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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 09 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Fiancé(e) Pursuant to § 101(a)(15)(K) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(K)

ON BEHALF OF PETITIONER:

[redacted]

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 law was inappropriately applied by us 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. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a citizen of the United States who seeks to classify the beneficiary, a native and citizen of the Philippines, as the fiancé(e) of a United States citizen pursuant to § 101(a)(15)(K) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(K).

The director denied the nonimmigrant visa petition because the petitioner failed to demonstrate that he, beyond any reasonable doubt, poses no risk to the safety and well-being of the beneficiary and/or any derivative beneficiary.[1] On appeal, counsel states, in part, that "while in prison, [the petitioner] successfully completed an intensive sexual offender program offered by the New Hampshire State Prison" and "[s]ince his release from prison, [the petitioner] has not been charged with any criminal activity of any type whatsoever." Counsel also states that the petitioner underwent a psychosexual evaluation with Dr. [redacted] who found that the petitioner did not pose a threat to the safety of the beneficiary. Counsel states that the beneficiary has no minor children and she has been diagnosed with menopause, indicating that she is unable to bear children. Counsel also asserts that applying the Adam Walsh Act to the petitioner violates the Ex Post Facto Clause, as the petitioner's conviction of felonious sexual assault on a minor occurred 13 years prior to the law's enactment. As supporting documentation, counsel resubmits a copy of Dr. [redacted] psychosexual evaluation.

On July 27, 2006, the President signed the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. 109-248, to protect children from sexual exploitation and violent crimes, to prevent child abuse and child pornography, to promote Internet safety and to honor the memory of Adam Walsh and other child crime victims.

Sections 402(a) and (b) of the Adam Walsh Act amend sections 101(a)(15)(K), 204(a)(1)(A) and 204(a)(1)(B)(i) of the Act to prohibit U.S. Citizens and Lawful Permanent Residents who have been convicted of any "specified offense against a minor" from filing a family-based visa petition on behalf of any beneficiary, unless the Secretary of the Department of Homeland Security (Secretary) determines in his or her sole and unreviewable discretion that the petitioner poses no risk to the beneficiary of the visa petition. Pursuant to 8 C.F.R. § 103.1, the Secretary has delegated that authority to U.S. Citizenship and Immigration Services (USCIS).

Section 111(7) of the Adam Walsh Act defines "specified offense against a minor" as:

> The term 'specified offense against a minor' means an offense against a minor that involves any of the following:
>
> (A) An offense (unless committed by a parent or guardian) involving kidnapping.

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[1] A search of New Hampshire's Registration of Criminal Offenders at [redacted] indicates that the petitioner was found guilty of "Felonious Sexual Assault (Victim under 13 y.o.)."

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.
(C) Solicitation to engage in sexual conduct.
(D) Use in a sexual performance.
(E) Solicitation to practice prostitution.
(F) Video voyeurism as described in section 1801 of title 18, United States Code.
(G) Possession, production or distribution of child pornography.
(H) Criminal sexual conduct involving a minor or the use of the Internet to facilitate or attempt such conduct.
(I) Any conduct that by its nature is a sex offense against a minor.

According to section 111(14) of the Adam Walsh Act, the term "minor" is defined as an individual who has not attained the age of 18 years. The statutory list of criminal activity in the Adam Walsh Act that may be considered a specified offense against a minor is stated in relatively broad terms. With one exception, the statutory list is not composed of specific statutory violations; the majority of these offenses will be named differently in Federal, State and foreign criminal statutes. For a conviction to be deemed a specified offense against a minor, the essential elements of the crime for which the petitioner was convicted must be substantially similar to an offense defined as such in the Adam Walsh Act (see § 111(5)(B) of the Adam Walsh Act, which establishes guidelines regarding the validity of foreign convictions).

The petitioner filed the Petition for Alien Fiancé(e) (Form I-129F) with USCIS on February 26, 2008. On April 17, 2008, the director issued a request for evidence (RFE), requesting that the petitioner submit certified copies of court and police records related to his criminal conviction.

In his response to the director's RFE, the petitioner submitted additional documentation, including two documents dated October 1, 1992 and April 28, 1993, respectively, from the Superior Court in Dover, Strafford County, New Hampshire, convicting the petitioner of "felonious sexual assault," a Class B felony, 632-A: 3, III, for engaging in sexual contact with a person, not his legal spouse, under thirteen years of age, and sentencing the petitioner to the New Hampshire State Prison for no more than 7 years and no less than 3 ½ years.

