

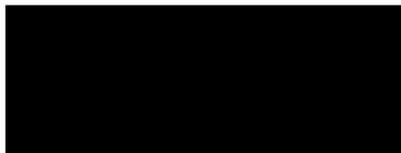
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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: **MAY 16 2011**

Office: BANGKOK, THAILAND

FILE: 

IN RE: 

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

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

If you believe the 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. The fee for a Form I-290B is currently \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion 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 District Director, Bangkok, Thailand, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Samoa 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 reside in the United States with her U.S. citizen spouse and three U.S. citizen children.

In a decision, dated February 12, 2008, the district director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of Conspiracy to Commit Forgery by the High Court of American Samoa on October 19, 2000. The district director noted that the applicant received a pardon for her conviction, but that a pardon does not erase a conviction for the purposes of immigration. The district director then found that the applicant had failed to establish extreme hardship to her qualifying relatives and denied the waiver application accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated March 10, 2000, counsel states that the district director applied the exceptional and extremely unusual hardship standard in assessing the applicant's waiver application; that the district director failed to consider the applicant's foreign pardon as a positive equity; and that the district director failed to weigh and consider all the relevant factors.

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.)

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

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

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record indicates that on October 19, 2000 the applicant was convicted by the High Court of American Samoa, Trial Division, of one count of Conspiracy to Commit Forgery, a class D felony, punishable by imprisonment of not more than five years and/or a fine of not more than \$5,000. The applicant was placed on probation for five years.

Forgery and conspiracy to commit forgery have been found to be crimes involving moral turpitude. See *Matter of Seda*, 17 I. & N. Dec. 550 (BIA 1980), Georgia; *Animashaun v. INS*, 990 F.2d 234 (5th Cir. 1993), Alabama Criminal Code; *Balogun v. Ashcroft*, 270 F.3d 274 (5th Cir. 2001); *Morales-Carrera v. Ashcroft*, 74 F.3d Appx. 324 (5th Cir. 2003). *Matter of S-*, 9 I. & N. Dec. 688 (BIA 1962), Penal Law of the State of New York, § 889, Subdivision 1, Paragraph 1. *Matter of Jimenez*, 14 I. & N. Dec. 442 (BIA 1973). In addition, it has been held that any crime involving fraud is a crime involving moral turpitude. *Burr v. INS*, 350 F.2d 87, 91 (9th Cir. 1965), *cert denied*, 383 U.S. 915 (1966). Thus, the AAO finds that the applicant's conviction for conspiracy to commit forgery is a crime involving moral turpitude and the applicant is inadmissible under section 212(a)(2)(A) of the Act.

The record contains an Executive Pardon for the applicant in regards to her conviction dated April 6, 2006 and signed by the Lieutenant Governor of American Samoa.

We note that under section 237(a)(2)(A)(vi) of the Act, a pardon by the President of the United States or by the Governor of any of the several States has the effect of waiving deportability for crimes. However, we also note that according to the Eleventh Circuit Court of Appeals, the pardon provision of section 237(a)(2)(A)(vi) applies only to persons subject to deportation and does not excuse inadmissibility. See *Irabor v. U.S.*, 219 Fed. Appx. 964 (11th Cir. 2007); *Balogun v. Attorney General*, 425 F.3d 1356 (11th Cir. 2005). See generally *Matter of Pedro Aguilera-Montero*, 2006 WL 1647442 (BIA May 15, 2006).

Also, for the purposes of U.S. immigration law, a foreign pardon, in itself, does not wipe out an alien's foreign conviction or relieve her from the disabilities which flow there from. *Marino v. INS*, 537 F.2d 686, 691 (2nd Cir. 1976) (citations omitted); see also, *Mercer v. Lence*, 96 F.2d 122 (10th Cir. 1938); *United States ex rel. Palermo v. Smith*, 17 F.2d 534 (2nd Cir. 1927).

The AAO recognizes that the applicant's pardon is not a foreign pardon because it is from the Lieutenant Governor of American Samoa, an American territory. However, the applicant's pardon is also not a pardon from the Governor of one of the States or a Presidential pardon. In accordance with sections 101(a)(29) and 101(a)(36) of the Act, American Samoa is considered an "outlying possession" and not a "State". Furthermore, as discussed above, there is conflicting authority as to whether a Presidential pardon or a pardon from a Governor would excuse inadmissibility. Thus, we will not find that the pardon in this case affects the applicant's inadmissibility under section 212(a)(2)(A) of the Act. The AAO notes that the applicant has not disputed this inadmissibility on appeal.

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

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

....

