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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN 14 2015

OFFICE: NEBRASKA SERVICE CENTER

IN RE:

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 1182(i)

ON BEHALF OF APPLICANT:

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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and the underlying waiver application is unnecessary.

The record reflects 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)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The record also reflects the applicant was 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 procured an immigrant visa through willful misrepresentation. The applicant, through counsel, contests the findings of inadmissibility. However, she filed an application for a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside with her U.S. citizen sons and child in the United States.

The Director concluded the applicant failed to establish that her U.S. citizen child is a qualifying relative, as required under section 212(i) of the Act, and therefore denied the Form I-601 accordingly. *See Decision of the Director*, dated January 15, 2014.

On appeal, counsel asserts U.S. Citizenship and Immigration Services (USCIS) erred as a matter of law in determining the applicant was inadmissible as: a court dismissed her underlying charges and vacated her convictions, and therefore, she could not be deemed inadmissible for crimes involving moral turpitude or convicted for immigration purposes; and because the U.S. Consulate in the Dominican Republic never determined the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act, USCIS erred in making this finding *sua sponte*. *See Form I-290B, Notice of Appeal or Motion*, dated January 24, 2014.

The record includes, but is not limited to: briefs, motions, and correspondence; the applicant's conviction records; affidavits by the applicant and her eldest son; letters of support; documents establishing identity and relationships; and academic, airline, employment, financial, psychological, and residential documents. The entire record was reviewed and considered in rendering a decision on the appeal.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 212(a)(2)(A) of the Act provides, in relevant 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.
>
> (ii) Exception.- Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> . . . .

(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* 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. *See Matter of Guevara Alfaro*, 25 I&N Dec. 417, 421 (citing *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689-90, 696-99 (A.G. 2008)); *see also Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); *but see Fajardo v. Attorney General*, 659 F.3d 1301, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, *supra*). A realistic probability, as opposed to a theoretical possibility, exists where there is an actual prior case, possibly the applicant's own 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 Louissaint*, *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 reflects that on July County, New York, the applicant pled guilty to and was convicted of prostitution in violation of N.Y. Penal Law § 230.00, which provides, "[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." The applicant was ordered to pay restitution in the amount of $230 and was placed on one year of conditional discharge.

The record also reflects that on January County, New York, the applicant pled guilty to and was convicted of promoting prostitution in the fourth degree in violation of N.Y. Penal Law § 230.20, which provides, "[a] person is guilty of promoting prostitution in the fourth degree when he knowingly advances or profits from prostitution. Promoting prostitution in the fourth degree is a class A

misdemeanor." The applicant was sentenced to three days' imprisonment and ordered to pay restitution in the amount of $230.20.

The Director, Nebraska Service Center, determined the applicant's convictions for prostitution and promoting prostitution are morally turpitudinous, and we agree. *See Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967); *see also Matter of W*, 4 I&N Dec. 401 (BIA 1951). Although counsel does not contest that the applicant was convicted of crimes involving moral turpitude, he asserts that she cannot be found inadmissible for those crimes, as both of the underlying criminal charges were ultimately dismissed. Counsel corroborates his claims by submitting a certificate of disposition with the waiver application. In support of counsel's assertion, the record also includes the orders to vacate the applicant's convictions, correspondence from the applicant to U.S. immigration officials concerning the orders to vacate, and a District Attorney's Office's memorandum response to the applicant's motion to vacate.

The record reflects that on October , the applicant filed a motion *pro se* with the Criminal Court of the County, seeking an order to vacate her judgments of conviction pursuant to N.Y. Criminal Procedure Law § 440.10, because she was not properly informed by the court of the immigration consequences of a guilty plea and that she was entitled to consular assistance. The District Attorney's Office did not oppose the applicant's motion. The judge granted the motion and ordered both of the applicant's convictions vacated.

The Board of Immigration Appeals (BIA) has held that vacating 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. *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (according full faith and credit to a New York court vacating a conviction pursuant to Article 440 of the N.Y. Criminal Procedure Law, as the statute was neither an expungement nor a rehabilitative statute). *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 the Ohio Revised Code § 2943.031, 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 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).

Like the respondent's conviction in *Matter of Rodriguez-Ruiz*, the applicant's convictions in the instant case were vacated pursuant to N.Y. Criminal Procedure Law § 440, a statute the BIA has determined to be neither an expungement nor a rehabilitative statute. Also, the record reflects the applicant's convictions were vacated not for immigration purposes, but because the applicant's motion to vacate was unopposed by the District Attorney's Office. Therefore, based on the precedential decisions noted above, we find that the applicant no longer has convictions for immigration purposes. The applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and she does not require a waiver of inadmissibility under section 212(h) of the Act.

We will now determine the applicant's inadmissibility under Section 212(a)(6) of the Act, which provides, in relevant part:

> (C) Misrepresentation.-
>
> > (i) In general.- 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.
> >
> > ...
> >
> > (iii) Waiver authorized.- For provision authorizing waiver of clause (i), see subsection (i).

As outlined by the BIA, a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

The record reflects that the applicant was issued an immigrant visa under category CR-1 upon completing U.S. Department of State's Option Form 155A, Immigrant Visa and Alien Registration (Form 155A), dated June 14, 1994. The record indicates the applicant responded "no" to questions about being convicted of a crime involving moral turpitude, engaging in prostitution, and being arrested.

