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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 11 2007

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible under 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), thus the relevant waiver application is moot.

The applicant is a native and citizen of the United Kingdom who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of two crimes involving moral turpitude. The applicant has a U.S. citizen spouse, and he seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may remain in the United States with his wife.

The director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's two convictions in the United Kingdom. *Director's Decision on Form I-485,* dated October 11, 2006. The record reflects that the applicant plead guilty and was convicted by the Ipswich Magistrates' Court of the offenses of "criminal damage" in 1993 and "assaulting a constable in the execution of his duty" in 1995. ***Court Registers,* printed June 16, 1993 and December 13, 1995, respectively.** The director concluded that these crimes involved moral turpitude. Referring to the applicant's arrest report, the director stated, "The fact that the applicant was charged with crimes that indicate that more than a mere obstruction of an officer occurred is indicative of the fact that a violent or malicious intent was involved in the crime." *Director's Decision on Form I-485, supra.*

The director also found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly, based on the requirements of section 212(h)(1)(B) of the act. *Director's Decision on Form I-601,* dated October 11, 2006.

On appeal, the applicant asserts that the director's legal analysis failed to consider the "petty offense" exception or evaluate negative and positive factors in the exercise of discretion, and that the couple was not given the benefit of an interview. The applicant also asserts that his convictions were for crimes that are not crimes involving moral turpitude. The entire record was reviewed and considered in rendering this decision.

Upon review of the record, the AAO finds that the director erred in concluding that the applicant was convicted of crimes involving moral turpitude, and erred in basing his legal analysis in part on charges that were subsequently withdrawn or dismissed. The record indicates that, based on current case law, neither of the applicant's convictions was of an offense that is considered to be a crime involving moral turpitude. The applicant is thus *not* inadmissible under Section 212(a)(2)(A) of the Act.

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

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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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.

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

> (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).

It is clear that the applicant has been convicted of two crimes. The Court Registers, or reports of proceedings in Magistrates' Court, describe the offenses and penalties as follows:

> [1] Charged on 03/05/93, at Ipswich, without lawful excuse, damaged a plate glass window measuring 6 ft x 6 ft to the value of [pounds] 600 belonging to Boots the Chemist Ltd, intending to destroy or damage such property or being reckless as to whether such property would be destroyed or damaged. Contrary to section 1(1) of the Criminal Damage Act 1971. [The applicant plead guilty to this charge, was convicted and ordered to pay compensation and court costs totaling 499 pounds; he was given "conditional discharge" for a period of 12 months.]
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> [2] Charged on 28/10/95, at Ipswich, assaulted Alan Oliver, a constable in the execution of his duty, contrary to section 51(1) of the Police Act 1964. [The applicant plead guilty to this charge, was convicted and ordered to pay compensation and court costs totaling 140 pounds; he was given "conditional discharge" for a period of 12 months.]

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992):

> [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.

The BIA and U.S. courts have found that it is the "inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction" and not the facts and circumstances of the particular person's case that determines whether the offense involves moral turpitude. *See, e.g., Matter of Short,* 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft,* 288 F.3d 254, 260 (5th Cir. 2002);

Goldeshtein v. INS, 8 F.3d 645 (9th Cir. 1993). Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the "statutory provision . . . encompasses at least some violations that do not involve moral turpitude"). As a general rule, if a statute encompasses acts that both do and do not involve moral turpitude, deportability cannot be sustained. *Hernandez-Martinez v. Ashcroft,* 329 F3d 1117 (9th Cir. 2003), *reh'g denied* 343 F.3d 1075 (9th Cir. 2003). Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS, supra.* Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado, v. INS,* 39 F.3d 245, 246 (9th Cir. 1994).

Where a statute is divisible (broad or multi-sectional), *see, e.g., Matter of P-,* 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.,* 300 F.2d 67 (9th Cir. 1962), the court looks to the "record of conviction" to determine if the crime involves moral turpitude. *Matter of Ajami,* 22 I&N Dec. 949, 950 (BIA 1999) (look to indictment, plea, verdict, and sentence; *Zaffarano v. Corsi,* 63 F.2d 67 757 (2d Cir. 1933); *U.S. v. Kiang,* 175 F.Supp.2d 942, 950 E.D. Mich. 2001). A narrow, specific set of documents comprises the record: "[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. U.S.,* 125 S.Ct. 1254, 1257 (2005). The Ninth Circuit has further clarified that that the charging document, or information, is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales,* 417 F.3rd 1022, 1028-29 (9th Cir. 2005). It is also important to note that the record of conviction does not include the arrest report. *See In re Teixeira,* 21 I&N Dec. 316, 319-20 (BIA 1996).

