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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 07 2013 OFFICE: KINGSTON, JAMAICA FILE:

IN RE: APPLICANT:

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:

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Kingston, Jamaica. A subsequent appeal was rejected by the Administrative Appeals Office (AAO), and is now before the AAO on a motion to reopen and reconsider. The motion will be granted. However, the applicant's original appeal will be dismissed and the underlying application remains denied.

The applicant is a native and citizen of Jamaica 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 been convicted of 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 reside in the United States with his U.S. citizen mother.

The director denied the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, concluding that the applicant did not meet the rehabilitative requirements of a waiver under section 212(h)(1)(A) of the Act and had also failed to show that denial of the waiver application would result in extreme hardship to his qualifying relative for purposes of a waiver under section 212(h)(1)(B) of the Act. *See Decision of Field Office Director*, dated August 14, 2009. The director further found that the applicant was convicted of an aggravated felony, constituting a permanent bar to his admission to the United States for which there was no waiver. The applicant filed a timely appeal to the AAO.

The AAO rejected the applicant's appeal without reaching the merits because the office lacked jurisdiction over the Form I-130, Petition for Alien Relative, which the applicant indicated was the basis of appeal on his Form I-290B, Notice of Appeal or Motion, dated September 11, 2009. *See Decision of AAO*, dated February 22, 2012.

On motion, counsel contends that the AAO's decision should be reopened and reconsidered because it was based on legal and factual errors. *See Form I-290B, Notice of Appeal or Motion*, dated March 19, 2012; *see also Counsel's Brief*, dated March 19, 2011, at 2.[1] He asserts that the applicant's original appeal was challenging the denied waiver application and not the Form I-130 visa petition, which had in fact already been approved. Counsel further asserts that the applicant's original appeal should be sustained because the director erred in finding that: (1) the applicant was permanently barred from admission because his conviction was an aggravated felony, and (2) he had failed to demonstrate extreme hardship to the qualifying relative.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

[1] The record indicates that the year is a typo and that the date of the brief should read March 11, 2012.

The record of evidence includes, but is not limited to, counsel's briefs; statement of the applicant's U.S. citizen mother; medical letters and records for the applicant's mother; the applicant's mother's bank statement; the applicant's birth certificate; western union records; and the applicant's criminal records. The entire record was reviewed and considered in rendering a decision on the motion.

After carefully reviewing the record, the AAO reopens our prior decision of February 22, 2012. Previously, we properly noted that the AAO had no jurisdiction over an appeal of the Form I-130 visa petition filed on the applicant's behalf, which the applicant indicated in his original Form I-290B to be the application and applicable receipt number being appealed. *See Form I-290B, Notice of Appeal or Motion*, dated September 11, 2009. However, we are satisfied that the record corroborates counsel's assertion on motion that this was the result of clerical error. Although counsel's statement contained in the Form I-290B contests the bases for the denial of the "immigrant visa application," the substance of counsel's statement and attached appeal brief sufficiently demonstrate that the applicant was in fact appealing the denial of his waiver application. We therefore grant the applicant's motion to reconsider his 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.
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> . . .
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> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> . . .
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> (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 record indicates that the applicant resides permanently in Jamaica. He is the beneficiary of an approved Form I-130 visa petition by his U.S. citizen mother. The record discloses that the applicant was convicted on or about July 11, 1995 in Antigua and Barbuda for possession of counterfeit United States of America currency. He was sentenced to fourteen days and was deported to Jamaica on or about July 25, 1995 following completion of his sentence. A letter from the Registrar's Division in Antigua, confirming the conviction, indicates that the maximum

punishment for this crime is imprisonment for life or for any term pursuant to section 4(1) of the Forgery Act (Cap. 181)[2].

As the applicant has not disputed his inadmissibility on appeal, and the record does not show that finding to be in error, we will not disturb the determination that his criminal conviction renders him inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude.

