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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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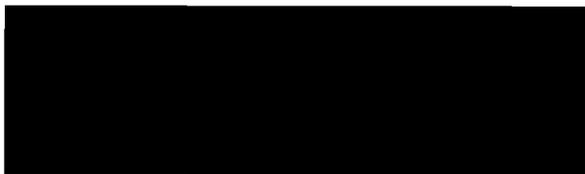
FILE: 

JUL 05 2011
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.

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 sustained.

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

The field office director concluded that the applicant failed to establish that extreme hardship would be imposed on his qualifying relatives, and he did not demonstrate that he merits a favorable exercise of discretion. *Decision of the Field Office Director*, dated March 18, 2009.

On appeal, counsel asserts that the applicant's wife and children will suffer extreme hardship if the present waiver application is denied. *Statement from Counsel on Form I-290B*, dated April 13, 2009.

The record contains, but is not limited to, a psychological evaluation of the applicant's wife; statements from the applicant's wife and children; medical documentation for the applicant's wife; tax and financial documents for the applicant and his wife; and documentation relating to the applicant's criminal conviction. The entire record has been reviewed in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime,

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

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

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

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

(Citations omitted.)

The record shows that the applicant was convicted in the United States District Court for the Southern District of New Jersey on October 30, 2001 of Conspiracy to Counterfeit Immigration Employment Documents in violation of 18 U.S.C. § 371. While 18 U.S.C. § 371 addresses inchoate crimes such as conspiracy offenses, the record shows that the underlying offense that the applicant conspired to commit was proscribed by 18 U.S.C. § 1546(a). The applicant received a sentence including three months of home confinement and three years of probation. The field office director determined that the applicant's conviction constituted a crime involving moral turpitude.

This case arises under the jurisdiction of the Third Circuit Court of Appeals. The Third Circuit has adopted the traditional categorical approach to determine whether a crime constitutes a crime involving moral turpitude. See *Jean-Louis v. Holder*, 582 F.3d 462, 473-82 (3rd Cir. 2009) (declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). The categorical inquiry in the Third Circuit consists of looking "to the elements of the statutory offense . . . to ascertain that least culpable conduct 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 crime involving moral turpitude." *Id.* at 470. However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a crime involving moral turpitude] and other 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.*

At the time of the applicant's conviction, 18 U.S.C. § 371 provided:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any

purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

At the time of the applicant's conviction, 18 U.S.C. § 1546 provided:

Fraud and misuse of visas, permits, and other documents

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact--

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate [FN1] such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

(b) Whoever uses--

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

(2) an identification document knowing (or having reason to know) that the document is false, or

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both. . . .

The Fifth Circuit Court of Appeals in *Omagah v. Ashcroft* noted that 8 U.S.C. § 1546 encompasses both crimes which involve moral turpitude and those which do not because it punishes a spectrum of offenses, including “(1) simple, knowing possession of illegal documents, (2) possession of illegal documents with an intent to use them, and (3) forgery of illegal documents.” 288 F.3d 254, 261 (5th Cir. 2002). The BIA in *Matter of Serna* addressed whether the first offense – simple, knowing possession of illegal documents – constitutes morally turpitudinous conduct, and held, “the crime of possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude.” 20 I&N Dec. 579, 586 (BIA 1992). In *Omagah*, the Fifth Circuit addressed the second offense on the spectrum – possession of illegal documents with an intent to use them – and noted that it found reasonable “the BIA’s decision to classify, as moral turpitude, conspiracy to possess illegal immigration documents with the intent to defraud the government.” 228 F.3d at 261.

Since a conviction under 8 U.S.C. § 1546 is not categorically a crime involving moral turpitude, we will examine the “record of conviction” to determine the section of the statute under which the applicant was convicted. *Jean-Louis v. Holder*, 582 F.3d 462, 466 (3rd Cir. 2009). The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. 24 I&N Dec. at 698, 704, 708. The record in the instant case contains a waiver of indictment that reflects that the applicant was convicted of:

[K]nowingly and willfully conspiring and agreeing with others to forge, counterfeit, and falsely make documents that are prescribed by statute and regulation as evidence of authorized employment in the United States, specifically INS Form I-688Bs, and

otherwise known as Employment Authorization Documents (“EADs”), contrary to 18 U.S.C. § 1546(a), in violation of 18 U.S.C. § 371.

