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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



H₂

Date:

AUG 01 2012

Office: ATLANTA, GEORGIA

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 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 in accordance with the instructions on 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,

for Perry Rhew

Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Korea who was found to be inadmissible to the United States pursuant to section 212(a)(2)(D) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D), for engaging in prostitution and pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The record indicates that the applicant is married to a United States citizen. 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 with her United States citizen husband.

In his decision, dated June 16, 2011, the field office director found that the applicant had failed to establish extreme hardship to her spouse as a result of her inadmissibility and denied the application accordingly.

In a brief on appeal, counsel states that he concedes the applicant's inadmissibility under section 212(a)(2)(D) of the Act, but asserts that the applicant has shown that her U.S. citizen spouse will suffer extreme hardship as a result of her inadmissibility.

The record indicates that on September 17, 2008 and September 30, 2009 in Forsyth, North Carolina, the applicant was arrested for prostitution. On April 15, 2010, the applicant pled guilty to one count of prostitution under Georgia Statute §16-6-9 and one count of giving a massage in a place used for lewdness under Georgia Statute §16-6-17. For the prostitution charge the applicant was sentenced to 11 months and 29 days in jail. For the giving a massage in a place used for lewdness charge the applicant was sentenced to 23 months and 28 days in jail.

Section 212(a)(2)(D) of the Act provides, in pertinent part, that:

(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,
- (ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or
- (iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

The AAO notes that the field office director found the applicant inadmissible to the United States under section 212(a)(2)(D) of the Act; however, he failed to specify under which subsection the applicant was inadmissible. Therefore, the AAO will address each subsection under 212(a)(2)(D) as it relates to the applicant's conduct.

It has long been established that inadmissibility under section 212(a)(2)(D) of the Act must be based on 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). The AAO notes that the Code of Federal Regulations under 22 C.F.R. § 40.24(b) provides that:

[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.

The AAO finds that although the applicant has been convicted of one count of prostitution and another related to prostitution, her acts cannot be found to be substantial, continuous and regular. The applicant's arrests occurred more than a year apart. The AAO acknowledges that the applicant's 2009 arrest was related to her working at a place where acts of prostitution occur, but the record does not indicate the period of time the applicant worked at this place of employment or the extent she was involved in prostitution beyond the act she was arrested for in 2008. Thus, the AAO finds that the applicant cannot be found to have engaged in prostitution because her acts cannot be found to have been substantial, continuous and regular.

Section 212(a)(2)(D)(ii) of the Act renders inadmissible any alien who attempts to procure, procures or has procured prostitutes or persons for the purpose of prostitution. The language of section 212(a)(2)(D)(ii), on its face, relates only to persons who procure others for the purpose of prostitution or who receive the proceeds of prostitution. The AAO notes that in *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 552 (BIA 2008), the Board of Immigration Appeals (Board) held that “Congress appears to have been primarily concerned with excluding and removing aliens who were involved in the business of prostitution, using the term ‘procure’ in its traditional sense to refer to a person who receives money to obtain a prostitute for another person.” The AAO notes that there is no evidence in the record that the applicant procured others for the purpose of prostitution or was receiving money to obtain a prostitute for another person. Therefore, the AAO finds that there is insufficient evidence showing that the applicant's conduct renders her inadmissible under section 212(a)(2)(D)(ii) of the Act.

Section 212(a)(2)(D)(iii) of the Act renders inadmissible any alien who comes “to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution.” The AAO

notes that the record does not establish that the applicant was “coming to” the United States to engage in prostitution; therefore, the applicant is not inadmissible under section 212(a)(2)(D)(iii) of the Act.

Thus, the AAO finds that the field office director erred in concluding that the applicant was inadmissible pursuant to section 212(a)(2)(D) of the Act, as there is insufficient evidence in the record to support this finding. However, the AAO does find that the applicant is inadmissible under section 212(a)(2)(A) of Act for having been convicted of a crime involving moral turpitude.

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.)

