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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

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 11 2011

IN RE: [redacted]

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)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

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

Thank you,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The applicant is a native and citizen of Pakistan who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and again seeking admission within ten years of his last departure from the United States. The applicant is the spouse of a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his family.

In a decision dated July 17, 2008, the Acting Center Director found that the applicant failed to establish that his qualifying relative would experience extreme hardship as a consequence of his inadmissibility. The application was denied accordingly. *See Decision of the Acting Center Director* dated July 17, 2008.

On appeal, the applicant's attorney provided a brief. In the brief, the applicant's attorney detailed the hardships that the qualifying spouse is facing as a result of her separation from the applicant. The attorney asserts that the qualifying spouse is encountering emotional, psychological, financial and medical hardships due to her husband's absence.

The record contains the original Application for Waiver of Grounds of Inadmissibility (Form I-601), the Notice of Appeal (Form I-290B), an appeal brief, affidavits from the qualifying spouse and the applicant, photographs of the applicant, the qualifying spouse and their children, naturalization certificates for the qualifying spouse and family members, birth certificates for the applicant's children, letters from medical professionals, a psychological evaluation, tax returns for 2007, some banking documentation, a pay stub and a letter from the applicant's employer in Canada, documents relating to the applicant's immigration case in Canada, a reference letter for the applicant, a letter from the applicant's congregation indicating membership, a letter from the qualifying spouse's employer, a lease for the qualifying spouse's residence and country condition materials. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. The applicant's wife is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-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 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 applicant's qualifying relative in this case is his wife, who is a United States citizen.

The record indicates that the applicant entered the United States without inspection in or about 1995, and departed on April 17, 2003 pursuant to an order of voluntary departure. The applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until April 17, 2003, a period in excess of one year. In applying for an immigrant visa, the applicant is seeking admission within ten years of his departure from the United States. The applicant has not disputed his inadmissibility. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for having been unlawfully present in the United States for a period of more than one year.

While the applicant's attorney does not dispute the applicant's inadmissibility, the attorney contends that, because the underlying application is for a nonimmigrant visa, use of the "extreme hardship" standard contained in the statutory waiver provision applicable to immigrants is inappropriate. Counsel contends that the relevant statutory provision is INA § 212(d)(3), which provides:

> (3) Except as provided in the subsection, an alien
>
> > (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) . . . may, after approval by the Attorney General [now Secretary of Homeland Security (DHS Secretary)] of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the [DHS Secretary] . . ..

8 U.S.C. § 1182(d)(3). The BIA has held:

> In deciding whether or not to grant an application under section 212(d)(3)(B), there are essentially three factors which we weigh together. The first is the risk of harm to society if the applicant is admitted. The second is the seriousness of the applicant's immigration law, or criminal law, violations, if any. The third factor is the nature of the applicant's reasons for wishing to enter the United States.

Matter of Hranka, 16 I&N Dec. 491, 492 (BIA 1978). The applicant's attorney also contends that the standard enunciated in this precedent decision is the proper standard for determining whether the applicant is eligible for a waiver of inadmissibility under INA § 212(a)(9)(B)(II). As support for this contention, the attorney cites to various portions of the Department of State Foreign Affairs Manual (FAM), finding that K visa applicants need only apply for a waiver of inadmissibility as a nonimmigrant under 212(d)(3). However, there are regulations directly applying to inadmissibility waivers for K visa applicants. The Department of State regulation provides as follows:

> § 41.81 Fiancé(e) or spouse of a U.S. citizen and derivative children.
>
> . . .
>
> > (b) Spouse. An alien is classifiable as a nonimmigrant spouse under INA 101(a)(15)(K)(ii) when all of the following requirements are met:
> >
> > > (1) The consular officer is satisfied that the alien is qualified under that provision and the consular officer has received a petition approved by the INS pursuant to INA 214(p)(1), that was filed by the U.S. citizen spouse of the alien in the United States.
> > >
> > > . . .

> (4) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, *including the requirements of paragraph (d)* of this section.
>
> . . .
>
> (d) *Eligibility as an immigrant required.* The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under paragraphs (a), (b) or (c) of this section *as if the alien were an applicant for an immigrant visa*, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

22 C.F.R. § 41.81 (emphasis added) (amended by 66 Fed. Reg. 19393, Apr. 16, 2001). The related USCIS provision is 8 C.F.R. § 212.7(a)(1), cited *supra*, specifically providing that K visa applicants shall file the same inadmissibility waiver as immigrant visa applicants. 8 C.F.R. § 212.7(a)(1)(66 Fed. Reg. 42587, Aug. 14, 2001). The supplemental information published in the Federal Register along with this amendment to 212.7(a)(1) stated:

> Although the new K-3/K-4 is a nonimmigrant classification, the alien spouse will still be required to meet certain State Department requirements and regulations as though they [sic] were applying for an immigrant visa. . . . Although entering as nonimmigrants, these aliens plan to ultimately stay in the United States permanently. . . . [A]pplicants for the new K-3/K-4 classification are subject to section 212(a)(9)(B) of the Act. . . . [I]n order to ensure that the K-3/K-4 nonimmigrants have the opportunity to apply for the same waiver provisions as do the K1/K-2's, 8 C.F.R. 212.7 is amended to include them.

66 Fed. Reg. 42587 (August 14, 2001). The requirement that the consular officer determine a K nonimmigrant visa applicant's eligibility as an immigrant "insofar as practicable," as stated in 22 C.F.R. § 41.81(d), is met by the provision in the USCIS regulation requiring the K nonimmigrant visa applicant to apply for a waiver under the provisions related to immigrant visas. If USCIS were to approve a Form I-601 waiver application, the K nonimmigrant would no longer be inadmissible, and so would not need the benefit of INA § 212(d)(3).