On April 2, 2009, the director issued a notice of intent to deny (NOID), indicating that the petitioner may be prohibited from filing a family-based visa petition on behalf of the beneficiary because the evidence of record indicated that the petitioner was convicted of felonious sexual assault (victim under 13 years old), and was sentenced to serve no more than 7 years and no less than 3 ½ years of confinement. The director requested that the petitioner submit evidence that he was not convicted of any "specified offense against a minor" as defined in § 111(7) of the Adam Walsh Act, and/or evidence that he poses no risk to the beneficiary of the visa petition. The director provided a detailed list of acceptable evidence.

In his June 9, 2009 response to the director's NOID, counsel stated, in part, that the evidence "clearly demonstrates, beyond any reasonable doubt, that [the petitioner] poses no risk to the safety of the beneficiary or any derivative beneficiary." Counsel also stated that the petitioner completed an intensive sexual offender program while in prison and that he had not been charged with any other

criminal activity since his release. As supporting documentation, counsel submitted: a psychosexual evaluation from Dr. [redacted] a medical certificate for the beneficiary; the petitioner's honorable discharge papers; an employment letter; and documents related to the petitioner's involvement with the community.

On September 15, 2009, the director issued a second RFE, requesting that the petitioner submit evidence of the termination of all of his prior marriages.

In his response to the director's RFE, the petitioner submitted evidence of the legal termination of his marriage to [redacted] As discussed above, the director denied the nonimmigrant visa petition because the petitioner failed to demonstrate that he, beyond any reasonable doubt, poses no risk to the safety and well-being of the beneficiary and/or any derivative beneficiary.

Preliminarily, we note counsel's claim that the application of the Adam Walsh Act to the instant I-130 petition violates the Ex Post Facto Clause of the U.S. constitution. Counsel is mistaken. The Ex Post Facto Clause applies to criminal, not civil law. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). While the Latin phrase " *ex post facto*" literally encompasses any law passed "after the fact," the Supreme Court has long recognized that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them. *Id.* The Ex Post Facto Clause is inapplicable in immigration proceedings which are civil, not criminal, in nature. *See e.g. Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 131-32 (2d Cir. 2005) (clause inapplicable to civil deportation proceedings).

The AAO acknowledges the petitioner's work history, military service, and community involvement, as well as the beneficiary's medical certificate diagnosing her with menopause. The AAO also acknowledges the petitioner's participation in a sex offender treatment program while in prison and counsel's assertion that the evidence "clearly demonstrates, beyond any reasonable doubt, that [the petitioner] poses no risk to the safety of the beneficiary or any derivative beneficiary." A review of the evidence of record as a whole, however, does not support counsel's assertion.

Specifically, the inconsistencies in the record raise serious concerns about the veracity of the petitioner's testimony. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In this case, the record contains various reports related to the petitioner's arrest for sexual assault, including a report dated August 28, 1992, wherein the reporting officer indicated that the petitioner was not telling the truth when he claimed that he "slept through" his sexual assault on a child, as there were no alcohol, drugs, illnesses, or a history of black-outs involved. Moreover, the petitioner admitted to the officer that the child, who had reported that the petitioner was awake when he put his hand down her pants, would not lie and thus must have been telling the truth. The petitioner went on to offer an "alternative explanation" to the reporting officer: "[H]e has a habit of scratching his groin with his left hand and that where [the victim] was sitting on his left knee he may have scratched her by mistake." The reporting officer also discussed with the petitioner a second child who had claimed she had been sexually assault by the petitioner. It is noted that the petitioner did not deny sexually assaulting another child; instead, he blamed her for not reporting him whereby he "would have had help by now." In spite of the petitioner's admissions, including his "alternative explanation" to the reporting officer on August 28,

1992, the petitioner reports to Dr. [redacted] during his May 19, 2009 examination that, although he did not deny inappropriately touching the victim, "he had fallen asleep in a chair and had no memory for the event." Based upon this statement, it appears that the petitioner also failed to disclose to Dr. [redacted] his sexual assault on at least one other child as well as the "alternate explanation" that he provided to the investigating officer. As the record indicates that the petitioner was less than truthful during his examination by Dr. [redacted] the summary and recommendations of Dr. [redacted] which were based in part on the petitioner's own testimony, are of limited probative value. Again, doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In this matter, the petitioner's work history, military service, community involvement, and participation in a sex offender treatment program while in prison, do not overcome the inconsistencies in the petitioner's testimony. In sum, the inconsistencies in the petitioner's testimony detract from the credibility of his claim. Based upon the totality of the evidence, the AAO cannot conclude that the petitioner poses no risk the safety and well-being of the beneficiary and/or any derivative beneficiary.

In view of the foregoing, the petitioner has failed to demonstrate that he, beyond any reasonable doubt, poses no risk to the safety and well-being of the beneficiary and/or any derivative beneficiary. Consequently, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.