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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 24 2014 Office: NEW YORK, NY FILE:

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B) and 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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Michael Shumway

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York, and the Administrative Appeals Office (AAO) dismissed an appeal of the District Director's decision. The matter was before the AAO as a motion to reopen and a motion to reconsider, which we dismissed. The matter is again before the AAO as a motion to reopen and a motion to reconsider. The motion will be granted and our previous decisions withdrawn; the applicant is no longer inadmissible and the waiver application is unnecessary.

The applicant is a native and citizen of Georgia who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of her last departure from the United States and pursuant to section 212(a)(2)(D)(i) of the Act, 8 U.S.C. § 1182(a)(2)(D)(i), for having engaged in prostitution. The applicant's spouse and child are U.S. citizens and she seeks a waiver of inadmissibility in order to reside in the United States.

In a decision, dated December 5, 2008, the District Director determined that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. In a decision on appeal, dated August 12, 2011, the AAO also found the record to lack sufficient evidence to establish the existence of extreme hardship to a qualifying relative and dismissed the appeal. In that decision, we found the applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of her last departure from the United States, and pursuant to section 212(a)(2)(D)(i) of the Act for having engaged in prostitution.

In the first motion, dated September 9, 2011, counsel asserted that the applicant had demonstrated extreme hardship to her U.S. citizen spouse and that her spouse was unable to relocate to Georgia in light of country conditions as well as a medical problem that could not be treated in Georgia. In support of this motion, the record included: statements from the applicant and her spouse, letters of support, and country conditions information on Georgia.

In our decision, dated March 7, 2013, we again found that the record lack sufficient evidence to support the applicant's hardship claims. Specifically, we found that the record did not adequately address the medical conditions of the applicant's spouse and son nor did it support the claims regarding conditions in Tbilisi, Georgia, the location where the applicant's family resides and he is most likely to reside upon removal. We found that the record also failed to establish the applicant's spouse's drug addiction, the reported post-traumatic stress syndrome being suffered by the applicant's son, and how separation from the applicant would affect these conditions. Moreover, we found that the record failed to establish that the applicant's removal would leave her son, born in 2001, without a caregiver, as we could not conclude from the record that the applicant was solely responsible for her son's care. Because the applicant did not contest the previous findings of inadmissibility, the AAO did not discuss these findings on motion.

The requirements for a motion to reopen are set forth in the regulation at 8 C.F.R. § 103.5(a)(2):

> (2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence . . . .

The requirements for a motion to reconsider are found in the regulation at 8 C.F.R. § 103.5(a)(3):

> (3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In the current motion, dated March 20, 2013, the applicant asserts that there are sufficient grounds upon which to find that her husband and son will be unable to maintain sobriety without her support. She states that her son will not be able to become a "successful efficient functioning man" without her and her husband, and will become depressed and return to drugs. With this motion, the applicant submits: a statement, country conditions information concerning Georgia, a statement from the applicant's son, a letter concerning the applicant's son from an expungement record for the applicant's criminal convictions, financial documentation showing the applicant's son as the applicant's dependent, and certificates for the applicant in recognition of her contributions to two charitable causes.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application for admission is a "continuing" application, and admissibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). We now find the applicant admissible and her waiver application unnecessary.

The applicant entered the United States with a B-2 visitor's visa on December 1, 1998 with an authorized stay until May 31, 1999. She received an extension of her visitor's status until December 1, 1999. On June 3, 2002, the applicant filed an Application to Register Permanent Residence or Adjust Status. The applicant departed the United States based on a grant of advance parole. She was then paroled into the United States on August 19, 2003.

Section 212(a)(9)of the Act provides:

> (B) ALIENS UNLAWFULLY PRESENT.-
>
> > (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the Board of Immigration Appeals (BIA) held that an applicant for adjustment of status who left the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act did not make a departure from the United States within the meaning of section 212(a)(9)(B)(i)(II) of the Act. Here, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled into the United States. In accordance with the BIA's decision in *Matter of Arrabally,* the applicant did not make a departure from the United States for the purposes of section 212(a)(9)(B)(i)(II) of the Act. Accordingly, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(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.

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

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) 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).

In assessing whether a conviction is a crime involving moral turpitude, the adjudicator must first "determine what law, or portion of law, was violated." *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). The adjudicator engages in a categorical inquiry, considering the "inherent nature of the crime as defined by statute and interpreted by the courts," not the underlying facts of the criminal offense. *Matter of Short,* 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States,* 495 U.S. 575, 599-600 (1990)). If the statute "defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude." *Matter of Short*, *supra*, at 137.

