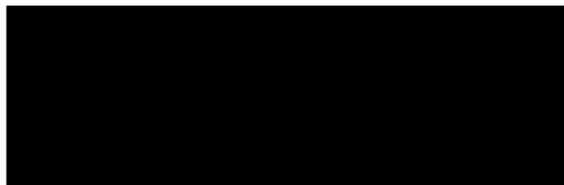


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



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



H2

DATE: **FEB 01 2012**

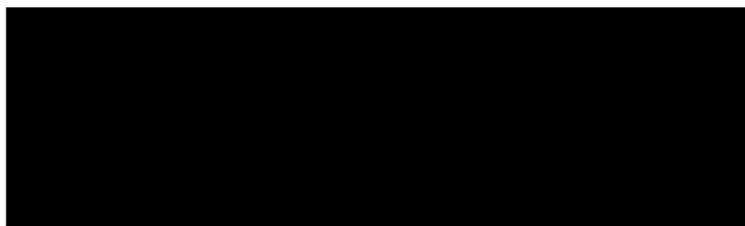
Office: BALTIMORE, MD

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, 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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Ground of Inadmissibility (Form I-601) was denied by the District Director, Baltimore, Maryland, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mongolia. She was found to be inadmissible to the United States 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 a crime involving moral turpitude. The applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative. She seeks a waiver of her inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. §1182(h), so that she may live in the United States with her spouse and children.

In a decision dated October 14, 2008, the director determined the applicant failed to establish that a qualifying family member would experience extreme hardship if she were denied admission into the United States. The waiver application was denied accordingly.

Counsel for the applicant does not contest that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Counsel asserts on appeal, however, that the applicant's U.S. citizen husband and her two lawful permanent resident daughters will experience extreme hardship if they move with the applicant to Mongolia, or if they live separately from her in the United States. In support of these assertions counsel submits letters written by the applicant's husband and children. The record also contains medical and psychological evaluation evidence, Mongolia country conditions information and letters from friends and family attesting to the applicant's good moral character.

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.

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 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.” *Matter of Silva-Trevino*, 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. *Matter of Silva-Trevino*, 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.

In the present matter, the record contains court disposition evidence reflecting that on March 16, 2005, the applicant was convicted in the Arlington County, Virginia, General District Court of the offense of Petit Larceny, in violation of Virginia Code section 18.2-96. The applicant was sentenced to 364 days imprisonment (304 days suspended), and she was ordered to pay fines.

The Virginia Code (VA. Code Ann.) defines the offense of Petit Larceny at section 18.2-96 by stating:

Any person who:

1. Commits larceny from the person of another of money or other thing of value of less than \$5, or
2. Commits simple larceny not from the person of another of goods and chattels of the value of less than \$200, except as provided in subdivision (iii) of § 18.2-95, shall be deemed guilty of petit larceny, which shall be punishable as a Class 1 misdemeanor.

The offense of larceny is not defined in VA Code Ann. Section 18.2-96. However, the Virginia Supreme Court held in *Tarpley v. Commonwealth*, 261 Va. 251, 256, 542 S.E. 2d 761, 763-64 (2001) that, “[l]arceny, a common law crime, is the wrongful or fraudulent taking of another's property without his permission and with the intent to deprive the owner of that property permanently.” (citations omitted). The Virginia Court of Appeals stated in, *Foster v. Commonwealth*, that petit larceny in Virginia is a common law crime that has been defined by case law as “the wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently.” 44 Va.App. 574, 577-81 (2004)(citations omitted).

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). *See also, In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006) (In determining whether theft is a crime of moral turpitude, the BIA considers “whether there was an intention to permanently deprive the owner of his property.”)

As Petit Larceny under Va. Code Ann. section 18.2-96 requires an intention to permanently deprive the owner of property, it thus categorically involves moral turpitude. Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i) of the Act.

The provisions contained in VA Code Ann. Section 18.2-96, specify that the offense of larceny is a Class 1 misdemeanor. The Virginia Code provides at section 18.2-11:

The authorized punishments for conviction of a misdemeanor are:

- (a) For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both.

Under the exception clause contained in section 212(a)(2)(A)(ii)(II) of the Act, a crime involving moral turpitude inadmissibility provision shall not apply to an alien who has been convicted of only one crime, if the maximum penalty possible for the crime of which the alien was convicted 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 applicant's conviction under Va. Code. Ann. Section 18.2-96

does not qualify for the exception under section 212(a)(2)(A)(ii)(II) of the Act, as the applicant was sentenced to 364 days imprisonment (304 days suspended).¹

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

The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . 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 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 record reflects that the applicant is married to a U.S. citizen, and that she has a U.S. citizen stepson and two lawful permanent resident (LPR) daughters. The applicant's spouse and children are qualifying relatives for section 212(h) of the Act, waiver of inadmissibility purposes.

