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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEWARK, NJ Date: MAR 1 5 2007

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).

ON BEHALF OF APPLICANT:

[redacted]

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 District Director, Newark, New Jersey, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. 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 Peru 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. The applicant is the husband of a U.S. citizen, the father of a U.S. citizen child, and the son of a permanent resident mother. He seeks a waiver of inadmissibility under section 212(h) of the Act so as to remain in the United States with his family.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on his qualifying relatives, and denied the Application for Waiver of Excludability (Form I-601). *Decision of the District Director*, dated October 29, 2004.

The entire record has been reviewed in rendering this decision.

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

> (A)(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.

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

> (h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> . . . .
>
> (1) (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 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 record reflects that on October 4, 1996, the applicant pled guilty to violation of N.J.S.A. 2C:24-4(a) (titled "Endangerment of Children") in the third degree. Then on August 23, 2002, he pled guilty to the charge of Failure to Register as a Sex Offender under N.J.S.A. 2C:7-2. The district director determined that the applicant committed a crime of moral turpitude based on the October 4, 1996 conviction. On appeal, counsel asserts that the applicant's offense was not a crime of moral turpitude.

In examining whether a crime involves moral turpitude, the 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. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.
>
> 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 Endangering Welfare of Children statute under which the applicant was convicted reads as follows:

> a. Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child, or who causes the child harm that would make the child an abused or neglected child as defined in R.S.9:6-1, R.S.9:6-3 and 9:6-8.21 is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this subsection to a child under the age of 16 is guilty of a crime of the third degree.
>
> b. As used in this subsection:
> (1) "Child" shall mean any person under 16 years of age.
> (2) "Prohibited sexual act" means
> (a) Sexual intercourse; or
> (b) Anal intercourse; or
> (c) Masturbation; or
> (d) Bestiality; or
> (e) Sadism; or
> (f) Masochism; or
> (g) Fellatio; or
> (h) Cunnilingus; or
> (i) Nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction.
>
> . . .

In deciding whether a crime involves moral turpitude, we must first examine the statute itself to determine whether the inherent nature of the crime involves moral turpitude. If the statute defines a crime in which moral turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for immigration purposes, and our analysis ends. However, if the statute contains some offenses which involve moral turpitude and others which do not, it is to be treated as a "divisible" statute, and we look to the record

of conviction, meaning the indictment, plea, verdict, and sentence, to determine the offense of which the respondent was convicted. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA) (citations omitted).

With the case here, counsel is correct in that the language of the statutory code is broad, encompassing acts which do and do not involve moral turpitude. Some of the acts, for example, that "causes the child harm that would make the child an abused or neglected child, as defined in R.S.9:6-1," might not involve moral turpitude. However, because the statute is divisible it is proper to look to the record of conviction to determine the offense of which the applicant was convicted.

The charging document (dated September 26, 1996) under which the applicant was convicted indicates that he pled guilty to third degree endangering welfare of a child. Thus, the applicant pled guilty to the provision of N.J.S.A. 2C:24-4(a) which states that "[a]ny person who engages in conduct or who causes harm as described in this subsection to a child under the age of 16 is guilty of a crime of the third degree." The charging document also indicates that "[o]n various and diverse dates between the 1st day of October, 1995, and the 31st day of July, 1996, . . . did engage in sexual conduct which would impair or debauch the morals of a child under the age of 16 . . ." Although the court abstained from specifying what the actual "sexual conduct" was that the applicant engaged in that would "impair or debauch the morals of a child under the age of 16," the subsection sets forth a list of the prohibited sexual conduct. The AAO notes, however, that the list of prohibited sexual acts is described in the disjunctive and therefore does not reveal which of the prohibited sexual acts the applicant was convicted of engaging in. In order to find that the applicant was convicted of a crime of moral turpitude, the full range of conduct proscribed by N.J.S.A. 2C:24-4(a) must involve moral turpitude. *See, e.g., Galeana-Mendoza*, 465 F.3d 1054, 1057 (9th Cir. 2006)(Under the categorical approach, the Court looks to whether the full range of conduct proscribed by the statute constitutes a crime of moral turpitude).

Counsel asserts that indecent exposure, the provision of the statute dealing with nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction, is not a crime of moral turpitude. Counsel relies on the Board of Immigration Appeal (BIA) decision in *Matter of Meuller*, 1 I&N Dec. 268 (BIA 1965),[1] and *Matter of H*, 7 I&N Dec. 301 (BIA 1956) to establish that indecent exposure is not a crime of moral turpitude.

The AAO finds that the BIA decision in *Matter of P*, 2 I&N Dec. 117 (BIA 1944) is relevant here. In *Matter of P*, 2 I&N Dec. 117 (BIA 1944), the statute under which the respondent was convicted is section 1987-17 of Remington's Revised Statutes of Washington, which reads as follows:

> In all cases where any child shall be dependent or delinquent under the terms of this act, the parent or parents, legal guardian or person having custody of such child, or *any other person who shall by any act or omission, encourage, cause or contribute to the dependency or delinquency of such child shall be guilty of a misdemeanor,* and upon conviction thereof, shall be punished by fine not exceeding one thousand dollars, or imprisonment in the county

[1] It is noted that counsel's citation for *Matter of Meuller* is incorrect. Notwithstanding this, the AAO acknowledges that indecent exposure was not found to be a crime involving moral turpitude in *Matter of P*, 2 I&N Dec. 117 (BIA 1944).

