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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 and Immigration Services

[redacted]

H6

DATE: JUL 17 2012 OFFICE: GUATEMALA CITY, GUATEMALA FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and 1182(a)(9)(B)(v)

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 waiver application was denied by the Field Office Director, Guatemala City, Guatemala and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guatemala who 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 committed a crime involving moral turpitude and under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having accrued more than one year of unlawful presence in the United States and seeking admission within ten years of his last departure. The applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility pursuant to sections 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h) and 212(a)(9)(B)(v), in order to reside in the United States.

The Field Office Director found that the applicant had failed to establish that his inadmissibility would result in extreme hardship for his U.S. citizen spouse and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated April 26, 2010.

On appeal, counsel asserts that United States Citizenship and Immigration Services (USCIS) erred as a matter of fact and law in denying the waiver application, failing to give sufficient weight to the evidence submitted or to assess the hardship factors in the aggregate. Counsel also contends that the applicant is deserving of a favorable exercise of discretion, as evidenced by an immigration judge's grant of voluntary departure in his 2006 immigration proceedings. *Form I-290B, Notice of Appeal or Motion*, dated May 20, 2010.

The record of evidence includes, but is not limited to: counsel's brief on appeal; statements from the applicant and his spouse;[1] a medical statement relating to the applicant's spouse; copies of medical prescriptions written for the applicant's spouse; online articles on medications prescribed for the applicant's spouse; country conditions information on Guatemala; and court records relating to the applicant's arrests and convictions. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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.

[1] The AAO notes that one of the statements from the applicant is in Spanish and is not accompanied by an English-language translation, as required by the regulation at 8 C.F.R. § 103.2(b)(3). Accordingly, the AAO will not consider this statement in our determination of extreme hardship.

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....
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> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. The methodology adopted by the Attorney General consists of a three-pronged approach. 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. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). If a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage or "modified categorical" inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. 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. Finally, if review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709.

In her decision, the Field Office Director noted that a December 15, 2001 Statement of Probable Cause included in the record indicated that the applicant had admitted to a police officer that he had violated Massachusetts General Laws Annotated (MGLA) 272 § 53A by having sex for a fee. Based on this admission, she found the applicant to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act even though the applicant was never convicted of this offense. The Field Office Director also noted that, in 2002, an assault victim had identified the applicant as one of her assailants and that, as a result, he had been charged with Indecent Assault on Child 14 or Over, MGLA 265 §1, although this charge was subsequently dismissed.

While the Field Office Director correctly stated that inadmissibility under section 212(a)(2)(A)(i)(I) of the Act may be found on the basis of an alien's admission to having committed a crime involving

moral turpitude or having committed acts that constitute the elements of a such a crime, she erred in finding the December 15, 2001 Statement of Probable Cause to establish that the applicant had admitted to having committed a crime involving moral turpitude.

The Board of Immigration Appeals (BIA) has established rules for establishing when a person who has not been convicted of a crime involving moral turpitude, is, nevertheless, inadmissible for having admitted to having committed a crime involving moral turpitude or acts that constitute the essential elements of such a crime. *See Matter of P--*, I&N Dec. 33 (BIA 1941); *Matter of J--*, 2 I&N Dec. 285 (BIA 1945); *Matter of K--*, 7 I&N Dec. 594 (BIA 1957). To have an admission qualify, the record must establish that certain procedural requirements were met: the admitted conduct must constitute the essential elements of a crime in the jurisdiction in which it occurred; the applicant must have been provided with the definition and essential elements of the crime prior to his admission; the applicant must admit the conduct constituting the essential elements of the crime and that he committed the offense; and the applicant's admission must be voluntary. *Id.*

These requirements have been incorporated into the Foreign Affairs Manual (FAM) of the Department of State for use by consular officers overseas in determining inadmissibility and are found in section 40.21(a), Note 5.1 of Volume 9 of the FAM, which states, in pertinent part:

> If it is necessary to question an alien for the purpose of determining whether the alien is ineligible to receive a visa as a person who has admitted the commission of the essential elements of a crime involving moral turpitude, the consular officer shall make the verbatim transcript of the proceedings under oath a part of the record. In eliciting admissions from visa applicants concerning the commission of criminal offenses, consular officers shall observe carefully the following rules of procedure:
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> (1) The consular officer shall give the applicant a full explanation of the purpose of the questioning. The applicant shall then be placed under oath and the proceedings shall be recorded verbatim.
>
> (2) The crime, which the alien has admitted, must appear to constitute moral turpitude based on the statute and statements from the alien. It is not necessary for the alien to admit that the crime involves moral turpitude.
>
> (3) Before the actual questioning, the consular officer shall give the applicant an adequate definition of the crime, including all essential elements. The consular officer must explain the definition to the applicant in terms he or she understands, making certain it conforms to the law of the jurisdiction where the offense is alleged to have been committed.
>
> (4) The applicant must then admit all the factual elements which constituted the crime.
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> (5) The applicant's admission of the crime must be explicit, unequivocal and unqualified.