This waiver of indictment shows that the applicant was convicted pursuant to the first clause of 8 U.S.C. § 1546(a) that addresses an individual who “knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States” The BIA has stated that “the crime of uttering or selling false or counterfeit paper relating to registry of aliens with knowledge of their counterfeit nature inherently involves a deliberate deception of the government and an impairment of its lawful functions.” *Matter of Flores*, 17 I&N Dec. 225, 230 (BIA 1980). In *Matter of Flores*, the BIA held that the respondent’s conviction for uttering or selling false or counterfeit paper relating to registry of aliens was a crime involving moral turpitude although intent to defraud was not an element of the crime. *Id.* at 228-29. The BIA noted that it had previously held that “the government need not have been cheated out of money or property in order for the crime to involve moral turpitude” as it is “enough to impair or obstruct an important function of a department of the government by defeating its efficiency or destroying the value of its operations by deceit, graft, trickery, or dishonest means.” *Id.* at 229.

The AAO finds that the crime of forging, counterfeiting or falsely making immigration documents involves inherently deceptive conduct that is morally turpitudinous. Accordingly, the AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for his conviction under 18 U.S.C. § 371. The applicant has not disputed his inadmissibility on appeal.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

(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
- (iii) 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 . . .; and

(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.

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, or child of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife and two children are the only qualifying relatives 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-Morales*, 21 I&N Dec. 296, 301 (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 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 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).

On appeal, the applicant provides medical documentation for his wife that shows she has been diagnosed with cervical cancer for which she began a schedule of at least two months radiotherapy and chemotherapy. [REDACTED], dated April 7, 2009. [REDACTED] further indicated that the applicant’s wife would undergo surgery, and that during her extensive course of treatment should would be unable to work and would rely on the applicant as the sole provider for her and their children. *Id.* at 1.

In a statement dated March 28, 2009, the applicant’s wife states that when she was diagnosed with cervical cancer on March 28, 2009, she, the applicant, and their children were “beyond devastated.” She adds that “it is extremely difficult, almost impossible to stay positive when facing the possibility of [the applicant’s] deportation.” She indicates that she relies on the applicant for financial support and health insurance that is provided through his employment. She expresses that she will require regular check-ups after her treatment, and that if her cancer enters remission she will always have the fear that it will return.

In a statement dated January 8, 2009, the applicant’s wife previously expressed that she is close with the applicant, that they’ve been together since she was 16 years old, they had been married for 19 years as of January 2009, and they have two young adult children. In a statement dated January 8, 2009, the applicant’s children stated that their family is close and the applicant is a kind, supportive father.

The applicant submits a letter dated April 1, 2009, from his employer, [REDACTED], that reflects that he has been employed there since 1997, and that he receives benefits including health insurance.

The applicant provides an evaluation of his wife conducted by [REDACTED]. [REDACTED] describes the applicant’s wife’s family experiences and the history of her relationship with the applicant. *Report from [REDACTED]*, dated December 18, 2010. [REDACTED] discusses the applicant’s wife’s treatment for cervical cancer. *Id.* at 7. She notes that the applicant’s wife returned to work at Hohokus Rets afterwards for 30 hours each week for \$12 per hour. *Id.* at 7-8. [REDACTED] indicates that the applicant’s sister- and mother-in-law lives nearby, as well as his brother and his family, and that their extended family gathers to celebrate holidays and special occasions. *Id.* at 7. [REDACTED] states that the applicant’s wife shares caretaking responsibilities for her cousin’s wife who is suffering from late-stage ALS disease. *Id.* [REDACTED] lists numerous symptoms suffered by the applicant’s wife, and diagnosed her with Major Depressive Disorder. *Id.* at 8-9. [REDACTED] posits that the applicant’s wife will suffer financial, physical, and emotional hardship should she remain in the United States without the applicant. *Id.* at 9-11.

further states that the applicant's wife will suffer hardship should she relocate to Poland with the applicant, including emotional hardship due to being separated from her mother, other family members, and social network. *Id.* at 11. posits that the applicant's wife would face difficulty finding employment and she would endure a reduced quality of housing. *Id.* at 12. notes that the applicant's wife would lack health insurance is neither she nor the applicant secure employment in Poland. *Id.* She adds that, even with health insurance, the applicant's wife expressed concern based on her prior experiences with the Polish healthcare system involving delays of up to years for treatment. *Id.* states that the applicant's wife has a need for ongoing medical care and vulnerability to loss-related psychological symptoms. *Id.*

Upon review, the applicant has shown that his wife will suffer extreme hardship should the present waiver application be denied. As discussed above, the applicant's wife was diagnosed with cervical cancer for which she required significant treatment. The applicant has submitted clear documentation to support that his wife was receiving cancer treatment in the United States, and that she relied on his financial support and health benefits.

