

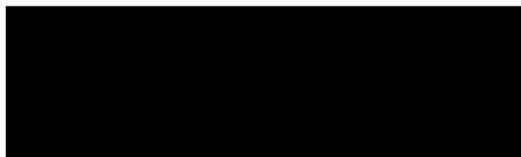
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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals
20 Massachusetts Avenue, N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: **JAN 23 2012**

Office: SACRAMENTO, CA

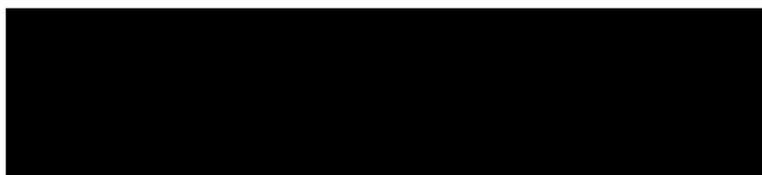
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IN RE:

Applicant: 

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

 Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Sacramento, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who the director found to be inadmissible under section 212(a)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A), for having been convicted of committing crimes involving moral turpitude. The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

In a notice of intent to dismiss the appeal, the AAO found that the director failed to address the applicant's two marijuana convictions, one of which is for possession of more than 28.5 grams of marijuana. On May 14, 1990, the applicant was convicted of violation of Cal. Health & Safety Code § 11357(c) (possession of marijuana over 28.5 grams). He was sentenced to 15 days jail, and 3 years probation. On February 2, 2001, the applicant was convicted of violation of Cal. Health & Safety Code § 11357(b) (possession of marijuana under 28.5 grams), and was ordered to pay a fine.

The marijuana convictions render the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Section 212(h) of the Act provides a waiver for a 212(a)(2)(A)(i)(II) inadmissibility only where an applicant has been convicted of a single offense of simple possession of 30 grams or less of marijuana. Because the applicant has two marijuana convictions, one of which is for possession of more than 28.5 grams of marijuana, the AAO concluded that the applicant is not eligible for consideration of a section 212(h) waiver.

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

(2) 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, or
 - (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

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

The Attorney General may, in his discretion, waive the application of . . . subparagraph (A)(i)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if – . . . in the case of an immigrant who is 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 permanent resident spouse, parent, son, or daughter of such alien.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

In response to the notice of intent to dismiss the appeal, counsel avers that regarding the 1990 marijuana possession conviction for possession of marijuana over 28.5 grams, the applicant withdrew his guilty plea and the El Dorado Superior Court dismissed the complaint for rehabilitative purposes.

Counsel maintains that in view of *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the applicant's 1990 marijuana conviction is eliminated for immigration purposes under the Federal First Offender Act (FFOA) because it was the applicant's first arrest and conviction for possession of marijuana. Counsel maintains that the applicant's 2001 simple possession offense is eligible for a waiver under section 212(h) of the Act, as it permits waiver for a single conviction for simple possession of less than 30 grams of marijuana.

We agree with counsel's arguments for the reasons set forth in this decision.

The applicant was convicted for violation of Cal. Health & Safety Code § 11357(b) and (c). Cal. Health & Safety Code § 11357 provides that:

(b) Except as authorized by law, every person who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of an infraction punishable by a fine of not more than one hundred dollars (\$100).

(c) Except as authorized by law, every person who possesses more than 28.5 grams of marijuana, other than concentrated cannabis, shall be punished by imprisonment in

the county jail for a period of not more than six months or by a fine of not more than five hundred dollars (\$500), or by both such fine and imprisonment.

With regard to the 1990 conviction for possession of more than 28.5 grams of marijuana, the record contains an Order Permitting Defendant to Withdraw Plea and Dismiss the Complaint filed with the El Dorado County Superior Court, State of California, South Lake Tahoe Session. This order indicates that the applicant was eligible for relief under Cal. Penal Code § 1018, and that the court permitted him to withdraw the previously entered plea of guilty and nolo contendere.

Cal. Penal Code § 1018 provisions states:

Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court. . . . On application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice.

The record indicates that the applicant's 1990 conviction qualifies for treatment under the FFOA. The FFOA provides in part:

(a) If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)-

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection;

the court may ... place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation....

