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

Date: JUN 10 2013 Office: NEW YORK FILE: A87 000 788

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:

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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. As we find the applicant is not inadmissible, the District Director's decision will be withdrawn and the appeal will be dismissed as unnecessary.

The applicant is a native and citizen of Russia and was found to be inadmissible to the United States pursuant to section 212(a)(2)(D)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D)(i) for having 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. 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 June 13, 2009, the District 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 January 22, 2013, counsel for the applicant[1] submitted evidence to illustrate that the applicant's convictions were vacated and stated that the applicant is no longer inadmissible. The original appeal in this case was filed on July 10, 2009, but was not received by the Administrative Appeals Office until February 12, 2013.

The record contains, among other documentation, a legal brief by counsel for the applicant, a statement from the applicant's husband, a statement from the applicant, psychological records for the applicant's husband, biographical information for the applicant and her family, photographs of the applicant and her family, letters of support, and documentation of the applicant's criminal and immigration 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 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 applicant was arrested and convicted on two occasions, September 14, 2005 and April 30, 2006, in violation of New York State Penal Law (PL) § 230.00, Prostitution. The applicant was arrested in violation of the same section of the statute a third time, however, on that occasion she pled guilty to New York State PL § 240.20, Disorderly Conduct. Based on the prostitution convictions, the District Director found the applicant to be 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

[1] The applicant's original appeal was filed with different counsel.

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 be inadmissible for having engaged in prostitution, there must be evidence showing that the acts of prostitution were substantial, continuous and regular. Based on the record, the AAO finds that the applicant was inadmissible to the United States under section 212(a)(2)(D)(i) of the Act.

The AAO also notes that a conviction for prostitution may make the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing a crime involving moral turpitude.[2] 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.
>
> . . .

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

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[2] 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).

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 New York State Penal Law provides that "[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. Prostitution is a class B Misdemeanor." 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 N.Y. PL § 230.00, which are done specifically for prostitution, are morally turpitudinous. Thus, the applicant is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

On appeal, however, the applicant's attorney submitted documentation that the applicant's convictions mentioned above have now been vacated by the Criminal Court of the City of New York pursuant to New York Criminal Procedure Law (CPL) § 440.10(1)(i), with the consent of the State, "as the movant has established by a preponderance of the evidence that her participation in conduct constituting the offense of PL § 230.00 was due to her having been victim of sex trafficking under Trafficking Victims Protection Act, 22 USCS title 22, chapter 78, section 7102" and as defined under PL § 230.34.

The Board of Immigration Appeals (BIA) has held that the vacating of a plea will vacate the conviction for immigration purposes as long as it was not pursuant to a rehabilitative statute or because of immigration hardship. *See e.g. Matter of Adamiak*, 23 I. & N. Dec. 878, 879 (BIA 2006) (where the criminal court failed to advise the defendant of the immigration consequences of his plea pursuant to section 2943.031 of the Ohio Revised Code, the subsequent vacatur is not a conviction for immigration purposes because the guilty plea has been vacated as a result of a "defect in the underlying criminal proceedings" and not for a rehabilitative or immigration hardship purpose); *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (concluding that in light of the language and legislative purpose of the definition of a "conviction at section 101(a)(48) of the Act, "there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships"); and *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (according full faith and credit to a New York court's vacation of a conviction under a statute that was neither an expungement nor a rehabilitative statute); *see also Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (under the definition in section 101(a)(48)(A), no effect is to be given in

immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute).

In this case, the record reflects that the applicant's convictions were vacated due to a defect in the underlying criminal proceedings and not pursuant to a rehabilitative statute or because of immigration hardship. Therefore, based on the precedential decisions noted above, the AAO finds that the applicant no longer has a conviction for immigration purposes and is no longer inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Additionally, we find that there is insufficient evidence of continuity and regularity to demonstrate that the applicant has "engaged in" prostitution to support a finding of inadmissibility under section 212(a)(2)(D)(i) of the Act.

The AAO finds that the applicant is not inadmissible under section 212(a)(2)(D)(i) or section 212(a)(2)(A)(i)(I) of the Act and withdraws the District Director's decision. The Form I-601 is moot. Having found that a waiver is unnecessary, no purpose would be served in discussing whether the applicant has established extreme hardship to her U.S. citizen husband or daughter under section 212(h) of the Act. The appeal will be dismissed as the applicant is not inadmissible and the waiver application is unnecessary.

ORDER: As the applicant is not inadmissible, the waiver application is declared unnecessary and the appeal is dismissed.