



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **APR 03 2013**

OFFICE: PHILADELPHIA, PA

File: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

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

If you believe the 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Poland who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. He is the beneficiary of an approved Form I-130 Petition for Alien Relative filed on his behalf by his U.S. citizen spouse and a Form I-360 Petition for Widow(er) filed on his own behalf following his spouse's death. The applicant seeks a waiver of inadmissibility in order to remain in the United States.

The field office director denied the Form I-601 waiver application as a matter of law, finding that the applicant is ineligible to adjust his status to that of a lawful permanent resident under section 245(a) of the Act based on his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. See *Decision of the Field Office Director*, dated September 16, 2011.

On appeal, counsel for the applicant asserts that the applicant: is eligible as a self-petitioning widower to adjust his status; is eligible for a waiver (without reference to hardship) because he qualifies for classification under section 204(a)(1)(A) of the Act; remains eligible for a waiver under section 212(h)(1)(A)(i) of the Act because the offense rendering him inadmissible occurred more than 15 years before he applied to adjust his status; and has shown that his admission to the United States would not be contrary to the national welfare, safety or security of the United States and has demonstrated that he has been rehabilitated. See *Form I-290B, Notice of Appeal or Motion*, received October 14, 2011.

The record contains, but is not limited to: Form I-290B and counsel's statement thereon; counsel's memorandum in support of appeal; various immigration applications and petitions; an affidavit and a statement from the applicant; letters of character reference and support; documents related to the applicant's business; income tax returns; country conditions documents concerning Poland; law-related print-outs from a text book and the internet; and documents related to the applicant's criminal record and history. The entire record was reviewed and considered in rendering this decision.

The AAO will first consider whether the applicant, a self-petitioning widower of a U.S. citizen, may file a waiver application under section 212(h) of the Act in the absence of a qualifying relative. The applicant is the beneficiary of an approved Form I-130 Petition for Alien Relative filed on his behalf by his then U.S. citizen spouse who has since passed away. The record does not demonstrate that there are any deficiencies undermining the approved Form I-130 which served as the basis for filing the applicant's first Form I-485 application in June 1997. The record shows that the applicant filed a Form I-360 Petition for Amerasian, Widow(er), or Special Immigrant on May 24, 2010, less than two years after the death of his spouse on July 9, 2009. Thus, the record does not demonstrate that there are any deficiencies undermining the approved Form I-360 which serves as the basis for filing his current Form I-485 and I-601 applications. It is noted that under section 204(2)(i)(1)(iv) of the Act, the filing of a Form I-360 self-petition is

not necessary where the applicant is already the beneficiary, as he is here, of an approved Form I-130 petition filed on his behalf by his U.S. citizen spouse as the I-130 automatically converts to an I-360 widow(er)'s petition upon the death of the U.S. citizen spouse.

The instructions for Form I-601 state that a waiver application may be filed, by among other applicants, "any applicant for adjustment of status" who seeks a waiver of grounds of inadmissibility of "certain criminal grounds" under section 212(a)(2) of the Act, including "a crime involving moral turpitude (other than a purely political offense)." Thus, the present applicant may indeed file an application for a waiver under section 212(h) of the Act. However, it is noted that with the application the applicant must establish either: (1) he is inadmissible only because of his participation in prostitution...; or (2) at least 15 years have passed since the activity that makes him inadmissible, and he has been rehabilitated, and his admission to the United States will not be contrary to the national welfare, safety, or security of the United States; or (3) his qualifying U.S. citizen or lawful permanent relative spouse, son, daughter or parent would experience extreme hardship if he is denied admission; or (4) he is an approved VAWA self-petitioner. As noted by the field office director, while the applicant is the beneficiary of an approved I-360 self-petition, he has neither sought nor been approved for classification as a VAWA self-petitioner. Counsel contends that the applicant is eligible for a waiver (without reference to hardship) because he qualifies for classification under section 204(a)(1)(A) of the Act. However, Sec. 204(a)(1)(A) of the Act provides:

(iii) (I) An alien who is described in subclause (II) may file a petition with the Attorney General [Secretary] under this clause for classification of the alien (and any child of the alien) if the alien demonstrates to the Attorney General [Secretary] that--

(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

(II) For purposes of subclause (I), an alien described in this subclause is an alien--

(aa)(AA) who is the spouse of a citizen of the United States;

