

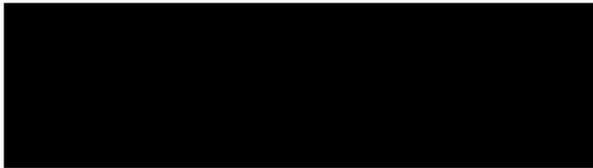
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U. S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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#6

FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ)

Date: JAN 11 2011

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(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Mexico City (Ciudad Juarez), Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico 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 committed a crime involving moral turpitude; pursuant to section 212(a)(9)(B)(i)(II) of 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 his last departure from the United States; and section 212(a)(2)(D)(i) of the Act, 8 U.S.C. § 1182(a)(2)(D)(i) for engaging in prostitution. The applicant seeks a waiver of inadmissibility to remain in the United States with his U.S. citizen wife and child.

In a decision dated February 8, 2008, the district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative due to the applicant's continued inadmissibility and denied the waiver application accordingly.

In a Notice of Appeal to the AAO, (Form I-290B), the applicant's spouse states that she and her children are going through very difficult times since her husband left the United States and that it has caused extreme hardship.

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).

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.)

The record indicates that on December 16, 2002 the applicant pled guilty to soliciting a prostitute in Cook County, Illinois. The applicant was sentenced to six month probation.

720 ILCS 5/11-15: Soliciting for a prostitute states:

- (a) Any person who performs any of the following acts commits soliciting for a prostitute:
  - (1) Solicits another for the purpose of prostitution; or
  - (2) Arranges or offers to arrange a meeting of persons for the purpose of prostitution; or
  - (3) Directs another to a place knowing such direction is for the purpose of prostitution.
- (b) Sentence. Soliciting for a prostitute is a Class A misdemeanor.

720 ILCS 5/11-14 states:

- (a) Any person who performs, offers or agrees to perform any act of sexual penetration as defined in Section 12 12 of this Code for any money, property, token, object, or article or anything of value, or any touching or fondling of the sex organs of one person by another person, for any money, property, token, object, or article or anything of value, for the purpose of sexual arousal or gratification commits an act of prostitution.

The AAO notes that the record is unclear as to what section of the statute the applicant was convicted under. In *Matter of Lambert*, 11 I&N Dec. 340 (BIA 1965), the Board held that the respondent's offering to secure a person for the purpose of prostitution and directing that person to another for the purpose of prostitution in violation of Fla. Stat. § 796.07 involved moral turpitude.

*Id.* at 341. The AAO finds that the Illinois statute in question involves both soliciting a prostitute and actions involving what constitute the procuring of a prostitute, as the term procuring is understood in immigration law, a distinction that may be relevant in making a determination as to whether the conviction is a crime involving moral turpitude. In addition, the AAO notes that the district director found that the applicant was charged with two counts of soliciting a prostitute and pled guilty to both counts. We are unable to find that the record supports this finding, as the documentation in the record seems to indicate that the applicant pled guilty to only *one* count of soliciting a prostitute. If in fact the applicant pled guilty to only one count of soliciting a prostitute, and we consider the offense to be a crime involving moral turpitude, then the conviction would qualify for the petty offense exception and the applicant would not be inadmissible. The record indicates that the applicant was not sentenced to time in prison and that the maximum sentence for a Class A misdemeanor is one year imprisonment. Thus, we will not make a final determination regarding the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, but we note that it appears that the applicant is not inadmissible for having been convicted of a crime involving moral turpitude.

Section 212(a)(2) of the Act states, in pertinent part,

(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.

A person who “directly or indirectly procures or attempts to procure, or . . . procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or . . . received, in whole or in part, the proceeds of prostitution” is inadmissible to the United States. Section 212(a)(2)(D)(ii) of the Act. For purposes of section 212(a)(2)(D) of the Act, the term “prostitution” is defined by the State Department as “engaging in promiscuous *sexual intercourse* for hire.” 22 C.F.R. § 40.24(b) (emphasis added). See *Kepilino v. Gonzales*, 454 F.3d 1057, 1061 (9<sup>th</sup> Cir. 2006). With regard to the term “procure,” in *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 551 (BIA 2008), the Board stated that “procure” in the context of prostitution “has a specific meaning, i.e., “[t]o obtain [a prostitute] for another.” *Id.* at 551. The individuals who may be

procured for the purpose of prostitution within the Act “are prostitutes, and persons of the male sex to have sexual intercourse with prostitutes.” See *Matter of R-M-*, 7 I&N 392, 394-396 (BIA 1957) (respondent’s conduct of knowingly procuring male customers for prostitutes rendered him inadmissible as being “within the class of aliens who directly procured and attempted to procure persons (men) for the purpose of prostitution”).

The AAO notes that 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). The AAO notes that the Code of Federal Regulations under 22 C.F.R. § 40.24(b) provides that:

[F]inding 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 order for the applicant to be inadmissible under section 212(a)(2)(D)(ii) of the Act, the applicant must have procured or attempted to procure prostitutes or persons for prostitution, or have received proceeds of prostitution; and the evidence must show that the acts of promoting prostitution were substantial, continuous and regular. It is unclear that the applicant was convicted of acts that meet the definition of “procuring,” as discussed above. Also, as previously stated, the term “prostitution” is defined as “engaging in promiscuous sexual intercourse for hire.” 22 C.F.R. § 40.24(b). Because the Illinois statute in question criminalizes conduct that does not necessarily involve sexual intercourse, it is broader than the definition in the Code of Federal Regulations. Consequently, the criminal record fails to establish that the applicant’s conduct falls within the definition of “prostitution” or that the applicant’s actions were substantial, continuous, and regular. Accordingly, the AAO finds that the record fails to demonstrate that the applicant is inadmissible under section 212(a)(2)(D) of the Act.

Although it appears that the applicant is not inadmissible under sections 212(a)(2)(D) or 212(a)(2)(A) of the Act, the AAO finds that the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(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.

The record reflects that the applicant entered the United States without inspection in April 2001. The applicant remained in the United States until April 2004. Thus, the applicant accrued unlawful presence from April 2001 until April 2004 when the applicant departed the United States. In applying for an immigrant visa, the applicant is seeking admission within ten years of his April 2004 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. 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-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. Cf. *Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact

that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

*Id.* See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., *In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. See *Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; see also *U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. See, e.g., *Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The AAO notes that the only evidence of hardship in the record is the statement made by the applicant’s spouse in the Form I-290B. The applicant’s spouse states that she and her children have been going through some very difficult times since the applicant left the United States and that this separation has caused extreme hardship on herself and her children. The AAO notes that the current record does not support a finding of extreme hardship. The record lacks detailed statements regarding the specifics of what the applicant’s spouse is experiencing as a result of being separated from the applicant as well as detailed statements regarding the hardship his spouse would suffer if she relocated to Mexico to be with the applicant. The record also lacks documentation to support any hardship claims. 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)). Accordingly, based on the

current record, the AAO cannot determine that the applicant's spouse is suffering extreme hardship as a result of separation or that she would suffer extreme hardship if she relocated to Mexico.

The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under 212(a)(9)(B)(v) 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 application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval 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.