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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy
PUBLIC COPY

U.S. Citizenship and Immigration Services

#6

[redacted]

Date: OCT 0 6 2011 Office: PHILADELPHIA, PA FILE: [redacted]

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), and under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B).

ON BEHALF OF PETITIONER:

[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 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. The fee for a Form I-290B is currently $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion 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, Philadelphia, PA, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Dominican Republic who was found to be inadmissible to the United States pursuant to section 212(a)(2)(D)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D)(ii), for procuring or attempting to procure persons for the purposes of prostitution. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and who is seeking readmission within ten years of his last departure from the United States. The record indicates that the applicant is married to a United States citizen and has two U.S. citizen children He 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.

In a decision, dated December 11, 2008, the field office director found that the applicant failed to establish that extreme hardship would be imposed on his spouse as a result of his inadmissibility and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly.

In a brief, dated February 11, 2009, counsel states that the applicant's spouse and children will suffer extreme hardship as a result of the applicant's inadmissibility and that the applicant's family cannot relocate to the Dominican Republic.

On July 8, 2011, the AAO issued a notice of its intent to dismiss the appeal to the applicant and his counsel of record. The applicant was granted thirty (30) days from the date of the notice to respond. The applicant did not respond and the AAO will dismiss the appeal for the reasons stated herein.

The record indicates that April 28, 2000, in Philadelphia, Pennsylvania, the applicant was arrested for patronizing a prostitute. On June 7, 2000, he was convicted, sentenced to six months probation, and ordered to pay a fine of $350. The criminal complaint in the applicant's case, dated April 29, 2000, states that the applicant approached a female undercover police officer and offered to perform oral sex on the office in exchange for money.

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

> (D) *Prostitution and commercialized vice.*—Any alien who—
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> ...
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> (i) 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
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> ...
>
> is inadmissible.

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 him inadmissible under section 212(a)(2)(D)(ii) of the Act.

In addition, the AAO finds that the applicant is not inadmissible under any other section of section 212(a)(2)(D) of the Act. Section 212(a)(2)(D)(i) of the Act renders inadmissible any alien who "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." The AAO notes that "each case must be determined on its own facts but the general rule is that to constitute 'engaging in' there must be a substantial, continuous and regular, as distinguished from casual, single or isolated, acts." *Matter of T*, 6 I&N Dec. 474, 477 (BIA 1955); *see also Kepilino v. Gonzales*, 454 F.3d 1057, 1061 (9th Cir. 2006) ("The term 'prostitution' means engaging in promiscuous sexual intercourse for hire. A finding 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."). In order for the applicant to have engaged in prostitution, there must be evidence showing that the acts of prostitution were substantial, continuous and regular. The current record indicates that the applicant engaged in only one attempted act of prostitution. Therefore, based on the record, the AAO finds that the applicant is not inadmissible to the United States under section 212(a)(2)(D)(i) of the Act.

Furthermore, 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. 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 the finding that the applicant engaged in prostitution, procured prostitutes, or came to the United States to engage in prostitution.

The AAO does note that although the applicant is not inadmissible under 212(a)(2)(D) of the Act, he is inadmissible under section 212(a)(9)(B)(i)(II) and section 212(a)(2)(A) of the Act.

The record indicates that in September 1994 the applicant entered the United States without inspection. On April 27, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On August 13, 2003, the applicant was issued Authorization for Parole

of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart the United States in December 2003, entering the Dominican Republic on December 26, 2003. The applicant then reentered the United States on January 25, 2004.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. Therefore, the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until April 27, 2001, the date of his proper filing of the Form I-485. In applying for an immigrant visa, the applicant is seeking admission within ten years of his January 2004 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B) of the Act provides, 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-
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> > . . . .
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> > > (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 AAO also finds that the applicant is inadmissible under section 212(a)(2)(A)(i) of the Act.

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

> (1) Criminal and related grounds. —
>
> > (A) Conviction of certain crimes. –
> >
> > > (i) In general. – Except as provided in clause (ii), any 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, or
> > > >
> > > > (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a

> foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.
>
> . . . .

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

> The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or 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 . . . .

As stated above, the applicant was convicted of patronizing a prostitute. The AAO notes that practicing prostitution has been found to be a crime involving moral turpitude. *Matter of W-*, 4 I&N Dec. 401 (C.O. 1951), Seattle, Washington City Ordinance 73095, § 1.

Moreover, the record indicates that on April 4, 1990, in Philadelphia, Pennsylvania, the applicant was arrested and charged with possession of cocaine and conspiracy to possess with intent to deliver. The criminal complaint in the applicant's case, dated April 5, 1990, specifically states that the drug involved in these charges was cocaine. The complaint states that the defendant delivered two vials of cocaine to an undercover police officer. The court disposition indicates that all charges against the applicant with the exception of the conspiracy charged were withdrawn by the Assistant District Attorney on December 8, 1998. The record then indicates that on January 14, 1999 the applicant was sentenced to six months probation and ordered to pay a $135 fine.

Section 101(a)(48) provides:

> (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
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> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
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> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The AAO finds that the applicant's probation is a restraint on his liberty that satisfies the second prong of section 101(a)(48)(A) of the Act. In addition, the AAO finds that without evidence to show otherwise, the applicant's sentencing strongly suggests that a judge or jury has found him guilty or that he has entered a plea of guilt or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, such as required by the first prong of section 101(a)(48)(A) of the Act. The AAO notes that the burden of establishing that the application is admissible remains entirely with the

applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Thus, the AAO finds that the applicant has been, for the purposes of immigration, convicted of conspiracy to possess cocaine with the intent to deliver.

The AAO notes that a section 212(h) waiver is not available to section 212(a)(2)(A)(i)(II) cases involving controlled substance crimes with the exception of cases involving a single offense of possession of 30 grams or less of marijuana. In this case, the applicant was convicted of an offense involving cocaine. Thus, the AAO finds that the applicant is statutorily ineligible to be considered for a section 212(h) waiver. It also appears that the applicant is inadmissible under section 212(a)(2)(C) of the Act, as a drug trafficker, for which no waiver is available.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to his U.S. citizen wife and/or children in regards to his inadmissibility under section 212(a)(2)(A) of the Act for patronizing a prostitute or his inadmissibility under section 212(a)(9)(B) of the Act for unlawful presence.

In proceedings for an 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. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.