



U.S. Citizenship
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Services

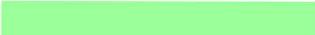
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Date: **JAN 11 2013**

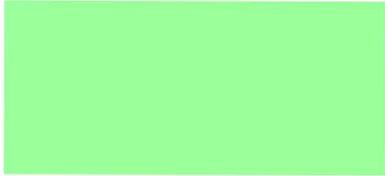
Office: NEWARK

FILE: 

IN RE: Applicant: 

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

ON BEHALF OF APPLICANT:



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 AAO inappropriately applied the law 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 with the field office or service center that originally decided your case by filing a Form I-190B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is unnecessary.

The applicant is a native and citizen of the Guinea 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 been convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen. 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 spouse and child.

On June 21, 2011, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based upon his approved immigrant petition. On January 26, 2012, the applicant filed an Application for a Waiver of Grounds of Inadmissibility (Form I-601).

In a decision dated March 31, 2012, the field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that his U.S. citizen wife would experience extreme hardship as a consequence of his inadmissibility.

On appeal, counsel for the applicant asserts that the criminal statute under which the applicant was convicted is divisible, and that there is no evidence in the record of conviction from which to conclude that the applicant's conviction renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Counsel further states that in the event the AAO were to find the applicant inadmissible for having been convicted of a crime involving moral turpitude, the evidence outlining emotional hardships and adverse country conditions in Guinea demonstrate extreme hardship to the applicant's qualifying relatives.

The record includes, but is not limited to: counsel's brief; the applicant's sworn statement; a sworn statement by the applicant's wife; medical reports concerning the applicant's wife's pregnancy; character reference letters; country conditions documentation; documentation concerning the removal proceeding against the applicant; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

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

(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

The Board of Immigration Appeals (Board) 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.)

A review of the record of conviction in this case reflects that the Judgment of Conviction dated April 24, 2005, indicates that the applicant entered a guilty plea and was sentenced to probation for one year for "Endangering Welfare of Child" in the fourth degree under statute NJSA 2C:24-4. However, section 2C:24-4 proscribes conduct punished exclusively as a second and third degree offense, which carry different penalties. Additionally, there is evidence in the record indicating that the NJSA 2C:24-4 charge was amended to a violation of a Title 9 offense, which governs juvenile and domestic relations in New Jersey. To resolve this discrepancy, the AAO will examine the documents comprising the record of conviction under the modified categorical approach announced in *Shepard v. U.S.*, 544 U.S. 13 (2005), as well as the documentary evidence submitted as proof of conviction. Cf. Section 240(c)(3)(B) of the Act; 8 C.F.R. § 1003.41(a). In this case, the record of conviction includes a plea transcript, the plea form, and the judgment and sentence. The documentary evidence submitted as proof of conviction also includes a probation document and the applicant's FBI rap sheet.

Here, the record includes the transcript of the plea hearing convened on April 22, 2005, before State Court Judge [REDACTED]. The transcript reflects that the applicant appeared before the state court represented by [REDACTED] Assistant Deputy Public Defender, to enter a guilty plea to count three, as amended, of the June 8, 2004 Indictment. The plea transcript indicates that count three of the indictment was amended to reflect the fourth degree offense of "Endangering Welfare of Child (abuse, cruelty, or neglect)" as codified in section 9:6-3 of the New Jersey Statutes, instead of the original third degree endangerment of a child charge under section 2C:24-4. The applicant pled guilty to a Title 9 offense, and not an offense under Title 2C of the New Jersey Criminal Code, as clarified on page five of the transcript. During questioning, Assistant Deputy Public Defender [REDACTED] asked the applicant the following:

"MR. [REDACTED] It was also explained to you that when you enter this guilty plea you're going to have a record for a conviction of a Title 9 offense, not an offense under 2C, but a Title 9 offense which is a fourth degree offense. Understood?"

THE DEFENDANT: Yes.”

It is also noted that on page 10 of the transcript, Judge () stated that “[the] Court is satisfied that the [applicant] voluntarily entered into this plea agreement and that there is a factual basis for the same.” The plea agreement was thus accepted by Judge (). Prior to the hearing being adjourned, Assistant Prosecutor () noted for the record the following:

“MS. () Your Honor, just to clarify, the plea form here seeks a Title 9 offense. Just to be a little bit more specific, the specific statute that criminalizes abuse or neglect under Title 9 is 9:6-3, so it’s New Jersey Statutes Annotated 9:6-3, and the factual basis relied on the definitions in 9:6-1, just for the Court’s record.”

