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



H2



FILE:



Office: NEWARK, NJ Date:

FEB 16 2011

IN RE:

Applicant:



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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

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

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

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Ecuador. The director stated that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude (criminal sexual contact). The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that he warranted a grant of a waiver under section 212(h)(1)(A) of the Act, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that the director erred in finding that the applicant has not been rehabilitated. Counsel maintains that the applicant is law-abiding, and that [REDACTED] determined that the applicant does not pose a risk to anyone. Counsel avers that the director went beyond the relevant factors under section 212(h)(1)(A) of the Act in rendering the decision. Counsel maintains that the factors under that section do not grant the director discretion to engage in a broad assessment of favorable and unfavorable factors.

The AAO will first address the finding of inadmissibility, which the applicant does not dispute. Section 212(a)(2)(A)(i)(I) of the Act states, in pertinent parts:

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

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

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, 582 F.3d 462 (3rd Cir. 2009), makes a categorical inquiry, which 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.” *Id.* at 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.” *Id.* at 470.

However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The record reflects that on May 25, 1993, the applicant was convicted in the New Jersey Superior Court for Essex County of criminal sexual contact in violation of New Jersey Stat. Ann. § 2C:14-2(b). He was sentenced to probation for two years and fined.

At the time of the applicant’s conviction, New Jersey Stat. Ann. § 2C:14-2(b) provided: “An actor is guilty of sexual assault if he commits an act of sexual contact with a victim who is less than 13 years old and the actor is at least 4 years older than the victim.” New Jersey Stat. Ann. § 2C:14-1(d) defines “sexual contact” to mean “an intentional touching by the victim or actor, either directly or through clothing, of the victim’s or actor’s intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present.” “Intimate parts” under New Jersey Stat. Ann. § 2C:14-1(e) is defined to mean “the following body parts: sexual organs, genital area, anal area, inner thigh, groin, buttock or breast of a person.”

We note that in *State in Interest of M.T.S.*, 129 N.J. 422, 443 (N.J. 1992), the Supreme Court of New Jersey indicates that in the sexual assault statute, New Jersey Stat. Ann. § 2C:14-2, the Legislature redefined rape and “other sexual crimes less serious than and derivative of traditional rape” to be consistent with the law of assault and battery. *Id.* The Court further states that the Legislature redefined the Code such that the offense of criminal sexual contact under New Jersey Stat. Ann. § 2C:14-1(d) was intended “to emphasize the involuntary and personally-offensive nature of the touching.” Moreover, the Court states that “just as any unauthorized touching is a crime under traditional laws of assault and battery, so is any unauthorized sexual contact a crime under the reformed law of criminal sexual contact.” *Id.*

The AAO is unaware of any published federal cases addressing whether the crime of “criminal sexual contact” under New Jersey law is a crime of moral turpitude. However, in *Matter of S-*, 5 I&N Dec. 686 (BIA 1954), the Board held that the crime of indecent assault on a female under section 292 (a) of the Canadian Criminal Code, although not statutorily defined, involved moral turpitude because the crime denotes depravity. 5 I&N Dec. 686, 688. Furthermore, in *Matter of Z-*, 7 I&N Dec. 253, 255 (BIA 1956), the Board found indecent assault in violation of section 6052 of the General Statutes of Connecticut, Revision of 1930, involved moral turpitude. An indecent assault is described as consisting “of the act of a male person taking indecent liberties with the

person of a female or fondling her in a lewd and lascivious manner without her consent and against her will, but with no intent to commit the crime of rape.”

With the present case, the AAO finds that sexual assault under New Jersey Stat. Ann. § 2C:14-2(b) is a crime involving moral turpitude. Sexual assault is a specific intent crime that involves unauthorized, personally-offensive sexual contact in the touching of an intimate part of another person, that is committed for the purpose of “degrading or humiliating the victim or sexually arousing or sexually gratifying the actor.” It is a crime that is derivative of traditional rape and is committed against a victim who is less than 13 years old. Viewed against the holdings in *Matter of S-* and *Matter of Z-*, wherein indecent assault was held to involve moral turpitude; and in light of *Perez-Contreras*, wherein the Board found that moral turpitude refers to conduct that is depraved and contrary to the rules of morality and is present when knowing or intentional conduct is an element of a crime, the AAO finds that sexual assault in violation of New Jersey Stat. Ann. § 2C:14-2(b) is a crime of depravity that involves moral turpitude. The applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

Thus, the record establishes that the applicant has been convicted of a crime involving moral turpitude, which renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

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

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

(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

(ii) the alien has been rehabilitated; or

(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 . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. Since the conviction rendering the applicant inadmissible occurred in 1993, which is more than 15 years ago, it is waivable under section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of employment letters, income tax records, a psychological evaluation of the applicant, a letter by the applicant's fellow parishioners, a letter by the administrative assistant of the applicant's church, letters by the applicant's daughter's teachers, a certificate of appreciation for school participation and support, affidavits by friends, an affidavit by the mother of the applicant's daughter, and other documentation.

