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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]

Date: NOV 22 2011 Office: VERMONT SERVICE CENTER FILE: [redacted]

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, with a fee of $630. 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 was convicted of a specified offense against a minor and he failed to demonstrate that he poses no risk to the safety and well-being of the beneficiary and/or any derivative beneficiary. On appeal, the petitioner, through counsel, submits a supplemental brief, a letter from the beneficiary, an employment verification letter, a photograph of the petitioner and beneficiary, and correspondence between the petitioner and the beneficiary during their courtship.

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.
> (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 November 13, 2009. The petitioner indicated at Part C of the Form I-129F that he had been convicted of a crime. He submitted with the Form I-129F the following relevant evidence: a letter, dated November 20, 1997, from the New Hampshire Department of Corrections certifying his participation in a support group for young offenders; a discharge summary, dated February 7, 1999, from the New Hampshire Department of Corrections Sex Offender Program Coordinator listing recommendations to minimize the petitioner's risk of reoffending; a memorandum, dated January 11, 2001, from the New Hampshire Department of Corrections Sex Offender Program Director to the Parole Board explaining the petitioner's violation of parole; and a discharge summary, dated May 24, 2005, from the New Hampshire Department of Corrections Sex Offender Treatment Unit summarizing the petitioner's treatment plan after his parole violation.

On June 7, 2010, the director issued a notice of intent to deny (NOID) the petition with a determination that the petitioner may be prohibited from filing a family-based visa petition on behalf of the beneficiary because the evidence of record indicates that he was convicted on July 2, 1997 of Rape of Child with Force in violation of the Massachusetts Criminal Code and Aggravated Felonious Sexual Assault in violation of the New Hampshire Criminal Code. 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 response to the director's NOID, counsel submitted the following additional relevant evidence: a statement from the beneficiary indicating that she knows of the petitioner's incarceration and still wants to marry him; copies of conviction records, including the indictment, judgment and sentencing instructions, for the petitioner's July 2, 1997 conviction in New Hampshire for Aggravated Felonious Sexual Assault; and copies of a court docket and court filings, including a request for sentencing considerations, for the petitioner's August 7, 2003 conviction in Massachusetts for Rape of a Child.

The conviction records submitted in response to the NOID reflect that the petitioner was convicted in the New Hampshire Superior Court on July 2, 1997 for Aggravated Felonious Sexual Assault in violation of section 632-A:2 II of the New Hampshire Criminal Code. At the time of the petitioner's conviction, the statute provided in pertinent part, "A person is guilty of aggravated felonious sexual

assault without penetration when he intentionally touches the genitalia of a person under the age of 13 under circumstances that can be reasonably construed as being for the purpose of sexual arousal or gratification." N.H. Rev. Stat. Ann § 632-A:2 II (West 1997). Although the petitioner did not submit the full record of conviction for his second offense, Rape of a Child By Force, the May 23, 2005 discharge summary from the New Hampshire Department of Corrections, the petitioner's July 27, 2003 request to the Cambridge Superior Court for sentencing considerations and Department of Homeland Security (DHS) databases reflect that he was convicted of this offense in Massachusetts on August 7, 2003. At the time of the petitioner's conviction, the statute provided, in pertinent part, "[w]hoever has sexual intercourse or unnatural sexual intercourse with a child under sixteen, and compels said child to submit by force and against his will or compels said child to submit by threat of bodily injury, shall be punished by imprisonment. . . ." Mass. Gen. Laws Ann. ch. 265 § 22A (West 2003). The petitioner's offenses are substantially similar to the specified offenses against a minor defined under subsections 111(7)(H) and (I) of the Adam Walsh Act: criminal sexual conduct involving a minor and any conduct that by its nature is a sex offense against a minor.

The director denied the nonimmigrant visa petition because the petitioner failed to demonstrate that he poses no risk to the safety and well-being of the beneficiary and/or any derivative beneficiary.

On appeal, counsel asserts that the petitioner's history does not demonstrate that he poses any risk of harm to his 32-year-old fiancée. Counsel contends that the petitioner has a fundamental right to marry and the allocation of the burden of proof in this case violates the petitioner's constitutional right to family. Counsel further contends that the denial of the petitioner's fiancée visa petition violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Constitutional issues are not within the appellate jurisdiction of the AAO. Like the Board of Immigration Appeals, the AAO cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992). Even if we were to identify a constitutional infirmity in the statute, we lack the authority to remedy it. *Matter of Fuentes-Campos*, 21 I&N Dec. at 912. Counsel's assertions regarding a violation of the applicant's constitutional rights will therefore not be addressed in this decision.

The beneficiary asserts in her letter, dated February 20, 2011, that she is aware of the petitioner's convictions in New Hampshire and Massachusetts for sexually assaulting two young girls. She notes that she was in constant contact with the petitioner by mail during his incarceration. She states that the petitioner visited her in the Philippines and she thinks he is a "very kind, simple and good person." She expresses her desire to marry the petitioner when she comes to the United States and conveys their mutual wish "to have two children" together.

Although counsel asserts that the petitioner's history does not demonstrate that he poses any risk of harm to his fiancée, the record indicates otherwise. The record reflects that the petitioner is a repeat offender with at least three known sex offenses. The New Hampshire Department of Corrections discharge summary, dated February 7, 1999, from the Sex Offender Program Coordinator states that the petitioner was given a 2 ½ to 10 year sentence for sexually assaulting an 8-year-old female and his minimum parole date was December 27, 1999. The report indicates that the petitioner completed all of the requirements for the Enhanced Relapse Prevention Program for sex offenders on December 17, 1999. Although the petitioner completed this program and was granted parole, the record shows that he

immediately reoffended. A memorandum from the Sex Offender Program Director to the Parole Board on January 11, 2001 states that the petitioner was originally paroled on July 17, 2000. Just one week after his release, he was arrested at a department store on July 25, 2000 for Lewd and Lascivious Behavior involving two girls and was returned to the New Hampshire State Prison. He also violated his parole by failing to enroll in Sex Offender Programming. The sentencing considerations request submitted on the petitioner's behalf in the Cambridge Superior Court shows that during the petitioner's re-incarceration it was discovered that he sexually assaulted his niece prior to his first conviction for sexual assault. As discussed, the petitioner was convicted of this offense on August 7, 2003 in Massachusetts.

According to a discharge summary from the New Hampshire Department of Corrections Sex Offender Treatment Unit, dated May 23, 2005, the petitioner attended a violator's group from October 2003 until May 2005. The discharge summary notes that it took the petitioner six to 12 months to acknowledge the conduct that resulted in his arrest and re-incarceration. The treatment unit indicated that the petitioner completed his sessions, but he needs to continue in sex offender treatment while in the community. The petitioner's Biographic Information Sheet (Form G-325A) indicates that he was released from prison in June 2007. However, the record does not contain evidence of the petitioner's continued treatment in a sex offender program. Moreover, the record is devoid of recent certified evaluations by psychiatrists, clinical psychologists, or clinical social workers attesting to the petitioner's rehabilitation or behavioral modification. The record shows that the petitioner is a repeat offender and he has failed to demonstrate his rehabilitation. The beneficiary's claim that she thinks the petitioner is a "very kind, simple and good person" does not overcome this determination, especially considering her expressed wish to have children with the petitioner.

Based on the foregoing, the evidence of record does not support the petitioner's assertions that he 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.