The applicant did not file his I-360 petition as the abused spouse of a U.S. citizen under section 204(a)(1)(A)(iii) of the Act, but rather as a widower of a U.S. citizen under section 204(a)(1)(A)(ii). In the absence of his classification as an approved VAWA self-petitioner under 204(a)(1)(A)(iii) of the Act, the applicant must establish eligibility under one of the other 212(h) subsections described. As the applicant is not inadmissible only for participation in prostitution and is not an approved VAWA self-petitioner, his potential eligibility rests on establishing either that he has a qualifying U.S. citizen or lawful permanent resident spouse, son, daughter or parent

who would experience extreme hardship if he is denied admission, or that more than fifteen years have passed since the activity that makes him inadmissible, he has been rehabilitated and his admission to the United States will not be contrary to the national welfare, safety, or security of the United States. Counsel asserts that the field office director erred in finding that the applicant is ineligible "as an 'immediate relative' pursuant to 201(b)(2)(A)(i)." The field office director made no such finding and the applicant's classification as an "immediate relative" under section 201(b)(2)(A)(i) is not the equivalent of a "qualifying relative" under section 212(h)(2)(B). Counsel offers no case law or other evidence equating the two and the AAO finds his assertion unpersuasive. The AAO finds that the applicant is eligible to file a waiver application under section 212(h) in conjunction with his adjustment of status application based on the approved underlying Forms I-130 and I-360 subject to the limitations described.

The AAO will next consider the applicant's inadmissibility and his eligibility for a waiver thereof. 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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary

to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

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

(Citations omitted.)

In determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, 582 F.3d 462 (3<sup>rd</sup> Cir. 2009), makes a categorical inquiry, which consists of looking “to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute.” *Id.* at 465-66. The “inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute “fits” within the requirements of a CIMT.” *Id.* at 470.

However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.* However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record shows that the applicant pled guilty on December 1, 1998 and was convicted of Retail Theft, in violation of 18 PA C.S. § 3929(A)(1), for his conduct on or about November 11, 1995. As noted by the field office director, the applicant was additionally charged with three counts of Criminal Conspiracy Engaging, in violation of 18 PA C.S. § 903(A)(1), and one count of Receiving Stolen Property, in violation of 18 PA C.S. § 3925(A) (a categorical crime involving moral

turpitude), and was permitted to enter the Accelerated Rehabilitative Disposition (ARD) program. The record shows that the court revoked the applicant's participation in ARD on December 1, 1998. While the two other charges were *nolle prossed*, the applicant pled guilty to Retail Theft and was sentenced to probation and assessed a monetary fine of \$413.75 which he failed to pay and included in a chapter 7 bankruptcy petition. As also noted by the field office director, the applicant failed to submit as required an accurate final disposition for the November 1995 arrest that led to his December 1998 conviction, instead providing only ARD documentation. Rather than addressing this deficiency on appeal by submitting an explanation as to the applicant's motives and/or documentary evidence demonstrating that the omission was not an intentional attempt to conceal a conviction for a crime involving moral turpitude, counsel attempts to shift the applicant's burden stating: "DHS claims that the applicant did not complete this ARD program" and "DHS' conclusion that the applicant was even convicted of a crime involving moral turpitude is without substantial support in the record." The AAO finds counsel's assertions unpersuasive, and he has not answered the identified evidentiary deficiency in the record.

First, it is a matter of court record that the applicant's ARD program participation was revoked and he did indeed plead guilty and was convicted on December 1, 1998 of Retail Theft in violation of 18 PA C.S. § 3929(A)(1). (See Court of Common Pleas of Montgomery County Criminal Docket Number [REDACTED]). Second, the burden is on the applicant alone to prove eligibility for a waiver under section 212(h) of the Act (See section 291 of the Act, 8 U.S.C. § 1361). And it is the applicant's responsibility to provide accurate documentary evidence of all final dispositions related to his criminal record.

PA C.S. § 3929. Retail theft.

(a) Offense defined.--A person is guilty of a retail theft if he:

(1) takes possession of, carries away, transfers or causes to be carried away or transferred any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof

Counsel correctly notes that 18 PA C.S. § 3929(A)(1) does not contain an element to permanently deprive the owner of property and the BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. See *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). Counsel fails to note, however, that the BIA has held that violation of the very statute under which the present applicant has been convicted is in fact a crime involving moral turpitude. In *In re Jurado-Delgado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA found that violation of 18 PA C.S. § 3929(A)(1) involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. "It is well settled that theft or larceny offenses involve moral turpitude. See, e.g., *Giammario v. Hurney*, 311 F.2d 285, 286 (3d Cir. 1962); *Matter of De La Nues*, 18 I&N Dec. 140, 145 (BIA 1981); *Matter of Westman*, 17 I&N Dec. 50, 51 (BIA 1979).

