U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: FEB 27 2013 Office: NEWARK [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and (i)

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 AAO inappropriately applied the law 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 with the field office or service center that originally decided your case by filing a Form I-190B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a citizen and national of Nigeria who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i), for having been convicted of crimes involving moral turpitude and section 212(a)(2)(D)(ii) of the Act, 8 U.S.C. § 1182(a)(2)(D)(ii) for having received, in whole or in part, the proceeds of prostitution. The applicant was further found to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182 (a)(6)(C)(i), for having for having procured admission to the United States through fraud or willful misrepresentation of a material fact. The applicant is married to a U.S. citizen. He seeks waivers of inadmissibility pursuant to sections 212(h) and 212(i) of the Act, 8 U.S.C. § 1182(h) and (i), in order to remain in the United States with his U.S. citizen spouse.

In a decision dated March 7, 2012, the field office director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly.

On appeal, counsel for the applicant contends that the field office director erred in denying the applicant's waiver application. Counsel asserts that the evidence outlining psychological, emotional and financial difficulties demonstrates extreme hardship to the applicant's qualifying relative.

The record includes, but is not limited to: the applicant's affidavit; an affidavit by the applicant's spouse; a letter form Psychiatric Associates and other medical documentation; a prescription profile for the applicant's spouse; country conditions documentation;; and documentation regarding the applicant's criminal history.

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 has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible

The Board of Immigration Appeals (Board) 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....
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> 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.)

The record shows that on November 20, 2005, the applicant was convicted in the Turin Court, Italy, of: "acts intended to effect foreigners illegal entry in the country, with the purpose of making a profit," in violation of Article 12, clause 3 of Italy's law of July 28, 1998; "criminal conspiracy" in violation of Article 416, Clause 2 of the Italian Penal Code; and "profiting from prostitution, continuing offense" in violation of Article 81, 110 of the Italian Penal Code and Article 3, no.8 of Italy's law 20/211958 N.75. The applicant appealed the decision to the Turin Court of Appeals, which confirmed the judgment of the Turin Court on November 17, 2007. The record reflects that the applicant was sentenced to a term of imprisonment of three years and eight months. The field office director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude.

This case arises in the jurisdiction of the Third Circuit. The Third Circuit has affirmed the traditional categorical approach for determining whether a crime involves moral turpitude. *See Jean-Louis v. Holder*, 582 F.3d 462, 473-82 (3rd Cir. 2009) (declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). The categorical inquiry in the Third Circuit consists of looking "to the elements of the statutory offense . . . to ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute." 582 F.3d 462, 465-66. The "inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute 'fits' within the requirements of a [crime involving moral turpitude]." 582 F.3d at 470. However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a crime involving moral turpitude] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466. This is true "even where clear sectional divisions do not delineate the statutory variations." *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The record reflects that in Italy on November 20, 2005, the applicant was convicted of the offense of profiting from prostitution, continuing offense. The applicant was sentenced to three years and eight months in prison. The AAO notes that the charge states that Italy's "Court Record Comprehensive Certificate" states that the applicant profited from prostitution from July 2004 through January 2005 in the cities of Turin and Genoa, the Milan Malpensa Area, and the Turin Belt Area.

Here, we find that the applicant's conviction involves moral turpitude in view of *Matter of Lambert*, 11 I&N Dec. 340 (BIA 1965). In that case the Board held that the respondent's conviction under Florida law for renting rooms that were to be used for the purpose of lewdness or prostitution is conviction of a crime involving moral turpitude. *Id.* at 342. The applicant's conviction related to him advancing and profiting from prostitution is analogous to the facts in *Matter of Lambert.* Therefore, the AAO finds that the applicant's conviction for profiting from prostitution, continuing offense is a crime involving moral turpitude that renders him inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. Since the applicant's conviction for profiting from prostitution renders him inadmissible for having been convicted of a crime involving moral turpitude, the AAO need not determine whether any of the applicant's other convictions render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

On appeal, the applicant indicates that he is innocent of the criminal offense of profiting from prostitution. However, we observe that in *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996), the Board held that collateral attacks on a conviction do not operate to negate the finality of the conviction unless and until the conviction is overturned. (citations omitted). A collateral attack on a judgment of conviction cannot be entertained "unless the judgment is void on its face," and "it is improper to go behind the judicial record to determine the guilt or innocence of an alien." *Id.*

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

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

The applicant was also found to be inadmissible for under section 212(a)(2)(D)(ii) of the Act, which provides, in pertinent part, that:

> (D) Prostitution and commercialized vice
> Any alien who—
> . . .
>
> (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 . . . is inadmissible.

