



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JAN 16 2009

IN RE: [REDACTED]

PETITION: 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 PETITIONER:

[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.

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, California Service Center and he dismissed a subsequent motion to reopen/reconsider. An appeal of the Director's decision regarding the applicant's motion is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible under section 212(a)(2)(D)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D)(i), and the relevant waiver application is thus moot. The matter will be returned to the Director for continued processing.

The applicant is a native and citizen of Brazil who was found to be inadmissible to the United States under section 212(a)(2)(D)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D)(i), for having been convicted of prostitution. The applicant is the spouse of a naturalized U.S. citizen and now seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that she may reside in the United States with her spouse.

The Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and affirmed his denial of the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Director*, dated February 28, 2006.

On appeal, counsel contends that Citizenship and Immigration Services (CIS) erred as a matter of law in finding that the applicant had failed to meet the burden of establishing extreme hardship to her qualifying relative, as necessary for a waiver under 212(h) of the Act. *Form I-290B; Attorney's brief*.

In support of the appeal, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant and her spouse; police clearance letters for the applicant; employment letters for the applicant and her spouse; earnings statements and a Form W-2 for the applicant's spouse; tax statements for the applicant and her spouse; medical records for the applicant; criminal records for the applicant; and a property lease for the applicant and her spouse. The entire record was considered in rendering a decision on the appeal.

The record reflects that on August 10, 1993, the applicant pled guilty to Prostitution under New York Penal Law § 230.00 for which she received a sentence of three days imprisonment. *Certificate of Disposition, Criminal Court of the City of New York, County of Kings*. On July 19, 1995, the applicant pled guilty to Prostitution under New York Penal Law § 230.00 for which she received a sentence of conditional discharge for one year. *Certificate of Disposition, Criminal Court of the City of New York, County of New York*. On December 7, 1995, the applicant was convicted of Promoting Prostitution in the fourth degree under New York Penal Law § 230.20 for which she received a sentence of conditional discharge for one year. *Certificate of Conviction, State of New York, Westchester County, Port Chester Village Court*. On February 27, 1998, the applicant pled guilty to Prostitution under New York Penal Law § 230.00 for which she received a sentence of time served. *Certificate of Disposition, Criminal court of the City of New York, County of Queens*.

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

(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.

Prior to addressing whether the applicant qualifies for the Form I-601 waiver, the AAO finds it necessary to address the issue of inadmissibility. The applicant asserts that she was forced to engage in acts of prostitution over the course of five years. *Attorney's brief, Statement from the applicant*, dated January 10, 2002. The applicant feared her family and friends would be harmed if she tried to escape. *Id.* Counsel asserts that the applicant is not excludable under section 212(a)(2)(D)(i) of the Act for the applicant engaged in acts of prostitution under duress. *See Matter of M-*, 7 I&N Dec. 251 (BIA 1956). While the AAO acknowledges counsel's assertions, it notes that in *Matter of M-*, the Board of Immigration Appeals ruled that a person who admitted to having engaged in prostitution under duress but had no prostitution convictions was not excludable as a prostitute under section 212(a)(12) of the Act (currently section 212(a)(2)(D) of the Act). *Id.*; 13066 Federal Register, Vol. 61, No. 59, March 26, 1996, [http://bulk.resource.org/gpo.gov/register/1996/1996\\_13066.pdf](http://bulk.resource.org/gpo.gov/register/1996/1996_13066.pdf). The facts of this case are distinguishable from *Matter of M-*, as the applicant has several convictions for prostitution. Therefore, counsel's assertions that the applicant is not inadmissible for having engaged in prostitution under duress are not persuasive.

The AAO notes that an application for admission or adjustment is a "continuing" application, adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). As a final decision has not been made on the Form I-601 application, the adjustment of status application is still considered pending. As such, the date of application for adjustment of status has technically not taken place yet.

Therefore, while the AAO disagrees with counsel's reasoning in this matter, it, nevertheless finds that the applicant is not inadmissible under section 212(a)(2)(D)(i) of the Act. The date of her most recent conviction is February 27, 1998, more than ten years ago. Accordingly, the applicant has not engaged in prostitution within ten years of applying for adjustment of status and is not inadmissible to the United States based on her convictions. As the applicant is not inadmissible, the waiver filed pursuant to section 212(h) of the Act is moot.

In proceedings for the application for waiver of grounds of inadmissibility under section 212(h) 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 is not required to file the waiver. Accordingly, the appeal will be dismissed as moot.

**ORDER:** The appeal is dismissed as the underlying application is moot. The Director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.