**U. S. Department of Homeland Security**
U. S. Citizenship and Immigration Services
*Office of Administrative Appeals* MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: MIAMI Date: MAY 10 2010

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the District Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Venezuela who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and child.

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.

On appeal, counsel asserts that the applicant's spouse, child and stepchildren would suffer extreme emotional and financial hardship if they are separated from the applicant. Counsel states that the applicant and his family have community ties in the United States. Counsel states that according to a letter from the Organization of Venezuelans In Exile, the applicant will be detained and imprisoned upon return to Venezuela. *Appeal Brief*, dated October 9, 2007.

In support of the waiver application, the record contains, but is not limited to, supporting letters from the applicant's family members, church and friends, employment records, financial records, school records, psychological evaluations, country condition reports, court records, family photos, and a letter from the Organization of Venezuelans in Exile. The entire record has been reviewed and considered in rendering a decision on the appeal.

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 –
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> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime,

> the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

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

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation

omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record shows that the applicant was convicted in the New Jersey Superior Court on April 12, 2000 of theft by deception in the third degree in violation of section 2C:20-4 of the New Jersey Statutes. A crime of the third degree is punishable by a term of imprisonment between three and five years. N.J. Stat. Ann. § 2C:43-6 (West 2000). The applicant was sentenced to 18 months probation (New Jersey Superior Court, Case Number 99-09-973).

At the time of the applicant's conviction, section 2C:20-4 of the New Jersey Statutes provided:

> A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely:
> a. Creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;
> b. Prevents another from acquiring information which would affect his judgment of a transaction; or
> c. Fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship.
> The term "deceive" does not, however, include falsity as to matters having no pecuniary significance, or puffing or exaggeration by statements unlikely to deceive ordinary persons in the group addressed.

This case arises in the 11th Circuit, and the Court of Appeals for the 11th Circuit has not ruled on the standards articulated in *Silva-Trevino*. The conviction, however, occurred in the Third Circuit. In *Nugent v. Ashcroft*, the Third Circuit held that theft by deception under section 3922 of the Pennsylvania Statues is categorically a crime involving moral turpitude. 367 F.3d 162, 165 (3rd Cir. 2004). The Third Circuit noted that theft by deception under the Pennsylvania Statutes "is taken word for word from § 223.3 of the Model Penal Code ("Code") promulgated by the American Law Institute ("ALI") in 1962." 367 F.3d 162, 168. Theft by deception under the New Jersey Statues is an analogous offense in that it is similarly "taken word for word" from section 223.3 of the Model Penal Code. Although *Nugent* does not explicitly apply the categorical analysis, it was the approach employed the Third Circuit at the time of its decision. *See Jean-Louis v. Holder*, 582 F.3d 462, 465 (3rd Cir. 2009)("In determining whether a state law conviction constitutes a CIMT, the agency, and we, have historically applied a 'categorical' approach . . . ."). The categorical inquiry in the Third Circuit consists of looking "to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute." 582 F.3d 462, 465-66. The "inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute 'fits' within the requirements of a CIMT." 582 F.3d at 470. Thus, a crime that has been found to be a categorical crime involving moral turpitude in the Third Circuit also constitutes a crime involving moral turpitude under the *Silva-Trevino* standards. Therefore, pursuant to the holding in *Nugent*, the AAO finds that section 2C:20-4 of the New Jersey Statutes is categorically a crime involving moral turpitude.

Therefore, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude. He does not qualify for the exception to this ground of inadmissibility under section 212(a)(2)(A)(ii) because he was 29 years old when he committed the offense and the maximum penalty possible for the crime exceeded one year. The applicant does not contest this determination on appeal.

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 –
>
> . . . .
>
> (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 notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relatives that qualify are the applicant's spouse and child. Hardship to the applicant himself is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

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 extreme hardship to a qualifying relative. 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. *See id.*

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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. *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

The AAO notes that in *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its

discretion." (Citations omitted). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, however, that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Court defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme 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.

The record reflects that the applicant wed [redacted], a native of Honduras and naturalized U.S. citizen, on March 14, 2001. The applicant and his spouse have a nine-year-old U.S. citizen child, [redacted] The applicant has indicated that he has two U.S. citizen stepchildren, [redacted] and [redacted] through his marriage to [redacted] The applicant furnished his stepchildren's school records. However, the applicant has not furnished copies of their birth certificates or other documentation to establish their U.S. citizenship. Therefore, only the applicant's spouse and nine-year-old son, [redacted] will be considered qualifying relatives for purposes of these proceedings. Hardship to the applicant's stepchildren will be considered only insofar as it results in hardship to his spouse.

