

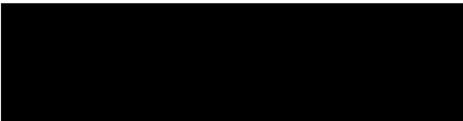
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals  
20 Massachusetts Ave., N.W. MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

htz



DATE: APR 25 2012

OFFICE: NEW YORK, NY

FILE: 

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
for Perry Rhew  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Colombia who was found to be inadmissible to the United States pursuant to section 212(a)(2)(D)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D)(i), for having engaged in prostitution within ten years of seeking adjustment of status. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The District Director concluded that the applicant did not have a qualifying relative on which to base a waiver request and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the District Director*, dated September 11, 2009.

On appeal, counsel asserts that the applicant is applying for a waiver of inadmissibility pursuant to section 212(h)(1)(A) of the Act, not section 212(h)(1)(B) of the Act, and that evidence of extreme hardship to a qualifying relative is therefore unnecessary. *Form I-290B, Notice of Appeal or Motion*, dated October 5, 2009.

The record of evidence includes, but is not limited to, counsel's brief; a statement from the applicant; letters from the [REDACTED] of the Universal Church of Spirituality, [REDACTED] of Latin Women of Action, Inc., and [REDACTED] discussing the applicant's rehabilitation; and court records relating to the applicant's convictions. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

The AAO acknowledges that a waiver for a 212(a)(2)(D)(i) inadmissibility is appropriately considered under section 212(h)(1)(A) of the Act, rather than 212(h)(1)(B). However, prior to engaging in any review of the applicant's eligibility for a 212(h)(1)(A) waiver, we will first consider the inadmissibility finding in this matter.

Section 212(a)(2)(D)(i) of the Act states:

(D) Prostitution and commercialized vice

Any alien who—

- (i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

....

is inadmissible.

The record reflects that the applicant has five convictions for prostitution in New York. On October 3, 1997, he pled guilty to prostitution, New York Penal Law (NYPL) Article 230.00, was conditionally discharged and required to perform five days of community service. On September 24, 1998, the applicant again pled guilty to prostitution, NYPL Article 230.00 and was again conditionally discharged and ordered to perform five days of community service. He pled guilty to prostitution for the third time on May 27, 2001, and was sentenced to time served. The applicant's fourth conviction under NYPL Article 230.00, based on a July 15, 2001 guilty plea, resulted in a five-day jail sentence. On April 8, 2004, the applicant pled guilty for a fifth time to prostitution, was conditionally discharged and given two days of community service.

At the time of the applicant's convictions, NYPL Article 230.00 provided:

A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.

Prostitution is a class B Misdemeanor.

In *People v. Costello*, 90 Misc.2d 431, 432, 395 N.Y.S.2d 139 (N.Y. Sup. 1977), the Supreme Court, New York County considered a conviction under NYPL Article 203.00, stating that:

The term "prostitution" itself has a commonly understood meaning, and the use of the term "fee" in the statutory definition is the key to that meaning. The legislature has enacted the section to prohibit commercial exploitation of sexual gratification. The methods of obtaining that gratification are as broad and varied as the term "sexual conduct," but the common understanding of the term "prostitution" involves the areas of sexual intercourse, deviate sexual intercourse, and masturbation. The many non-physical facets of sexual conduct are defined and regulated by other statutes (e. g., obscenity and exposure of a female).