Section 212(h) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999), the BIA 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 BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

¹ It is noted the exception contained in section 212(a)(2)(A)(ii)(I) does not apply in the present case, as the applicant was over the age of 18 when the crime was committed.

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

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

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

The applicant asserts, through counsel, that her husband and children will experience extreme hardship if she is denied admission into the U.S. and they either move to Mongolia with her, or remain separated from her in the U.S. Counsel asserts that the applicant's husband has joint legal custody of a school-aged son in the U.S. The applicant's stepson resides with his biological mother, and it would cause the applicant's husband emotional hardship if he were unable to see his son regularly, as he does now. Counsel asserts further that the applicant's husband is Jewish and that he would be unable to practice his religion in Mongolia due to the lack of synagogues and an overall Jewish community in the country. Counsel asserts that the applicant's daughters rely on the

applicant to help them communicate in English and to make important cultural and legal decisions for them. She indicates that the daughters lost their biological father to illness in 2007, and that it would be very hard for them if their mother moved away. Counsel refers to briefs submitted with the applicant's initial Form I-601 application, which state that the applicant's husband is a professional computer programmer, that he would lose his career if he moved to Mongolia, and that he would face unemployment in Mongolia. Counsel asserts further that the applicant's husband suffers from bronchial asthma, and that his asthma attacks are often accompanied by panic attacks. Counsel indicates that the applicant's presence decreases her husband's stress and anxiety during asthma attacks because he relies on her to help him locate his inhaler. Counsel asserts that the applicant also provides care and assistance to her husband's grandmother, and that she has a close relationship with her stepson. In addition, counsel states that the applicant's husband has been under the care of a psychotherapist for depression and anxiety with panic attacks, due to the applicant's immigration situation. In support of these assertions counsel submits letters written by the applicant's husband and children, as well as medical and psychological report evidence and Mongolia country conditions information.

Letters from the applicant's daughters reflect that their biological father died in Mongolia in 2007, and that the applicant and their stepfather have helped them get through hard times related to their father's death. The applicant's daughters indicate that they enjoy living in the U.S. with their family and going to school, and that they need their mother's caring and emotional support. The record contains 2009 school enrollment evidence reflecting the applicant's daughters' enrollment in high school and community college. A letter written by the applicant's minor stepson additionally reflects that he likes his stepsisters and that he enjoys playing with them.

The applicant's husband writes in a letter that he feels happy when the applicant is near, and that she helps him overcome work-related stress. She also helps to decrease his asthma-related panic attacks because he counts on her to know where his inhaler is during asthma attacks. The applicant's husband states that his biological son also likes and depends on the applicant, and that the applicant helps care for his grandparents by reading to his grandmother and helping with chores. The applicant's husband indicates further that the thought of living separately from the applicant makes him feel depressed.

A general article on asthma, contained in the record, indicates that people with asthma do not have a higher rate of anxiety or depression than the general population. The article notes, however, that negative emotions can discourage compliance with medication and the ability to cope, that poor control of symptoms increase the risk for negative emotions, and that stress and depression have been associated with more severe symptoms. The record contains medical evidence reflecting the applicant's husband has been diagnosed with Bronchial Asthma, with intermittent episodes of shortness of breath, and that he was prescribed an oral inhaler for his condition.

A psychological evaluation dated November 28, 2007 is also contained in the record. The evaluation states the applicant's husband suffers from severe anxiety associated with life-threatening asthma attacks. The evaluation reflects that the applicant's husband reported he was diagnosed with

asthma at the age of five, that due to his asthma he was hospitalized many times between the ages of 12 and 16, and that he has had to use oral inhalers at home and at work for many years. The evaluation reflects that the applicant's husband also reported an increase in his asthma attacks after 2007, and he reported that he feels extremely tense and panicky when he experiences asthma attacks alone or away from home. The evaluation reflects that the applicant's husband reported a fleeting suicidal ideation and attempt to overdose on Vicodin a month prior to the psychological evaluation. Based on the evaluation interview and diagnostic tests, the applicant's husband was diagnosed with Anxiety Disorder Due to Asthma with Panic Attacks; Acute Adjustment Disorder with Depressed Mood; and Dependent Personality Disorder, and the evaluation concluded that the applicant's husband's outcome might be tragic if he lost hope of being together in the U.S. with the applicant.

