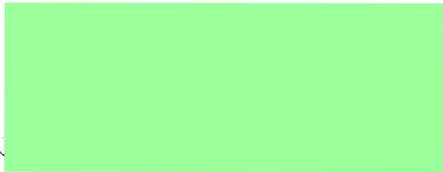


(b)(6)

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

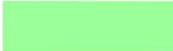


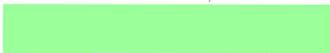
U.S. Citizenship
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Services



Date: **NOV 22 2013**

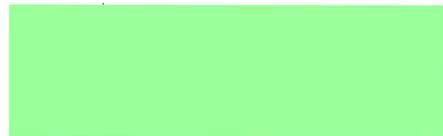
Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Applicant: 

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Albania who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year, and section 212(a)(2)(A)(i) of the Act for having been convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant section 212(h) of the Act in order to live with his wife in the United States.

The director found that the applicant was convicted of a violent or dangerous crime and failed to establish that extraordinary circumstances exist to warrant a favorable exercise of discretion. The director denied the application accordingly.

On appeal, counsel contends the applicant is not inadmissible for unlawful presence under section 212(a)(9)(B)(i)(II) of the Act. In addition, counsel contends that the applicant's conviction is not for a violent or dangerous crime. Counsel further contends the applicant established extreme hardship to his wife, particularly considering her psychological state and the fact that she has gone into debt since the applicant's departure from the United States.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, [REDACTED], indicating they were married on March 18, 2008; a letter from the applicant; a letter from [REDACTED]; copies of police reports and court documents; psychological assessments; letters from physicians and copies of medical records; copies of tax returns, bills, and other financial documents; letters of support, including from family members; letters from employers; an Order of the Immigration Judge and a decision from the Board of Immigration Appeals; articles addressing country conditions in Albania; and an approved Immigrant Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

With respect to unlawful presence, the AAO finds counsel's contention that the applicant is not inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act to be persuasive. Section 212(a)(9)(B) of the Act provides, in pertinent part:

(i) *In general.* - Any alien (other than an alien lawfully admitted for permanent residence) who -

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, . . . is inadmissible.

- (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The record shows the applicant entered the United States as a lawful permanent resident in April 1998. The applicant's permanent resident card indicates that it was valid for ten years, through April 5, 2008. The record shows that in June 2002, the applicant was convicted of Assault With Intent To Do Great Bodily Harm Less than Murder in violation of Michigan Code § 750.84,¹ and sentenced to sixty days imprisonment and two years probation. As a result of the conviction, a Notice to Appear was issued on September 27, 2002, placing the applicant in removal proceedings. The applicant was ordered removed by an immigration judge in May 2006 and the Board of Immigration Appeals (BIA) dismissed an appeal in January 2008. The applicant departed the United States in March 2008. Therefore, the record shows the applicant was lawfully admitted for permanent residence and has not accrued unlawful presence of over 180 days. Accordingly, the applicant is not inadmissible under section 212(a)(9)(B) of the Act.

With respect to the applicant's inadmissibility for his conviction for a crime involving moral turpitude, section 212(a)(2)(A) of the Act states in pertinent part:

(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.

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

(h) 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 -

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General 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,

¹ Michigan Code § 750.84 states, "Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars."

(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.

(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 . . . [and]

(2) the Attorney General, 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.

The director found the applicant inadmissible for having been convicted of a crime involving moral turpitude pursuant to section 212(a)(2)(A)(i)(I) of the Act. Counsel has not contested that the applicant's conviction was for a crime involving moral turpitude on appeal and the record does not show that determination to be in error. Therefore, we will not disturb the finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act and is eligible to apply for a waiver of inadmissibility under section 212(h) of the Act.

In most discretionary matters, the alien bears the burden of proving eligibility simply by showing equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957). However, based on the facts of this particular case, the record does not support a favorable exercise of discretion based solely on the balancing of favorable and adverse factors. The applicant's conviction indicates that he is subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be

insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The words “violent” and “dangerous” and the phrase “violent or dangerous crimes” are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, “crime of violence,” is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). It provides that a “crime of violence,” as defined under 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is an aggravated felony. As such, “crime of violence” is limited to those crimes specifically listed in 18 U.S.C. § 16. It is not a generic term with application to any crime involving violence, as that term may be commonly defined. That the DOJ chose not to use the language of section 101(a)(43)(F) of the Act or 18 U.S.C. § 16 in promulgating 8 C.F.R. § 212.7(d) indicates that “violent or dangerous crimes” and “crime of violence” are not synonymous. The Department of Justice clarified the relationship between these distinct terms in the interim final rule codifying 8 C.F.R. § 212.7(d):