The AAO acknowledges that facing a potentially fatal illness involves significant emotional distress. The applicant's wife expressed that she shares a close relationship with the applicant and that they have been together since she was 16 years old, for over 20 years. It is evident that she would suffer significant emotional hardship should she reside apart from him at a time when she is recovering from cancer treatment and her health is uncertain. It is understood that the strain of the applicant relocating to Poland, including losing the applicant's income and health benefits, would exacerbate the applicant's wife's psychological difficulty at a time of illness. The AAO has carefully examined the report from and concludes that it provides detailed information in support of these findings.

The applicant has not shown that he or his wife would be unable to obtain employment in Poland or that they would be unable to meet their needs there. Nor has the applicant shown that his wife would lack access to medical services. Yet, separating the applicant's wife from the medical professionals in the United States who manage her cancer treatment, and causing her to face reestablishing care in another country, constitute unusual hardships. The AAO acknowledges other challenges that the applicant's wife would suffer should she relocate to Poland, including separation from her family and community in the United States, the loss of her employment, and emotional difficulty she would experience related to the challenges her two children would face as a result of the family's relocation.

All stated elements of hardship faced by the applicant's wife have been considered in aggregate. Based on the foregoing, the applicant has shown that denial of the present waiver application "would result in extreme hardship" to his wife, as required by section 212(h) of the Act.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factors in this case consist of the following:

The applicant entered the United States in B-2 status and remained without authorization for a lengthy period, almost 20 years. The applicant committed a crime involving moral turpitude that calls into question his honesty and respect for the laws of the United States.

The positive factors in this case include:

The record does not reflect that the applicant has committed further criminal activity since his single conviction in 2001. The applicant has expressed remorse for his criminal act. The applicant has conducted himself well since his criminal conviction, including working, supporting his family, and assisting his U.S. citizen wife during a time of serious illness. The applicant's wife will suffer extreme hardship if the present waiver application is denied. The applicant's U.S. citizen children will endure hardship if the applicant is compelled to depart the United States.

The nature of the applicant's criminal conviction is particularly troubling due to the fact that it shows a calculated intent to undermine the immigration laws. However, a presentence investigation report states that the applicant "has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for the offense charged" and he was "fully cooperative with supervision conditions." It is noted that the applicant was deemed a minor actor in the document fraud scheme that led to his conviction. The presentence investigation report further states:

[The applicant is] considered less culpable than other participants involved in this scheme. [He was] recruited and directed by other coconspirators The role[] of [the applicant] could be described as mitigating as the other individuals were responsible for the production and manufacturing of the fraudulent documents. While [the applicant was] aware of the conspiracy, [he] lacked the knowledge and/or understanding of the scope and structure of the enterprise. Additionally, the investigation revealed that [the applicant] did not share in the major profits received by the main coconspirators, and [his role was] limited to collecting the information and giving it to these main coconspirators.

While the applicant's criminal activity cannot be condoned, the record supports that he did not create the criminal scheme in which he participated, and his role was peripheral. The fact that he accepted responsibility for his transgression and he has not been convicted of subsequent offenses leads the AAO to conclude that he does not have a propensity to engage in further criminal activity.

As discussed above, it is evident that the applicant's wife would suffer significant emotional hardship should she reside apart from him or relocate to Poland at a time when she is recovering from cancer treatment and her health is uncertain. The AAO finds this to be an unusual factor that weighs heavily in favor of allowing the applicant to continue to reside in the United States. The significant hardship the applicant's U.S. citizen wife and children would face upon denial of the waiver outweighs the gravity of his criminal offense and unlawful stay in the United States. Accordingly, the applicant has shown that he warrants a favorable exercise of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant also bears the burden of persuasion. *See Matter of Mendez-Morales*, 21 I&N Dec. at 301 (applicant must show that he merits a favorable exercise of discretion).

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In this case, the applicant has met his burden that he is eligible for a waiver and he merits approval of his application.

ORDER: The appeal is sustained.