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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

Office: NEW JERSEY, (NEWARK)

Date:

OCT 29 2008

IN RE:

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 Field Office 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 underlying application is moot. The matter will be returned to the field office director for continued processing.

The applicant, [REDACTED], is a native and citizen of the Dominican Republic who was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i), for committing a crime involving moral turpitude. The applicant sought a waiver of inadmissibility under section 212(h) of the Act, which the Field Office Director denied, finding the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated August 28, 2007.

The AAO will first address whether the applicant was convicted of a crime involving moral turpitude.

Section 212(a)(2) of the Act states 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 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

The Judgment of Conviction in the record before the AAO reflects that the applicant pled guilty to neglect of a child in the fourth degree in violation of N.J.S.A. 9:6-3, in the year 2003. The judge sentenced him to one year of probation, to provide minimal reporting, and to receive counseling. The applicant, therefore, has been convicted within the meaning of Section 101(a)(48)(A) of the Act as the judge’s imposition of probation places a restraint on his liberty.

The New Jersey statute under which the applicant was convicted, N.J.S.A. 9:6-3, provides that “[a]ny parent, guardian or person having the care, custody or control of any child, who shall abuse, abandon, be cruel to or neglectful of such child, or any person who shall abuse, be cruel to or neglectful of any child shall be deemed to be guilty of a crime of the fourth degree.”

The definition of “neglect of a child” is under N.J.S.A. 9:6-1, which provides that:

Neglect of a child shall consist in any of the following acts, by anyone having the custody or control of the child: (a) willfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance or surgical treatment, and a clean and proper home, or (b) failure to do or permit to be done any act necessary for the child's physical or moral well-being. . . .

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.

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.

Courts employ two approaches, the “categorical” and “modified categorical” approaches, in determining whether a crime involves moral turpitude. With the “categorical approach, they look to the elements of the criminal statute and the nature of the offense, rather than to the particular facts relating to the crime, to determine whether an offense involves moral turpitude. *Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S. Ct. 377, 160 L.Ed.2d 271 (2004). The elements of the convicting statute are examined to determine whether the inherent nature of the crime involves moral turpitude. See, e.g. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Esfandiary*, 16 I & N Dec. 659 (BIA 1979). For the categorical approach, a court considers only the fact of conviction and the statutory definition of the criminal offense. *Matter of Tobar-Lobo*, 24 I. & N. Dec. 143 (BIA 2007). 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*, 8 F.3d 645 (9th Cir. 1993). 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). Neither the seriousness of the criminal offense nor the severity of the sentence imposed determines whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). “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.” *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999).

The modified categorical approach is applied where a statute is divisible, containing offenses that do and do not involve moral turpitude. See, e.g., *Neely v. U.S.*, 300 F.2d 67 (9th Cir. 1962). With this approach 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 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). 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). The record of conviction does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

In applying the categorical approach here, the question is whether, given the elements of neglect, the full range of conduct proscribed by N.J.S.A. 9:6-1 involves moral turpitude. The AAO finds that it does not. It is arguable that willful failure to provide medical attendance or surgical treatment under section (a) may involve moral turpitude in some circumstances. However, willful failure to provide a “clean and proper home” is not conduct that is inherently grave, base, or depraved or is “accompanied by a vicious motive or corrupt mind.” Section (b) of N.J.S.A. 9:6-1 criminalizes a person for failure to do or permit to be done *any* act necessary for a child’s physical or moral well-being. The failure to do *any* act for a child’s physical or moral well-being, naturally, encompasses failure to do acts of a minor or insignificant nature for which failure to perform would not be characterized as inherently grave, base, or depraved or as being “accompanied by a vicious motive or corrupt mind.”

Since the neglect of child statute is divisible or separable, containing acts which both do and do not involve moral turpitude, the AAO must apply the “modified categorical” approach to determine under which of the sections the applicant was convicted. The record here is complete, containing the accusation, the judgment of conviction and the transcripts of the sentence and the plea. *See Shepard, supra*. None of these documents indicate the nature of the neglect of the child or the section of N.J.S.A. 9:6-1 under which the applicant was convicted. Consequently, the AAO finds the applicant’s conduct for which he was convicted would not be characterized as inherently grave, base, or depraved; or as being “accompanied by a vicious motive or corrupt mind.”

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)(6)(C) 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 appeal is dismissed as the underlying waiver application is moot. The field office director shall continue the processing of the Form I-485 adjustment application.