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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 23 2010**

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:

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, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, 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.

The applicant is a native and citizen of Malaysia, the mother of two United States citizens, and the beneficiary of an approved Form I-140 petition. The applicant was found to be 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 offenses related to prostitution. 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 children. The director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant filed a timely appeal.

On appeal, counsel asserted that the applicant applied for waiver of inadmissibility pursuant to section 212(h)(1)(A) of the Act, not section 212(h)(1)(B) of the Act, and that evidence of hardship to a qualifying relative is therefore unnecessary.

The AAO will first consider the finding of inadmissibility under section 212(a)(2)(D) of the Act. Section 212(a)(2) 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.

The record reflects that on May 20, 2004, in Queens County, New York, the applicant pled guilty to and was convicted of promoting prostitution in the fourth degree in violation of New York Penal Law § 230.20. She was required to perform three days of community service and was placed on one year of conditional discharge. On July 26, 2005, the applicant, using the name Jane Chung, was

arrested in Queens County, New York, for violation of N.Y. Penal Law § 230.20. On July 27, 2005, she pled guilty to and was convicted of that offense. She was sentenced to jail for one day and was given credit for one day of time served.

N.Y. Penal Law § 230.20 provides that “[a] person is guilty of promoting prostitution in the fourth degree when he knowingly advances or profits from prostitution. Promoting prostitution in the fourth degree is a class A misdemeanor.”

“Promoting prostitution” is defined under N.Y. Penal Law § 230.15 as follows:

1. "Advance prostitution." A person "advances prostitution" when, acting other than as a prostitute or as a patron thereof, he knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution.
2. "Profit from prostitution." A person "profits from prostitution" when, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.

The substantive crime of prostitution is defined under N.Y. Penal Law § 230.00, which provides: “A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.” In *People v. Costello*, 90 Misc.2d 431, 432, 395 N.Y.S.2d 139 (N.Y.Sup. 1977), the Supreme Court, New York County stated that:

The term “prostitution” itself has a commonly understood meaning, and the use of the term “fee” in the statutory definition is the key to that meaning. The legislature has enacted the section to prohibit commercial exploitation of sexual gratification. The methods of obtaining that gratification are as broad and varied as the term “sexual conduct,” but the common understanding of the term “prostitution” involves the areas of sexual intercourse, deviate sexual intercourse, and masturbation. The many non-physical facets of sexual conduct are defined and regulated by other statutes (e. g., obscenity and exposure of a female).

In *People v. Hinzmann*, 177 Misc.2d 531, 677 N.Y.S.2d 440 (N.Y.City Crim.Ct.,1998), the Criminal Court noted that the purpose of Article 230 was “to prohibit the commercial exploitation of sexual gratification,” and that “[t]he sexual conduct need not in fact be consummated; the offer or agreement to trade the sexual conduct with another person for a fee may be sufficient”. *Id.* at 533. (See, Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law art 230, at 145 [1989].) The Criminal Court indicated that *Costello's* interpretation of the term “sexual conduct” has been followed by other courts, but that a more expansive interpretation of “sexual conduct” is warranted. *Id.* at 533-534. Thus, the Criminal Court held that the combination of “lap

dancing” with the touching of naked breasts and buttocks is to be encompassed within the meaning of “sexual conduct.” *Id.* The Court reached this conclusion by reasoning that:

[T]he defendants agreeing to sit on the officer's lap and “move around” while the officer would touch their naked breasts and buttocks were suggestive of conduct done to satisfy a sexual desire. This was not merely nude dancing, which generally is protected as expressive conduct under the First Amendment. . . . In addition, there are sufficient allegations the defendants agreed to perform these acts in exchange for money. That is the essence of prostitution.

Id. at 534.

A person who “directly or indirectly procures or attempts to procure, or . . . procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or . . . received, in whole or in part, the proceeds of prostitution” is inadmissible to the United States. Section 212(a)(2)(D)(ii) of the Act. For purposes of section 212(a)(2)(D) of the Act, the term “prostitution” is defined by the State Department as “engaging in promiscuous *sexual intercourse* for hire.” 22 C.F.R. § 40.24(b) (emphasis added). *See Kepilino v. Gonzales*, 454 F.3d 1057, 1061 (9th Cir. 2006). With regard to the term “procure,” in *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 551 (BIA 2008), the Board stated that “procure” in the context of prostitution “has a specific meaning, i.e., “[t]o obtain [a prostitute] for another.” *Id.* at 551. The individuals who may be procured for the purpose of prostitution within the Act “are prostitutes, and persons of the male sex to have sexual intercourse with prostitutes.” *See Matter of R-M-*, 7 I&N 392, 394-396 (BIA 1957) (respondent’s conduct of knowingly procuring male customers for prostitutes rendered him inadmissible as being “within the class of aliens who directly procured and attempted to procure persons (men) for the purpose of prostitution”).