The applicant submitted with his waiver application a letter from his spouse stating that the applicant is the main income earner in the family and her earnings are not enough to support herself and her children. She states that she would not only be emotionally destroyed but would also suffer economically without the applicant. *Letter from* [redacted] dated May 23, 2007. In a letter filed with the appeal, the applicant's spouse asserts that the applicant "is now the perfect father and husband." She states that she has no other family members and the cost of living is so high that she "would die from a depression by just imagining it." *Appeal Letter from* [redacted]

As evidence of financial hardship, the applicant furnished copies of his earnings and deductions statements, 2004, 2005 and 2006 tax returns, Wage and Tax Statements (Forms W-2), and employment verification letters. The employment verification letter dated March 19, 2007 states that the applicant has been a full-time employee of Adhesive Tape Products Ltd. since August 8, 2005 and he is earning $12.50 per hour. The most current Form W-2 in the file is from 2006 and reflects that the applicant earned $25,724.58. The applicant also furnished his spouse's 2006 Form W-2, which shows that she earned $16,568.61 and a "Notice of Cost of Living Adjustment" dated March 25, 2007 ordering the payment of child support to the applicant's spouse in the amount of $143.00 per week ($7,436.00 annually) from [redacted] Counsel notes that the applicant's absence "will result in an overwhelming financial burden on [redacted] causing the family to

drop below the national poverty guidelines, declare bankruptcy, eviction from their apartment, and limiting opportunities available for the children." *Appeal Brief*, dated October 9, 2007. The U.S. Department of Health and Human Service's 2006 federal poverty guidelines reflect that an annual income of less than $20,000 for a family of four constitutes poverty, thus allowing for financial eligibility for certain federal program purposes.[1] The applicant's spouse's approximate income of $24,004 (wages and child support) is near the U.S. Department of Health and Human Services 2006 federal measure of poverty. Therefore, upon review of the submitted financial documentation, the AAO finds that the applicant's removal from the United States would cause financial hardship to his spouse.

The applicant furnished a psychological evaluation of his spouse diagnosing her with major depression, generalized anxiety disorder, dependent personality traits and having severe stressors. The evaluation states, "Given [redacted] fragile personality style and her psychosocial history of depending on her family for her well-being and previous difficult relationships with men, it is clear that the possibility of losing the major source of support in her life could prove to be devastating and would result in extreme hardship for this patient." The evaluation notes that the applicant's spouse is "showing symptoms of anxiety and depression that would be exacerbated if her family were broken-up." *Psychological Evaluation Report of* [redacted] dated September 17, 2007. The applicant also furnished a psychological evaluation of his family members. The evaluation states that, "Without doubt, [redacted] will develop a Separation Anxiety Disorder and depressive symptomatology if he becomes separated from his father." It further states that the applicant's spouse "is likely to suffer from reactive major depression." The evaluation concludes that a separation from the applicant "would represent an exceptional hardship" to the applicant's spouse and child. *Psychological Evaluation of* [redacted] dated September 18, 2007. The AAO acknowledges that the applicant and his qualifying family members will experience emotional hardship if they are separated as a result of his inadmissibility. In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and that "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted). The applicant's conviction for a crime involving moral turpitude was on April 12, 2000; he is not eligible for the 15 year waiver of inadmissibility based on rehabilitation under section 212(h)(1)(A) of the Act until April 2015. The applicant is therefore facing the prospect of at least a five year period of separation from his immediate family members. The AAO finds that the applicant's separation from his spouse and son for a period of at least five years constitutes emotional suffering for his qualifying family members.

The AAO concludes that the emotional suffering the applicant's qualifying relatives would experience as a result of their separation from the applicant and the financial hardship that would result from the loss of the applicant's income while his spouse is financially supporting three dependent family members rises to the level of extreme hardship.

As stated, extreme 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. The next issue

[1] http://aspe.hhs.gov/poverty/06poverty.shtml

to be addressed is whether the applicant's spouse and child would suffer extreme hardship if they accompanied the applicant to Venezuela.

On appeal, counsel asserts, "Within Venezuela, unemployment remains high, poverty has fallen only with rises in the price of oil, and the main human-development indicators are little changed." Counsel further contends, "inequality and corruption have, by most measures, gotten marginally worse with [redacted] as president." Counsel states that according to a letter from the Organization of Venezuelans In Exile, the applicant will be detained and imprisoned upon return to Venezuela. *Appeal Brief*, dated October 9, 2007.

In the letter filed with the waiver application, the applicant's spouse asserts that her children "would suffer terribly" in Venezuela and she cannot imagine living in another country. She states that she wants her children to have "the opportunity to attend good schools, go to college and have good professions." She states that she cannot see how this would be possible if they are living in Venezuela. *Letter from* [redacted], dated May 23, 2007.