The applicant in the present case was not convicted in any criminal proceeding of Sexual Conduct for a Fee, MGLA 272 § 53A, and to find him to have admitted to having violated this statute requires the process noted above. The record, however, does not reflect that the procedures for establishing a valid admission were followed in obtaining the applicant's December 15, 2001 admission. Therefore, the AAO does not find the December 15, 2001 Statement of Probable Cause to establish the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

We do, however, find the record to indicate that, on September 16, 2001, the applicant either pled guilty to or admitted to sufficient facts to support a finding of guilt on the charges of Disorderly Conduct, MGLA 272 §53 and Resisting Arrest, MGLA 268 §32B. The record also indicates that the applicant was arrested on April 2, 2006 on a charge of Simple Assault or Battery, MGLA 265 § 13A, but does not include the disposition for this offense.

The record contains no other information concerning these crimes, and as such, we will not determine whether or not they constitute crimes involving moral turpitude. We note that the burden of proof is on the applicant. Should they be crimes involving moral turpitude, it is possible also that they are violent or dangerous crimes, subjecting the applicant to the heightened discretionary standard found at 8 C.F.R. § 212.7(d). Nevertheless, as the applicant has been found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, and we find that he has not demonstrated extreme hardship to a qualifying relative to qualify for a waiver of that inadmissibility, we need not further address possible 212(a)(2)(A)(i)(I) inadmissibility at this time.

Section 212(a)(9)(B) states in pertinent part:

> (B) Aliens Unlawfully Present.-
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> > (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.

The record reflects that the applicant entered the United States without inspection in 1998 and remained until August 9, 2006, when he departed under a grant of voluntary departure. The applicant accrued unlawful presence from the date of his unlawful entry in 1998 until July 14, 2006, the date on which he was granted 30 days voluntary departure by an immigration judge. As the applicant's period of unlawful presence in the United States lasted at least one year and he is seeking admission within ten years of his 2006 departure, he is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act and must obtain a waiver under section 212(a)(9)(B)(v) of the Act.

Section 212(a)(9)(B)(v) states:

> 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. Hardship to the applicant or other family members can be considered only to the extent that it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse 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).

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 BIA 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 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.

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, the AAO considers the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

We now turn to a consideration of the record and the extent to which it establishes that the applicant's inadmissibility would result in extreme hardship to a qualifying relative.

On appeal, counsel asserts that the applicant's spouse has hearing and visual impairments, and requires special services as a result. He states that the applicant's spouse has been hearing-impaired her entire life, that she has also been diagnosed with glaucoma and that she recently underwent a corneal transplant and cataract repair. While counsel indicates that the applicant's spouse is employed, he reports that she is living with her parents and that she would be able to attain financial and emotional independence with the applicant by her side. He also contends that because of her hearing disability, the applicant's spouse requires the use of a special telephone system that is not available to the applicant in the town where he resides and, therefore, cannot even talk to the applicant in Guatemala. Counsel further maintains that the applicant's spouse's vision problems will also severely hamper even the exchange of pictures with the applicant.

In July 17, 2008 and May 20, 2010 statements, the applicant's spouse asserts that she is employed by the [redacted] earns $16.56 an hour and receives health insurance. She states that she and the applicant had a little apartment, but that she is again living with her parents as she does not want to live alone. She contends that the applicant's return to the United States would make it possible for her to be independent and to be financially self-sufficient. She states that her parents would feel more secure knowing that she is able to live independently.

In support of the preceding claims, the record contains prescriptions for Lotemax and Timolol, which printouts from [redacted] indicate are used in reducing swelling of the eye after surgery and in the treatment of glaucoma. A July 18, 2008 medical note, written by [redacted] states that the applicant's spouse is deaf and has a history of depression.