The AAO notes that it has long been established that inadmissibility under section 212(a)(2)(D) 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.”); *see also Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 553-54 (BIA 2008); *Mirabal-Balon v. Esperdy*, 188 F.Supp. 317 (D.C.N.Y. 1960) (a single act of procuring does not render an alien inadmissible under section 212(a)(12) of the Act). The AAO notes that the Code of Federal Regulations under 22 C.F.R. § 40.24(b) provides that:

[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.

In order for the applicant to be inadmissible under section 212(a)(2)(D)(ii) of the Act, the applicant must have procured or attempted to procure prostitutes or persons for prostitution, or have received proceeds of prostitution; and the evidence must show that the acts of promoting prostitution were substantial, continuous and regular. As previously stated, the term “prostitution” is defined as

“engaging in promiscuous sexual intercourse for hire.” 22 C.F.R. § 40.24(b). Because N.Y. Penal Law § 230.20 criminalizes conduct that does not necessarily involve sexual intercourse-including the touching of the naked breasts and buttocks of another - New York's statute is much broader than the Code of Federal Regulations definition. Thus, the AAO must look to the record of conviction to determine the specific prohibited conduct of which the applicant committed. The arrest report for the May 20, 2004 conviction conveyed that the applicant was arrested for offering a female for “a hand masturbation” and the arrest report for the July 27, 2005 conviction stated that the applicant offered “one female Asian . . . for sexual activity.” The AAO finds that “hand masturbation” does not involve sexual intercourse, and that the record contains no detail of the “sexual activity” for which the applicant offered the woman’s services. Consequently, the documents in the criminal record fail to establish that the applicant’s conduct falls within the regulatory definition of “prostitution” relevant to section 212(a)(2)(D) of the Act. Accordingly, we find that the record fails to demonstrate that the applicant is inadmissible under 212(a)(2)(D) of the Act.

Although not addressed by the director, the record reveals that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing a crime involving moral turpitude. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude. In evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

The AAO is unaware of any published federal cases addressing whether the crime of promoting prostitution under New York law is a crime of moral turpitude. However, in *Matter of Lambert*, 11 I&N Dec. 340 (BIA 1965), the Board held that the respondent's offering to secure a person for the purpose of prostitution and directing that person to another for the purpose of prostitution in violation of Fla. Stat. § 796.07 involved moral turpitude. *Id.* at 341. Fla. Stat. § 796.07 defines "prostitution" as "the giving or receiving of the body for sexual activity for hire"; and "sexual activity" to mean "oral, anal, or vaginal penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation."

As previously stated, N.Y. Penal Law § 230.20 provides that a person is guilty of promoting prostitution when he knowingly advances or profits from prostitution. The substantive crime of prostitution under New York law occurs when a "person engages or agrees or offers to engage in sexual conduct with another person in return for a fee." N.Y. Penal Law § 230.00. As previously stated, in *Costello* the Court held that even though the term "prostitution" has no statutory definition, the term has its "commonly understood meaning," which involves sexual intercourse, deviate sexual intercourse, and masturbation; and "the use of the term "fee" in the statutory definition is the key to that meaning." *Id.* at 432. In *Hinzmann*, the Criminal Court found that the defendants' agreement "to sit on the officer's lap and "move around" while the officer would touch their naked breasts and buttocks" in exchange for money was "the essence of prostitution." *Id.* at 534. In view of the holding in *Lambert*, which is that it is morally turpitudinous to offer to secure a person for prostitution and direct that person to another for the purpose of prostitution, we find that the acts proscribed under N.Y. Penal Law § 230.15, which are done specifically to advance or profit from prostitution, are morally turpitudinous. Thus, the applicant is inadmissible, as conceded by counsel in the letter dated August 29, 2009, under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude.

A waiver is available for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

...

(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 is established to the satisfaction of the Attorney General [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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives here are the applicant's two U.S. citizen children.