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

The AAO also notes that the record indicates, through a letter from counsel dated August 3, 2007, that the applicant entered the United States by presenting a U.S. passport showing her place of birth as American Samoa. Counsel states that the applicant did not present herself as a U.S. citizen, but rather a U.S. national because her birthplace was listed as American Samoa. In addition to counsel's statement, the Presentence Report associated with the applicant's criminal convictions states that the applicant admitted to preparing visa applications for seven members of her church youth group knowing that the applications would be submitted to the U.S. Consulate in Auckland, New Zealand and knowing that the applications contained fraudulent certificates of identities for the applicants. The Presentence Report also states that the applicant helped all the members of her youth group in passing through U.S. immigration and was responsible for handling their travel documents at the airport.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

(i) 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 Act is inadmissible.

(ii) Falsely claiming citizenship. –

(I) In General –

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act . . . is inadmissible.

....

(iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

(1) 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.

The AAO notes that if the applicant presented herself as a U.S. citizen no waiver would be available to her, but the AAO finds that because the applicant's birthplace was listed as American Samoa she was presenting herself as a U.S. national and not a U.S. citizen. The AAO notes that section 308 of the Act confers U.S. nationality but not U.S. citizenship, on persons born in or having ties with "an outlying possession of the United States." Outlying possessions of the United States are defined in Section 101(A)(29) of the Act as American Samoa and Swains Island. Nevertheless, the AAO does find that the applicant is inadmissible under section 212(a)(6)(C) of the Act for having entered the United States by fraud. She will require a waiver of this ground of inadmissibility.¹

In sum, the applicant will require a waiver of inadmissibility under section 212(h) for having been convicted of a crime involving moral turpitude and a waiver under section 212(i) for gaining admission to the United States by fraud.

A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C)(i) of the Act is dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse and/or parent of the applicant. A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A) of the Act is dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse, parent and/or child of the applicant. Hardship the applicant experiences due to separation is not considered in section 212(h) and section 212(i) waiver proceedings unless it is shown that hardship to the applicant is causing hardship to the applicant's spouse. The AAO notes that the applicant has three U.S. citizen children and hardship to these children is considered in section 212(h) waiver proceedings, but is not considered in section 212(i) waiver proceedings unless it is shown that the hardship to the applicant's children is causing hardship to the applicant's spouse. Thus, to be found admissible to the United States the applicant will have to show extreme hardship to her spouse. 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-Moralez*, 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

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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 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 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).

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 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) (“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 record of hardship includes a brief from counsel and a statement from the applicant's spouse. In his brief, counsel states that the district director failed to consider the fact that the applicant had lived in the U.S. for twenty years, had been separated from her family for eight years, that her conviction was eight years old, and that she had been granted a pardon. Counsel also states that the applicant's daughter attempted to live with her mother in American Samoa, but could not given the superior education system in the United States. The AAO notes that counsel is very critical of the district director for not weighing certain positive factors in the applicant's case against negative factors. However, the AAO notes that before a weighing of equities as part of a discretionary analysis, the applicant must first show statutory eligibility by demonstrating that her qualifying relatives would suffer extreme hardship as a result of her inadmissibility. Thus, the district director did not weigh the positive equities in the applicant's case against the negative equities because no purpose would be served in doing so, as the applicant had not met her burden in regards to extreme hardship. The AAO also notes that in his decision the district director cites to case law related to the exceptional and extremely unusual hardship standard used in waiver applications that involve violent or dangerous crimes. The AAO notes that this standard is not the correct standard to be used in the applicant's case.

In a statement from the applicant's spouse, dated April 3, 2008, the applicant's spouse states that he and the applicant have four children ranging in ages 12 to 22 and that the applicant has been in Samoa for eight years, making it very difficult for him to be both father and mother to his two daughters. The applicant's spouse states that his daughter went to live with the applicant in Samoa from six to nine years old, but was brought back to the United States because of the education system in the United States. The applicant's spouse states that he works long hours and it is hard for him to spend time with his daughter. He states that his daughter cries every day for her mother and that he is going to have her examined by a therapist.

The AAO finds that the record does not contain sufficient evidence to show that the hardships faced by the applicant's spouse, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The record fails to include any supporting documentation regarding the hardship being suffered by the applicant's spouse. Furthermore, except for the statement regarding the education system in Samoa, no evidence has been presented to show that the applicant's spouse would suffer extreme hardship as a result of relocation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) or section 212(i) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) and 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 not met that burden. Accordingly, the appeal will be dismissed.

[REDACTED]

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ORDER: The appeal is dismissed.