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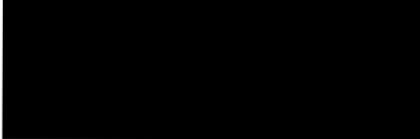
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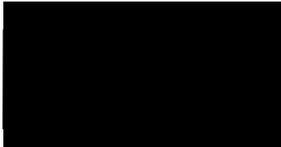
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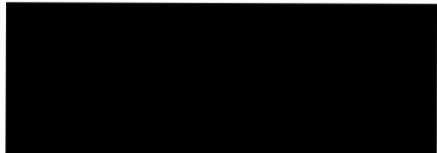
Office: NEW YORK, NY

Date: SEP 20 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:



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 District Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The applicant's waiver application will be declared moot and the appeal will be dismissed.

The applicant is a native of Scotland and a 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 Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen wife and children.

The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on August 12, 2004 as an alien who has continuously resided in the United States since before January 1, 1972. The applicant subsequently filed an Application for Waiver of Grounds of Inadmissibility (Form I-601).

The district director determined that the applicant had been convicted of two crimes involving moral turpitude (patronizing a prostitute and forgery) and concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Decision of District Director*, dated October 21, 2005.

On appeal counsel contends that the district director erred in not considering the extreme hardship to the applicant's U.S. citizen spouse and three U.S. citizen children and failed to give proper weight to the positive factors warranting a favorable exercise of discretion. *See Form I-290B attachment.*

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 –

(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).

The record shows that the applicant pled guilty in the First District Court of the County of Suffolk, New York on August 3, 1998 to forgery in the third degree, a Class A misdemeanor, in violation of section 170.05 of the New York Penal Law (NYPL). The applicant was placed on probation for a period of three years. The applicant also pled guilty on the same date to operating a motor vehicle while under the influence of alcohol or drugs in violation of section 1192.2 of the New York Vehicle and Traffic Law (NYVTL). The applicant was fined \$750 and placed on probation for a period of three years. Finally the applicant pled guilty in the First District Court of the County of Suffolk, New York on September 24, 2004 to patronizing a prostitute in the fourth degree in violation of NYPL § 230.03. The applicant was fined \$400.

The AAO notes that 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 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 (5<sup>th</sup> Cir. 2002); *Goldshtein v. INS*, 8 F.3d 645 (9<sup>th</sup> 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").

Where a statute is divisible (broad or multi-sectional), *see, e.g., Matter of P-*, 6 I&N Dec. 193 (BIA 1954); *Neely v. US.*, 300 F.2d 67 (9<sup>th</sup> 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); *US. 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 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.3d 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).

Although crimes relating to the practice of prostitution, such as maintaining a house of prostitution or securing another for employment as a prostitute, have been found to be crimes involving moral turpitude, the AAO notes that the BIA has found that a single act of soliciting prostitution on one's own behalf does not fall within section 212(a)(2)(D)(ii) of the Act. *Matter of Oscar Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008).

NYPL § 230.03 provides that a person is guilty of patronizing a prostitute in the fourth degree when he patronizes a prostitute. NYPL § 230.02 defines patronizing a prostitute as follows:

- (a) Pursuant to a prior understanding, he pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him; or
- (b) He pays or agrees to pay a fee to another person pursuant to an understanding that in return therefore such person or a third person will engage in sexual conduct with him; or
- (c) He solicits or requests another person to engage in sexual conduct with him in return for a fee.

As the record establishes that the applicant was convicted of a single act of soliciting prostitution on his own behalf, he has not been convicted of a crime involving moral turpitude. Accordingly, he is not inadmissible to the United States as a result of his conviction for violating NYPL § 230.03 and the district director's findings regarding this conviction are withdrawn.

The district director did not find that the applicant's conviction under NYFSL § 1192.2 for operating a motor vehicle under the influence of drugs or alcohol (DUI) was a crime involving moral turpitude and the AAO concurs. A simple DUI offense is not a crime involving moral turpitude. See *In re Lopez-Meza* Interim Dec. 3423 (BIA 1999); see also *Matter of Torres-Varela*, 23 I&N Dec. 788 (BIA 2001).

The applicant, therefore, has only one conviction for a crime involving moral turpitude and the AAO finds that this conviction for forgery in the third degree in violation of NYPL § 170.05 falls under the petty offense exception in section 212(a)(2)(A)(ii)(II) of the Act.

Section 170.05 of the NYPL states:

A person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written statement.

Forgery in the third degree is a class A misdemeanor.

Section 70.15 of the NYPL provides that the "sentence of imprisonment for a class A misdemeanor ... shall not exceed one year." The record shows that the applicant was placed on probation but not sentenced to a

term of imprisonment for his violation of NYPL § 170.05. Accordingly, the record establishes that the applicant, pursuant to section 212(a)(2)(A)(ii)(II) of the Act, is not subject to section 212(a)(2)(A) of the Act for his conviction under NYPL § 170.05.

In *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003), the Board held that a respondent who was convicted of more than one crime, only one of which was a crime involving moral turpitude, was eligible for the petty offense exception provided for under section 212(a)(2)(A)(ii) of the Act. The Board reasoned that:

The "only one crime" proviso, taken in context, is subject to two principal interpretations: (1) that it is triggered . . . by the commission of any other crime, including a mere infraction; or (2) that it is triggered only by the commission of another crime involving moral turpitude .... [W]e construe the "only one crime" proviso as referring to ... only one crime involving moral turpitude.

*Matter of Garcia-Hernandez* at 594.

The record establishes that the applicant was convicted of only one crime involving moral turpitude and that the crime qualifies under the petty offense exception to inadmissibility. Accordingly, the AAO finds that the applicant is not inadmissible to the United States because of his prior convictions. The applicant's waiver application is thus moot and the appeal will be dismissed.

**ORDER:** The applicant's waiver application is declared moot and the appeal is dismissed.