In determining whether there was an intention to permanently deprive the owner of his property, we have found it appropriate to consider the nature and circumstances surrounding a theft offense. *See, e.g., Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973); *Matter of S-*, 5 I&N Dec. 552, 555 (BIA 1953); *Matter of M-*, 2 I&N Dec. 686, 688 (C.O., BIA 1953); *Matter of F-*, 2 I&N Dec. 517, 520 (C.O., BIA 1946); *Matter of G-*, 2 I&N Dec. 235, 238 (BIA 1945). We have also found that similar offenses involving theft of goods from a retail establishment are crimes involving moral turpitude. *See, e.g., Matter of Neely and Whyllie*, 11 I&N Dec. 864 (BIA 1966); *Matter of P-*, 4 I&N Dec. 252 (Acting A.G., BIA 1951); *Matter of W-*, 2 I&N Dec. 795 (C.O., BIA 1947). A conviction for retail theft under Pennsylvania law requires proof that the person took merchandise offered for sale by a store without paying for it and with the intention of depriving the store owner of the goods. Under these circumstances, we find that the nature of the offense is such that it is reasonable to assume that the taking is with the intention of retaining the merchandise permanently. *Matter of Grazley, supra*, at 333; *see also Matter of V-Z-S-*, 22 I&N Dec. 1338, 1350 (BIA 2000) (noting that "the state courts have repeatedly concluded that this specific intent [to permanently deprive] can be *presumed* whenever one unlawfully takes, or attempts to take, the property of another"). Consequently, we conclude that the respondent's 1991 conviction for retail theft is for a crime involving moral turpitude." *Id.* The BIA's conclusion in *Jurado-Delgado* is applicable to the present applicant's case.

In applying the modified categorical approach described in *Silva-Trevino* 24 I&N Dec. at 698-699, 703-704, 708, it is noted that 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. The record of conviction in the present case clearly shows that the applicant engaged in retail theft with the intention of permanently taking property from the owner. The probable cause statement shows that the applicant was observed selecting a black DKNY dress and a black DKNY sweater with a total value of \$590, bagging these articles, and exiting the store without making any attempt to pay for the clothing taken. Based on the foregoing, the AAO finds that the applicant has been convicted of knowingly taking the property of another with the intent to permanently deprive that person of the property, a crime involving moral turpitude, and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant is not eligible for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act because the crime for which he was convicted is a first degree misdemeanor punishable by a term of more than one year. He requires a waiver under section 212(h) of the Act.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .

- (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

(b)(6)

- (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,
- (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; or

(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 [Secretary] 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 [Secretary], 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 applicant's most recent conviction for a crime involving moral turpitude occurred on December 1, 1998 as a result of his culpable conduct on November 11, 1995. As the applicant's culpable conduct occurred more than 15 years ago, he meets the threshold requirement for consideration under section 212(h)(1)(A)(i) of the Act. The applicant has not, however, established by a preponderance of the evidence that he has been rehabilitated.

As noted by the field office director, the applicant has an extensive history of contact with law enforcement officers due to criminal matters, spanning from at least 1994 to 2009 and involving incidents including allegations of assault and aggravated assault, multiple retail thefts, receiving stolen property, terroristic threats, sexual assault, recklessly endangering another person, driving under the influence of alcohol or a controlled substance, criminal restraint servitude, and false imprisonment. The AAO lacks adequate records of these incidents in order to determine the applicant's conduct that led to the charges. While these incidents do not serve as a further basis for inadmissibility, they call into question whether the applicant has rehabilitated himself since his act of retail theft for which he was convicted.

The applicant expresses no personal responsibility for his behavior and he has not provided sufficient explanation or evidence to show that he no longer has a propensity to engage in unlawful conduct. It is noted that the applicant's lengthy statement dated June 21, 2011 contains errors in recounting his contacts with law enforcement and he attributes all of his contacts to factors beyond his control including the behavior of others.

