

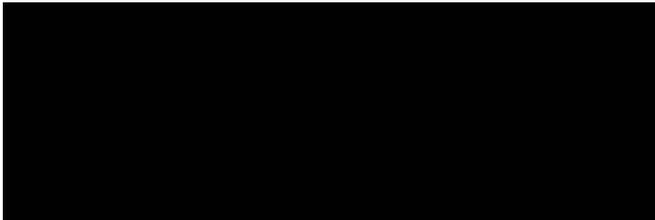
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H2

FILE:



Office: PANAMA CITY, PANAMA

Date: JAN 05 2010

IN RE:

Applicant:



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:



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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Panama City, Panama, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the District Director will be withdrawn as it has not been established that the applicant is inadmissible pursuant to section 212(a)(2)(D) of the Act. The appeal will be dismissed, and the matter returned to the District Director for further proceedings consistent with this decision.

The record reflects that 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) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D), for engaging in prostitution. The record indicates that the applicant is married to a United States citizen and she is the beneficiary of an approved Petition for Alien Relative (Form I-130) and Petition for Alien Fiancé(e) (Form I-129F). 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 husband.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated August 5, 2008. The AAO notes that the District Director also found the applicant inadmissible to the United States pursuant to section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), for being ordered removed under section 235(b)(1) of the Act.

On appeal, the applicant, through counsel, asserts that the District Director's decision "is contrary to law, against the substantial weight of the evidence and an abuse of discretion." *Attachment to Form I-290B*, filed September 8, 2008.

The record includes, but is not limited to, counsel's appeal brief, affidavits from the applicant and her husband, medical documents regarding the applicant's husband's medical conditions, a psychological evaluation on the applicant's husband, and the applicant's sworn statement. The entire record was reviewed and considered in arriving at a decision on the appeal.

In a sworn statement taken on March 31, 2006, the applicant was questioned regarding her employment as a prostitute in the United States.

Q. Approximately how much money did you enter with you have on your last entry?

A. Two thousand five-hundred dollars (\$2,500.00)

Q. Are you saying you lived off \$2,500.00 for six months?

A. Yes, I have my friend there that is why I did not work.

Q. What is the name of the bar that you worked at?

A. [REDACTED]

Q. What type of bar was it?
A. It is a bar where people drink and play Billiards.

Q. Have you heard of an establishment in [REDACTED] know as [REDACTED]

A. Yes.

Q. What type of work did you do?

A. Prostitution.

Q. How much money were you making?

A. One-thousand dollars (\$1,000.00) a week.

Q. Why are you coming to the United States today?

A. I came to visit a friend.

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 [her] discretion, waive the application of subparagraphs (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...

(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 [her] 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) of the Act provides, in pertinent part, that:

(A) Certain alien previously removed.-

(i) Arriving Aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

In the present application, the record indicates that the applicant entered the United States on April 1, 2006. During secondary inspection, the applicant was found to be inadmissible to the United States under section 212(a)(2)(D) of the Act, and was expeditiously removed from the United States. On June 20, 2006, the applicant married [REDACTED] a United States citizen, in Panama. On September 27, 2006, the applicant's husband filed a Form I-130 on behalf of the applicant. On October 31, 2006, the applicant's husband filed a Form I-129F on behalf of the applicant. On May 23, 2007, the applicant's Form I-129F was approved. On or about January 3, 2008, the applicant filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and a Form I-601. On August 5, 2008, the District Director denied the applicant's Form I-601, finding

the applicant engaged in prostitution and failed to demonstrate extreme hardship to her United States citizen spouse. On November 14, 2008, the applicant's Form I-130 was approved.

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 AAO notes that the District Director found the applicant inadmissible to the United States under section 212(a)(2)(D) of the Act; however, the District Director failed to specify under which subsection the applicant was inadmissible. Therefore, the AAO will address each subsection under 212(a)(2)(D) as it relates to the applicant's conduct.

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." In the applicant's sworn statement, the applicant states she worked in a bar in St. Thomas as a prostitute earning \$1,000.00 a week. In order for the applicant to be inadmissible under section 212(a)(2)(D)(i), the applicant must have engaged in prostitution. 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.").

Therefore, 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 AAO notes that the applicant admitted to engaging in prostitution; however, the applicant's statement that she made one-thousand dollars (\$1,000.00) a week is insufficient alone to establish that the acts of prostitution were substantial, continuous and regular. The record fails to establish the duration of time that the applicant worked as a prostitute or the regularity of the acts, and it is not clear if the reference to an amount earned per week reflects numerous acts of prostitution committed regularly over the course of several weeks or more, or instead refers to amounts received for acts that were not substantial, continuous and regular but were merely measured in units of weeks (rather than earnings measured by the hour, month or year). The AAO further notes irregularities or "gaps" in the applicant's sworn statement. The applicant initially stated that she did not work in the United States, but was living off some saved money and help from a friend. However, the subsequent question—"What is the name of the bar that you worked at?"—seems to be based on an admission by the applicant that she was employed rather than a statement that she was not. Likewise, the interviewing officer followed up his inquiry as to whether the applicant had "heard of" an establishment known as [REDACTED] to which the applicant responded yes, with the question "What type of work did you do?", to which the applicant admitted prostitution. The questions asked by the interviewing officer appear to be based on answers to other questions, neither of which appear in the sworn statement. Additionally, after the applicant admitted to working as a prostitute, there was no further questioning on the topic by the officer. 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.

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

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. For the reasons stated above, the AAO finds that the sworn statement relied on by the District Director is insufficient to support a finding that the applicant is inadmissible under section 212(a)(2)(D)(iii) of the Act.

The AAO finds that the District 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. Beyond the decision of the District Director, the AAO also notes that there is insufficient evidence in the record to support a finding that the applicant admitted to having committed, or admitted committing acts which constitute the elements of a crime involving moral turpitude, as there is no evidence that the applicant was “given an adequate definition of the crime, including all essential elements, and that it [was] explained in understandable terms.” *Matter of K-*, 7 I&N Dec. 594, 597 (BIA 1957). As such, the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to section 212(h)(1)(B) is also moot and will not be addressed.

However, the AAO notes that the applicant is still inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), in that she has not resided outside the United States for the statutory 5 year period; therefore, the applicant will need permission to reapply for admission after her removal, which can be granted upon the filing of a Form I-212.

ORDER: The decision of the District Director is withdrawn as it has not been established that the applicant is inadmissible pursuant to section 212(a)(2)(D) of the Act. The appeal is dismissed, and the matter is returned to the District Director for further proceedings consistent with this decision.