The director indicated in the denial letter that the psychological evaluation dated May 22, 2009 of the applicant conveys that the applicant is unrepentant of his crime involving moral turpitude. We note that [REDACTED] states in the psychological evaluation the applicant reported the following:

[I]n 1992 he was accused of touching the chest and buttocks area of an 11-year-old girl. He reported that at the time he and a friend of his went to buy beer. His friend went to urinate on a wall, and they were assaulted by two African American females who beat up his friend and him. He said that someone called the police, and they arrested both of them and accused them of touching the chest and buttocks of an 11-year-old girl with their hands. He claims that he never touched or saw any girl at that time but that his lawyer told him to plead guilty . . . he pleaded guilty even though he was innocent. He stated that he did not see any girl at the time of this incident but his lawyer told him that if he risked going to trial, he could get 5 years in prison. He again said that his lawyer told him that it would be better to plead guilty and be on probation than to risk a trial even though he did not do anything.

[REDACTED] conveys in the evaluation the personal, social, medical, and family history of the applicant. He indicates that the applicant and his girlfriend have two children, who were born on September 12, 1989 and February 23, 2001. He states that their daughter, [REDACTED]s, has been raised by the applicant's maternal grandmother in Ecuador and that his daughter still lives there. [REDACTED] indicates that the applicant has a third daughter, [REDACTED] living in Ecuador from a prior relationship, who was born on July 28, 1983. He conveys that the applicant's girlfriend works part-time in a restaurant, and that the applicant states he has been in the United States for 20 years and has always worked and supported his family. [REDACTED] asserts that "[t]here is no indication that [the applicant] is any kind of risk to others, and there are indications that he has been rehabilitated and has been able to put his life together in spite of the event in 1992."

The letter dated June 2, 2009 and signed by 19 parishioners of the applicant state that "[h]e has good moral issues, and helps out in all parish activities." The affidavit by a kindergarten teacher attests that the applicant is a good father. The applicant was awarded a certificate of appreciation dated June 8, 2007 by his daughter's school. The owner of the [REDACTED] states in the affidavit dated June 4, 2009, that the applicant is an honest and valued employee and a committed

father. The affidavit by a second-grade teacher attests that the applicant is a good father. Two statements by friends and the affidavit by the applicant's girlfriend attest to the good character of the applicant.

With regard to the applicant's sexual assault offense, we note that count 2 of the indictment, of which the applicant was convicted, states that the applicant "did commit an act of sexual assault by sexual contact upon A.C., age 11 years . . . in that they touched the intimate parts of said victim . . . buttocks and breasts, with the intent to sexually gratify themselves or degrade the victim." The stenographic transcript of the plea proceedings conveys that the applicant agreed to plead guilty to count two of the indictment. The judge asked the applicant: "Did anyone force or threaten you to get you to sign the form?" The applicant answered "No." In response to questions asked by the judge, the applicant confirmed that he signed the plea form voluntarily, and that there had been no other promises or inducements made to him by the prosecutor or anyone else to get him to plead guilty. The judge asked the applicant whether he is "pleading guilty because you are, in fact, guilty of a fourth degree criminal sexual contact?" The applicant responded: "Yes." In describing the incident of which he was arrested, the applicant states that "Two girls were passing by on the sidewalk. And we touched them at that moment." The judge asked whether "[y]ou used force when you touched them?" The applicant answered: "Yes." The judge asked: "And you touched them in their intimate parts?" The applicant answered: "Yes."

Though the applicant has provided evidence attesting to his good character, and [REDACTED] states that the applicant poses no risk to others and that there are indications of his rehabilitation, we find that the record does not support a finding that the applicant has been rehabilitated. Even though the applicant's criminal record clearly indicates his voluntary acknowledgment of having committed the sexual assault offense, [REDACTED] reports that the applicant denies having sexually assaulted an 11-year-old girl. We cannot look behind the applicant's conviction to relitigate the issue of his guilt, and, even if we could, we find incredible the applicant's account of the events resulting in his conviction. Therefore, we find that the applicant has failed to acknowledge or show remorse for his crime. Based on the record, we agree with the director's determination that the applicant fails to establish his rehabilitation, as required by section 212(h)(1)(A)(ii) of the Act.

