

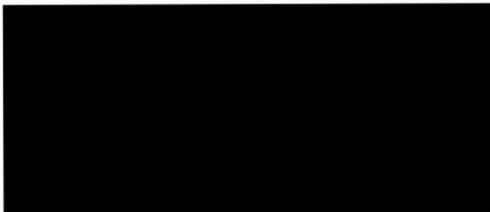
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U.S. Citizenship  
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FILE:



Office: VIENNA, AUSTRIA

Date: JAN 05 2009

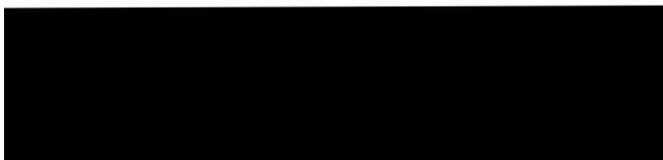
IN RE:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B) and under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) AND an Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application and application for permission to reapply for admission were denied by the Officer in Charge, Vienna, Austria. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Albania who was found by the officer in charge to be inadmissible to the United States pursuant to section 212(k), section 212(a)(6)(C)(i), section 212(a)(9)(B)(i)(II), and section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(k), 8 U.S.C. § 1182(a)(6)(C)(i), 8 U.S.C. § 1182(a)(9)(B)(i)(II), and 8 U.S.C. § 1182(a)(9)(A)(ii), respectively.

The AAO notes that section 212(k) of the Act is not applicable to the applicant's case. Section 212(k) of the Act states, in pertinent part, that, "[a]ny alien, inadmissible to the United States under paragraph (5)(A) or (7)(A)(i) of subsection (a)..." the applicant is not inadmissible under section 212(5)(A) or section 212(7)(A)(i) of the Act, as, section 212(k) does not apply to the applicant's case.

However, sections 212(a)(6)(C)(i), 212(a)(9)(B)(i)(II), and 212(a)(9)(A)(ii) of the Act do apply in the applicant's case. The applicant was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, for having procured admission into the United States by fraud or willful misrepresentation on October 7, 2001. The applicant was found to be inadmissible to the United States under 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 seeking readmission within 10 years of his last departure from the United States. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

In addition, the applicant was found to be inadmissible under section 212(a)(9)(A)(ii) of the Act as an alien who departed the United States while an order of removal was outstanding and who is now seeking admission to the United States within ten years of the date of his departure. The applicant is seeking permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to travel to the United States and reside with his U.S. citizen spouse.

In one decision with two cover letters, the officer-in-charge denied both the applicant's Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). *Decision of the Officer in Charge*, dated May 30, 2008. The officer in charge found that based on the evidence in the record, the applicant's spouse's situation did not rise to the level of extreme hardship. She then denied both the Form I-601 and Form I-212 based on this finding. *Id.*

Counsel appeals the denial of the applicant's Form I-601 and Form I-212.<sup>1</sup> *Form I-290B*, dated June 27, 2008. In his brief, counsel states that the officer in charge erred in denying the applicant's Form

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<sup>1</sup> The AAO notes that because the Officer in Charge addressed both the Form I-601 and Form I-212 in her May 30, 2008 decision, the AAO will review both applications on appeal.

I-601 and that the factors in the applicant's case should have been evaluated in the aggregate. *Counsel's Brief*, dated June 27, 2008. He states that when these factors are considered in the aggregate they constitute extreme hardship. *Id.* On appeal, counsel submits updated medical records for the applicant's spouse and her mother; statements of hardship from the applicant's spouse and her mother; an updated report from the applicant's spouse's therapist; a letter from the applicant's former employer; and a request for an oral argument from the applicant's spouse.

On November 20, 2008, the applicant's spouse, through [REDACTED] of Michigan, submitted additional documentation including: a statement of hardship, medical records, photographs of her mother and bank statements.

The AAO notes that in regards to the applicant's spouse's request for an oral argument, the regulation at 8 C.F.R. § 103.3(b) provides that the affected party must explain in writing why oral argument is necessary. United States Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant such argument only in cases that involve unique factors or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Consequently, the request is denied.

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

- (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.

In the present application, the record indicates that the applicant attempted to enter the United States on October 7, 2001 with a fraudulent Norwegian passport.

