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



H₂

DATE: **FEB 02 2012** Office: ATLANTA FILE:

IN RE:

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:

SELF-REPRESENTED

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 \$630. 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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Atlanta, Georgia. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Trinidad and Tobago and was found to be inadmissible to the United States pursuant to section 212(a)(2)(D)(i) of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. § 1182(a)(2)(D)(i) for having engaged in prostitution. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside in the United States with her U.S. citizen husband and children. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed on her behalf by her U.S. citizen husband.

In a decision dated March 9, 2009, the Field Office Director concluded that the applicant did not establish that a qualifying relative would suffer extreme hardship and her application for a waiver of inadmissibility was denied accordingly.

On appeal, the applicant states that her qualifying relatives would suffer extreme hardship if she were not granted admission to the United States.

On December 27, 2011, the AAO issued a Notice of Intent to Deny (NOID) providing the applicant notice that it intended to dismiss the appeal. The applicant was provided 30 days to respond to the issues raised in the NOID. The applicant failed to submit a response.

The record contains, among other documentation, the applicant's criminal record, statements written by the applicant, a statement from the applicant's husband, letters from the applicant's church, documentation concerning the applicant's husband's home ownership and mortgage payments, photographs and certificates.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

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,

...

is inadmissible.

The Field Office Director found the applicant inadmissible to the United States under section 212(a)(2)(D)(i) of the Act. In order for the applicant to be inadmissible under section

212(a)(2)(D)(i), the applicant must have engaged in prostitution within 10 years of the date of application for adjustment of status. The applicant does not contest her inadmissibility.

The applicant, using the name [REDACTED], was arrested on June 30, 1997 and charged with Prostitution in violation of Pennsylvania Statutes and Consolidated Statutes (Pa.C.S.A) § 5902, and Criminal Solicitation in violation of Pa.C.S.A. § 902. On October 10, 1997, in the Philadelphia Municipal Court, the record indicates that she was convicted on both counts and sentenced to nine months of probation and ordered to pay court costs.

The applicant's conviction was based on actions taken by the applicant on June 26, 1997. Although 8 C.F.R § 103.2(b)(1) requires that "[a]n applicant or petitioner . . . establish that he or she is eligible for the requested benefit at the time of filing the application or petition," when adjudicating issues of admissibility, the date of application is ongoing and admissibility is determined based on the "facts and law at the time the application is finally considered." *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). This rule applies specifically to admissibility and does not necessarily apply to other adjustment eligibility criteria or to other adjudications. *See, e.g., Cuadra v. Gonzales*, All F.3d 947 (8th Cir. 2005); *Robledo v. Chertoff* 658 F.Supp.2d 688 (D.Md. 2009). As such, the AAO finds that the applicant is no longer inadmissible under INA § 212(a)(2)(D)(i) as there is no evidence in the record that she has engaged in prostitution within the past ten years. The record illustrates that the applicant last engaged in prostitution on June 25, 1997.

The applicant's convictions for prostitution and criminal solicitation, however, may make the applicant inadmissible under section 212(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude.¹ Section 212(a)(2)(A) of the Act states in pertinent part:

(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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

...

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. *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).

- (I) 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).

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 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).

On October 10, 1997, the applicant was convicted of Prostitution in violation of Pa.C.S.A. § 5902, which provides, in pertinent part:

- (a) Prostitution.--A person is guilty of prostitution if he or she:

(1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or

(2) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.

...

(b) Promoting prostitution.--A person who knowingly promotes prostitution of another commits a misdemeanor or felony as provided in subsection (c) of this section. The following acts shall, without limitation of the foregoing, constitute promoting prostitution:

...

(4) soliciting a person to patronize a prostitute;

...

(8) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this subsection.

The record does not make clear the subsection of Pa.C.S.A. § 5902 under which the applicant was convicted, however, the record indicates that the applicant “unlawfully offered to engage in sexual intercourse/sexual activity with an undercover police officer, in exchange for money.” In *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967), the Board of Immigration Appeals held that the charge of “offer to commit or to engage in prostitution, lewdness, or assignation,” a misdemeanor under Florida law, was a crime involving moral turpitude. *Id.* at 207. Furthermore, in *Matter of W*, 4 I&N Dec. 401 (BIA 1951), the Board held that a conviction for violation of an ordinance of the City of Seattle, Washington, which ordinance 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 Board stated that “[i]t is well established that the crime of practicing prostitution involves moral turpitude.” *Id.* 401-404. In view of the holdings in *Turcotte* and *Matter of W*, in so far as they relate to prostitution, we find that the acts proscribed under Pa.C.S.A. § 5902, which are done specifically for prostitution, are morally turpitudinous. Thus, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

The applicant was also convicted of Criminal Solicitation in violation of Pa.C.S.A. § 902, which states, in pertinent part:

Criminal solicitation

(a) Definition of solicitation.--A person is guilty of solicitation to commit a crime if with the intent of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

(b) Renunciation.--It is a defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal intent.