Courts have described the two separate ways of analyzing crimes as the "categorical" and "modified categorical" approaches. The former looks solely to the structure of the statute of conviction to determine whether a person has been convicted of a designated crime; the latter looks to a limited set of documents in the record of conviction in cases where the statute of conviction was facially over inclusive. *See, e.g., Chang v. INS,* 307 F.3d 1185, 1189-92 (9th Cir. 2002).

Regarding the applicant's 1993 conviction, the relevant statute, Section 1(1) of the Criminal Damage Act 1971, states:

> 1 Destroying or damaging property
>
> (1) A person who without lawful excuse destroys or damages any property belonging to another **intending** to destroy or damage any such property **or being reckless** as to whether any such property would be destroyed or damaged shall be guilty of an offense (emphasis added).

The statute does not indicate whether a conviction of this offense involves intent or recklessness. As it may therefore be considered a divisible statute, the decision-maker may look to the record of conviction to determine whether the crime involves intent or recklessness, which is then considered in a determination of whether the offense involves moral turpitude. In this case, the only information available is the applicant's plea and conviction of the charge as noted above. Neither the statute nor the record of conviction gives any

indication that intent, much less evil intent, is explicit in the statute or implicit by the nature of the crime or that there was any intent involved in the commission of the crime.

The BIA has found that damaging private property where no evil is inherent in the statute does not involve moral turpitude. *Matter of M-*, 2 I&N Dec. 686 (BIA 1946) (unlawful destruction of railway telegraph property in violation of the Criminal Code of Canada does not involve moral turpitude). The BIA has also found that that even where the person is guilty of willfully damaging property, which is not the case here, the crime is not one involving moral turpitude. *Matter of B-*, 2 I&N Dec. 867 (BIA 1947) (willfully damaging mail boxes and other property in violation of the Criminal Code of Canada are not shown to involve moral turpitude where the statutory provisions do not require base or depraved conduct, the records of convictions do not allege such conduct, and the acts do not show base or depraved conduct); *Matter of M-*, 2 I&N Dec. 716, 718-9 (BIA 1946) (no moral turpitude found where appellant, in violation of the Criminal Code of Canada, "did without color of right willfully do damage to private property, to wit: Break a glass in the door of [a business]"). In *Matter of M-*, the BIA also noted that the term "willfully" is defined so broadly in Canadian law that it would cover what U.S. courts would regard as gross or wanton negligence, adding that "[i]f the statute is so broad that it covers gross negligence, we think that the offense cannot be regarded as inherently base, vile or depraved." *Id.* at 720.

According to the BIA, conviction for destruction of property might be considered a crime involving moral turpitude if the statute required a finding that the respondent, with malice, intended to injure, break or destroy the property of another for a bad or evil purpose. Here, the statute does not require intent or willfulness, as recklessness is conduct included in the offense; it does not include any language of malicious, bad, or evil intent, and the record of conviction indicates only that the applicant plead guilty to the offense as described under the statute. The applicant's conviction of damage to property, therefore, whether it involved intent or recklessness under the statute at issue here, is not conduct that is inherently base, vile or depraved. In light of current case law and the statute of conviction, the applicant's conviction of damaging a plate glass window cannot be interpreted to be of a crime involving moral turpitude.

Regarding the applicant's 1995 conviction, the relevant statute, Section 51(1) of the Police Act 1964[1], states:

> Section 51.—(1) Any person who assaults a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable—
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> (a) on summary conviction to imprisonment for a term not exceeding six months or in the case of a second or subsequent offence nine months, or to a fine not exceeding [pounds]100, or to both.

The statute does not include any language of intent, willfulness, knowledge or even recklessness. In *Matter of Perez-Contreras, supra,* the BIA found that moral turpitude does not inhere where the required *mens rea* may not be determined from the statute. *Matter of Perez-Contreras*, at 618. As a general rule, simple assault

[1] The language of the statute cited in the director's decision is copied from an unofficial source, http://nwhsa.redblackandgreen.net/police_act_1964.htm. The AAO cites to the exact language of Section 51(1) of the Police Act 1964, though noting that an amended version may have been in effect in 1995.

or battery is not deemed to involve moral turpitude for purposes of the immigration laws, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau,* 21 I&N Dec. 475, 477 (BIA 1996). This general rule does not apply, however, where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers. *See, e.g., Matter of Danesh,* 19 I&N Dec. 669 (BIA 1988). In this case, none of the aggravating factors is present, as the crime does not necessarily involve the use or a weapon or the infliction of serious injury.