The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude. *See Fajardo v. Attorney General*, 659 F.3d 1303, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). In its decision, the Eleventh Circuit defined the categorical approach as "'looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.'" 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court indicated, however, that where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernaut v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

In regards to the applicant's conviction for prostitution, Ga. Code Ann., § 16-6-9 states, "a person commits the offense of prostitution when he or she performs or offers or consents to perform a sexual act, including but not limited to sexual intercourse or sodomy, for money or other items of value."

In *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967), the respondent was charged with prostitution and the Board held that the charge of "offer to commit or to engage in prostitution, lewdness, or assignation," a misdemeanor under Florida law, was a crime involving moral turpitude. *Id.* at 207. Furthermore, in *Matter of W*, 4 I&N Dec. 401 (BIA 1951), the Board held that the respondent's conviction for violation of an ordinance of the City of Seattle, Washington, which ordinance stated that "[i]t shall be unlawful to commit or offer or agree to commit any act of prostitution, assignation, or any other lewd or indecent act," involved moral turpitude. The Board stated that "[i]t is well established that the crime of practicing prostitution involves moral turpitude." *Id.* 401-404. Thus, the applicant's conviction for prostitution is a crime involving moral turpitude.

In regards to the applicant's conviction for giving a massage in a place used for lewdness and prostitution, Ga. Code Ann. § 16-6-17(a) states, "it shall be unlawful for any masseur or masseuse to massage any person in any building, structure, or place used for the purpose of lewdness, assignation, prostitution, or masturbation for hire." In Ga. Code Ann. § 16-6-17(b) masseur or masseuse is defined as a male or female who practices massage or physiotherapy, or both. Thus, in accordance with the Eleventh Circuit's categorical approach, the AAO finds that Ga. Code Ann. § 16-6-17 is not a crime involving moral turpitude as a conviction under this statute does not require sexual acts for hire.

The AAO finds that the applicant has been convicted of only one crime involving moral turpitude, but this conviction does not qualify for the petty offense exception. The record indicates that maximum penalty for

a conviction under Ga. Code Ann., § 16-6-9, a misdemeanor, is 12 months in prison and that the applicant was sentenced to 11 months and 29 days in jail. The evidence in the record thus establishes that the applicant's conviction under Ga. Code Ann., § 16-6-9 does not fall within the petty offense exception set forth in the Act. The applicant is eligible to apply for a waiver under section 212(h) of the Act.

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

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

. . . .

(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

A waiver of inadmissibility under section 212(h) 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. The applicant's 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-Morales*, 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 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 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 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.*

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

The record of hardship includes: counsel’s brief, a psychological evaluation for the applicant’s spouse, and a statement from the applicant’s spouse.

The applicant’s spouse is claiming emotional hardship as a result of separation and as a result of relocation. He states that based on past experiences, separation from his wife will cause him depression and loneliness. He states that he will not be able to start a family like he wanted and that his mother will be upset because the applicant was going to help care for her after she returned from Korea, where she went to have surgery. The psychological evaluation in the record supports the applicant’s assertions in regards to separation, stating that the applicant is marginalized from mainstream American culture, is socially isolated, and is highly dependent on his wife for emotional, psychological, and social support.

We find that where the record may support a finding of extreme emotional hardship to the applicant's spouse if he were to be separated from the applicant, it does not support a finding that relocation to Korea, the country of the applicant's spouse's birth would be extreme hardship.

The applicant's spouse claims that relocating to Korea will cause him emotional hardship as returning to Korea under the current circumstances would be shameful in his culture and he would not be able to tolerate this stigma of failure. He also asserts that he will need to care for his mother in the United States when she returns from Korea. The applicant submits no evidence to support these claims. Furthermore, his statements suggest that his mother is currently spending time in Korea, having medical surgery there, which would indicate that his family still has ties to the country and would suggest that relocation would not be an extreme hardship for the applicant's spouse and his family. In addition, the psychological evaluation indicates that the applicant's spouse has not assimilated into American society, making it easier for him to leave the United States for his native culture.

We can 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 remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative(s) in this case.

The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act. The AAO notes that the applicant has submitted three reference letters regarding her good moral character, but having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she 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 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.