The applicant was found to be inadmissible and was paroled into the United States to apply for asylum. On September 18, 2002, the immigration judge denied his asylum application. On October 9, 2002, the applicant filed an appeal with the Board of Immigration Appeals (BIA). The BIA denied the applicant's appeal and he was ordered removed on November 28, 2003. The applicant remained in the United States until November 1, 2005. Therefore, the applicant accrued unlawful presence from when he was ordered removed from the United States on November 28, 2003 until November 1, 2005, the date he departed the United States. In applying for an immigrant visa, the applicant is seeking admission within 10 years of his November 1, 2005 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

- (B) Aliens Unlawfully Present.-

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

....

(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.

Both section 212(a)(9)(B) and section 212(a)(6)(C) of the Act provide for a waiver of inadmissibility under section 212(a)(9)(B)(v) and section 212(i) of the Act.

Section 212(a)(9)(B)(v) of the Act provides:

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

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.

Both a section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act and a section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act are dependent first 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. Hardship the alien experiences due to separation is not considered in section 212(a)(9)(B)(v) and section 212(i) waiver proceedings unless it causes hardship to the applicant's spouse.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter*

*of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

*Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted). 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).

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that she resides in Albania or in the event that she resides in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

The AAO also notes that the applicant's case has a long history of documenting hardship to the applicant's spouse. The applicant filed his first Form I-601 and Form I-212 in 2006. These applications were denied on February 23, 2007. The applicant appealed these decisions to the AAO in March 2007 and the appeal was dismissed on August 21, 2007. In November 2007 the applicant filed a second Form I-601 and Form I-212 with the office in Vienna, Austria and on May 30, 2008 these applications were denied. At that time, the applicant's spouse asserted that she was suffering emotional and financial hardship because of the applicant's inadmissibility. The record at that time included evidence that from November 1, 2005 to March 2007 the applicant's spouse was residing in Albania with the applicant. In a psychological evaluation submitted by the applicant she stated to her doctor that she went to live in Albania with the applicant when he departed the United States on November 1, 2005 and returned to the United States in March 2007. *Psychological Evaluation*, dated November 5, 2007. Copies of the applicant's spouse's passport were submitted showing entry stamps for Albania in 2005 and 2006 in addition to entry stamps to the United States on March 1, 2007 and June 22, 2007. The record also contains copies of airline tickets showing travel from Albania on March 1, 2007 and June 22, 2007 and travel to Albania on April 20, 2007. The record also contains documents of medical care that the applicant's spouse received while in Albania. The applicant's spouse went to the emergency room in Albania complaining of head pain, vomiting and fever on November 18, 2007 and soon after had surgery to have her tonsils removed. *See Medical Report from [REDACTED]*, dated November 18, 2007 and *Case Record from [REDACTED]* translated on December 18, 2007.

Also submitted with this waiver application were reports and a letter from two of the applicant's spouse's doctors and one therapist who have been treating the applicant's spouse for Major Depression. [REDACTED] states that she has interviewed the applicant's spouse on several occasions and has concluded that the applicant's spouse is suffering from depression, insomnia, and a high level of anxiety, issues of abandonment, impaired thought processes and diminished capacity to function on a daily basis. [REDACTED] does not recommend a course of treatment for the applicant's spouse's symptoms other than her husband, the applicant, returning to the United States. *Psychological Evaluation*, dated November 5, 2007. The officer in charge found that she could not consider this report as a governing factor in deciding the applicant's case because the recommendation of the doctor was to grant an immigration benefit. *Decision of the Officer in Charge*, dated May 30, 2008. The officer in charge then notes the statement submitted by [REDACTED], stating that [REDACTED] statement suggests that the applicant's spouse should continue to have regular appointments for ongoing therapy and that the prescribed medication and stable daily routine could help improve her psychological condition. The AAO notes that this summary of the statement by [REDACTED] is incorrect and the officer in charge failed to consider other documentation regarding the applicant's spouse's condition.