In *People v. Hinzmann*, 177 Misc.2d 531, 677 N.Y.S.2d 440 (N.Y. City Crim. Ct., 1998), the Criminal Court noted that the purpose of Article 230 was "to prohibit the commercial exploitation of sexual gratification," and that "[t]he sexual conduct need not in fact be consummated; the offer or agreement to trade the sexual conduct with another person for a fee may be sufficient". *Id.* at 533. (See, Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law art 230, at 145 [1989].) The Criminal Court indicated that *Costello's* interpretation of the term "sexual conduct" has been followed by other courts, but that a more expansive interpretation of "sexual conduct" is warranted. *Id.* at 533-534. Thus, the Criminal Court held that the combination of "lap dancing" with the touching of naked breasts and buttocks is to be encompassed within the meaning of "sexual conduct." *Id.* The Court reached this conclusion by reasoning that:

[T]he defendants agreeing to sit on the officer's lap and "move around" while the officer would touch their naked breasts and buttocks were suggestive of conduct done to satisfy a sexual desire. This was not merely nude dancing, which generally is protected as expressive conduct under the First Amendment. . . . In addition, there are

sufficient allegations the defendants agreed to perform these acts in exchange for money. That is the essence of prostitution.

*Id.* at 534. The AAO also notes that for purposes of determining inadmissibility under section 212(a)(2)(D) of the Act, the term “prostitution” is defined by the U.S. Department of State as “engaging in promiscuous *sexual intercourse* for hire.” 22 C.F.R. § 40.24(b) (emphasis added). *See Kepilino v. Gonzales*, 454 F.3d 1057, 1061 (9<sup>th</sup> Cir. 2006).

We further observe that it has long been established that a finding of inadmissibility under section 212(a)(2)(D) of the Act requires a regular pattern of conduct, rather than isolated acts. *See Matter of T*, 6 I&N Dec. 474, 477 (BIA 1955) (“[T]he general rule is that to constitute ‘engaging in’ there must be substantial, continuous and regular, as distinguished from casual, single or isolated, acts.”); *see also Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 553-54 (BIA 2008); *Mirabal-Balon v. Esperdy*, 188 F.Supp. 317 (D.C.N.Y. 1960) (a single act of procuring does not render an alien inadmissible under section 212(a)(12) of the Act). This requirement is reflected in the regulation at 22 C.F.R. § 40.24(b), which instructs Department of State consular officers as follows:

[F]inding that an alien has “engaged” in prostitution must be based on elements of *continuity* and *regularity*, indicating a *pattern* of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts.

Therefore, in order for the applicant to be inadmissible under section 212(a)(2)(D)(i) of the Act, the applicant must have engaged in prostitution as it is defined at 22 C.F.R. §40.24(b) and that such prostitution must have been substantial, continuous and regular. In the present matter, however, court records submitted by the applicant do not reflect the specific activities that resulted in his convictions for prostitution under NYPL Article 230.00. In that New York criminal courts have defined the “sexual conduct” punished under NYPL Article 230.00 more broadly than the act of sexual intercourse, we cannot find that the applicant’s five convictions for prostitution bar his admission to the United States under section 212(a)(2)(D)(i) of the Act.

However, while these convictions do not render the applicant inadmissible under section 212(a)(2)(D)(i) of the Act, they are sufficient to establish his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act,<sup>1</sup> which states:

(A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

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<sup>1</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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 *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 the present matter, the applicant has been convicted of prostitution under NYPL Article 230.00, a statute that, as previously discussed, defines prostitution more broadly than the regulation at 22 C.F.R. §40.24. However, unlike an inadmissibility determination under section 212(a)(2)(D) of the Act, a finding that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act does not require that his prostitution offenses meet the regulatory definition of prostitution, only that they constitute crimes involving moral turpitude. As the record contains no documents from the

applicant's record of conviction, nor any other evidence relating to the specific nature of his prostitution offenses, the AAO's analysis of the applicant's convictions for prostitution will be limited to a categorical inquiry into whether NYPL Article 230.00 prohibits any conduct that does not involve moral turpitude.

In considering offenses under NYPL § 230.00, New York courts have indicated that NYPL § 230.00 was enacted to prohibit the commercial exploitation of sexual gratification. In *Costello*, the Court held that even though the term "prostitution" has no statutory definition, the term has its "commonly understood meaning," which involves sexual intercourse, deviate sexual intercourse, and masturbation; and "the use of the term 'fee' in the statutory definition is the key to that meaning." 90 Misc.2d at 432. In *Hinzmann*, the Court determined that that it was the defendants' agreement to perform lap dances in exchange for money that was "the essence of prostitution." 177 Misc.2d at 534.

