant's 1991 conviction for Sexual Battery and his 1988 entry to the United States without inspection with subsequent period of unlawful presence. The favorable factors in the present case are hardship to the applicant and his spouse and children; letters of support from his spouse and children, family members, and friends; his employment in the United States; the passage of nearly 25 years since his criminal conviction; and the apparent lack of criminal activity since that time. The applicant does not appear to have been arrested or charged for any other criminal offenses and he has not been charged with any other immigration violations.

III. CONCLUSION AND ORDER

Although the applicant's criminal conviction and immigration violations are serious, the record establishes that the positive factors in this case outweigh the negative factors and a favorable exercise of discretion is warranted.

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 motion is granted, the prior AAO decision is withdrawn and the underlying appeal is sustained.