18 U.S.C. § 3607 (1988).

The Ninth Circuit Court of Appeals has held that an alien whose offense would have qualified for treatment under the FFOA, but who was convicted and had his conviction expunged under state or foreign law, may not be removed on account of that offense. *See Ramirez-Altamirano v. Holder*, 563 F.3d 800, 812 (9th Cir. 2009); *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001); *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). Moreover, the Ninth Circuit Court of Appeals held in *Rice v. Holder*, 597 F.3d 952, 957 (9th Cir.2010), that an individual convicted for the first time in state court of using or being under the influence of a controlled substance was eligible for the same immigration treatment as individuals convicted of drug possession under the FFOA.

With regard to applicant's 1990 marijuana conviction, we find the applicant to be similarly situated to a first-time offender with a simple drug possession offense whose controlled substance conviction would have qualified for relief under FFOA. We note that the applicant's 1990 marijuana conviction was expunged under state law. Consequently, the AAO concludes that the applicant's 1990 marijuana conviction is no longer a conviction for immigration purposes. However, the applicant still has the February 2, 2001 conviction for possession of not more than 28.5 grams of marijuana. This violation is eligible for consideration under section 212(h) of the Act as it relates to a single offense of simple possession of 30 grams or less of marijuana.

Furthermore, we observe the record reflects that the applicant has other convictions:

<u>Conviction date</u>	<u>Crime/Sentence</u>
• 02/16/1988	Cal. Penal Code § 484(a) (theft) 8 days jail, 2 years probation
• 05/06/1992	Cal. Penal Code § 666/484(a) (petty theft with prior) 10 days jail, 3 years probation
• 03/14/1995	Nev. Rev. Stat § 205.0832/205.0835 (petit theft) 6 months jail (suspended), 6 months probation
• 12/03/1997	Cal. Penal Code § 242 (misdemeanor battery) 1 year probation, fined

The director found these convictions rendered the applicant inadmissible under section 212(a)(2)(A) of the Act for having been convicted of crimes involving moral turpitude. That section states, in pertinent parts:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The 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.)

We will first examine whether the applicant's most recent conviction, which occurred in 1997 and is for battery, is a crime involving moral turpitude.

Cal. Penal Code § 242 defines battery as, "any willful and unlawful use of force or violence upon the person of another."

We note that Cal. Penal Code § 243(e) provides:

When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment. If probation is granted, or the execution or imposition of the sentence is suspended, it shall be a condition thereof that the defendant participate in, for no less than one year, and successfully complete, a batterer's treatment program, as defined in Section 1203.097, or if none is available . . .

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir.2008)). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero, supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

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." *Matter of Silva Trevino*, 24 I&N Dec. 687, 697 (A.G. 2008) (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.

With regards to following *Silva-Trevino* in the Ninth Circuit, the Board stated recently “Since the Ninth Circuit . . . has not rejected *Silva-Trevino*, we will follow the approach set forth in the Attorney General's opinion.” *Matter of Guevara Alfaro*, 25 I&N Dec. 417, 423 (BIA 2011).

In *In re Sanudo*, 23 I&N Dec. 968 (BIA 2006), the Board addressed whether domestic battery in violation of Cal. Penal Code §§ 242 and 243(e) constitutes a crime involving moral turpitude. 23 I&N Dec. at 969. The Board assessed the manner in which California courts have applied the “use of force or violence” clause of Cal. Penal Code § 242. *Id.* The Board observed that courts have held that “the force used need not be violent or severe and need not cause pain or bodily harm.” *Id.* at 969 (citing *Gunnell v. Metrocolor Labs., Inc.*, 112 Cal. Rptr. 2d 195, 206 (Cal. Ct. App. 2001)). The Board also examined the situations where assault and battery offenses are generally classified as crimes involving moral turpitude, which is when aggravating factors are present such as the use of deadly weapon, the intentional infliction of serious bodily injury, and bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer. 23 I&N Dec. at 971-72. The Board also held that “the existence of a current or former ‘domestic’ relationship between the perpetrator and the victim is insufficient to establish the morally turpitudinous nature of the crime,” and, therefore, a conviction for domestic battery does not qualify categorically as a crime involving moral turpitude. *Id.* at 972-73.

Furthermore, the Ninth Circuit Court of Appeals addressed whether Cal. Penal Code §§ 242 and 243(e) constitutes a crime involving moral turpitude in the case *Galeana-Mendoza v. Gonzalez*, 465 F.3d 1054 (9th Cir. 2006). The Ninth Circuit found that conduct that does not involve moral turpitude, such as slightly shoving a cohabitant, is punishable under section 243(e). *Id.* at 1061. The Ninth Circuit determined that since the full range of conduct proscribed by the statute did not categorically involve moral turpitude, the court would conduct a modified categorical analysis and look “beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings to determine whether the applicant was convicted of a crime involving moral turpitude.” *Id.* at 1057-1058 (citations omitted).