Further evidence that the applicant pled guilty to “endangerment of a child (abuse, cruelty, or neglect)” under Title 9 section 9:6-3 is found in the plea form dated April 22, 2005. The plea form, which was signed by the applicant, Assistant Deputy Public Defender (), and Assistant Prosecutor () contains the following statement on page one: “List the charges to which you are pleading guilty: count 3, EWC: Title 9 offense as amended, a fourth degree offense, NJSA 9:6-3 and 9:6-1.” It is further noted that question 5a of the plea form indicates that by pleading guilty, the applicant will have a record for a conviction of a Title 9 offense.

The record also contains an FBI rap sheet of the applicant’s criminal history. It is reflected on page three of the rap sheet that the applicant was indicted for endangering the welfare of a child in violation of section 2C:24-4 of the New Jersey Statutes, but was found guilty of “Count: 9:6-3, Degree: 4, child abuse,” cruelty, or neglect. Lastly, the record of proceedings contains a certified “Charges Inquiry” document from the Comprehensive Probation System Database of the Somerset Superior Court in New Jersey. This document indicates that a search of the relevant records revealed that the applicant was sentenced on June 10, 2005, to probation for a term of one year following his April 22, 2005 conviction of “abuse of child-cruelty-neglect,” a fourth degree offense in violation of NJSA 9:6-3. As such, it appears that the Judgment of Conviction in this case presents a clerical error as to the statute of conviction. Both the documentary evidence submitted as proof of conviction, as well as the documents comprising the record of conviction, indicate that the applicant pled guilty to and was convicted for violating section 9:6-3 of the New Jersey Statutes. For this offense, the applicant was sentenced to one year of probation, received credit for time served, and was ordered to pay court costs and fees.

The AAO next addresses whether the applicant’s conviction for “endangerment of a child (abuse, cruelty, or neglect)” in violation of section 9:6-3 of the New Jersey Statutes renders the applicant inadmissible as an alien who has been convicted of a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act.

This case arises in the Third Circuit. The Third Circuit has affirmed the traditional categorical approach for determining whether a crime involves moral turpitude. *See Jean-Louis v. Holder*, 582 F.3d 462, 473-82 (3rd Cir. 2009) (declining to follow the “realistic probability approach” put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). The categorical inquiry in the Third Circuit consists of looking “to the elements of the statutory offense . . . to

ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute.” 582 F.3d 462, 465-66. The “inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute ‘fits’ within the requirements of a [crime involving moral turpitude].” 582 F.3d at 470. However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a crime involving moral turpitude] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The statute pertaining to endangerment of a child (cruelty or neglect of children), NJSA 9:6-3 provides; in pertinent part, that:

Any 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 statutory provision defining cruelty, abuse, abandonment, and neglect of child, NJSA 9:6-1, reads, in pertinent part:

Abuse of a child shall consist in any of the following acts: (a) disposing of the custody of a child contrary to law; (b) employing or permitting a child to be employed in any vocation or employment injurious to its health or dangerous to its life or limb, or contrary to the laws of this State; (c) employing or permitting a child to be employed in any occupation, employment or vocation dangerous to the morals of such child; (d) the habitual use by the parent or by a person having the custody and control of a child, in the hearing of such child, of profane, indecent or obscene language; (e) the performing of any indecent, immoral or unlawful act or deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child; (f) permitting or allowing any other person to perform any indecent, immoral or unlawful act in the presence of the child that may tend to debauch or endanger the morals of such child; (g) using excessive physical restraint on the child under circumstances which do not indicate that the child's behavior is harmful to himself, others or property; or (h) in an institution as defined in section 1 of P.L.1974, c. 119 (C. 9:6-8.21), willfully isolating the child from ordinary social contact under circumstances which indicate emotional or social deprivation.

Abandonment of a child shall consist in any of the following acts by anyone having the custody or control of the child: (a) willfully forsaking a child; (b) failing to care for and keep the control and custody of a child so that the child shall be exposed to physical or moral risk without proper and sufficient protection; (c) failing to care for and keep the control and custody of a child so that the child shall be liable to be supported and maintained at the expense of the public, or by child caring societies or private persons not legally chargeable with its or their care, custody and control.

Cruelty to a child shall consist in any of the following acts: (a) inflicting unnecessarily severe corporal punishment upon a child; (b) inflicting upon a child unnecessary suffering or pain, either mental or physical; (c) habitually tormenting, vexing or afflicting a child; (d) any willful act of omission or commission whereby unnecessary pain and suffering, whether mental or physical, is caused or permitted to be inflicted on a child; (e) or exposing a child to unnecessary hardship, fatigue or mental or physical strains that may tend to injure the health or physical or moral well-being of such child.

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.