The BIA has long held that an act of prostitution is a crime involving moral turpitude. *Matter of W*, 4 I&N Dec. 401-02, 404 (BIA 1951)(finding a Canadian citizen convicted of practicing prostitution in violation of Seattle, Washington City Ordinance 73095 § 1 to have been convicted of a crime involving moral turpitude); see also *Matter of Turcotte*, 12 I&N Dec. 206, 208 (BIA 1967)(noting that the language of Florida Statutes 796.07(3)(A), "[t]o offer to commit, or to commit, or to engage in, prostitution, lewdness or assignation," was "almost identical" to the wording of Seattle City Ordinance § 73095, a crime involving moral turpitude). In that New York courts have concluded that the fee requirement in NYPL Article 230.00 establishes the "sexual conduct" it punishes as prostitution, an offense that the BIA has found to be a crime involving moral turpitude, the AAO finds the applicant's five convictions for prostitution to bar his admission to the United States under section 212(a)(2)(A)(i)(I) of the Act.

The record also indicates that the applicant has nine convictions for Loitering for the Purpose of Engaging in a Prostitution Offense, NYPL § 240.37; three convictions for Disorderly Conduct, NYPL § 240.20; two convictions for Public Lewdness, NYPL § 245.00; one conviction for Theft of Services, NYPL § 165.15; one conviction for Criminal Mischief in the Fourth Degree, NYPL § 145.00; one conviction for Urinating in Public, New York Health Code § 153.09; and one conviction for Consumption of Alcohol on the Street, New York City Administrative Code 10.125 b. However, as the AAO has already found the applicant to be inadmissible pursuant to section 212(a)(2)(A)(i)(I) based on his convictions for prostitution, we will not consider whether any of his other convictions may be convictions for crimes involving moral turpitude.

Inadmissibility under section 212(a)(2)(A)(i)(I) of the Act may be waived by establishing eligibility under section 212(h) of the Act which provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if –

(1)(A) [I]t is established to the satisfaction of the Attorney General [Secretary of Homeland Security] that–

- (i) [T]he 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 . . . .

As previously indicated, a 212(a)(2)(D)(i) inadmissibility may be considered under the more generous waiver provisions of section 212(h)(1)(A) of the Act. The AAO further notes that an applicant who is inadmissible based on offenses that occurred more than 15 years in the past may also apply for relief under section 212(h)(1)(A) of the Act. In the present matter, however, the applicant's prostitution offenses occurred less than 15 years ago and he must therefore satisfy the requirements of section 212(h)(1)(B) of the Act.

A section 212(h)(1)(B) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be evaluated only in so far as it results in hardship to a qualifying relative. If extreme hardship to the qualifying relative is established, the Attorney General (now Secretary) then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The AAO will not, however, consider the waiver application filed by the applicant in the present case as the record fails to establish that he has a qualifying relative on which to base a waiver request. The Form I-130, Petition for Alien Relative, benefitting the applicant was filed by his U.S. citizen brother who is not a qualifying relative for the purposes of this proceeding. The Form I-485, Application to Register Permanent Residence or Adjust Status, submitted by the applicant on March 6, 2009, indicates that he is unmarried and has no children. A January 23, 2009 statement signed by the applicant reports that his father abandoned him and his siblings when he was 13 years old and that his mother is no longer living. As the record does not demonstrate that the applicant has a U.S. citizen or lawfully resident spouse, parent, or child, he is not eligible for waiver consideration under section 212(h)(1)(B) of the Act. Accordingly, the appeal will be dismissed.

In proceedings for an application for a waiver of grounds of inadmissibility under sections 212(h) 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.



Page 8

**ORDER:** The appeal is dismissed.