If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios are possible should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action to be taken is difficult, and it is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. Cf. *Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have

never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

With regard to the applicant’s children joining the applicant to live in Malaysia, the undated letter from the applicant’s son stated that if the applicant returns to Malaysia he will have to go with her, but that he has grown up in the United States, has no knowledge of Malaysia, and would have to leave his school, education, friends, and community. He noted that the educational system is different in Malaysia and that he could not get a proper education there. The undated letter from the applicant’s daughter averred that the education available to her in the United States is suitable, whereas in Malaysia they speak English much differently. She claimed that her mother has taught her Mandarin, Cantonese, and the Malaysian languages. ██████████ a licensed clinical social worker, asserted that in Malaysia the future of the applicant’s children would be dim with respect to their educational and employment opportunities. He reports that the applicant claims that they would not be able to afford medical care in Malaysia, whereas the medical care they now have is excellent. ██████████ stated that the applicant’s husband contends that their work opportunities would be limited and their wages would be low in Malaysia. He conveyed that the applicant’s children are learning Cantonese and Mandarin; however, their spoken vocabulary would be far below that of their peers and their reading and writing ability is very poor, which would complicate their integration into the school system. ██████████ asserted that the applicant’s children fear the loss of their teachers, friends, and their familiar environment and living in a country that has a different physical, social, and cultural environment. The record conveys the applicant’s children were born on November 2, 1993 and February 14, 1995.

The asserted hardship factors presented relate to education, language, employment, healthcare, and living in a foreign culture. We note that the Board addressed the issue of whether a respondent’s 15-year-old daughter would experience extreme hardship if she relocated to Taiwan in *In re. Kao*, 23

I&N Dec. 45, 50 (BIA 2001). In *Kao*, the Board concluded that the respondent's daughter would experience extreme hardship in relocating to Taiwan because her language capabilities were not sufficient for her to adequately transition to daily life in Taiwan; she had lived her entire life in the United States and was completely integrated into an American lifestyle; and she would be uprooted at a critical stage in her education and social development to survive in a Chinese-only environment. In view of the holding in *Kao*, and the evidence that establishes that the applicant's son is 16 years old and her daughter is 15 years old, that they have always lived in the United States and are doing well in school, and that they do not speak the official language of Malaysia, we find that the applicant's son and daughter would experience extreme hardship if, at this stage in their education and their social development, they were to join the applicant to live in Malaysia.

We will also consider whether the applicant's son and daughter would experience extreme hardship if they remain in the United States and are thereby separated from the applicant and their father, who is a derivative beneficiary of the applicant's petition and, consequently, would be required to leave the United States if the waiver is not granted.

Family separation has been found to be a common result of inadmissibility or removal in some cases. See *Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the type of familial relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; see also *U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and otherwise establish a life together, such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. See, e.g., *Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of familial relationship involved, the hardship resulting from family separation is based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O*, 21 I&N Dec.

at 383. Indeed, the specific facts of a case may dictate that even the separation of a spouse and children from an applicant does not constitute extreme hardship. In *Matter of Ngai*, for instance, the Board did not find extreme hardship because the claims of hardship conflicted with evidence in the record and because the applicant and his spouse had been voluntarily separated from one another for 28 years. 19 I&N Dec. at 247. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

In view of fact that the applicant's son is 16 years old and her daughter is 15 years old and their father, who is a derivative beneficiary of the applicant's petition, would be required to leave the United States if the waiver application is denied, and given the substantial weight that is accorded to family separation in the hardship analysis, we find that the significant impact that the applicant's son and daughter indicate that separation from their mother, and consequently, separation from their father, will have on them, demonstrates that the hardship that the applicant's son and daughter will experience as a result of separation is extreme.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Id. at 301.

The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The favorable factor in the present case is the extreme hardship to the applicant's children. The adverse factors are the two criminal convictions for promoting prostitution in the fourth degree in violation of New York law. The record contains letters by the director of the Chinese-American Planning Council, Inc. commending the applicant's character, and the record indicates that the applicant owns her home. Counsel contends on appeal that the promoting prostitution convictions on May 20, 2004 and July 26, 2005 were aberrations and that she was not working in a house of prostitution or massage parlor, but was employed as a hairstylist or cosmetician.

However, we do not accept counsel's contention, in view of the fact that the applicant has two convictions occurring within the span of a year. The record suggests that these incidents were not aberrations. The applicant has not explained why, if her place of employment was merely a hair salon and not a house of prostitution or massage parlor, she was offering prostitution to customers in the first place, and how she succeeded in maintaining employment in spite of having engaged in criminal activities during her employment. Given that the applicant's convictions are relatively recent, and the fact that she has continued in the same profession as before, we have serious doubts as to whether she has been rehabilitated and is a person of good character. The crimes committed by the applicant are serious, and when all the circumstances are considered together, we find the adverse factors outweigh the favorable factor, such that a favorable exercise of discretion is not warranted in this case. Accordingly, the appeal will be dismissed.

In proceedings for 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. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.