Initially, it is noted that in *Matter of R-*, 4 I&N Dec. 192, 193 (C.O. 1950), the Board held that the act of willfully neglecting or refusing to provide for the support and maintenance of a children in destitute circumstances to involve moral turpitude. The Board stated that an examination of the past decisions regarding child neglect and abandonment showed that “in each case where a statute was held to be one involving moral turpitude ..., the statute specifically required that the failure to provide support be willful and that the child be in destitute circumstances.” *Id.* “One or the other or both of these elements were absent in each of the cases wherein the decision was reached that the statute under consideration was one which did not involve moral turpitude.” *Id.* As an example, the Board in *Matter of R-* cited with approval the case of *Matter of E-*, 2 I&N Dec. 134 (BIA 1944; A.G. 1944), in which it was found that not providing support to a child when acting in good faith and with honest motives, and where the child is not in destitute circumstances and where the health or the life of the child has not been impaired, is not a crime involving moral turpitude. 4 I&N Dec. at 193. Additionally, the AAO notes that Circuit Courts and the Board have found that the offense of child abuse, with the infliction of corporal injury upon a child as an element of the offense, has been found to involve moral turpitude. *See Guerrero v. INS*, 407 F.2d 1405, 1407 (9th Cir. 1969); *Matter of Tobar-Lobo*, 24 I&N Dec. 143, 145 (BIA 2007). Consequently, child cruelty under NJSA 9:6-3 would constitute a crime involving moral turpitude given that it contains the additional element of “inflicting unnecessarily severe corporal punishment upon a child.” *See* NJSA 9:6-1, cruelty to a child, subsection (a). However, while the Board has generally held that abuse or neglect of children constitutes a crime involving moral turpitude where the criminal statute includes as elements willfulness and a child in destitute circumstances, it has also found that child neglect or abandonment cases lacking these additional elements do not constitute crimes involving moral turpitude.

The AAO notes that NJSA 9:6-1 prohibits four types of conduct toward a child: abuse, abandonment, cruelty and neglect. The statute contains no restriction as to who may commit abuse and cruelty; however, only a person having “the custody or control of the child” may be guilty of abandonment and neglect. *In Re R.B.*, 376 N.J. Super. 451, 467 (A.D. 2005). The abuse provision of NJSA 9:6-1 provides, in part, “Abuse of a child shall consist in any of the following acts: ... (e) the performing of any indecent, immoral or unlawful act that may tend to debauch or endanger or

degrade the morals of the child....” *See id.* New Jersey Courts have interpreted this provision by finding that the reference in NJSA 9:6-1 to “debauch[ing] or endanger[ing] or degrad[ing] the morals of the child” is a reference to prohibited sexual conduct under NJSA 2C:24-4. *Id.* at 469. Additionally, “knowing” culpability applies to the offense of fourth-degree child abuse or child cruelty. *Id.* Under the abuse and cruelty portions of the statute, once injury to a child is shown to have occurred, the only requirement is that it not be accidental. *State v. Hofford*, 152 N.J. Super. 283, 294 (L. 1977).

However, it is also noted that NJSA 9:6-1 and 9:6-3 prohibit neglect of a child. The neglect which is made an offense by the referenced statutes consists of 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, 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.” *State v. Muniz*, 150 N.J. Super. 436, 443 (L. 1977). New Jersey State Courts have found that this latter act of omission includes: (a) a failure to complain to the proper authorities; (b) a failure to call the hospital and ask for emergency help; and (c) a failure to have sought medical care sooner. *See id.* at 444; *State v. Burden*, 126 N.J. Super. 424 (App. Div. 1974). Additionally, in the case of *State v. Burden*, it was held that evil intent or bad motive is not required to prove child neglect under NJSA 9:6-1 and 9:6-3. *State v. Burden*, 126 N.J. Super. at 427. “The word “willful” in the context of this statute means intentionally or purposely as distinguished from inadvertently or accidentally.” *Id.* As such, a person may be convicted of child neglect under the relevant statutory provisions without knowing that his or her conduct would result in an injury to and/or adversely affect the welfare of a child. Furthermore, it does not appear that neglect of child by failing to provide a clean home or by failing to complain to proper authorities, where there is no element requiring harm, injury, or the impairment to the health or life of the child, is the type of conduct that has been found by the Board to involve moral turpitude. *See Matter of E-*, 2 I&N Dec. 134 (BIA 1944; A.G. 1944). Consequently, based on the statutory language, it appears that NJSA 9:6-3 encompasses conduct that involves moral turpitude and conduct that does not.

The AAO now turns to an examination of the documents comprising the judicial record of conviction for the purpose of determining the specific subpart under which the applicant was convicted. *See Jean-Louis*, 582 F.3d at 466. In *Shepard*, the Supreme Court opined that the record of conviction includes the charging document, the plea agreement or transcript of the plea colloquy in which the defendant confirmed the basis for the factual plea, or a comparable judicial record of information. *Shepard v. United States*, 544 U.S. at 26.