Solicitation under Pa.C.S.A. § 902 is an inchoate offense, which is distinct from the crime solicited. *Barragan-Lopez v. Mukasey*, 508 F.3d 899, 903 (9th Cir. 2007). Therefore, we look to the underlying offense to determine whether the conviction involves moral turpitude. The crime underlying the applicant's offense appears to be solicitation of prostitution under Pa.C.S.A. § 5902. The AAO is not aware of any cases where a conviction under Pa.C.S.A. § 5902 does not involve moral turpitude. Thus, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of two crimes involving moral turpitude and, as such, is not eligible for the petty offense exception under section 212(a)(2)(A) of the Act.

As a person found to be inadmissible under section 212(a)(2)(A) of the Act, the applicant is eligible to apply for a waiver under section 212(h) of the Act.

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

The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if –

(1) (A) . . . it is established to the satisfaction of the Attorney General that –

(i) . . . 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 is established to the satisfaction of the Attorney General 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 . . .

As it has not yet been 15 years since the time of the activities that led to the applicant's inadmissibility, she must illustrate that the denial of her admission would result in extreme hardship to a qualifying relative. In this case, the applicant's qualifying relatives are her U.S. citizen husband and her two U.S. citizen children. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and the AAO then assesses whether a favorable

exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (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*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., *Matter of 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

speaking the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The applicant states that her U.S. citizen children will suffer hardship if she is separated from them, because she will no longer be there to care for them. The record indicates that the applicant's children are three years old and six years old. The applicant, however, has not provided any evidence of the role that she currently plays in her children's lives, such as letters from neighbors, community members, teachers, or family members aside from her husband. She has not provided any evidence of any special needs that her children have or whether there is any other individual that would be able to care for her children should she no longer be present. Additionally, the applicant states that her U.S. citizen husband relies on her and would suffer extreme hardship in her absence, but she has not provided any independent evidence of the support that she provides to her husband. Moreover, the applicant has not provided evidence of how her husband would suffer in her absence.

The applicant also states that her husband would suffer financial hardship if she were no longer to reside in the United States, but the applicant does not provide any evidence of how she contributes to the household financially, such as paystubs or evidence of current employment. The applicant states that her oldest child was taken out of school because of her and her husband's inability to pay for his tuition; however she does not provide any independent evidence of this fact or any evidence why the child is not able to attend a public school. Additionally, the applicant does not explain how this fact is affected by her admissibility.

We must also consider whether the applicant's U.S. citizen spouse and children would suffer extreme hardship if they were to relocate to Trinidad and Tobago with the applicant. The applicant has not submitted any evidence of the country conditions in Trinidad and Tobago. If the AAO were to take administrative notice of the conditions in Trinidad and Tobago, the applicant has not presented any evidence of how those country conditions would specifically cause extreme hardship to her husband or children, such as an inability for them to treat certain medical conditions, obtain employment or education, or other circumstances. All evidence in the record of hardship to the applicant's spouse and children should they relocate to Trinidad and Tobago has been considered in aggregate. Based on the foregoing, the applicant has not shown that a qualifying relative will endure extreme hardship should they join her abroad.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's U.S. citizen spouse or children will face extreme hardship if

the applicant is not granted a waiver of inadmissibility. Although the AAO acknowledges that the applicant's U.S. citizen spouse and children will suffer hardship, the record does not establish that the hardship they would face rises to the level of "extreme" as contemplated by statute and case law. The applicant has expressed remorse for her past decisions that led to her inadmissibility and has submitted evidence regarding her moral character; however, that information is not relevant to the determination of whether her qualifying relatives will suffer extreme hardship if she is not granted a waiver of inadmissibility. Additionally, the AAO notes that the applicant's diplomas were issued prior to her criminal convictions. Moreover, having found the applicant statutorily ineligible for relief under section 212(h) of the Act, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. Here, the applicant has not met that burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.