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 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." 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).

Here, the evidence in the record reflects that the applicant was convicted on November 20, 2005 for the offense of profiting from prostitution in violation of Article 81, 110 of the Italian Penal Code and Article 3, no.8 of Italy's law 20/211958 N.75. The record of conviction reveals that the applicant was convicted for a continuing offense as he committed the crime from July 2004 through January 2005 in the cities of Turin and Genoa, the Milan Malpensa Area and the Turin Belt Area. Accordingly, the evidence in the record establishes that the applicant's conviction was based on a regular pattern of conduct, as he was engaged in receiving the proceeds of prostitution during the aforementioned six-month period. Therefore, the AAO finds that there is sufficient evidence showing that the applicant's conduct renders him inadmissible under section 212(a)(2)(D)(ii) of the Act. The applicant does not contest his inadmissibility on appeal.

The waiver for inadmissibility under section 212(a)(2)(D)(ii) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part, that:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (D), . . . of subsection (a)(2) . . . if –
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> . . .
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> (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 . . . .

The applicant was also found to be inadmissible for under section 212(a)(6)(C) of the Act, which provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

An applicant who applies for a nonimmigrant visa must complete a Form DS-156, Nonimmigrant Visa Application. The reverse side of Form DS-156, at Question 38, asks an applicant the following: "Have you ever been arrested or convicted for an offense or crime . . . ?" The applicant answered "No" even though at the time of filing the applicant had already been found guilty of the above-mentioned criminal offenses. We note that the applicant signed the application on October 18, 2006. Therefore, the record conveys that the applicant willfully failed to disclose in the Form DS-156 the material fact of his criminal convictions, which render the applicant inadmissible to the United States. Based on the record, we find the applicant inadmissible under section 212(a)(6)(C) of the Act for seeking admission into the United States by fraud or willful misrepresentation of a material fact. The applicant does not contest his inadmissibility pursuant to this ground on appeal.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states that:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The AAO begins its analysis by noting that a section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act is first dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. The applicant's U.S. citizen wife is the qualifying relative in these proceedings. If extreme hardship to a qualifying relative is established, USCIS then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 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 the 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 speak 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 is 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 AAO first considers the hardship claimed to the applicant's spouse if she were to remain in the United States without the applicant. The primary hardship claimed is the medical and psychological hardship the applicant's wife currently experiences and which will worsen if the applicant is removed to Nigeria. The applicant provides affidavits from himself and his spouse in support of the medical and psychological hardship that the applicant's spouse currently experiences. In her affidavit dated November 1, 2010, the applicant's wife indicates that she currently suffers from multiple medical conditions, including hypertension, diabetes, and high cholesterol. The applicant's wife indicates that she has been prescribed medication for these medical conditions, and evidence in

the record consisting of a prescription list from her doctor corroborates this assertion. The applicant's wife further states that she receives treatment form a psychologist once a month for her symptoms of anxiety and depression. In her affidavit, the applicant's wife also states that she is experiencing stress as a result of "the situation with her two daughters, and the situation with the applicant." In support of the applicant's wife's claim of psychological hardship, the applicant submitted a July 12, 2012, letter prepared by the psychologist who has been treating the applicant's wife since April 2010. indicates in her three-sentence letter that the applicant's wife is being treated for Major Depressive Disorder and Generalized Anxiety. does not indicate in her statement any tests she performed to conclude that the applicant's wife is experiencing depression and anxiety, or the extent of her observation and communication with the applicant wife. Additionally, there is no evidence in the record indicating that the applicant's wife's condition has been exacerbated due to the applicant's husband's possible removal, or the impact separation or relocation may have on her. The letter does not specify the applicant's wife's mental health history, specific treatment she has received, the impact treatment has or might have, or whether the applicant's wife requires assistance and care from family members. The AAO acknowledges that the applicant's wife is suffering some mental health problems, but the evidence does not demonstrate beyond the common hardships associated with inadmissibility or removal.