Here, count three of the criminal indictment states in language tracking NJSA 2C:24-4 that the applicant was charged with “engag[ing] in sexual conduct which would impair or debauch the morals of a child under the age of sixteen (16) ..., contrary to the provisions of NJSA 2C:24-4a.” It is noted that count three of the criminal indictment does not allege that the applicant engaged in sexual conduct or contact *with* a child under the age of sixteen. *Cf. Matter of Silva-Trevino*, 24 I&N Dec. at 705 (finding that “so long as the perpetrator knew or should have known that the victim was a minor, any intentional sexual contact by an adult with a child involves moral turpitude”). However, further examination of the applicant’s criminal indictment is unnecessary, given that the record of conviction reflects the applicant was not convicted of the charged offense of endangering

the welfare of a child in the third degree in violation of NJSA 2C:24-4. *See Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 468 (BIA 2011) (stating that immigration adjudicators are not allowed to “undermine plea agreements by going behind a conviction ... to determine that an alien was convicted of a more serious turpitudinous offense”). Rather, the judicial record of conviction reflects that count three of the indictment was amended to an offense under NJSA 9:6-1 and 9:6-3, and there is no language in these two statutes relating to sexual conduct which would impair or debauch the morals of a child. Though the AAO acknowledges that New Jersey Courts have found that the “child abuse” definition found in NJSA 9:6-1(e) is a reference to sexual conduct under NJSA 2C:24-4, *see In Re R.B.*, 376 N.J. Super. at 469, the admissible portion of the applicant’s record of conviction indicates that the applicant was convicted under the “child neglect” subpart of NJSA 9:6-3, and not the “child abuse” nor “child cruelty” portions of the statute.

Specifically, the submitted transcript of the plea hearing reflects that the factual basis relied upon by Judge [REDACTED] to accept the applicant’s guilty plea tracks the statutory language prohibiting “child neglect” under NJSA 9:6-1 and 9:6-3. The plea transcript indicates that during questioning, Assistant Deputy Public Defender [REDACTED] asked the applicant the following:

“MR. [REDACTED]: And a child whose initials are J.S. was living there in that same house at the same time as you were during that period of time, correct?”

THE DEFENDANT: Yes.

MR. [REDACTED]: And you acknowledge, do you not, that during that period of time you failed to do or you omitted to be done an act that was necessary for the child’s physical well-being?”

THE DEFENDANT: Yes.”

Here, the record of conviction reveals that the applicant was convicted for failing to do or omitting to be done an act that was necessary for the child’s physical well-being. As previously indicated, neglect of a child under the definitional statute NJSA 9:6-1 consists of a “failure to do or permit to be done any act necessary for the child’s physical or moral well-being.” *See* NJSA 9:6-1, neglect of child, subpart (b). This act of omission includes, but is not limited to: failure to complain to the proper authorities; failure to call the hospital and ask for emergency help; and failure to have sought medical care sooner. *See State v. Muniz*, 150 N.J. Super. at 443. Consequently, the judicial record of conviction reveals that the applicant was convicted of “child neglect” in violation of NJSA 9:6-3, as the plea transcript reflects on page 10 that Judge Gelade understood a sufficient factual basis for the guilty plea existed after the Public Defender’s questioning of the applicant, which, in turn, mirrored the language of the “child neglect” definition found in the statute codified as NJSA 9:6-1.

As previously indicated, the least culpable conduct required to sustain a “child neglect” offense in violation of NJSA 9:6-3 is a failure to alert the proper authorities or an act of omission of an act necessary for the child’s physical or moral well-being. *See generally Jean-Louis*, 582 F.3d at 466. The Board has found moral turpitude where the statute specifically required that the act be willful and that the child be in destitute circumstances, or the infliction of corporal injury upon a child.

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Matter of R-, 4 I&N Dec. at 193; *Matter of Tobar-Lobo*, 24 I&N Dec. at 145. We see no reason to find moral turpitude beyond such circumstances, and the breadth of the statute at issue here leads us to the conclusion that the least culpable conduct punished under the statute does not necessarily require proof of any of the aforementioned elements. Accordingly, the AAO cannot find that the applicant's conviction for the "child neglect" subsection of the NJSA 9:6-3 endangerment statute is a crime involving moral turpitude that renders him inadmissible under 212(a)(2)(A)(i)(I) of the Act.

ORDER: The appeal is dismissed as the waiver application is unnecessary. The matter will be returned to the Field Office Director for continued processing.