The visa and waiver application process established by regulation ensures that the Department of Homeland Security will not admit to the United States, even temporarily, an individual who is ineligible to fulfill the purpose of his or her admission. Further, the immigration process for eligible individuals is streamlined, in that, since under 8 C.F.R. § 212.7(a)(4) the waiver of inadmissibility is valid indefinitely, the alien's eventual application for adjustment of status will

be adjudicated in the United States in light of the already-approved waiver of any identified inadmissibility grounds.

Finally, although 8 C.F.R. § 212.3, the USCIS regulation governing waivers under INA § 212(d)(3), does not explicitly preclude a K nonimmigrant visa applicant from seeking relief under INA § 212(d)(3), whether to grant this relief is a matter entrusted to the discretion of the Secretary of Homeland Security, upon the recommendation of the Secretary of State. The Administrative Appeals Office concludes that 8 C.F.R. § 212.7(a)(1), by requiring the K nonimmigrant to seek a waiver on the same terms as an immigrant visa applicant, must be seen as precluding USCIS from exercising the discretion under INA § 212(d)(3) in the applicant's favor. The supplemental information cited above, 66 Fed. Reg. 42587, clearly supports this conclusion. Further, as an alternative ground for this decision, the AAO concludes that, even if 212.7(a)(1) does not actually *preclude* granting relief under INA § 212(d)(3) of the Act, it would not be an appropriate exercise of discretion to grant relief under INA § 212(d)(3) of the Act to an alien who does not intend his sojourn in the United States to be temporary.

A waiver of the bar to admission under section 212(a)(9)(B)(v) of the Act is dependent first upon a showing that the bar imposes extreme hardship on a qualifying relative of the applicant. The AAO notes that extreme hardship to the applicant's wife must be established in the event that she relocates to Pakistan and in the event that she remains in the United States, as she is not required to reside outside 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 documentation provided which specifically relates to the qualifying spouse's hardship includes an appeal brief, affidavits from the qualifying spouse and the applicant, naturalization certificates for family members, letters from medical professionals, a psychological evaluation, tax returns for 2007, some banking documentation, a pay stub and a letter from the applicant's employer in Canada, a letter from the qualifying spouse's employer, a lease for the qualifying spouse's residence and country condition materials. The entire record was reviewed and considered in rendering a decision on the appeal.

As aforementioned, the applicant's attorney detailed the hardships that the qualifying spouse is facing as a result of her separation from the applicant. The attorney asserts that the qualifying spouse is encountering emotional, psychological, financial and medical hardships due to her husband's absence.

The AAO finds that the qualifying spouse is suffering extreme hardship as a consequence of being separated from the applicant. The applicant's attorney contends that she is encountering emotional and psychological hardships as a result of her separation from the applicant. The record contains a psychological evaluation, letters from medical professionals and an affidavit from the qualifying spouse. This evidence confirms the severity of her depression due to the applicant's absence. In addition, the psychological evaluation explains that the qualifying spouse has had a history of psychological issues, such as depression, which began prior to her separation from the applicant. If the applicant is unable to return to the United States due to his inadmissibility, the psychologist finds that the qualifying spouse may "require hospitalization in order to protect her

from acting on her suicidal ideation." The record also contains verification of her medical issues including chronic hyperthyroidism and sinus allergies. Moreover, the applicant's attorney and the qualifying spouse assert that the qualifying spouse is suffering financially. To support these assertions the applicant submitted tax returns for 2007, some banking documentation, a letter from the qualifying spouse's employer, and a lease for the qualifying spouse's residence. This evidence confirmed that the applicant's spouse is suffering financially. In addition, the qualifying spouse's affidavit further details her financial struggles. She indicates that she and her daughters "live in a very small one bedroom apartment where [they] share the same bed" and that she "can barely make ends meet and every single day is a great financial and emotional struggle." Moreover, the qualifying spouse explains her struggles as a single parent in raising two young children. The psychological evaluation also notes that the qualifying spouse, who lost her own father as a young child, is also suffering emotional issues because she does not want her own children to be raised with only one parent. The applicant provided sufficient evidence to demonstrate that his qualifying spouse would suffer extreme hardship should she remain in the United States without the applicant.

The applicant has also demonstrated that his qualifying relative would suffer extreme hardship in the event that she relocated to Pakistan. In her affidavit, the qualifying spouse asserts that the conditions in Pakistan are "extremely unstable, and dangerous, particularly for Americans." The record contains country condition information to support her assertions about her safety concerns regarding living in Pakistan. The applicant's attorney also provided country condition information discussing the general problems with the applicant's home country including its political, economic and human rights issues. Moreover, the qualifying spouse contends that the applicant is unemployed in Pakistan and is unable to find work due to his disability. The record contains country condition materials that suggest the applicant may be finding it difficult to find work due to his disability. A letter confirming the applicant's disability, caused by [redacted] was also submitted. Therefore, if the qualifying spouse were to relocate to Pakistan and the applicant is still unemployed, she may face financial difficulty and other hardships as a result. As such, the AAO concludes that were the applicant unable to reside in the United States due to his inadmissibility, his qualifying spouse would suffer extreme hardship if she returned to Pakistan to be with him.

Considered in the aggregate, the applicant has established that her husband would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this

cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra,* is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant must bring forward to establish that she merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in this matter are the extreme hardships the applicant's United States citizen spouse would face if the applicant is not granted this waiver, regardless of whether she accompanied the applicant or remained in the United States and his apparent lack of a criminal record. The unfavorable factors in this matter are the applicant's unlawful presence in the United States for a period of more than one year.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.