Where the statute includes some offenses involving moral turpitude and some which do not – where there is a *realistic probability, not a theoretical possibility*, that the statute would be applied to conduct not involving moral turpitude – the adjudicator looks to the record of conviction to determine the offense for which the applicant was convicted. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 698 (A.G. 2008) (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where there is an actual prior case, possibly the applicant's own criminal case, in which "the relevant criminal statute was applied to conduct that did not involve moral turpitude." *Matter of Silva-Trevino*, *supra*, at 708. The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Matter of Louissant*, *supra,* at 757; *see also Shepard v. U.S.,* 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.")

The record indicates that on February 15, 2005, the applicant was convicted of Harassment under New Jersey Statutes Annotated (N.J.S.A.) 2C:33-4(b) and fined $200. On June 28, 2006, the applicant was convicted of engaging in prostitution under N.J.S.A. 2C:34-1(b)(1) and fined $500.

At the time of the applicant's conviction, N.J.S.A. 2C:33-4(b), stated, in pertinent part:

> Except as provided in subsection e., a person commits a petty disorderly persons offense if, with purpose to harass another, he:
>
> ...
>
> b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so;

Based on this statutory language and that of other crimes under New Jersey law, we find that there is not a realistic probability that this statute encompasses crimes involving moral turpitude. This statutory offense is, at most, akin to simple battery. As a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws. *Matter of Fualaau,* 21 I&N Dec. 475, 477 (BIA 1996). Thus, we find that the applicant's conviction under N.J.S.A. 2C:33-4(b) is not a crime involving moral turpitude.

At the time of the applicant's conviction, N.J.S.A. 2C:34-1, stated, in pertinent part:

a. As used in this section:

(1) Prostitution is sexual activity with another person in exchange for something of economic value, or the offer or acceptance of an offer to engage in sexual activity in exchange for something of economic value.

...

b. A person commits an offense if:

(1) The actor engages in prostitution;

Practicing in prostitution has been found to be a crime involving moral turpitude. *Matter of W-*, 4 I&N Dec. 401 (C.O. 1951), Seattle, Washington City Ordinance 73095, § 1. Thus, we find that the applicant's conviction under N.J.S.A. 2C:34-1(b)(1) is a crime involving moral turpitude. However, this conviction qualifies for the petty offense exception.

N.J.S.A. 2C:34-1(c)(4) classifies a first offense under N.J.S.A. 2C:34-1(b)(1) as a disorderly person offense which carries a maximum sentence of six months imprisonment. The applicant was sentenced to a $500 fine. Therefore, the applicant's conviction falls within the petty offense exception set forth in the Act.

In *Matter of Garcia-Hernandez, supra,* the Board held that a respondent who was convicted of more than one crime, only one of which was a crime involving moral turpitude, was eligible for the petty offense exception provided for under section 212(a)(2)(A)(ii) of the Act. The Board reasoned that:

> The "only one crime" proviso, taken in context, is subject to two principal interpretations: (1) that it is triggered . . . by the commission of any other crime, including a mere infraction; or (2) that it is triggered only by the commission of another crime involving moral turpitude . . . . [W]e construe the "only one crime" proviso as referring to . . . only one crime involving moral turpitude.

Matter of Garcia-Hernandez at 594.

The record shows that the applicant was convicted of only one crime involving moral turpitude and that the crime qualifies under the petty offense exception to inadmissibility. Accordingly, the AAO finds that the applicant is not inadmissible under section 212(a)(2)(A) of the Act .

We also find that the previous finding of inadmissibility under section 212(a)(2)(D) of the Act was in error.

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(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." 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 records of conviction and the applicant's statements do not establish acts of prostitution of a substantial, continuous and regular nature. The applicant has only one conviction for prostitution, and given that she was convicted of harassment following her other arrest for engaging in prostitution, we will not conclude that that arrest was based on her engaging in acts of prostitution. *Cf. Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 468-69 (BIA 2011) (holding that an adjudicator cannot undermine plea agreements by going outside of the record of conviction to determine that an applicant was convicted of a more serious offense). In her statements, the applicant proclaims her innocence, claiming that she was falsely accused of prostitution while seeking to enroll in a massage therapy school. Given that the applicant has one conviction for engaging in prostitution, we cannot fully credit the applicant's statements of innocence. Nevertheless, neither the records of conviction nor her statements show that she engaged in prostitution in a substantial, continuous and regular manner. Therefore, based on our careful review of the record, the AAO withdraws the finding that the applicant is inadmissible to the United States under section 212(a)(2)(D)(i) of the Act.

Thus, we find that the applicant is no longer inadmissible. In proceedings for an application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. The motion will be granted and our previous decisions will be withdrawn. The applicant is not inadmissible and the waiver application is not necessary.

ORDER: The motion is granted, our previous decisions are withdrawn, and the appeal is dismissed as the applicant is not inadmissible and the waiver application is unnecessary.