The letter from [REDACTED] states that the applicant's spouse resumed therapy on September 14, 2007, experiencing a relapse of Major Depression and that it was recommended that the applicant's spouse see her family doctor, [REDACTED], for resumption of anti-depressant medication and to have her blood drawn to rule out other conditions. *Letter from [REDACTED]* dated September 27, 2007. Ms. [REDACTED] states that the applicant's spouse followed up with a phone call after her doctor's appointment and agreed to comply with taking the prescribed medication. [REDACTED] also states that the applicant's spouse scheduled a therapy appointment and had a phone appointment on September 27, 2007. *Id.* Documentation attached to this statement included notes from therapy sessions between [REDACTED] and the applicant's spouse, showing that her initial therapy appointment was on March 9, 2007 and that in 2007 she attended therapy sessions on: March 20<sup>th</sup>, March 27<sup>th</sup>, April 10<sup>th</sup>, April 14<sup>th</sup>, September 19<sup>th</sup>, October 2<sup>nd</sup>, and October 12<sup>th</sup>. In addition to this documentation, the applicant's spouse also submitted a letter from her family doctor, [REDACTED], which states that she examined the applicant's spouse on September 28, 2007 and that the applicant's spouse was diagnosed with Major Depression, is on medication for this depression and is going to counseling. *Letter from [REDACTED]*, dated October 1, 2007.

On appeal, the applicant's spouse states that she met the applicant when she was eighteen years old and he was twenty-seven years old and that she became very attached to the applicant and relied on him for emotional and spiritual support. *Spouse's Statement*, dated October 31, 2008. She states that after moving to Albania for over a year she decided to return to the United States and that she missed her close-knit family. She states that after returning to the United States in March 2007, her health deteriorated and her mother was diagnosed with pancreatic cancer and diabetes. The applicant's spouse was told that her mother had six months to live and she became her mother's caregiver. She states that she believes her mother's illness and husband's absence were her greatest enemies and she was heartbroken and felt absolutely hopeless. She states that she could not rely on her father or siblings for support because they were also heartbroken by their mother's illness, that her sister was

married with a one-month-old baby and that she was the only child living at home with her parents. She describes having to change her mother's open wound, cook her special diet, give her medications, help with her insulin shots and clean the house. She explains that during this time she was also worried about the applicant living in Albania and that she needed to continue working to help him financially. She states that she started seeing a psychologist every other week and her family doctor once a month. She states that she was put on anti-depressants and anti-anxiety medication, which was increased over time as her depression became worse. The applicant's spouse states, "I suffer a lot. I am hopeless. I am lonely and I feel like my life has no purpose." The applicant's spouse also states that the first Form I-601 was denied in part because the applicant's spouse did not suffer any health problems, and at that time in her life that was true. She states at that time she was still with the applicant and they had been living in Albania for eight months. However, she states that it has now been three years since the applicant returned to Albania and due to this separation she is now experiencing health problems. She states that she has severe depression, she cannot drive and she cannot focus on her daily activities. The applicant's spouse asserts that because of being separated from the applicant she has also suffered financially because she no longer has health insurance, she had to stop going to school and now has to work to support the applicant and her family. *Id.*

In addition to the documentation previously submitted, the applicant's spouse submits on appeal: notes from her therapy session on October 29, 2008; another letter from her family doctor, Dr. [REDACTED], dated October 31, 2008 and stating that the applicant has been prescribed medication for depression; documentation concerning the applicant's mother-in-law's battle with pancreatic cancer and diabetes, including a statement from the mother's physician, [REDACTED], in which he states that the applicant's mother-in-law requires a caregiver and her daughters are providing this care; a statement from the applicant's mother-in-law explaining how the applicant's spouse cares for her; and photographs of the applicant's mother-in-law before her surgery for cancer and after.

The AAO finds that the applicant's spouse is experiencing extreme hardship as a result of being separated from the applicant. The applicant's spouse has submitted documentation of her mental health problems, which began shortly after being separated from the applicant. The AAO acknowledges that the applicant's spouse's current position as a caregiver for her sick mother seem to be a contributing factor to the stresses in her life, however, the AAO also acknowledges that these stresses would be more easily overcome with the love and support that her spouse was once able to provide her when he resided with her in the United States.