However, on appeal, counsel contests the director's finding that the applicant's conviction is an aggravated felony under section 101(a)(43)(R) of the Act, 8 U.S.C. § 1101(a)(43)(R), relating to counterfeiting or forgery, that constitutes a permanent bar to his admission to the United States for which there is no waiver. The decision below does not indicate the section of the Act upon which the director relied in finding that the applicant's aggravated felony conviction was a permanent bar to his admission to the United States.

Section 101(a)(43) provides in pertinent part:

> The term "aggravated felony" means –
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> ...
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> (R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered *for which the term of imprisonment is at least one year.*

(emphasis added). The AAO notes that convictions for certain types of offenses qualify as an "aggravated felony" under section 101(a)(43) of the Act only where the term of imprisonment is at least one year. The phrase "term of imprisonment" refers to the actual sentence imposed. *See Matter of Song*, 23 I&N Dec. 173, 174 (BIA (2001) (finding that a conviction no longer constituted an aggravated felony under section 101(a)(43)(G) where the original one year sentence was modified to less than one year); *In re Cota-Vargas*, 23 I&N Dec. 849, (BIA 2005) (same). The AAO notes that the record establishes that the sentence imposed for the applicant's conviction was fourteen days. Accordingly, even if the applicant's conviction for possession of counterfeit U.S. currency is a counterfeiting or forgery offense, it does not constitute an aggravated felony within the meaning of section 101(a)(43)(R), as he was not sentenced to a term of imprisonment of at least one year. His conviction therefore does not render him subject to a "permanent bar" for which there is no waiver.

The term "permanent bar" as applied by the director likely references inadmissibility under sections 212(a)(9)(A)(i) and (ii) of the Act, which are triggered where an alien who has been

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[2] The AAO notes, however, that section 4(1) of the Forgery Act relates specifically to forgery, rather than the offense of possession of counterfeit currency for which the applicant was convicted. The latter offense appears to fall within section 11 of the Forgery Act and is punishable by a term of imprisonment for any term not exceeding fourteen years. Regardless, in either scenario, the record indicates that the maximum possible punishment for the applicant's offense is more than one year. As such, his offense does not fall within the petty offense exception to a finding of inadmissibility for a crime involving moral turpitude. *See* INA § 212(a)(2)(A)(ii)(II).

previously ordered removed (or has departed the United States while a removal order was outstanding), seeks admission within five (or ten) years of the date of the alien's removal (or departure). This ground of inadmissibility becomes, in a sense, a "permanent bar" to admission if the alien has been convicted of an aggravated felony, because inadmissibility is triggered "at any time" the alien seeks admission to the United States, regardless of the passage of time. INA §§ 212(a)(9)(A)(i) and (ii). We note, however, that section 212(a)(9)(A)(iii) provides for an exception to inadmissibility where the alien is seeking admission within the period of inadmissibility, if the Attorney General has consented to the alien's reapplying for admission. Thus, even if the applicant here had been convicted of an aggravated felony, he would be still be eligible to seek permission to reapply for admission to the United States. However, we note that section 212(a)(9)(A) is otherwise inapplicable in the applicant's case, regardless of whether he has an aggravated felony conviction, because there is no evidence that he has ever been previously ordered removed.

As noted, however, the applicant remains inadmissible for having been convicted of a crime involving moral turpitude. He is, however, eligible for a waiver under section 212(h) of the Act. The applicant's qualifying relative for purposes of a waiver under section 212(h) of the Act to overcome this ground of inadmissibility is his U.S. citizen mother.

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

> The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
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> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --
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> > (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
> >
> > (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> >
> > (iii) the alien has been rehabilitated; or
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> (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 . . .; and
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> (2) the Attorney General [Secretary], 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.

Pursuant to section 212(h)(1)(A) of the Act, the ground of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act may be waived in the exercise of discretion, if the applicant demonstrates that the activities for which he is inadmissible occurred more than 15 years before the date of his application for a visa, admission, or adjustment of status. In addition, the applicant must demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated in order to qualify for a waiver under this provision.