In view of the foregoing discussion of *In re Sanudo* and *Galeana-Mendoza*, violation of Cal. Penal Code § 242 does not categorically involve moral turpitude. We must therefore apply the modified categorical approach, and review the applicant’s record of conviction. The Order, Notice, Sentence, Commitment Form and the disposition submitted by the applicant reflects that the applicant was placed on court probation for one year, and U.S. Citizenship and Immigration Service (USCIS) records reflect that the applicant’s battery conviction is a misdemeanor.

The complaint states that the applicant “did willfully and unlawfully use force and violence upon the person of [REDACTED]. The record contains an arrest report that states, in part, the following narrative:

I contacted [REDACTED] and obtained the following statement from him in summary. On 5/20 . . . [REDACTED] was at his step father’s [sic] house . . . with his younger brother, [REDACTED]. [REDACTED] wanted to ride his bike, but [REDACTED] didn’t want him to. [REDACTED] became upset, grabbed [REDACTED] by the arm and “dragged” him to his vehicle. [REDACTED] “threw” [REDACTED] into the car. [REDACTED] hit his head on the way into the car. [REDACTED] got into the back seat of the car. Before they drove away, [REDACTED] threw a “fuzzy toy” onto the dash board from the back seat. [REDACTED] thought he was throwing it at him and became angry. [REDACTED] reached back to [REDACTED] and pulled his right ear. [REDACTED] also scratched his right armpit area while trying to grab him. [REDACTED] had about a 1” by 1/8” [REDACTED] the front of his right arm pit, and a 1/8” circular abrasion just inside his right ear . . .

I contacted [REDACTED] and obtained the following statement from him in summary. [REDACTED] said he was at his father’s house . . . [REDACTED] wanted to ride his bicycle and [REDACTED] wouldn’t let him. [REDACTED] said [REDACTED] pushed him into the vehicle, and he hit his head on the top of the car as he went in. After they were in the car, [REDACTED] reached back toward [REDACTED] and tried to “hit” him several times.

. . .

In view of *Sanudo*, we find that, as described in the arrest report, the applicant’s actions toward his 11-year-old stepson (injuring his ear, causing an abrasion on his armpit, and trying to hit him) involves moral turpitude, which renders him inadmissible under section 212(a)(2)(A) of the Act.

The applicant was convicted of theft under Cal. Penal Code § 484(a), which provides, in pertinent part:

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). Thus, the applicant’s two theft convictions involve moral turpitude, rendering the applicant inadmissible under section 212(a)(2)(A) of the Act.

The applicant was convicted of the crime of battery. The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

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

The AAO finds that the crime of battery is a violent crime. In the instant case, as we find that there are not national security or foreign policy considerations that would warrant a favorable exercise of discretion, we review the evidence to determine if the applicant, in addition to meeting the statutory

requirement of proving extreme hardship, has demonstrated that denial of admission would result in exceptional and extremely unusual hardship.

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that “must be ‘substantially’ beyond the ordinary hardship that would be expected when a close family member leaves this country.” However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean*, *supra*, and codified at 8 C.F.R. § 212.7(d).

The Board stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

We note that in *Monreal*, the Board provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

[T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the Board noted that, “the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face.” 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent’s minor children was demonstrated by evidence that they “would suffer hardship of an emotional, academic

and financial nature,” and would “face complete upheaval in their lives and hardship that could conceivably ruin their lives.” *Id.* at 321 (internal quotations omitted). The Board viewed the evidence of hardship in the respondent’s case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The Board noted:

While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former “extreme hardship” standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher “exceptional and extremely unusual hardship” standard.

23 I&N Dec. at 324.

However, the Board in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that “the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief.” 23 I&N Dec. 467, 470 (BIA 2002). The Board found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The Board noted that these factors included her heavy financial and familial burden, lack of support from her children’s father, her U.S. citizen children’s unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The Board stated, “We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met.” *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. *See Gonzalez Recinas*, 23 I&N Dec. at 469 (“While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship.”).

Birth certificates in the record reflect that the applicant’s children were born on November 3, 1990 and June 23, 1992, and his stepchildren were born on December 11, 1982 and October 20, 1985. The marriage certificate reflects that the applicant married his wife on August 11, 1994. The record contains a U.S. Department of State Country Reports on Human Rights Practices – 2005 for Mexico; and information about education, employment, human rights, and healthcare in Mexico. The record also contains financial records.