The applicant's spouse also asserts that she did suffer hardship when she relocated to Albania and if she had to return to Albania she would continue to suffer extreme hardship. *Spouse's Statement*, dated October 31, 2008. The applicant's spouse states that she left Albania with her family when she was thirteen years old and that adjusting to life there after living in the United States was very difficult. She states that while in Albania she lived in a rural village four hours away from Tirana, the capital city. She states that because they had nowhere else to live, they lived with the applicant's parents and the house was extremely damp and cold with only a wood stove for heat. She states that they did not have regular access to water and that food was limited because they grew their own food. She also states that in Albania she had not prospects of building a successful future because

she could not afford school and she would be unable to find employment. The applicant's spouse also cites inadequate medical care, poverty, and crime as reasons that she would face extreme hardship in Albania. The applicant's spouse submitted a letter from the Mayor of District Voskop, where the applicant and his parents reside. In the letter, the Mayor states that the applicant's family lives in a small house in poor conditions. *Letter from Mayor*, translated March 4, 2007. The record also includes a consular information sheet for Albania, dated January 19, 2007, and the 2006 State Department Report on Human Rights Practices in Albania. The consular information sheet states that Albania's per capita income is the lowest in Europe and that organized criminal gangs operate throughout the country. The information sheet states that a high level of security awareness should be maintained at all times and that medical facilities and capabilities are limited beyond rudimentary first aid treatment. The 2006 State Department report states that women were not accorded full and equal opportunity in their careers and that in practice men were often favored over women. The record also includes country reports from 2003 and 2004. The AAO finds that the current consular information sheet, dated November 4, 2008 and the 2007 State Department Report on Human Rights Practices in Albania continue to express the concerns stated above.

The AAO also finds that upon relocation the applicant's spouse would suffer extreme hardship. The record indicates that the applicant attempted to relocate to Albania, but that as a consequence of hardship she experienced there, she returned to the United States. In addition, country reports confirm that the economic conditions and the discrimination against women would make it hard for the applicant's spouse to find employment. Furthermore, given the applicant's spouse's family ties to the United States, her mother's current medical condition and her current mental health condition, the applicant's spouse would suffer extreme hardship as a result of relocating to Albania.

Given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, the AAO finds that the applicant has established that his wife would suffer extreme hardship if his waiver of inadmissibility is denied.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of 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).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service

in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. “ *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant’s misrepresentation in an attempt to gain entry into the United States, his unlawful presence in the United States and his unauthorized employment in the United States. The favorable factors in the present case are the extreme hardship to his U.S. citizen wife if he is denied a waiver of inadmissibility; the applicant’s financial support of his wife while living in the United States; and the applicant’s lack of a criminal record or offense. The applicant’s spouse also states that the applicant was a great emotional and spiritual support for her and worked to support her while she was in school. *Spouse’s Statement*, dated October 31, 2008.

In her decision, the officer-in-charge cites to *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> Cir. 1991), where the court held that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9<sup>th</sup> Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5<sup>th</sup> Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien’s possible deportation was proper.

The AAO notes that the applicant and his spouse were married in April 2005 and that the applicant states that at the time she was not aware of the applicant’s removal proceedings. *Spouse’s Statement*, dated October 31, 2008. Furthermore, although the courts have said the equity of a marriage and the weight given to any hardship to a spouse is diminished if the parties married after the commencement of deportation proceedings, the courts have not said that these equities are not to be considered. Thus, considering the diminished weight equities of marriage to a U.S. citizen spouse and extreme hardship to the spouse, in addition to the other equities stated above, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal of the applicant’s Form I-601 is sustained.

The AAO also finds that the appeal of the applicant’s Form I-212 is sustained.

Section 212(a)(9) of the Act, states, in pertinent part:

(A) Certain alien previously removed.-

. . . .

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

The applicant was ordered removed on November 28, 2003 and is seeking admission within ten years of the date of his departure on November 1, 2005. Thus, he is inadmissible under Section 212(a)(9)(A)(ii) of the Act. However, as the applicant's Form I-601 requires the same weighing of discretionary factors as the applicant's Form I-212, the AAO finds that the appeal of the applicant's Form I-212 is sustained.

In proceedings for an application for waiver of grounds of inadmissibility under sections 212(i) and section 212(a)(9)(B)(v) of the Act and in proceedings for an application for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal of the Form I-601 and the appeal of the Form I-212 will be sustained.

**ORDER:** The appeal is sustained.