The record demonstrates that the applicant's criminal conduct leading to his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act occurred more than 15 years ago. An application for admission is a "continuing" application, and admissibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). We consider whether the applicant's admission to the United States would be contrary to the national welfare, safety, or security of the United States, and if he has been rehabilitated.

The record discloses only one arrest and conviction for the applicant, who indicated at his consular interview that he was arrested at the airport in Antigua for possessing counterfeit U.S. currency. He claimed that he was unaware that the money was counterfeit. We note, however, that the applicant has not produced any actual conviction records, including an arrest report, complaint, or judgment of conviction to corroborate his claim. Moreover, the statute under which he appears to have been convicted in 1995 for possession of counterfeit currency, provided, in pertinent part:

> Every person shall be guilty of felony and on conviction thereof shall be liable to imprisonment for any term not exceeding fourteen years, who, without lawful authority or excuse, the proof whereof shall lie on the accused, purchases or receives from any person, or has in his custody or possession, a forged bank note, or a forged currency note, *knowing the same to be forged.*

Section 11(1) of the Forgery Act (Cap. 181) (Antigua). Thus, a conviction for possession of forged currency notes requires a finding of knowledge, contradicting the applicant's assertion that he had no knowledge. Finally, we note that the record contains no statement from the applicant, expressing any remorse or explanations for his arrest or subsequent rehabilitation and good moral character. Although the lack of subsequent criminal history is compelling and is some evidence of the applicant's rehabilitation, we note that the burden is on the applicant to produce affirmative evidence of such. Instead, the record is otherwise silent as to the applicant's rehabilitation and general character. The record does not contain any character references, or even a police certificate indicating that the applicant has not been arrested or convicted in Jamaica. Although the record does contain a letter from the applicant's mother, she does not address the applicant's arrest, his character, or any attempts at rehabilitation. Without such evidence, the AAO is unable to meaningfully assess whether the applicant has rehabilitated or whether his admission would be

contrary to the national welfare, safety, or security of the United States. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO finds that the applicant has not demonstrated that his admission to the United States is not contrary to the national welfare, safety, or security of the United States and that he has been rehabilitated, as required by section 212(h)(1)(A) of the Act.

We now turn to the counsel's primary argument on appeal that the applicant qualifies for a discretionary waiver under section 212(h)(1)(B) of the Act, on the basis that the bar to admission would cause extreme hardship to his qualifying relative, his U.S. citizen mother. Section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (Board) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

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

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

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g.*, *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

Counsel contends that the denial of admission to the applicant would result in physical and emotional hardship to the applicant's seventy-three-year-old mother, as a result of her medical and physical conditions. Counsel asserts that the applicant's mother suffered a fall in 2006 causing a permanent injury to her right knee. She indicates that the applicant's mother now suffers also from arthritis, high blood pressure, and high cholesterol, for which she is being treated. Counsel states that as a result, the applicant's mother will be forced to retire and will have increasing difficulty in caring for herself or performing ordinary physical duties, such as cooking, cleaning and laundry. The applicant's mother, in her May 21, 2008 statement, indicates that she is also having fainting spells from the high blood pressure, severe headaches, and sinus and allergy problems.

The record also contains two letters from the applicant's mother's physicians, [redacted] dated September 9, 2009, and [redacted], dated September 10, 2009, as well as a report of the applicant's mother's medical examination by [redacted] on April 3, 2009. The records corroborate that the applicant's mother suffers from the arthritis, high blood pressure, and high cholesterol. Both doctors also indicate that the applicant's mother resides alone and faces hardship that would be alleviated by the applicant's presence. We note, however, that the letters and medical records show that the applicant's mother is being treated for her ailments and

appears to be able to work and manage her day to day activities without assistance. In fact, the medical examination report indicates that the applicant's mother has only been able to work as a home attendant three days a week in 2009 because there was not enough work. *See Medical Examination Report*, at 1-2. There is no indication in any of the reports or letters that the applicant's mother is unable to work or care for herself because of her age or medical ailments. While it may be true that having the applicant in the United States would make things somewhat easier for his mother, the applicant has not shown that medical and physical issues faced by his mother, together with other hardship factors, are such that the denial of his admission to the United States would cause his mother extreme hardship.

