U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-L-P-D-L-

DATE: JAN. 4, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-918, PETITION FOR U NONIMMIGRANT STATUS

The Petitioner seeks nonimmigrant classification as a victim of certain qualifying criminal activity. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. APPLICABLE LAW AND APPELLATE JURISDICTION

Section 101(a)(15)(U)(i) of the Act provides for U nonimmigrant classification to victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. Section 212(d)(14) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918, Petition for U Nonimmigrant Status, and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion. The petitioner bears the burden of establishing that he or she is admissible to the United States or that any grounds of inadmissibility have been waived. *See* 8 C.F.R. § 214.1(a)(3)(i).

For individuals seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192, Application for Advance Permission to Enter as a Nonimmigrant, in conjunction with a Form I-918 in order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: "There is no appeal of a decision to deny a waiver." As we do not have jurisdiction to review whether the Director properly denied the Form I-192, we do not consider whether approval of the Form I-192 should have been granted. The only issue that may come before us is whether the Director was correct in finding the Petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent part:

. . . .

(2) 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 . . . .

. . . .

is inadmissible.

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

. . . .

(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).

. . . .

(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.

. . . .

(6) Illegal Entrants and Immigration Violators

(A) Aliens Present Without Permission or Parole

(i) In General.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

. . . .

(9) Aliens Previously Removed

. . . .

(C) Aliens Unlawfully Present After Previous Immigration Violations

(i) In General.-Any alien who –

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year . . . .

. . . .

and who enters or attempts to reenter the United States without being admitted is inadmissible.

II. FACTS AND PROCEDURAL HISTORY

The Petitioner is a native and citizen of Guatemala who claims to have last entered the United States in November 2002 without inspection, admission, or parole. On February 13, 2012, the Petitioner filed the instant Form I-918 and Form I-192. On April 5, 2013, the Director issued two requests for evidence (RFE) relating to, in pertinent part, the Petitioner's arrest history and the applicable grounds of inadmissibility. The Director also requested evidence to demonstrate that USCIS should exercise discretion in the Petitioner's favor to approve her Form I-192. In response, the Petitioner submitted additional evidence, which the Director found insufficient to show that the Petitioner merited a favorable exercise of discretion. As the Petitioner was found inadmissible and the Form I-192 was denied, the Director denied the Form I-918. The Petitioner filed a timely appeal and submits a brief on appeal.

The record shows that on [redacted] 2011, the Petitioner was convicted, pursuant to her guilty plea, of the offense of prostitution under Section 16-6-9 Georgia Code Annotated (Ga. Code Ann. West 2011) in [redacted] Georgia. The Petitioner was sentenced to 12 months confinement, with

credit for time served and the remainder of the sentence to be served on probation, and payment of costs, fines, and restitution.

III. ANALYSIS

We conduct appellate review on a *de novo* basis. A full review of the record supports the Director's determination that the Petitioner is inadmissible.

The Director found the Petitioner inadmissible under the following sections of the Act: 212(a)(2)(A)(i)(I) (crime involving moral turpitude (CIMT)), 212(a)(2)(D)(i) (prostitution within the last 10 years), 212(a)(6)(A)(i) (present without permission or parole), and 212(a)(9)(C)(i)(I) (unlawfully present in the United States for one year or more). The Petitioner is not inadmissible for unlawful presence in the United States under section 212(a)(9)(C)(i)(I) of the Act, and we withdraw the Director's finding to the contrary.

The Petitioner has been convicted of one count of prostitution, and the record does not indicate that she was ever investigated, arrested, or prosecuted for any act of prostitution other than the one leading to this conviction. Thus, she has not "engaged in prostitution" within the meaning of subsection 212(a)(2)(D)(i) of the Act. Inadmissibility under subsection 212(a)(2)(D)(i) 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."). The regulation at 22 C.F.R. § 40.24(b), which applies to prospective immigrant and nonimmigrant admissions, provides:

> [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. (Emphasis added).

The Petitioner's single conviction for prostitution does not constitute "engaging in prostitution" within the meaning of the Act, and we withdraw the Director's finding that she is inadmissible under subsection 212(a)(2)(D)(i) of the Act.

On appeal, the Petitioner contests the Director's finding that she is inadmissible under subsection 212(a)(2)(A)(i)(I) because the Director did not inform her of this ground prior to denying the Form I-192. The Petitioner had the opportunity to address the basis for denial under the subsection 212(a)(2)(A)(i)(I) ground of denial on appeal, which we would consider under our *de novo* review authority. On appeal, however, the Petitioner does not provide substantive analysis regarding whether her conviction for prostitution is a CIMT.

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 Turcotte*, 12 I&N Dec. 206 (BIA 1967), a 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 CIMT. *Matter of Turcotte,* at 207.[1] Furthermore, in *Matter of W*, 4 I&N Dec. 401 (BIA 1951), the Board held that a respondent's conviction for violation of an ordinance of the Washington, which 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 Georgia statute of conviction similarly criminalizes both the offer to commit and the act of committing prostitution. *See* Ga. Code Ann. § 16-6-9 (West 2011) ("[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)." Accordingly, the Petitioner's conviction for prostitution is a CIMT.[2]

Moreover, as the Petitioner admits that she is inadmissible under section 212(a)(6)(A)(i) of the Act, and the Director correctly found the Petitioner inadmissible for her CIMT conviction, we must dismiss the appeal despite any procedural error by the Director, as the Petitioner has not established that she is admissible to the United States and that any resultant prejudice violated her right to due process. *Hassan v. INS*, 927 F.2d 465, 469 (9th Cir. 1991) (due process violation exists only where alien demonstrates resultant prejudice). The Petitioner further asserts that the Director should have favorably exercised discretion and approved the Form I-192. As the Petitioner is inadmissible, we have no jurisdiction to review the denial of a Form I-192 submitted in connection with a Form I-918. *See* 8 C.F.R. § 212.17(b)(3).

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[1] The Petitioner's case arises within the jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit, 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 (11thCir. 2011). In its decision, the court 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)).

[2] The Petitioner does not qualify for the petty offense exception to the CIMT ground of inadmissibility at subsection 212(a)(2)(A)(ii)(II), as she was sentenced to 12 months confinement. The fact that the sentence of confinement was partially suspended is not relevant in determining that the Petitioner does not qualify for the exception.

IV. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Although the Petitioner has met the statutory eligibility requirements for U nonimmigrant classification, she has not established that she is admissible to the United States or that her grounds of inadmissibility under §§ 212(a)(2)(A)(i)(I) and 212(a)(6)(A)(i) of the Act have been waived. She is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act, pursuant to 8 C.F.R. § 214.1(a)(3)(i).

ORDER: The appeal is dismissed.

Cite as *Matter of E-L-P-D-L-*, ID# 15129 (AAO Jan. 4, 2016)