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U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: **MAY 12 2008**

[relates]

IN RE:

Applicant:

[Redacted]

APPLICATIONS:

Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), and Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and the matter 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 El Salvador who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien convicted of crimes involving moral turpitude. The record indicates that the applicant is married to a naturalized United States citizen and she is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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 spouse.

The director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Director's Decision*, dated May 10, 2006. The AAO notes that the applicant is also inadmissible pursuant to section 212(a)(2)(D)(i) of the Act, 8 U.S.C. § 1182(a)(2)(D)(i), as an alien convicted of prostitution, and section 212(a)(9)(B)(i)(II) of 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 seeking readmission within 10 years of her last departure from the United States.

On appeal, the applicant, through prior counsel, contends that "the Director's decision failed to adequately weigh the extreme hardship that will occur upon the applicant being refused admission to the United States." *Appeal Brief*, dated June 5, 2006.

The record includes, but is not limited to, counsel's brief, an affidavit from the applicant's husband, the applicant's marriage certificate, letters of recommendations, and court dispositions for the applicant's arrests and convictions. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that on August 11, 1993, the applicant was arrested for prostitution, and on August 12, 1993, she was convicted of prostitution and was sentenced to time served. On July 9, 1996, the applicant was arrested for promoting prostitution; however, there is no evidence in the record that she was convicted of any crime for that arrest. On September 15, 1998, the applicant was arrested for promoting prostitution in the third degree. On September 30, 1998, the applicant was convicted of promoting prostitution in the fourth degree, and was sentenced to one year probation. On September 19, 2000, the applicant was arrested for attempting to promote prostitution in the third degree. On December 19, 2000, the applicant was convicted of attempting to promote prostitution, and was sentenced to three years probation.¹

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

(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 —

¹ The AAO notes that when the applicant was arrested and convicted of prostitution, she used the name Aury Garay.

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

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.

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

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraphs (A)(i)(I)...[and] (D)...of subsection (a)(2) if—

(1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that—

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the 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 established to the satisfaction of the [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...

(2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

...

(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.

...

(v) Waiver.-The Attorney General [now the Secretary of Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The AAO finds that the applicant's convictions for prostitution are not crimes involving moral turpitude. "A crime involving moral turpitude must be a crime that (1) is vile, base or depraved and (2) violates societal moral standards." *Navarro-Lopez v. Gonzalez*, 503 F.3d 1063, 1074 (9th Cir. 2007). Even though some sexual crimes are considered crimes of moral turpitude, if the sexual conduct affects only consenting adults then it may not be a crime involving moral turpitude. *See Matter of R-*, 6 I&N Dec. 444, 451-55 (BIA 1954) (holding that conviction for simple fornication was not crime involving moral turpitude). If the conviction was for an illegal sexual conduct that was not consensual, then courts usually consider the crime to be one involving moral turpitude. *See Maghsoudi v. INS*, 181 F.3d 8, 15 (1st Cir. 1999) (based on lack of consent, conviction for indecent assault was a crime involving moral turpitude); *United States v. Kiang*, 175 F.Supp.2d 942, 949-52 (E.D.Mich.2001) (conviction for fourth degree sexual assault, using force or coercion to accomplish sexual contact, was a conviction for crime involving moral turpitude); *Matter of S-*, 5 I&N Dec. 686 (BIA 1954) (conviction for indecent assault was a conviction involving moral turpitude).

Therefore, the applicant is not inadmissible under section 212(a)(2)(A) of the Act, in that she has not been convicted of crimes involving moral turpitude.

Based on her convictions regarding prostitution, the applicant is inadmissible under section 212(a)(2)(D) of the Act. The applicant is also inadmissible under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under IIRIRA, until at least September 30, 1998, the date she was convicted of promoting prostitution in the fourth degree. The AAO finds that since the applicant is inadmissible under both sections 212(a)(2)(D) and section 212(a)(9)(B) of the Act, she is ineligible for the waiver provided under section 212(h)(1)(A) of the Act. The AAO will adjudicate the applicant's waiver under sections 212(h)(1)(B) and 212(a)(9)(B)(v) of the Act.

In the present application, the record indicates that the applicant initially entered the United States sometime before August 11, 1993, the date of her first arrest for prostitution. On August 12, 1993, the applicant was convicted of prostitution and was sentenced to time served. On July 9, 1996, the applicant was arrested for promoting prostitution; however, there is no evidence in the record that she was convicted of any crime for that arrest. On September 15, 1998, the applicant was arrested for promoting prostitution in the third degree. On September 30, 1998, the applicant was convicted of promoting prostitution in the fourth degree, and was sentenced to one year probation.² On September 19, 2000, the applicant was arrested for attempting to promote prostitution in the third degree. On December 19, 2000, the applicant was convicted of attempting to promote prostitution, and was sentenced to three years probation. On some unknown date, the applicant departed the United States. On February 17, 2002, the applicant reentered the United States on a B-2 nonimmigrant visa, with authorization to remain in the United States until August 16, 2002. On May 14, 2002, the applicant married [REDACTED], a naturalized United States citizen, in New York. On September 4, 2002, the applicant's husband filed a Form I-130 on behalf of the applicant. On the same day, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On June 7, 2005, the applicant's Form I-130 was approved. On August 1, 2005, the applicant filed a Form I-601. On May 10, 2006, the Director denied the applicant's Form I-485 and Form I-601, finding the applicant failed to demonstrate extreme hardship to her qualifying relative.