Counsel contends that the applicant has demonstrated substantial hardship to qualifying relatives, and that the director failed to consider the totality of the hardships to the applicant’s family members. Counsel avers that the applicant’s U.S. citizen wife has extensive family ties in the United States, and that the applicant’s wife and children and stepchildren have no familial ties to Mexico other than the applicant’s elderly parents. Counsel declares that the applicant’s wife conveys that the applicant grew up in an impoverished, small rural town in Mexico, without indoor

plumbing, and they would be forced to live in such conditions with the applicant's parents. Counsel indicates that the applicant's wife does not speak Spanish and has no transferable skills that will enable her to obtain a job in Mexico. Counsel states that the applicant will not be able to afford decent health care for his family. Counsel asserts that the U.S. Department of State confirms the limited availability of affordable quality health care in Mexico, particularly in rural areas. Counsel states that separation from the applicant will devastate the applicant's wife and children.

In rendering this decision, the AAO will consider all of the evidence in the record.

The applicant's wife states in her declaration dated February 2007 that she has been married for more than 12 years, and has a close relationship with her husband even though they have arguments. She states that she works at a hospital and earns a decent wage, but would not be able to provide for her family on her own. She avers that she would like to pursue a registered nurse license. The W-2 Wage and Tax Statement indicate that the applicant's wife earned \$37,285 in 2006. The applicant has not submitted evidence of monthly household expenses so as to demonstrate that his wife will not be able to support herself without his income.

The stated hardship factors in the instant case are that of the emotional and financial impact to the applicant's wife and adult children if they remain in the United States without the applicant. In view of the submitted evidence we find that the applicant has not demonstrated that his wife and adult children will experience "exceptional and extremely unusual hardship" if they remained in the United States without him. Though the applicant's wife asserts that she and her children have a close relationship, the record reflects that in the past she has had a very strained relationship with her husband. And the submitted financial records do not reflect the applicant's wife's financial situation other than her income. Thus, we find that the applicant has not fully demonstrated that his wife and adult children would experience "exceptional and extremely unusual hardship" if they remain in the United States without him.

In regard to having his family members live in Mexico, the record conveys that the applicant has resided in the United States since 1988. The applicant's wife's declaration dated February 2007 stated that the applicant had lived in a small town in Jalisco state, which is where most of the applicant's his immediate family members now live. The applicant's wife indicates that she visited her husband's town in 1991. She states that Mexico has problems of violence, drugs, and poverty; poor health care; and lack of educational opportunities and jobs. The applicant's wife avers that her husband's town lacks jobs, clean public drinking water, and enough public clinics. She maintains that it will be difficult for her to obtain a job in Mexico because she does not speak, read, or write in Spanish. The applicant's wife indicates that pay is low in Mexico and a home will therefore be unaffordable. She avers that they will be forced to live with her in-laws in a house where the "services of clean water, reliable electricity and indoor bathrooms are not counted on."

Counsel states that the applicant's wife has no transferable skills that will enable her to obtain employment in Mexico. Income tax records reflect that the applicant has been employed in housekeeping for several years, and wage statements show he earned \$10.90 per hour in 2006 working for a hotel. Counsel indicates that the applicant's family will not be able to afford decent healthcare in Mexico, and that limited healthcare is available in rural areas such as the applicant's home town. This assertion is substantiated in the Consular Information Sheet on Mexico wherein it

states that medical care in remote areas in Mexico is limited. U.S. Department of State, Bureau of Consular Affairs, *Consular Information Sheet: Mexico*, 7 (August 17, 2006). Also substantiated is the applicant's wife's assertion about widespread poverty and low pay rates. The U.S. Department of State report conveys that the minimum wage in Mexico did not provide a decent standard of living for a worker and family. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2007: Mexico*, 9 (March 11, 2008). Lastly, the record reflects that the applicant's family presently has Blue Cross insurance.

However, the applicant has failed to demonstrate "exceptional and extremely unusual hardship" to his wife and adult children if they remain in the United States. Thus, the applicant has not demonstrated "exceptional and extremely unusual hardship" as required in 8 C.F.R. § 212.7(d), and we therefore find that there are not extraordinary circumstances warranting a favorable exercise of discretion in this case.

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

ORDER: The appeal is dismissed.