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

U.S. Citizenship and Immigration Services

[redacted]

#6

DATE: MAY 24 2011 Office: NEW YORK, NY FILE: [redacted]

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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.

Thank you,

Ellen C. Johnson

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and a citizen of Pakistan who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i) for having sought a benefit under the Act through fraud or willful misrepresentation and section 212(a)(9)(B)(i)(II) of the Act for having accrued more than one year of unlawful presence in the United States and seeking admission within ten years of his last departure. He is the spouse of a U.S. citizen. The applicant is seeking a waiver under sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i) in order to remain in the United States.

The District Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *District Director's Decision,* dated October 27, 2008.

On appeal, counsel contends that United States Citizenship and Immigration Services (USCIS) erred in finding the applicant to be inadmissible under section 212(a)(6)(C)(i) of the Act and that the applicant's spouse would suffer extreme hardship if his waiver application is denied. *Form I-290B, Notice of Appeal or Motion,* dated November 25, 2008.

The record of proceeding contains, but is not limited to, the following evidence: counsel's December 23, 2008 letter; statements from the applicant, his spouse and his stepson; medical records and statements relating to the applicant's spouse's health; documentation relating to the applicant's and his spouse's financial obligations; bank and credit union statements; a letter of support from a Queens County Assistant District Attorney; an employment letter for the applicant's spouse; Social Security Statements for the applicant's spouse; W-2 forms and earnings statements for the applicant's spouse; and tax returns for the applicant and his spouse. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(6)(C) Misrepresentation, states in pertinent part:

> (i) **In general.** Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

The AAO notes that the applicant claimed on the Form I-485, Application to Register Permanent Resident or Adjust Status, he submitted on April 30, 2001 to have entered the United States without inspection but that he subsequently demonstrated that he had entered the United States on December 30, 1998, using a Pakistani passport and U.S. nonimmigrant visa issued under the name of Imran

Shafi. On appeal, counsel contends that the applicant is not inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act and the AAO notes that the Form I-601 states that the applicant entered the United States under another name, but with a valid passport.

We acknowledge that an alien's entry into the United States as a nonimmigrant under a false identity does not necessarily constitute a material misrepresentation within the meaning of section 212(a)(6)(C)(i) of the Act. In *Matter of Gilikevorkian*, 14 I&N Dec. 454 (BIA 1973), the Board of Immigration Appeals (BIA) found that:

> An alien's entry into the United States as a nonimmigrant under a false identity did not constitute a material misrepresentation within the meaning of section 212(a)(19) [now section 212(a)(6)(C)(i)] of the Immigration and Nationality Act where he had adopted the false identity for a legitimate reason (to obtain employment) and had used it for a prolonged period of time prior to his entry into this country.
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> The cases have distinguished between a false identity used to facilitate entry into the United States and one used for other reasons. In *Matter of Sarkissian*, *supra*,[10 I&N Dec. 109 (BIA 1962)] on which the immigration judge relied, there was no indication that the alien used the false identity for any purpose other than to obtain a visa to enter the United States. Where a person uses a false identity long before, and for reasons unrelated to, obtaining admission to the United States, and over a long period of time, misrepresentation as to identity made when applying to enter the United States has been held not to be material, *U.S. ex rel. Leibowitz v. Schlotfeldt*, 94 F.2d 263 (C.A. 7, 1938),
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> . . . .
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> The Attorney General has established the test that a misrepresentation is material if (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which might have resulted in a decision to exclude the alien, *Matter of S-- and B- - C--*, 9 I.&N. Dec 436 (BIA 1961). Inasmuch as the respondent's use of the false identity was for a legitimate reason and was for a prolonged period prior to entry, a line of relevant inquiry was not cut off. Inquiry would have revealed no information damaging to the respondent so as this record indicates. No ground of excludability would have been uncovered. (Citations omitted).

In the present case, however, the record does not establish either that the applicant's use of the name Imran Shafi was for a legitimate reason or that he used it for a prolonged period of time prior to entering the United States. The AAO finds that, as the applicant has failed to prove that he previously acquired the identity of Imran Shafi for purposes unrelated to his 1998 admission, he was excludable on the true facts at the time of his 1998 admission since he did not have valid entry

documents, i.e., entry documents issued in the name of [redacted] Accordingly, the applicant's use of the name [redacted] to enter the United States must be viewed as a material misrepresentation for the purposes of section 212(a)(6)(C)(i) of the Act.