As corroborating evidence, the applicant furnished a letter from the Organization of Venezuelans in Exile stating that the applicant is an active member of the organization. The letter states that the applicant "has participated in the meetings and events organized by our non-profit organization, and he has always been a very honest, collaborative and hard working person who is very concerned and committed to the well-being of Venezuelans, either in Venezuela and in the U.S." The letter further states that the applicant "will undoubtedly be detained and imprisoned as soon as he returns to Venezuela, with a most likely than not probability of being tortured, dismembered and executed by the Venezuelan authorities." *Letter from* [redacted] *In Exile*, dated August 30, 2007. The applicant also furnished a document entitled "Text of News Broadcast on TV Channe[l] 'VTV', in which [redacted] is considered to be a terrorist organization, and charging it with conspiracy to assassinate the head of state, [redacted]," dated May 25, 2007.

The applicant furnished the U.S. Department of State's 2006 *Country Report on Human Rights Practices* for Venezuela and newspaper articles written in Spanish. The AAO notes that because the applicant failed to submit certified translations of the newspaper articles, the AAO cannot determine whether the evidence supports the applicant's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The current U.S. Department of State Human Rights Report for Venezuela summarizes the following problematic conditions in the country:

> Politicization of the judiciary and official harassment and intimidation of the political opposition and the media intensified during the year. The following human rights problems were reported by the nongovernmental organization (NGO) community, the media, and in some cases the government itself: unlawful killings, including summary executions of criminal suspects; widespread criminal kidnappings for ransom; prison uprisings resulting from harsh prison conditions; arbitrary arrests and detentions; corruption and impunity in police forces; a corrupt, inefficient, and politicized judicial system characterized by trial delays and violations of due process; political prisoners and selective prosecution for political purposes; infringement of citizens' privacy rights by security forces; government closure of radio and television stations

> and threats to close others; government attacks on public demonstrators; systematic discrimination based on political grounds; considerable corruption at all levels of government; threats and attacks against domestic NGOs; violence against women; inadequate juvenile detention centers; trafficking in persons; and restrictions on workers' right of association.

U.S. Department of State, 2009 *Country Reports on Human Rights Practices –Venezuela*, March 11, 2010.

The AAO notes that while the U.S. Department of State's human rights report indicates "harassment and intimidation" of the political opposition in Venezuela, the applicant has not shown that he would be targeted in Venezuela as a political activist. The assertion from [redacted] of the Organization of Venezuelans in Exile [redacted] that the applicant "will undoubtedly be detained and imprisoned as soon as he returns to Venezuela, with a most likely than not probability of being tortured, dismembered and executed by the Venezuelan authorities" appears to be based on speculation and is not supported by facts. The applicant has not submitted evidence to show that individuals who are merely members of [redacted] have been targeted by the Venezuelan government. Further, the assertion that the applicant "has participated in the meets and events" organized by ORVEX is vague and fails to specify the extent of his involvement in the organization. *See Letter from* [redacted] *Organization of Venezuelans In Exile*, dated August 30, 2007. Similarly, counsel indicates that "It is likely that [the applicant] will not be issued a Venezuelan passport to facilitate international travel, nor will he be considered for employment in government, state or municipal institutions, or related entities." *Appeal Brief*, dated October 9, 2007. However, counsel's statement does not provide a factual basis for this assertion. For instance, there is no indication that the applicant has been denied an application for a Venezuelan passport. Accordingly, the AAO cannot conclude that the applicant's qualifying family members would suffer extreme hardship in Venezuela as a result of the applicant's political activities.

Counsel asserts that [redacted] and his family are completely integrated and tied into their South Florida community. Their family, their friends, their church, and their interests are all here in the U.S." *Appeal Brief*, dated October 9, 2009. However, the record does not indicate whether the applicant's spouse and nine-year-old son would face linguistic and cultural barriers upon relocation to Venezuela. The AAO notes that the applicant appears to have family ties in Venezuela that could facilitate his qualifying family members' residence in the country. Counsel notes that the applicant's father resides in Venezuela. *See Appeal Brief* at 6, dated October 9, 2007. Further, the initial Petition for Alien Relative (Form I-130) filed on behalf of the applicant by his spouse shows that the applicant has a 23-year-old son and a 19-year-old son who were born in Venezuela. *See Form I-130*, filed May 1, 2001, denied March 9, 2005. Notably, the applicant failed to list these children on his Application to Register Permanent Residence or Adjust Status (Form I-485). The applicant has not indicated whether he is in contact with his father and adult children, his father's living conditions in Venezuela, and whether his adult children currently reside in Venezuela. This lack of information precludes the AAO from assessing the level of support the applicant and his family would receive upon relocation to Venezuela. Therefore, the AAO cannot conclude that the applicant's spouse and son would suffer extreme hardship if they relocated to Venezuela.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's spouse and son, considered in the aggregate, rise beyond the common results of removal

or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.