While the AAO finds the medical evidence that has been submitted for the record to establish that the applicant's spouse is hearing-impaired, is being treated for glaucoma and has a history of depression, we do not find this evidence sufficient to establish that she would experience extreme hardship if the applicant's waiver application is denied. The record does not demonstrate that the applicant's spouse's medical conditions prevent her from meeting her daily responsibilities or that

she is dependent on the applicant for any of her hearing or vision needs. Neither does it establish her emotional state in the applicant's absence. Although July 18, 2008 statement indicates that the applicant's spouse has a history of depression, she does not address the severity or nature of the applicant's spouse's depression or indicate how it affects the applicant's spouse's ability to function, including her job performance. Further, although we note that the applicant's spouse is being treated for glaucoma, the applicant has submitted no medical statement or record that would establish the severity of his spouse's glaucoma or the impact it has had on her vision.

The AAO acknowledges counsel's and the applicant's spouse's claims that the applicant's presence would allow her to achieve financial independence. We do not, however, find the record to indicate that the applicant's spouse is not currently capable of supporting herself, although she may live with her parents. Although the record contains no financial documentation to establish the applicant's spouse's financial status, she states that she earns $16.56 an hour, which translates into approximately $2,600 a month or nearly $31,800 a year, an income level that is significantly higher than the 2010 federal poverty guideline of $10,830 for a family of one. Therefore, absent additional evidence, the record does not demonstrate that the applicant is necessary to his spouse's financial independence. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Having reviewed the record, the AAO acknowledges that the applicant's spouse would suffer hardship as a result of her continued separation from the applicant, including that created by the difficulties of communicating with the applicant in Guatemala. We do not, however, find sufficient evidence to establish that the claimed hardships, even when considered in the aggregate, would be beyond those normally created by the separation of spouses. While the record demonstrates that the applicant is hearing-impaired and has glaucoma, it does not document that such conditions make her dependent financially, emotionally or physically on the applicant. Therefore, the applicant has not established that his spouse would suffer extreme hardship if the waiver application is denied and she remains in the United States.

On appeal, counsel asserts that the applicant's spouse would experience extreme hardship in Guatemala as persons with hearing impairments are often marginalized and have limited access to social services and employment. He maintains that although laws exist to protect and provide services for those who are disabled, these policies have not been enforced. Counsel also contends that the applicant's spouse has no family ties outside the United States, that she would have difficulty obtaining employment and that any employment she might obtain would be severely underpaid as a result of her physical impairment. He states that Guatemala is a country with endemic poverty, dysfunctional law enforcement, one of the highest crime rates in Latin America, limited medical care outside Guatemala City, and serious shortages of basic medicine and equipment in its public hospitals.

In her July 18, 2008 and May 20, 2010 statements, the applicant's spouse maintains that she feels safe in her job and does not feel that she could ever do any other. She states that she would have

tremendous difficulties in communicating in Guatemala because of her hearing and speech disabilities, and because she does not read or understand Spanish. She also contends that without communication skills, she could not do the type of job she currently performs. The applicant's spouse further asserts that, while visiting the applicant, she has found no services in Guatemala for individuals who are hearing-impaired and that she is, therefore, unable to communicate with her family while in Guatemala. The applicant's spouse also asserts that unemployment is high in Guatemala, as is the crime rate. She states that she currently receives medical supervision from a health center that understands her history and that provides her with hearing-impaired assistance.

The applicant's spouse reports that she has recently had a corneal transplant and cataract repair. She also states that she has been diagnosed with glaucoma and must use eye drops if she is to retain her vision. As a result, the applicant's spouse asserts, she needs access to medical care but that, in Guatemala, such care is three hours away from where the applicant lives. She also maintains that she needs a signing interpreter for all medical visits. The applicant's spouse further states that she has struggled with depression and does not believe she could live in Guatemala.

The applicant has submitted a range of country conditions information to establish conditions in Guatemala, including the following materials published by the U.S. Department of State: Background Note: Guatemala, dated November 2005; the sections on Guatemala from the 2005 and 2009 Country Reports on Human Rights Practices; and a Country Specific Information, dated April 6, 2010. Also provided for the record are a 2008 Sociolingistic Survey Report of the Deaf Community of Guatemala by [redacted] and [redacted] and a USCIS report on disabled persons in Guatemala, entitled "Guatemala: The Situation Facing the Disabled, Particularly Persons with Speech and Hearing Loss." The submitted materials establish that those with hearing impairments or other disabilities face significant difficulties in Guatemalan society.

We can, however, 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). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

The record does not demonstrate that a qualifying relative would suffer extreme hardship and the applicant has, therefore, failed to establish eligibility for a waiver under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion and the AAO will not address counsel's assertions regarding the exercise of discretion in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.