[I]n general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be insufficient" to obtain the waiver. See 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Counsel's contention that the applicant should not be held to the heightened standard because he was not charged as being removable for having committed an aggravated felony is unpersuasive. The fact that a conviction constitutes an aggravated felony under the Act may be indicative that an alien has also been convicted of a violent or dangerous crime, but it is not dispositive. Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual “case-by-case basis.” The AAO interprets the phrase “violent or dangerous crimes” in accordance with the plain or common meaning of its terms, consistent with any published precedent decisions addressing discretionary denials under 8 C.F.R. § 212.7(d) or the standard originally set forth in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

Using the above definitional framework, the record establishes that the applicant's felony conviction for assault with intent to do great bodily harm less than murder in violation of Michigan Code § 750.84 is a violent crime for the purposes of 8 C.F.R. § 212.7(d). Counsel contends that the specific facts leading to the applicant's conviction show that he was not involved in a particularly violent or dangerous crime, but rather, that the applicant was involved in a fight with twenty individuals, using

a “baseball bat” that was similar to a souvenir bat that was only 13½” long. Counsel’s contention is unpersuasive. The State of Michigan Court of Appeals rejected this argument in a decision affirming the applicant’s criminal conviction. According to this decision, a copy of which is in the record, “[t]he victim sustained a hematoma on the back of his head, a broken nose that required plastic surgery, and possibly bruises to his hands and arms.” *People v. Marpali*, No. 249858, 2004 WL 2290474 (Mich. Ct. App. Oct. 12, 2004) (unpublished). The Michigan Court of Appeals specifically stated that “striking someone on the neck with a baseball bat constitutes the use of deadly force.” *Id.* Therefore, the director did not err in finding that the applicant was convicted of a violent or dangerous crime and is subject to the heightened discretion standard of 8 C.F.R. § 212.7(d).

Under 8 C.F.R. § 212.7(d), the applicant must show that “extraordinary circumstances” warrant approval of the waiver. Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant’s admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has “clearly demonstrate[d] that the denial of [admission] would result in exceptional and extremely unusual hardship” to a qualifying relative. *Matter of Jean*, 23 I. & N. Dec. at 383.

The exceptional and extremely unusual hardship standard is more restrictive than the extreme hardship standard. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). Since the applicant is subject to 8 C.F.R. § 212.7(d), merely showing extreme hardship to his qualifying relatives under section 212(h) of the Act is not sufficient. He must meet the higher standard of exceptional and extremely unusual hardship. Therefore, the AAO will determine whether the applicant meets this heightened standard.

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that “must be ‘substantially’ beyond the ordinary hardship that would be expected when a close family member leaves this country.” However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean*, *supra*, and codified at 8 C.F.R. § 212.7(d).

The BIA stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. 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. 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 an exclusive list. *Id.*

In *Monreal*, the BIA provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

[T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-64.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the BIA noted that, “the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face.” 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent’s minor children was demonstrated by evidence that they “would suffer hardship of an emotional, academic and financial nature,” and would “face complete upheaval in their lives and hardship that could conceivably ruin their lives.” *Id.* at 321 (internal quotations omitted). The BIA viewed the evidence of hardship in the respondent’s case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The BIA noted:

While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former “extreme hardship” standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher “exceptional and extremely unusual hardship” standard.

23 I&N Dec. at 324.

However, the BIA in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that “the hardship standard is not so restrictive that only a handful of

applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief.” 23 I&N Dec. 467, 470 (BIA 2002). The BIA found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The BIA noted that these factors included her heavy financial and familial burden, lack of support from her children’s father, her U.S. citizen children’s unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The BIA stated, “We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met.” *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. See *Gonzalez Recinas*, 23 I&N Dec. at 469 (“While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship.”). The AAO notes that exceptional and extremely unusual hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

In this case, the applicant’s wife, [REDACTED] states that she has been suffering emotionally, financially, and physically since her husband departed the United States. She states that her husband is her soul mate and that it is killing her inside to be apart. She contends she is depressed, feels lost and lonely without her husband, has no passion to do anything, cries herself to sleep, and has headaches, back pain, fluctuating weight, and difficulty concentrating. According to [REDACTED], she suffers from anxiety attacks and sees a psychiatrist. In addition, [REDACTED] contends she lives with her elderly parents-in-law and takes care of them every day. She states her father-in-law is seventy-three years old, has high cholesterol, hearing problems, arthritis, and memory problems. [REDACTED] asserts that her father-in-law is suffering emotionally and hopes to see his son again before he dies. She states her mother-in-law is fifty-nine years old and is also struggling emotionally due to the applicant’s absence. Furthermore, [REDACTED] states that her own parents have health issues as well and that she is struggling financially to help her parents and parents-in-law. Moreover, [REDACTED] asserts she cannot relocate to Albania to be with her husband because she would lose her job and all of its benefits, would be unable to help her parents or parents-in-law who are the most important people in her life, and has no place to live in Albania. She states that people in Albania struggle to survive, that there are no job opportunities in Albania, and that she fears walking down the street by herself.