Counsel contends the applicant did not personally complete Form 155A, the contents of which were not reviewed with her; and the applicant's arrest and charge involved a misdemeanor, and thereby she had no reason to believe her arrest had "immigration consequences." In a Record of Sworn Statement in Affidavit Form (Form I-215W) obtained during her interview with a U.S. immigration official at on October 26, 1998, the applicant indicates she did not tell immigration officials that she had been arrested for prostitution-related offenses upon adjusting her status to a lawful permanent resident because she was never asked.

As mentioned previously, on July the applicant pled guilty to and was convicted of prostitution in violation of N.Y. Penal Law § 230.00, a crime involving moral turpitude. Also, the evidence demonstrates the applicant signed Form 155A, and in so doing, certified under penalty of perjury that the application and the evidence submitted with it are true and correct. Moreover, the applicant has not submitted evidence demonstrating her legal incapacity or inability to understand the documents she signed. We therefore find that the applicant's misrepresentation of her arrest and criminal conviction in connection with her request for an immigrant visa in 1994 was willful as opposed to accidental, inadvertent, or in an honest belief that the facts were otherwise.

We will now determine whether the applicant's willful misrepresentation is material. A misrepresentation is generally material only if the alien received a benefit for which she would not otherwise have been

eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys,* 485 U.S. at 771-72. The BIA has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, is material if either:

1. the alien is excludable on the true facts, or

2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

Counsel contends a fact is material when "the truth of the matter" leads "to a proper finding of ineligibility," and since the applicant at the time would have been entitled to the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act, the applicant would not have been found inadmissible had she disclosed her conviction for prostitution upon applying for her immigrant visa in 1994.

To qualify for the petty offense exception, the maximum penalty possible for the crime of which an individual was convicted must not exceed imprisonment for one year, and the applicant must not be sentenced to a term of imprisonment in excess of six months. N.Y. Penal Law § 70.15 provides, in part: "[a] sentence of imprisonment for a class B misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed three months." As the maximum term of imprisonment for prostitution is three months, and the record reveals that the applicant was sentenced to a fine and a conditional discharge, her single offense in qualified for the petty offense exception. Accordingly, the applicant is not inadmissible under Section 212(a)(6) of the Act for having failed to disclose her conviction for prostitution, a crime involving moral turpitude, upon applying for an immigrant visa in 1994.[1]

The applicant's misrepresentation in 1994 about her conviction in however, may have been material if she were determined to be inadmissible under section 212(a)(2)(D) of the Act, for having engaged in prostitution.[2] In order for the applicant to have engaged in prostitution, "the general rule is that . . . there

[1] We note the applicant, however, would not be currently eligible for the petty offense exception, as she has been convicted of more than one crime involving moral turpitude.

[2] Section 212(a)(2)(D) of the Act provides, in relevant part:

> 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.

must be 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) ("[t]he 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.")

In her affidavit dated January 30, 2004, the applicant states, in part:

> I was deemed a prostitute after my arrest in by being found in a house doubling as a brothel. I was forced to be there and to make a living due to [my ex-husband's] personal influence and abandonment of his marital obligations with me.

The applicant also discusses her employment history during her 1998 interview at indicating that she was a nurse's aide who previously did not have stable work, but she would babysit and clean homes, working out of her house. Also during her 1998 interview, Form I-215W indicates the applicant provided the following responses:

> Q. Do you use any other name?
> A. Yes. [Alias omitted]. I use this name when I date men.
> ...
>
> Q. Have you ever been arrested anywhere?
> A. Yes. Twice.
>
> Q. Where and when were you arrested?
> A. Both times in
>
> Q. What were the charges filed against you, and in what court were they filed?
> A. Both times at criminal court. Both times for accused prostitution.

For the applicant to have engaged in prostitution, the evidence must show that the acts of prostitution were substantial, continuous and regular. The applicant admitted to her convictions for prostitution; however, the applicant's statements that she used an alias when she would "date men" and that she was "deemed a prostitute" after her arrest in at a "house doubling as a brothel" are insufficient alone to establish that any 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. It also is not clear if the reference to "make a living" in her 2004 affidavit concerns prostitution and if so, whether the acts constituting prostitution were substantial, continuous and regular. Moreover, after the applicant admitted to her arrests for "accused prostitution," the officer did not question her further about the elements of continuity and regularity. In addition, the record reflects a four-year gap between her arrests. Accordingly, we find the applicant is not inadmissible under Section 212(a)(6)(C)(i) of the Act for failing to disclose on her 1994 immigrant visa application that she engaged in prostitution.

The record also reflects that the applicant presented two different identities to U.S. immigration officials upon her apprehension at on October Initially the applicant indicated she was a national of Mexico and then indicated she was a national of Venezuela without proper documentation to be in the United States. The applicant was placed in deportation proceedings pursuant to former section 242 of the Act, and the immigration judge administratively closed her case on November Although the applicant wilfully misrepresented her identity and nationality, the record does not support finding that she otherwise would have been excludable or that her misrepresentations cut off a line of inquiry relevant to her eligibility for admission, nor did the applicant. obtain a benefit under the Act for which she was otherwise not eligible. We thus conclude that the applicant's misrepresentations in were not material, and she therefore is not inadmissible under Section 212(a)(6) of the Act. The applicant's waiver application is thus unnecessary and the appeal will be dismissed.

ORDER: The appeal is dismissed as the underlying waiver application is unnecessary.