Based both on his misrepresentation regarding his manner of entry into the United States on the Form I-485 and his use of another identity to enter the United States, the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for having sought to obtain and having obtained immigration benefits under the Act through fraud or the willful misrepresentation of a material fact.

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

> (B) Aliens Unlawfully Present.-
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> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > . . . .
> >
> > > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The applicant was admitted to the United States as a nonimmigrant visitor on December 30, 1998 for a period of time that could not have exceeded one year. 8 CFR § 214.2(b)(1).[1] As no evidence indicates that the applicant sought or received an extension of his nonimmigrant stay in the United States, he would have begun accruing unlawful presence on or about December 31, 1999, the day after his nonimmigrant visitor's visa would have expired. When the applicant departed the United States on advance parole, he triggered the unlawful presence provisions under the Act. Although the record does not indicate the specific date on which the applicant left the United States, the AAO notes that his departure occurred between October 29, 2001, the date on which his request for advance parole was granted, and January 14, 2002, the date on which his previous passport shows that he entered Pakistan. Therefore, regardless of when the applicant departed the United States during this period, he had already accrued more than one year of unlawful presence. As he is now applying for immigrant admission within ten years of his departure, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The provisions of the Act under which the applicant must establish eligibility for a waiver are: section 212(a)(9)(B)(v), which provides:

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[1] Title 8, Codes of Federal Regulations, Revised as of January 1, 1998.

> Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

and section 212(i)(1) of the Act, which states:

> The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) or section 212(i) of the Act is dependent on a showing that the bar to admission would impose extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or other family members can be considered only insofar as it results in hardship to the qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez,* 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals (BIA) stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (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 BIA 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 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 exclusive. *Id.* at 566.

The BIA has also held that the common or typical results of deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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 BIA 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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the BIA considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The AAO now turns to the question of whether the applicant in the present case has established that his U.S. citizen spouse would experience extreme hardship as a result of his inadmissibility.

On appeal, counsel states that the applicant's spouse has severe health problems, including insulin-dependent diabetes, hypertension, hypercholesterolemia, major depression, sleep disorder, cerebrovascular disease, and anemia, and that she has previously suffered a stroke. Because of these conditions, counsel contends, the applicant's spouse requires access to sophisticated medical treatment that is unavailable in Pakistan. Counsel also asserts that the applicant's spouse would be unable to obtain medical insurance in Pakistan, placing health care beyond her and the applicant's financial reach. Further, counsel claims, many medical practitioners in Pakistan are not equipped to deal with health conditions such as high blood pressure and hypertension. She asserts that the applicant's spouse is at risk for further strokes and that Pakistan has poor rehabilitation programs for stroke victims.

In support of counsel's claims, the record contains several medical statements from [redacted]. [redacted] Long Island College Hospital, the most recent of which is a December 22, 2008 letter that identifies [redacted] as the applicant's spouse's primary care physician for more than six years. In this letter, [redacted] reports that the applicant's spouse has a history of insulin-dependent diabetes, hypertension, hypercholesterolemia, major depression, sleep disorder and cerebrovascular disease. He also indicates that the applicant's spouse suffered a stroke in 2003 and that her diabetes and high blood pressure have proven difficult to control over the years. He states that she remains at high risk for developing heart disease, kidney dysfunction or stroke. [redacted] also states that it is his opinion that the applicant's spouse's health would suffer if she lost the structure and security of her established health care program, where her care is provided by doctors who know her well.

The record also includes a November 26, 2008 statement written by [redacted], a physician and surgeon in Faisal Abad, Pakistan who states that the applicant's spouse's health problems would prevent her from securing health insurance in Pakistan and that, based on his assessment of the medical information provided him, her medical costs could range from $10,000-$15,000 annually. He advises that the applicant's spouse suffers from too many health problems to relocate to Pakistan.