The applicant's spouse states she is very concerned about the applicant's ability to remain in the United States. She asserts that the applicant has been a source of support in dealing with her medical conditions, and in dealing with anxiety and depression. The applicant's wife further asserts that the applicant is involved in her life and that of her children. The AAO notes that family separation must be considered in determining hardship. Additionally, it is acknowledged that the applicant's wife may experience some emotional difficulties in being separated from the applicant. In *Salcido-Salcido v. INS,* 138 F.3d 1292 (9th Cir. 1998) the Ninth Circuit discussed the effect of emotional hardship on the alien and her husband and children as a result of family separation. Similarly, the Third Circuit in *Bastidas v. INS*, 609 F.2d 101 (3rd Cir.1979) explicitly stressed the importance to be given the factor of separation of parent and child. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the hardship described by the applicant's wife, and as demonstrated by the evidence in the record in the form of statements and letters, is the common result of removal or inadmissibility and does not rise to the level of extreme hardship. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F. 2d 465, 468 (9th Cir. 1991).

In addition, the record also fails to establish extreme hardship to the applicant's wife if she relocates to Nigeria with the applicant. As noted above, diagnosed the applicant's wife with major depressive disorder. The applicant's wife states she relies on the applicant for help and she cannot even imagine a future without the applicant. However, no documentary evidence has been submitted establishing that she could not receive treatment in Nigeria, or that she has to remain in the United States for treatment.

The AAO acknowledges that the applicant's wife is a United States citizen and that she has resided in the United States her entire life. However, the record does not establish that the applicant's wife would be unable to obtain employment upon relocation that would allow her to use the skills she has acquired in the United States. Additionally, the AAO acknowledges that the applicant's spouse's

immediate family members, including her children and mother, reside in the United States. However, the applicant has not shown that the children's relocation to Nigeria, or separation from her mother, would elevate her challenges to an extreme level. Additionally, the applicant's family members are not qualifying relatives in these proceedings, and hardship to them will be considered only insofar as it results in hardship to the qualifying relative. In this case, the applicant has not shown that hardships to the applicant's children as a result of relocation would result in extreme hardship to his wife.

The AAO takes note of the current country conditions in Nigeria from the information provided in U.S. Department of State report included in the record. The applicant has not indicated, however, how those conditions would affect his wife specifically. The general economic conditions and high rate of unemployment in the country do not prove in the instant case that the applicant's spouse would be unable to obtain employment in Nigeria. No information is provided from which to determine whether employment would be available to the applicant's spouse. Additionally, from the financial information in the record, it is not possible to determine if she would suffer financial hardship if she were to be unemployed in Nigeria. Statements of counsel pertaining to minimum wage earnings in Nigeria as a result of relocation are not evidence and the AAO will analyze the hardship in this case based on the documentary evidence of record, and not on the statements of counsel. *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 504 (BIA 1980). Although there is currently a reported high level of violence and unrest in Nigeria, the applicant has not shown that he has been affected by this violence or that his wife would be specifically affected by conditions there. Also, the applicant has not provided any evidence regarding his spouse's inability to adapt culturally to life in Nigeria. Accordingly, the record does not show that relocation to Nigeria would cause extreme hardship to the applicant's spouse. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66.

Based on the foregoing, the AAO finds that the evidence in the record, when considered in the aggregate, fails to establish that the applicant's qualifying relative would experience hardship that rises beyond the common results of removal or inadmissibility. The documentation in the record therefore fails to establish the existence of extreme hardship to the applicant's wife caused by the applicant's inadmissibility to the United States, as required by sections 212(h) and 212(i) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under sections 212(h) and 212(i) the Act, the burden of proving eligibility rests 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.