We next must make a determination as to whether the applicant established eligibility for the grant of a waiver under section 212(h)(1)(B) of the Act.

A section 212(h)(1)(B) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives here is the applicant's U.S. citizen daughter. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (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 are possible 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 to be taken is difficult, and it 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 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*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established 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. *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 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 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.*

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).

In rendering this decision, the AAO will consider all of the evidence in the record including birth certificates, letters, income tax returns, and other documentation.

With regard to remaining in the United States without the applicant, the applicant’s girlfriend states in her affidavit dated June 4, 2009, that the applicant is a good father, and if he left to Ecuador that she and her child would lose their primary source of financial support. She declares that they have strong family ties to the United States, and that their daughter has lived her entire life in New Jersey. We take notice of the letters indicating that the applicant is a good father and has a close relationship with his daughter, who was born on February 23, 2001.

Family separation 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 type of familial relationship considered. For example, in *Matter of Shaughnessy*, the Board 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) [redacted] 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 otherwise 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 familial relationship involved, the hardship resulting from family separation is 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. Indeed, the specific facts of a case may dictate that even the separation of a spouse and children from an applicant does not constitute extreme hardship. In *Matter of Ngai*, for instance, the Board did not find extreme hardship because the claims of hardship conflicted with evidence in the record and because the applicant and his spouse had been voluntarily separated from one another for 28 years. 19 I&N Dec. at 247. 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 asserted hardship factors in the instant case are the emotional and financial hardship to the applicant’s daughter, who will be 10 years old next month, as a result of separation from the applicant. We note that the applicant’s girlfriend indicates that the applicant is their sole source of income, and that the employment letter in the record reflects that the applicant has been employed as a cook, and the W-2 Wage and Tax Statement shows his earnings as \$36,909 in 2008. Further, we observe the letters and affidavits in the record asserting that the applicant is a good father, and that he has a close relationship with his daughter. Moreover, we observe that there is no documentation in the record establishing that the applicant’s girlfriend is legally in the United States. Thus, in view of the age of applicant’s daughter, and her emotional and financial dependence on her father, which as been established by the evidence in the record, the AAO finds that separation from her father would be extreme. Her separation hardship is that of a minor child separated from a parent upon whom she is emotionally and financially dependent, which is the type of family separation hardship that warrants considerable weight in the hardship analysis. As such, the applicant has demonstrated extreme hardship to his daughter if she remains in the United States without him.

In addition, the applicant must also demonstrate extreme hardship to his daughter if she joins him to live in Ecuador. With regard to the asserted hardship factors of joining the applicant to live in Ecuador, the applicant’s girlfriend states that if they lived in Ecuador, they would live in an impoverished country with terrible conditions, and with few or no opportunities for work, education, and professional development. She avers that Ecuador does not have suitable educational and medical facilities. The AAO acknowledges that though the applicant’s daughter does not appear to have cultural ties to Ecuador, she has familial ties. The applicant has two adult daughters (one of whom is married) in Ecuador, and a maternal grandmother there. Further, we note that the Form I-140, Immigrant Petition for Alien Worker, conveys that the applicant has a son who was born on May 22, 1986 in Ecuador. There is no information in the record indicating where the applicant’s son presently resides. Moreover, the applicant has not furnished any documentation to demonstrate that he will be unable to obtain employment in Ecuador for which he is qualified that will provide a

sufficient income in which to support himself and his U.S. citizen daughter, who will next month be 10 years old. We note that the applicant has been employed as a cook, and the Application for Alien Employment Certification conveys that in 2001 he sought employment in construction as a truss carpenter. In addition, no documentation has been provided in which to establish that the applicant's daughter will not have access to educational and medical facilities that are comparable to what she now has in the United States. In consideration of the combined asserted hardship factors, which are the emotional and financial hardship to the applicant's daughter, and the lack of evidence of these hardships if she joins their father to live in Ecuador, we cannot find that when all of the hardship factors are considered in the aggregate they establish extreme hardship to the applicant's daughter if she joined the applicant to live in Ecuador.

Though the applicant has established extreme hardship to his daughter if she remains in the United States without him, we find that he has not established that she would experience such hardship if she joins him to live in Ecuador. Consequently, based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief 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 proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.