The record also includes media articles and reports on aspects of health care in Pakistan. An article, entitled "Diabetes in Pakistan," by [redacted] in *Diabetes Voice* (July 2003, Volume 48, Issue 2), reports that the failure of the Pakistani government to invest in health care has led to reliance on private sector care, which has made health care expensive and beyond the reach of most people. The articles states that this problem has been compounded by the scarcity of health care services and that people with diabetes cannot be provided with the care they need. A 2005 abstract published by the American Heart Association, "General Practitioners' Approach to Hypertension in Urban Pakistan," reports that general practitioners in Pakistan undertreat high blood pressure and that there is an urgent need for the revision of curricula in medical schools regarding the risks, complications, and management of hypertension, and for the initiation of continuing medical education for all doctors involved in the management of patients with hypertension. Also found in the record is a copy of a letter written by [redacted] to *Diabetes Care* (Volume 30, Number 4, April 2007). In this letter, [redacted] states that, based on a survey of 104 physicians in Karachi who treat middle- and upper-middle patients, even individuals

with the financial means to seek private health care for their diabetic conditions do not receive quality care.

When the AAO considers the applicant's spouse's multiple serious medical conditions; the length of her relationship with her current medical caregivers; the documented concerns about the availability and quality of health care in Pakistan; and the hardships that are normally created by relocation to an unfamiliar country and culture in the aggregate, we find the applicant to have established that his spouse would experience extreme hardship if she relocates with him to Pakistan.

Having found the record to establish extreme hardship upon relocation, we turn to a consideration of the extent to which it also establishes that the applicant's spouse would experience extreme hardship if she remains in the United States.

Counsel asserts that the applicant's spouse would suffer extreme hardship if she and the applicant are separated. She contends that because of her depression, the applicant's spouse would not be able to manage the stress of losing the applicant and that her health would deteriorate even further. In a statement, dated February May 22, 2008, the applicant's spouse states that she suffers from diabetes, hypertension, hypercholesterolemia and anemia, and that she had a stroke in August 2003 that left her in a weakened condition. The applicant's spouse states that she depends on the applicant's support, economically, emotionally and spiritually, and that without him, she does not believe that she would survive much longer. The applicant, his spouse asserts, gives her a reason for living and brings joy to her life.

In his letter of December 22, 2008, [redacted] states that in his opinion the removal of the applicant from the United States would be too much for the applicant's spouse to bear given her multiple medical problems and her underlying depression. He asserts that the loss of the applicant's support would result in harm to her health. In earlier statements, dated October 2, 2003, April 5, 2004 and February 3, 2005, [redacted] noted that a healthy emotional state is of great importance to the applicant's spouse's overall condition and that a reduction in the external stressors affecting her, which "includes ensuring that her family is able to provide an adequate emotional support system," would be very helpful. A May 21, 2008 statement from [redacted] Broadway Family Health Clinic states that the applicant's spouse is a patient and that she has chronic medical conditions for which she is being treated.

We note that the record establishes that the applicant's spouse is 56 years of age; has a number of serious, long-standing physical medical problems; has previously suffered a stroke; and is at high risk of a recurrence. The record also establishes that the applicant's spouse suffers from depression for which she takes medication. When the multiple health problems, physical and emotional, that affect the applicant's spouse and the hardships normally created by removal, including that of permanent separation, are considered in the aggregate, the resulting hardship can be distinguished from that which normally results from inadmissibility or removal proceedings. Accordingly, the AAO finds the applicant has also established that his spouse would suffer extreme hardship if the waiver application is denied and she remains in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's misrepresentations made at the port-of-entry and on the Form I-485, and his unlawful presence in the United States. The mitigating factors are the applicant's U.S. citizen spouse and stepson; the extreme hardship to his spouse if the waiver application is denied; the applicant's consistent record of lawful employment since 2002 and his payment of taxes; the assistance given by the applicant to the Queens County District Attorney's Office and the New York City Police Department, as evidenced by a February 17, 2005 letter from [redacted] and the applicant's attributes as a good father, as indicated in a February 22, 2005 statement from the applicant's stepson.

The AAO finds that the immigration violations committed by the applicant were serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for an application for a waiver of grounds of inadmissibility under section 212(i) 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal will be sustained.