



U.S. Citizenship  
and Immigration  
Services

(b)(6)



Date:

**JUN 05 2015**

FILE:

APPLICATION RECEIPT #:

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Newark, New Jersey, denied the waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and the waiver application is unnecessary.

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 been convicted of a crime 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 spouse and child.

The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

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 applicant is inadmissible for having been convicted of a crime involving moral turpitude, the applicant has established extreme hardship to his qualifying relatives. The entire record was reviewed and considered in rendering this decision.

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.)

The record establishes that in [REDACTED] 2006, the applicant was charged with Wrongful Impersonation, a violation of New Jersey Statutes Annotated (NJSA) 2C:21-17a(4); Using False ID, a violation of NJSA 2C:21-2.1c; and Insurance Fraud, a violation of NJSA 2C:21-4.6a. On [REDACTED] 2008, the applicant successfully completed New Jersey's Pre-Trial Intervention (PTI) Program and all charges were dismissed.

Section 101(a)(48) of the Immigration and Nationality Act (the Act) provides:

- (A) The term “conviction” means . . . a formal judgment of guilt . . . 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.

Where an alien pleads guilty or nolo contendere, or is found guilty, but entry of the judgment is deferred by the court to allow for a period of probation and/or completion of a diversion program, the alien has been convicted for immigration purposes even if the charges are later dismissed. *See Matter of Marroquin-Garcia*, 23 I&N Dec. 705, 714-15 (A.G. 2005); *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999).

By contrast, an alien has *not* been convicted for immigration purposes where the criminal charges were dismissed following successful completion of a pretrial diversion program which occurred prior to any pleading or finding of guilt. *Matter of Grullon*, 20 I&N Dec. 12, 14-15 (BIA 1989) (citing *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988)). For there to be no conviction in such a case, the alien must not have entered a plea of guilty or nolo contendere and there must have been no adjudication of guilt or imposition of punishment or restraint by a court. *Id.*

The disposition of the petitioner's above-referenced offenses in 2008 under New Jersey's PTI Program did not result in a conviction because the petitioner did not enter a plea of guilty nor did he admit sufficient facts to warrant a finding of guilt. Under New Jersey Rules of Court Governing Criminal Practice, participation in the PTI program does not require an informal admission or entry of a plea of guilt.<sup>1</sup> Instead, the New Jersey Court Rules specify that certain conditions be met for admittance to and successful completion of the program.<sup>2</sup> Accordingly, the petitioner's PTI disposition is not a conviction under section 101(a)(48)(A) of the Act. It is, therefore unnecessary to determine whether Wrongful Impersonation is a crime involving moral turpitude.

<sup>1</sup> N.J. R. Ct. Crim. R. 3:28, Guideline 4; *see also Pinho v. Gonzalez*, 432 F.3d 193, 195 n. 1 (3<sup>rd</sup> Cir. 2005) (discussing New Jersey's Pretrial Intervention Program).

<sup>2</sup> *Id.* at Guidelines 2-8.

The record further establishes that on [REDACTED] 2009, the applicant was convicted of Child Neglect, a fourth degree offense under NJSA 9:6-3, based on a [REDACTED] 2009 offense. The applicant was placed on probation for a two year term and was ordered to pay costs and fees.

For cases arising in the Third Circuit, the determination of whether a conviction is a crime involving moral turpitude requires a categorical inquiry into “the elements of the statutory state offense . . . to ascertain the least culpable conduct necessary to sustain conviction under the statute.” *Jean-Louis v. Holder*, 582 F.3d 462, 465-66 (3d Cir. 2009) (citing *Knapik v. Ashcroft*, 384 F.3d 84, 88 (3d Cir. 2004)). The “inquiry concludes when [the adjudicator] determine[s] whether the least culpable conduct sufficient to sustain conviction under the statute ‘fits’ within the requirements of a [crime involving moral turpitude].” *Jean-Louis, supra*, 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 others of which are not, [we] . . . examine the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Jean-Louis v. Holder*, 582 F.3d 462, 466 (3d Cir. 2009); *see also U.S. v. Marrero*, 743 F.3d 389, 395-396 (3<sup>rd</sup> Cir. 2013) (citing *Descamps v. United States*, 133 S. Ct. 2276 (2013)). The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *See Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); *see also Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented”).

The question before us is whether the applicant’s conviction for Child Neglect in violation of NJSA section 9:6-3 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.

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.

A conviction under NJSA Section 9:6-3, a fourth degree offense, shall not exceed 18 months imprisonment. *See* NJSA Section 2C: 43-6a(4).

The statutory provision defining 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.

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.

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 care, 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, NJSA 9:6-1 and 9:6-3 also 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.

Here, the record of conviction clearly states that the applicant was convicted of “child neglect” in violation of NJSA 9:6-3. 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. *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 punishable under the statute does not necessarily require proof of any of the aforementioned elements. Accordingly, we cannot find that the applicant’s conviction for the “child neglect” subsection of NJSA 9:6-3 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 applicant is not inadmissible and the waiver application is unnecessary.