The applicant is seeking a section 212(h) and section 212(a)(9)(B)(v) waiver of the bar to admission resulting from violations of sections 212(a)(2)(D)(i) and 212(a)(9)(B)(i)(II) of the Act. A waiver under section 212(h) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant, while a waiver under section 212(a)(9)(B)(v) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the alien herself experiences upon removal is irrelevant to sections 212(h) and 212(a)(9)(B)(v) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's United States citizen spouse. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

² Based on the applicant's Biographic Information (G-325A), the applicant departed the United States in 1998 and did not return until 2002. The AAO notes that this is not confirmed in the record.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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.

The applicant's husband states the applicant has been rehabilitated and they "have resurrected [their] self-confidence and self esteem and have created a refuge of love, support and mutual respect. The feelings of insecurity that led [the applicant] towards her path of self destruction no longer exist and she now remains a law abiding, devoted and productive member of society." *Affidavit from* [REDACTED], dated September 16, 2005; *see also letter from* [REDACTED], dated September 6, 2005 ("[The applicant] is a very honest [sic] and kind woman; Hard working Person and excellent friend. She always look for the help of the [sic] others."); *see also letter from* [REDACTED], dated September 7, 2005 ("[The applicant] has been [her] friend since the year 1999, she always showed to be great a [sic] person, kind, honest, excellent friend, very hard working woman."); *see also letter from* [REDACTED], dated September 7, 2005 ("[The applicant] showed to be an excellent person, very honest, hard working women [sic].").

The applicant's husband states he will suffer extreme hardship if the applicant is removed from the United States. *Affidavit from* [REDACTED] *supra*. The AAO notes that the applicant's husband was diagnosed with hyperthyroidism, Hepatitis B, and hyperlipidemia. *See letter from* [REDACTED], M.D., dated September 6, 2005. [REDACTED] states the applicant is "very involved in her husband's medical care and he requires her assistance in managing her [sic] complex medical regimen." *Id.* The AAO notes that there is no indication that the applicant's husband cannot receive treatment for his medical conditions in El Salvador or that he has to remain in the United States to receive his medical treatments. The applicant's husband states that he "will surely suffer extreme hardship" if the applicant's waiver application is denied, and the applicant's "absence would unleash prior feelings of loneliness and desolation that haunted [his] existence in past years." *Affidavit from* [REDACTED] *supra*. The applicant's husband claims that if the applicant is removed, "[he] will be thrust back in time to a nightmare of trepidation, melancholy, despair, isolation, and insecurity with no refuge for [his] feelings and emotions...[He does] not believe that [he] will be able to sustain the loss of such a beautiful and angelic presence in [his] life and [he] fear[s] the deterioration of [his] psychological and physical well being." *Id.* The AAO notes that there are no professional psychological evaluations for the AAO to review to determine if the applicant's husband is suffering from any depression or anxiety or whether any depression and anxiety is beyond that experienced by others in the same situation. Additionally, the AAO notes that since the applicant's husband claims that the diminishment of his psychological standing will be caused by the separation from the applicant, if the applicant's husband joins the applicant in El Salvador then the depression and anxiety would presumably no longer be an issue. The AAO notes that the applicant's husband made no claim that he would suffer any hardship if he joined the applicant in El Salvador, and it has not been established that he has no transferable skills that would aid him in obtaining a job in El Salvador. Additionally, the AAO notes that the applicant's husband is a native of Colombia and speaks Spanish, the same language spoken in El Salvador. The AAO finds that the applicant failed to establish that her husband would suffer extreme hardship if he joined the applicant in El Salvador.

In addition, the applicant fails to establish extreme hardship to her spouse if he remains in the United States, maintaining his employment and access to medical care. As a United States citizen, the applicant's spouse is not required to reside outside of the United States as a result of denial of the applicant's waiver request. Further, the record fails to demonstrate that the applicant will be unable to contribute to her husband's financial wellbeing from a location outside of the United States. Moreover, the United States Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981). The applicant's husband faces the decision of whether to remain in the United States or relocate to avoid separation. However, this is a factor that every case will present, and the BIA has held, "election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed." *Matter of Mansour*, 11 I&N Dec. 306, 307 (BIA 1965).

United States court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. In *Hassan, supra*, the Ninth Circuit Court of Appeals held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, his situation is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. 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 sections 212(a)(2)(D) and 212(a)(9)(B) of the Act, the burden of proving eligibility 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.