Counsel also asserts that the applicant's mother faces financial hardship and will face homelessness as a result of ongoing separation from the applicant. She asserts that the applicant's mother pays $600 per month for rent and has other regular expenses, including food, transportation, and clothing. In addition, the applicant's mother sends the applicant approximately $100 per month to assist him financially. *See Western Union Receipts.* Counsel contends that the applicant's mother makes a varied salary between $300 to $700 biweekly, depending on the number of hours she is able to work, and receives $880 social security monthly. Counsel maintains that when the applicant's mother is no longer able to work, she will be unable to survive on the monthly social security payments without help. She states that the applicant is his mother's only child and is the only one able to help as she faces retirement. In support of these assertions, the applicant has submitted western union receipts and a single month's bank statement for the applicant's mother. However, we observe that the record lacks any Internal Revenue Service (IRS) Forms W2, Wage and Tax Statement, tax returns, social security earnings statements, or other evidence of the applicant's mother's income and expenses to support counsel's claim of financial hardship or to enable the AAO to assess the financial impact on the applicant's mother of the ongoing separation from her son. We note that the applicant's mother's statement is also devoid of any reference to the financial hardship she faces as a result of the separation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Having considered the evidence of record, the AAO finds that it does not demonstrate that the applicant's mother would experience extreme hardship as a result of separation from the applicant. The applicant has not shown the hardship his mother would suffer constitutes "significant hardship over and above the normal disruption of social and community ties" normally associated with deportation or refusal of admission. *Matter of O-J-O-*, 21 I&N Dec. at 385.

Counsel also contends that the applicant's mother would face extreme hardship upon relocation to Jamaica. She contends that if the applicant is denied admission, the applicant's mother would be forced to relocate to Jamaica, where the applicant would not be in a position to provide for her financially. In addition, counsel asserts that the applicant's mother would lose the care her primary doctor and specialist in the United States and would not have access to the medical care she needs for her ailments in Jamaica. However, the record contains no evidence corroborating

these assertions. There is no assertion by the applicant or his mother that the applicant would not be able to provide financially for his mother. Similarly, there is no evidence that the applicant's mother would not be able to receive proper medical care for arthritis, high cholesterol, or high blood pressure in Jamaica. As previously noted, the assertions of counsel are insufficient to meet the applicant's burden. Moreover, we note that the U.S. Department of State reported that although medical care is more limited in Jamaica than in the United States, comprehensive emergency medical services are located only in Kingston and Montego Bay, and smaller public hospitals are located in each parish. *See* Bureau of Consular Affairs, U.S. Dep't of State, *Country Specific Information: Jamaica* (Nov. 17, 2011). There is nothing in the record to indicate that the applicant's mother suffers from conditions that require treatment that is unavailable in Jamaica.

Moreover, we note that relocation for the applicant's mother would not entail adaptation to a new culture or language. The applicant's mother is a native of Jamaica and presumably resided there until she immigrated to the United States in 1996. While the record contains virtually no evidence of any close ties she has in the United States, aside from her employment, it shows that in Jamaica she would be reunited with her son, grandchildren, and potentially other family or friends from her many years there.

Having considered all the evidence of record, the AAO does not find that it demonstrates that the applicant's mother would suffer extreme hardship as a result of relocation to Jamaica. We acknowledge that the usual hardships arising from relocation will be distressful to the applicant's mother. However, the applicant has failed to show that the hardships upon relocation, even when considered in the aggregate, rise beyond the normal results of a bar to admission.

In proceedings for a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, although the motion to reopen and reconsider has been granted, the applicant's original appeal is dismissed and the underlying application remains denied.

ORDER: The motion is granted, but the appeal is dismissed and the underlying application remains denied.