> jail for not more than one year, or by both such fine and imprisonment, and the juvenile court shall have jurisdiction of all such misdemeanors. [Italics supplied.]

The BIA found that the criminalizing statute was broad, encompassing acts that both did and did not involve moral turpitude. The BIA then looked to the information in the case, which indicated that the defendant made an indecent exposure of his person in the presence of minor children, thus placing them in danger of growing up to lead an idle, dissolute, and immoral life. The BIA stated that the broadness and the generality of the terms "from any cause" and "idle, dissolute, or immoral life," and the age limit of 18, all appearing in the statute, and the use of the broad and general term "by any act or omission" appearing in the statute, when considered in the light of the legislative policy of liberal construction, leads it to conclude that the crime, as thus defined, would not necessarily or inherently make a violator guilty in every instance of base, vile, or depraved conduct. *Id.* at 120.

In *Matter of P*, the BIA stated that one of the criteria adopted to ascertain whether a particular crime involves moral turpitude is that it be accompanied by a vicious motive or corrupt mind. "It is in the intent that moral turpitude inheres." *Id.* at 121. The BIA found that the criminalizing statute did not require any specific intent. The mere doing of any act which encourages, causes, or contributes to the dependency of a child by placing him in danger of growing up to lead an idle, dissolute, or immoral life constitutes a violation of the statute. In the absence of this essential element the BIA stated that it cannot say that the crime, as defined, involves moral turpitude. *Id.* The BIA stated that the recital did not indicate the circumstances under which the exposure was made; whether to arouse the sexual desires of the parties concerned or with a lewd or lascivious intent, or whether it was because of a negligent disregard of the children's presence occasioned by physical necessity. It stated that it did not feel that the act in the latter instance shows a base, vile or depraved mind. The BIA further stated that even if the respondent acted willfully and unlawfully to contribute to the delinquency and dependency of the two children, this does not supply the essential vicious motive or corrupt mind. It is used merely to show that the act was done consciously. *Id.*

The facts in the instant case are distinguishable those in *Matter of P* in many respects. The statute in *Matter of P* criminalizes any person who shall by any act or omission, encourage, cause or contribute to the dependency or delinquency of such child. The provision of the New Jersey statute under which the applicant was convicted does not expressly have a *mens rea* requirement as an element of the crime. However, U.S. courts have stated that where the language of the statute does not require a specific mens rae, courts may turn to the laws of the convicting state to determine its judicial interpretations of the offense. *See, e.g., Matter of Bart*, 20 I&N Dec. 436 (even where the language of the statute did not require intent to defraud, bad check conviction under Georgia statute considered to be a crime of moral turpitude because of judicial interpretation requiring intent to defraud); *Parrilla v. Gonzales,* 414 F.3d 1038, 1042 (9th Cir. 2005) (language of the convicting statute was interpreted by decisions rendered by the Washington State Supreme Court); and *Matter of Ajami*, 22 I&N Dec. 949, 951-952 (BIA's interpretation of Michigan statute based on its legislative history and a decision rendered by the Court of Appeals of Michigan).

Here, New Jersey courts, in construing N.J.S.A. 2C:24-4(a), have found that the state must prove that a defendant acts "knowingly" in order to convict under the statute. See, e.g., *State vs. Demarest*, N.J. Super. Ct. App. Div., 252 N.J.Super. 323, 599 A.2d 937, 942, (1991) (holding that the state must prove that a defendant acts "knowingly" in order to convict defendant of endangering welfare of child); *See State vs. Hackett*, 166

N.J. 66, 764 A.2d 421, 429-433 (2001). (New Jersey Model Jury Charges, Criminal, requires that the defendant act "knowingly") Thus, unlike the statute in *Matter of P* that does not have a *mens rea* requirement, the New Jersey statute is construed as requiring that the state establish that a defendant act "knowingly."

There are nine prohibited sexual conduct acts set forth in N.J.S.A. 2C:24-4(a). The AAO finds that it is clear that the first eight "prohibited sexual acts" (sexual intercourse; anal intercourse; masturbation; bestiality; sadism; masochism; cunnilingus; fellatio) involve moral turpitude. However, in applying the BIA's reasoning in *Matter of P* to the facts in the instant case, the AAO finds that the prohibited sexual act in N.J.S.A. 2C:24-4(a) involving nudity ("nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction") would not constitute a crime of moral turpitude. The BIA in *Matter of P* stated that even if the "respondent acted willfully and unlawfully to contribute to the delinquency and dependency of the two children, this does not supply the essential vicious motive or corrupt mind." Thus, even if the applicant acted "knowingly" that nudity was being depicted for the purpose of sexual stimulation or gratification of any person who might view the depiction and that his conduct would impair or debauch the morals of a child under the age of 16, his conduct would not constitute moral turpitude under the BIA's reasoning in *Matter of P*.

Thus, 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)(i)(I) 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden.

ORDER: The October 29, 2004 decision of the director is withdrawn. The appeal is dismissed as the underlying application is moot.