Mongolia country information contained in the record reflects that it is difficult to practice the Jewish faith in Mongolia, that there are no synagogues in the country, and that the Jewish community is small.

Upon review, the AAO finds that the evidence in the record fails to establish that the hardships faced by the applicant's daughters, considered in the aggregate, rises beyond the common results of removal or inadmissibility to the level of extreme hardship, if they return to Mongolia with the applicant, or if they remain in the U.S. It is noted that the applicant's daughters lived separately from the applicant for many years prior to coming to the U.S. in 2009. The applicant moved to the U.S. in 2003, without her daughters, and the applicant's daughters remained in Mongolia with their father until his death from illness in 2007. The record indicates they subsequently lived with family in Mongolia for up to two years before being admitted into the U.S. as lawful permanent residents on April 24, 2009. The applicant's daughters were 17 and 19 years old at the time of their admission into the United States, and they are now both adults. The applicant's daughters are attending school and appear to have knowledge of English, and the evidence fails to establish that they would experience extreme emotional, financial or other hardship if they remained in the U.S. separated from the applicant. The evidence in the record additionally fails to establish that the applicant's daughters would experience emotional, financial or other hardship beyond that normally experienced upon removal if they chose to move to Mongolia to be with the applicant. Although the applicant's daughters have lived in the U.S. as lawful permanent residents for over two years, they were born and raised in Mongolia, the majority of their family is in Mongolia, and they are familiar with the language and culture in Mongolia.

With regard to the applicant's stepson, the record indicates that the applicant's husband has legal custody and regular visitation with his son, but that he does not have primary physical custody of his son. The applicant's stepson would thus remain in the U.S. with his biological mother if the applicant were denied admission into the U.S. Although the applicant and her stepson appear to have a good relationship, the record lacks evidence establishing that the applicant's stepson is dependent on her in a way that would cause hardship beyond that normally found in cases of inadmissibility or removal if the applicant were denied admission into the U.S.

With respect to the applicant's husband, however, the record reflects that he would lose his career and home in the U.S. if he moved to Mongolia, that he would be separated from his family in the U.S., and that he would be unable to see his young son regularly. He would also be unable to practice his religion in Mongolia. The hardships faced by the applicant's husband, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship, if the applicant's husband relocated to Mongolia.

Nevertheless, the AAO finds that the cumulative evidence in the record fails to show that the hardships faced by the applicant's husband, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship, if the applicant's husband remains in the U.S.

The psychological evaluation contained in the record reflects the applicant's husband was diagnosed with Anxiety Disorder Due to Asthma with Panic Attacks; Acute Adjustment Disorder with Depressed Mood; Dependent Personality Disorder. The evaluation indicates further that the applicant's husband reported a fleeting suicidal ideation and a suicidal overdose attempt, and that his outcome might be tragic if he lost hope of being together in the U.S. with the applicant. It is noted that the evaluation report was a year old at the time the appeal was filed, and no new evidence was submitted regarding the applicant's husband's mental state as of the date of the appeal. It is additionally noted that the evidence in the record does not indicate that the applicant's husband has required treatment for suicidal tendencies, and the record lacks other evidence indicating that the applicant's husband's psychological state has affected his work or home life. In addition, although the psychological evaluation indicates that the applicant's husband reported an increase in his asthma attacks after the applicant's waiver application was denied, and he reported he feels tense and panicky when he experiences asthma attacks alone, the evaluation also reflects that the applicant's husband has had asthma since he was five years old and that he has used an inhaler, when needed, for most of his life. The medical evidence contained in the record fails to establish that the applicant's husband's asthma conditions have decreased due to the applicant's presence, and the evidence fails to establish that the applicant's husband would be unable to locate his inhalers if the applicant were not with him. The evidence additionally fails to demonstrate that the applicant's husband is reliant on the applicant in order to provide care to his grandparents.

Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship" Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(h) of the Act, be above and beyond the normal, expected hardship

involved in such cases. In the present matter, the applicant has established only that her husband would experience the type of hardship commonly associated with removal or inadmissibility, if he remained in the U.S. and lived separated from the applicant.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also *cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996).

Upon review of the totality of the evidence, the AAO finds that the applicant failed to establish extreme hardship to a qualifying family member as required under section 212(h) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant 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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed

ORDER: The appeal is dismissed.