Although the AAO is sympathetic to the couple’s circumstances, the record does not establish that the hardship the applicant’s wife has suffered or will suffer would be exceptional and extremely unusual if the applicant’s waiver application was denied. If [REDACTED] decides to remain in the United States, their situation is typical of individuals separated as a result of inadmissibility or exclusion and does not rise to the heightened standard of exceptional and extremely unusual hardship based on the record. Although the record contains a psychological assessment diagnosing her with Major Depressive Disorder and Posttraumatic Stress Disorder, the record does not establish that [REDACTED]’s

situation, or the symptoms she is experiencing, are unique or atypical compared to others who are separated from a spouse. *See Perez v. INS*, 96 F.3d 390 (9th Cir. 1996) (holding that the common results of deportation are insufficient to prove extreme hardship and defining extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation). Regarding letters from her doctor stating she suffers from severe depression, chronic low back pain, GERD, epigastric abdominal pain, vitamin D deficiency, knee pain, hyperthyroidism, and migraine headaches, and concluding that she needs her husband “to provide basic and supportive care and to assist with ADL’s,” the record does not show that [REDACTED] is limited in any way in activities of daily living. Rather, the record shows she has worked for [REDACTED] since January 2006 and according to [REDACTED] herself, she cares for her parents and her parents-in-law. Significantly, [REDACTED] does not contend she is limited in any activities or that she needs her husband’s assistance due to any medical condition. With respect to financial hardship, the record shows that [REDACTED] has over \$15,000 in credit card debt and financially assists her parents and parents-in-law. Nonetheless, the record shows that in 2011, her salary was \$34,007, with a minimum of \$5,200 in incentive pay in addition to her salary, and there is no evidence in the record showing that [REDACTED] is delinquent in paying any of her bills. Even considering all of the evidence in the aggregate, the hardship endured by the applicant’s wife does not meet the exceptional and extremely unusual hardship standard set forth in 8 C.F.R. § 212.7(d). Moreover, the couple met in 2005 while the applicant was in removal proceedings and were married in March 2008, the same month the applicant departed the United States. Therefore, [REDACTED] entered into the marriage with knowledge that her husband might be removed from the United States. *See Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992) (giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien’s possible deportation was proper); *cf. Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991); *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980).

If [REDACTED] decides to relocate to Armenia, the record does not establish that her hardship would rise to the heightened standard of exceptional and extremely unusual hardship. The record shows [REDACTED] was born in Armenia and lived there until she was thirteen years old, entering the United States in August 1998. The record also establishes that [REDACTED] has lived in the United States her entire adult life, including her formative years, and that her parents and brother are all naturalized U.S. citizens. Relocating to Armenia would also entail leaving her job and all of its benefits, and leaving her family. The AAO also takes administrative notice that the U.S. Department of State has stated that high unemployment and other economic factors encourage criminal activity in Albania, and that violent crime has been steadily increasing. *U.S. Department of State, Country Specific Information, Albania*, dated September 24, 2013. Although these circumstances may involve extreme hardship, the applicant has not clearly demonstrated exceptional and extremely unusual hardship upon relocation.

Finally, although the applicant’s mother is a [REDACTED] and his father is a [REDACTED], neither the applicant nor counsel has specifically addressed hardship to either of the applicant’s parents, both of whom are qualifying relatives under the Act. Regardless, for the sake of thoroughness, the AAO shall address the hardship to the applicant’s parents.

The record contains documentation showing that the applicant's father is currently seventy-five years old and the applicant's mother is sixty-one years old. A Notice of Case Action from the State of Michigan's Department of Human Service shows that the applicant's father qualifies for the Medicaid Program and that they receive \$318 per month for food assistance. In addition, copies of medical records indicate the applicant's father suffers from depression, dementia, hyperlipidemia, vitamin B-12 deficiency, and has a history of hypertension, arthritis, coronary artery disease, and shoulder pain that has lasted several years. Although the BIA has commented that an applicant who has elderly parents in the United States who are solely dependent upon him for support might well have a strong case of showing exceptional and extremely unusual hardship, *Monreal*, 23 I&N Dec. at 63-64, there is insufficient information in the record to make such a finding. The applicant has not discussed the possibility of his parents returning to Armenia, where they were born, to avoid the hardship of separation and he does not address whether such a move would cause them exceptional and extremely unusual hardship. Furthermore, the record shows that the applicant's wife, [REDACTED] lives with and cares for the applicant's parents and the applicant has a sister who also resides in the United States. Although the applicant's sister states she is a single parent to two young children and is "barely mak[ing] ends meet," the record does not show that the applicant's parents are solely reliant on the applicant. Therefore, even considering all of the evidence in the aggregate, the record does not show that the hardships the applicant's wife or parents have suffered or will suffer produce a "truly exceptional situation" that would meet the exceptional and extremely unusual hardship standard. See *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 at 62. Accordingly, the applicant failed to demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d), and the appeal will be dismissed.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.