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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

U.S. Citizenship and Immigration Services

H5

[redacted]

Date: SEP 27 2011 Office: NEW YORK, NY FILE [redacted]

IN RE: [redacted]

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

Michael Shumway

for Perry Rhew
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. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Colombia who was found to be inadmissible to the United States pursuant to section 212(a)(2)(D) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D), for engaging in prostitution and under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for failing to disclose one of her four convictions for a prostitution related offense. The record indicates that the applicant is married to a United States citizen and has a U.S. citizen son. The applicant seeks a waiver of inadmissibility pursuant to sections 212(h) and 212(i) of the Act in order to reside in the United States with her spouse and child.

In a decision, dated February 12, 2009, the district director found that the applicant had failed to establish that separation would result in extreme hardship to her spouse and denied the application accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated March 11, 2009, counsel states that the district director failed to properly consider all the factors in the applicant's case, including, but not limited to the extreme hardship to the petitioner due to their child's special needs and other factors.

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

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

The AAO notes that the district director found the applicant inadmissible to the United States under section 212(a)(2)(D)(i) of the Act for engaging and procuring in prostitution with the past ten years.

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." In order for the applicant to be inadmissible under section 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 have engaged in prostitution, there must be evidence showing that the acts of prostitution were substantial, continuous and regular.

The record indicates that from 1995 to 2000, the applicant has been arrested and convicted four times for acts relating to prostitution. The record indicates that on June 8, 1995 the applicant was arrested for prostitution under N.Y. Penal Law § 230.00 and on June 14, 1995 was found guilty for loitering for the purpose of engaging in prostitution under N.Y. Penal Law § 240.37. The record indicates that on November 27, 1999 the applicant was arrested for prostitution in Union City, New Jersey, under New Jersey Stat. Ann. § 2C:34-1, and on January 4, 2000 was found guilty for engaging in prostitution under New Jersey Stat. Ann. §2C:34-1B(1). On May 21, 2000 the applicant was arrested for promoting prostitution in the third degree under N.Y. Penal Law § 230.25 and on June 6, 2000 was found guilty under N.Y. Penal Law § 230.20 for promoting prostitution in the fourth degree. On August 25, 2000 the applicant was arrested and on October 3, 2000 was found guilty for prostitution under N.Y. Penal Law § 230.00.

The AAO finds that the applicant's four convictions for crimes related to prostitution within a span of five years indicate substantial, continuous, and regular activity. However, as it has now been over 10 years from the applicant's last conviction to the date of the applicant's application to adjust status, the AAO also finds that she is no longer inadmissible under section 212(a)(2)(D)(i) of the Act. An application for admission or adjustment of status, and the extension of a waiver application filed in connection with such an application, is a "continuing" application and "admissibility is determined on the basis of the facts and the law at the time the application is finally considered." *Matter of Alarcon*, 20 I.&N. Dec. 557, 562 (BIA 1992) (citations omitted).

However, though not specifically addressed by the district director, the applicant's convictions also render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing crimes involving moral turpitude. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the district office does not identify all of the grounds for denial in the initial decision. *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).

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

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....
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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.)

In the recently decided *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 where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, 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).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

As stated above, the applicant has been found guilty on four different occasions for crimes involving either engaging or promoting prostitution.

The Board of Immigration Appeals has found crimes involving prostitution to be crimes involving moral turpitude. In *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967), the respondent was charged with prostitution and the Board 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 the respondent's 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. Accordingly, the AAO finds that the acts proscribed under N.Y. Penal Law §§ 230.00, 240.37, and 230.20 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 crimes involving moral turpitude.

As the applicant has been found to be convicted of more than one crime involving moral turpitude, we will not address whether her New Jersey conviction was for a crime involving moral turpitude.

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

> (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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> . . . .
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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 AAO now turns to whether the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for failing to disclose her January 4, 2000 conviction in Union City, New Jersey on her adjustment application.

Section 212(a)(6)(C) of the Act 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.

The applicant's adjustment application indicates that during the adjustment interview the applicant admitted to three convictions relating to prostitution offenses, but failed to disclose a fourth conviction which took place in New Jersey. This fourth conviction was revealed by an FBI fingerprint record check. Based on this failure to mention her New Jersey conviction, the district director found the applicant inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for misrepresentation. The issue, therefore, becomes whether the applicant's failure to disclose her fourth conviction related to prostitution when questioned during her adjustment interview constitutes a willful misrepresentation of a material fact that would render her inadmissible under section 212(a)(6)(C)(i) of the Act.

The AAO concludes that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. Although, the applicant was forthcoming about her other convictions, the AAO does find that she engaged in a willful misrepresentation by failing to mention her arrest in New Jersey as this arrest resulted in a conviction. Additionally, the misrepresentation committed by the applicant was material. According to the Department of State's Foreign Affairs Manual, a misrepresentation 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 that is relevant to the alien's eligibility and that might well have resulted in a proper determination that he be excluded. *9 FAM 40.63 N61*. A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 US 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) and *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961).

The AAO notes that the applicant's New Jersey conviction was directly related to her potential inadmissibility under section 212(a)(2)(D) of the Act. The AAO acknowledges that the applicant would have been found inadmissible under section 212(a)(2)(A) of the Act even without her New Jersey conviction being disclosed. However, this arrest is material in regards to her inadmissibility under section 212(a)(2)(D) of the Act and whether the applicant engaged in acts of prostitution that were substantial, continuous and regular. Therefore, this conviction is material and the applicant's omission is a material misrepresentation. Thus, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for having attempted to procure admission into the United States by fraud or willful misrepresentation and will require a waiver under section 212(i) of the Act.

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

> (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.

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. Hardship to the applicant or her children can be considered only insofar as it results in hardship to a qualifying relative. The AAO notes that unlike a section 212(h) waiver, a section 212(i) waiver does not include the applicant's child as a qualifying relative. Thus, because the applicant must qualify for a section 212(i) waiver and a section 212(h) waiver the only hardship to be considered is the hardship to the applicant's spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable 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 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 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 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 notes that the record of hardship includes a statement from the applicant's spouse and a country condition report for Colombia. In his affidavit, dated August 16, 2006, the applicant's spouse states that he and his son depend on the applicant physically, emotionally, and psychologically. He states

that he is unable to sleep at night because he is thinking of his wife's inadmissibility. The applicant's spouse also states that if the applicant were to be removed to Colombia she would return to her hometown of Buenaventura, which is a town full of crime and violence. He states that the country of Colombia is extremely violent all over and that he and his son would be quickly targeted as U.S. citizens. The applicant's spouse states further that he does not feel his family could relocate to Colombia because he has never traveled to Colombia, he would not be able to find a decent job, they would live in extreme poverty, and he would find it extremely difficult to adapt to the culture and customs in Colombia. The applicant's spouse also states that separation would cause an extreme hardship for him.

The AAO notes that the applicant's spouse has submitted the 2005 U.S. State Department Country Report on Human Rights Practice in Colombia to support his statements regarding relocation. The AAO notes that the report cites to various serious human rights problems in Colombia, but it does not prove that individuals such as applicant and her family members would be at risk of such violence. Furthermore, the record does not indicate that someone of the applicant's spouse's background and experience as a construction worker would not be able to find employment in Colombia. In addition, the applicant's spouse has not provided documentation to support his statement regarding the financial and emotional hardship he would experience as a result of separation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.