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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

JUN 11 2008

IN RE:

[REDACTED]

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:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink that reads "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed as the applicant is not inadmissible under section 212(a)(2)(D)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D)(iii), thus the relevant waiver application is moot.

The applicant is a native and citizen of Columbia who was found 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 coming to the U.S. to engage in commercial vice. The applicant sought a waiver of inadmissibility under section 212(h) of the Act, which the Director denied, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Director, dated April 26, 2006.*

The AAO will first address the finding of inadmissibility.

Section 212(a)(2) of the Act states in pertinent part:

D) Prostitution and commercialized vice.-Any alien who-

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution, is inadmissible.

The record reflects that the applicant has the following convictions in the Criminal Court of the City of New York, County of Bronx:

- January 19, 1995 - pled guilty to § 225.15; \$350 fine and sentenced to 90 days;
- June 17, 1993 - pled guilty to § 225.15; \$150 fine and sentenced to 30 days;
- April 23, 1993 - pled guilty to § 225.15 and § 225.05; \$100 fine and sentenced to 30 days.

The statutory provisions under which the applicant was convicted are as follows:

McKinney's Penal Law § 225.15 Possession of gambling records in the second degree

A person is guilty of possession of gambling records in the second degree when, with knowledge of the contents or nature thereof, he possesses any writing, paper, instrument or article:

1. Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise; or
2. Of a kind commonly used in the operation, promotion or playing of a lottery or policy scheme or enterprise; except that in any prosecution under this subdivision, it is a defense that the writing, paper, instrument or article possessed by the defendant constituted, reflected or represented plays, bets or chances of the defendant himself

in a number not exceeding ten.

Possession of gambling records in the second degree is a class A misdemeanor.

McKinney's Penal Law § 225.05 Promoting gambling in the second degree.

A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity.

Promoting gambling in the second degree is a class A misdemeanor.

Language referring to commercialized vice has been interpreted in *Matter of B*, 6 I&N Dec. 98 (BIA-1954) to include the crime of gambling. The BIA indicated that the meaning of the phrase "unlawful commercialized vice, whether or not related to prostitution" was not given any definition and was not discussed by the various congressional committees, or in the debate in Congress. The BIA stated that one of the dictionary definitions of the word "commercialize" is: "specifically to cause to yield pecuniary profit; as, to *commercialize* vice." Thus, the BIA stated that:

"[C]ommercialized gambling" is such gambling as is a source of sure and steady profit (*State v. Gardner*, 92 So. 368, 371, 151 La. 874 (Sup. Ct., 1922)). The word "vice" is defined as "state of being given up to evil conduct or habit; depravity; wickedness; corruption." While the phrase "commercialized vice" has been referred to as "traffic in women for gain," or "immoralities having a mercenary purpose" (*Caminetti v. United States*, 242 U. S. 470, 484, 497 (1917)), the court there was speaking of the White Slave Traffic Act which relates specifically to prostitution. However, in the provision of law under discussion, the phrase "commercialized vice" is enlarged by the use of the words "whether or not related to prostitution." It was, therefore, clearly intended by Congress that in construing the phrase "commercialized vice," the definition was not to be *ejusdem generis* with prostitution but was to be given meaning wider in scope.

Matter of B at 101, 102.

Furthermore, the BIA held that an alien who has engaged in unlawful commercialized vice *after* entry is not deportable under section 212 (a) (12) of the Act because the statutory language states that the alien must be "coming to" the United States to engage in unlawful commercialized vice. *Id.* at 100.

The BIA addressed commercialized vice in another case. In *Matter of A*, 6 I&N Dec. 540 (BIA 1995), the BIA stated that the alien earned his livelihood in illegal activities relating to the sale of liquor, the taking of numbers, and other gambling activities; and had been convicted for violation of lottery and bootlegging laws. The alien was charged with being deportable under section 241 (a) (12) of the act of 1952 for engaging in "unlawful commercialized vice, whether or not related to prostitution." However, the BIA did not find the alien deportable in light of its holding in *Matter of B*, which was that the alien must be coming to the United States to engage in commercialized vice. The BIA determined that the record did not establish that the alien was coming to the United States to engage in commercialized vice in 1922 or in the alleged entry in 1931.

With the case here, the record does not establish that the applicant was coming to the United States to engage in gambling. The AAO finds that the record does not show the date the applicant arrived in the United States; however, the Biographic Information indicates that the applicant lived in the United States in December 1990. The applicant has two convictions of possession of gambling records in 1993, one conviction of this in 1995, and one conviction of promoting gambling in 1993. This evidence, the AAO finds, is not sufficient to establish that the applicant was coming to the United States to engage in commercialized vice. *See, Matter of B and Matter of A, supra.*

The AAO therefore finds that the applicant is not inadmissible under section 212(a)(2)(D) of the Act, 8 U.S.C. § 1182(a)(2)(D).

Further, the applicant is not inadmissible under section 212(a)(2)(A)(i) of the Act for conviction of a crime involving moral turpitude.

Section 212(a)(2) of the Act states that:

(A)(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.

Matter of Perez-Contreras, 20 I&N Dec. 615, 617-18 (BIA 1992) describes moral turpitude as follows:

[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.

The applicant's gambling convictions are not morally turpitudinous. *Matter of S-*, 9 I&N Dec. 688, 696 (BIA 1962) indicates that "gambling and owning and operating a gambling establishment and being a common gambler under sections 970 and 973 of the New York Penal Code are not crimes involving moral turpitude," and *Matter of Gaglioti*, 10 I&N Dec. 719, 720 (BIA 1964) states that "[v]iolations of gaming laws do not ordinarily involve moral turpitude."

Because gambling and owning and operating a gambling establishment are not crimes involving moral turpitude, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(D) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden.

ORDER: The April 26, 2006 decision of the director is withdrawn. The appeal is dismissed as the underlying application is moot.