In his favor, 10 affidavits have been submitted on appeal in which different individuals have attested to the applicant's good moral character and domestic difficulties related to his late wife's alcoholism. [REDACTED] writes that the applicant was able to switch his life around after his spouse's death and has since opened a successful business. Online ratings posted at servicemagicpros.com from July 2006 to September 2011 have also been submitted and reflect favorably on the applicant and his work. The applicant states that he has continuously maintained employment in the United States and has paid taxes on his income. The record corroborates that the applicant filed income tax returns for tax years 2010 and 2011. It appears that with the exception of the incident on the day of his spouse's funeral in July 2009, the applicant has not been arrested since her death less than four years ago. However, there are far more troubling concerns which weigh unfavorably against the applicant than those that weigh favorably. These include the applicant's questionable veracity, his unwillingness to accept responsibility for his own conduct, his lengthy history of contacts with law enforcement and allegations of serious criminal activity spanning an approximately 15-year period, and whether he exhibits a propensity toward violence or driving under the influence of alcohol, thus placing the safety of others at risk. The applicant must establish by a preponderance of the evidence that he has been rehabilitated and that admitting him would not constitute a risk to the safety of others in the United States. At the present time, with the record as currently constituted, the applicant has failed to do so. Based on the foregoing, the applicant has not shown that he is eligible for a waiver under section 212(h)(1)(A) of the Act. A waiver under section 212(h)(1)(B) of the Act will still be considered.

A waiver of inadmissibility under section 212(h)(1)(B) 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, parent, son, or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. In the present case the applicant has not shown that he has a qualifying relative. The applicant's U.S. citizen spouse would have been a qualifying relative had the applicant filed a Form I-601 waiver application in conjunction with an I-485 adjustment of status application following the approval in April 1996 of the Form I-130 petition she filed on his behalf. Instead, the applicant filed only a Form I-485 in June 1997 on which he indicated at Part 3, Number 1(b) that he has never "been arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations." The record shows that by that date the applicant had already been arrested on at least three separate occasions (in September 1994 for simple assault, aggravated assault and recklessly endangering another person; in March 1995 for retail theft and receiving stolen property, and in November 1995 for retail theft, receiving stolen property and criminal conspiracy). In a letter dated March 12, 2004, the then interim district director, reminded the applicant that he was informed on June 27, 2003 to submit his fingerprints to USCIS for a criminal background check to be completed, and that he did not so submit. As a result, the applicant's Form I-485 was considered abandoned and denied pursuant to 8 C.F.R. § 103.2(b)(13). While a denial for abandonment may not be appealed, the letter explained that the applicant could file a motion to reopen. He did not. The applicant did not file for adjustment of status again until May 24, 2010, after his spouse's death, submitting a Form I-485 alone. This time the applicant acknowledged he had been arrested, but as noted in the field office director's

Notice of Intent to Deny, he did not comply with the requirement to bring to his interview certified dispositions of all his arrests. And while the applicant through counsel subsequently submitted some dispositions, he failed to provide USCIS with certified final dispositions for all of his arrests in the United States, most notably for his November 1995 arrest that resulted in his conviction for retail theft in December 1998 following the court's revocation of his participation in an ARD program and his entrance of a guilty plea. The applicant filed his first and only Form I-601 waiver application in August 2011, more than two years after his spouse's death.

The applicant's U.S. citizen spouse was deceased as of the date that he filed his Form I-601 application and no assertions have been made regarding any hardship that either separation from the applicant or relocation to Poland would have caused her. The record also does not show that the applicant has a lawful permanent resident or U.S. citizen parent or child whose hardship may serve as a basis for a waiver under section 212(h)(1)(B) of the Act. Thus, he has not shown that denial of the waiver application would result in extreme hardship to a qualifying relative and he is not eligible for a waiver under section 212(h)(1)(b) of the Act.

The applicant discusses his own hardship. However, hardship to the applicant himself is not a basis for a waiver application under section 212(h)(1)(B) of the Act, and as noted the applicant has not established the existence of a qualifying relative.

In conclusion, the AAO finds that the applicant has not shown that he is eligible for a waiver under section 212(h)(1)(A) of the Act because he has not established by a preponderance of the evidence that he has been rehabilitated and that admitting him would not constitute a risk to the safety of others in the United States. The applicant has not established that he has been classified as a VAWA self-petitioner under section 204(a)(1)(A)(iii) of the Act, and thus he is required to demonstrate hardship to a lawful permanent resident or U.S. citizen spouse, child or parent for a waiver under section 212(h)(1)(B) of the Act. As the applicant has failed to demonstrate that he has a qualifying relative, he has failed to establish extreme hardship thereto. Because the applicant is currently statutorily ineligible for a waiver under section 212(h) of the Act, no purpose would be served in determining whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.