The director concluded that the statute was divisible, as the version of the statute included in the record by the Regional Service Center (*see* fn 1, *supra*) includes the offenses of "assaulting" or "obstructing" a constable. The director then looked to the record of conviction, as is appropriate under the modified categorical approach, to ascertain the details of the crime. The director states, and the AAO agrees, that the applicant's guilty plea makes it clear that he admitted to the offense of "assaulting" a constable. The director added that "a review of the applicant's arrest report indicates that the applicant was on the same day charged with the crimes of "assaulted [the same constable in an unofficial capacity] thereby occasioning him actual bodily harm" and "used towards another threatening abusive or insulting words or behavior with intent to cause that other person to believe that immediate unlawful violence would be used against him. . ." *Director's Decision on Form I-485, supra.* Based on those charges, the first of which was withdrawn and the second "dismissed – no evidence offered," (*see Court Register,* printed December 13, 1995) the director concluded that "a violent or malicious intent was involved in the crime." *Director's Decision on I-485, supra.*

Under certain circumstances, conducting an analysis based on the record of conviction is appropriate, as noted above. *See U.S. v. Rivera-Sanchez,* 247 F.3d 905, 908 (9th Cir. 2001)(*en banc*), quoting from *Taylor v. U.S.,* 495 U.S. 575 (1990); *Chang v. INS,* 307 F.3d 1185 (9th Cir. 2002); *Matter of Sweetser,* 22 I&N Dec. 709 (BIA 1999); *Matter of Short,* 20 I&N Dec. 136, 137-8 (BIA 1989). The AAO does not agree, however, that the statute at issue in this case is overly broad, and finds no need to go beyond a categorical analysis under the statute to determine if the conduct the statute criminalizes involves moral turpitude. Even using the modified categorical approach, where a record of conviction may be consulted, charges that have been withdrawn or dismissed are not part of the record of conviction and are not evidence of the conduct for which a defendant has been convicted. *Shepard v. U.S.,* 125 S.Ct. 1254, 1257 (2005); *Martinez-Perez v. Gonzales,* 417 F.3d 1022, 1028-29 (9th Cir. 2005) (applying *Shepard* to immigration proceedings). For information in a criminal charge to be considered, there must be proof that the defendant specifically pled guilty to that count. *See, e.g., U.S. v. Corona-Sanchez,* 291 F.3d 1201, 1211 (9th Cir. 2002)(*en banc*); *U.S. v. Velasco-Medina,* 305 F.3d 839, 852 (9th Cir. 2002). In this case, the two charges relied on by the director are not a part of the record of conviction; the record shows that the applicant plead guilty to the one charge of assault on a constable in the execution of his duty.

The BIA and U.S. courts have found that assault on a law enforcement officer is not a crime involving moral turpitude absent elements including malicious intent, use of a weapon or infliction of bodily injury. *Partyka v. Attorney General,* 417 F.3d 408, 411-17 (3d Cir. 2005) (no moral turpitude involved in aggravated assault on a law enforcement officer under a New Jersey statute where the person may be convicted for negligent conduct and the record in the case did not reveal otherwise); *Zaffarano v. Corsi,* 63 F.2d 757 (2d Cir. 1933) (no moral turpitude involved in assault related to resisting arrest); *Ciambelli v. Johnson,* 12 F.2d 465

the person assaulted must sustain bodily injury and the accused must know that the person assaulted is a peace officer. *Matter of Danesh, supra* at 673. Neither of those elements is a requirement under the statute at issue here, and the AAO finds *Danesh* to be distinguishable from the situation in this case. Moreover, looking beyond the statute at the record of conviction and the applicant's plea, there is no indication of malicious intent, use of a weapon or the infliction of bodily injury. In light of controlling case law and the statute at issue in this case, the AAO finds that the applicant's conviction of assaulting a constable in the execution of his duty cannot be interpreted to be of a crime involving moral turpitude.

Based on the record, the AAO finds that the applicant did not commit a crime involving moral turpitude and he is not inadmissible under section 212(a)(2)(A) of the Act. The waiver filed pursuant to section 212(h) of the Act is therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

ORDER: The October 11, 2006 decision of the director is withdrawn. The appeal is dismissed as the underlying application is moot.