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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D6

[redacted]

Date: SEP 24 2012 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, 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 any 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center (the director) approved the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn and the petition will be denied.

The petitioner is a citizen of the United States who married the beneficiary, a native and citizen of Nepal, on January 29, 2007 in Colorado. The petitioner seeks approval of the instant Form I-129F petition pursuant to section 101(a)(15)(K)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(K)(ii).

Applicable Law

A U.S. citizen may file a Form I-129F petition on behalf of his alien spouse though the provisions of section 101(a)(15)(K) of the Act, which states, in pertinent part:

> Subject to subsections (d) and (p) of section 214, an alien who -
>
> * * *
>
> (ii) has concluded a valid marriage with a citizen of the United States (other than a citizen described in section 204(a)(1)(A)(viii)(I)) who is the petitioner, is the beneficiary of a petition to accord a status under section 201(b)(2)(A)(i) that was filed under section 204 by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa[.]

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 amended 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 determines in 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).

Facts and Procedural History

The petitioner filed the Petition for Alien Fiancé(e) (Form I-129F) with USCIS on March 9, 2007.[1] The director subsequently issued a notice of intent to deny (NOID) the petition, 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 in 2002, the petitioner was convicted of indecent exposure to a minor in the State of Colorado. 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, or evidence that he posed no risk to the beneficiary of the visa petition. The director provided the petitioner with a detailed list of acceptable evidence.

In response to the director's NOID, the petitioner submitted, *inter alia*: dispositions of his arrest and conviction, including a police report, a news article about his arrest, and a court transcript of his sentencing hearing; evidence relating to the completion of his probation; a letter from [redacted], regarding the petitioner's treatment at [redacted] a letter from [redacted] stating, in part, that the petitioner successfully completed therapy; statements from the petitioner and beneficiary; and evidence relating to the petitioner's community service.

In his certification notice, the director noted that the petitioner's Form I-130 had been approved by the Director of the California Service Center, and that the petitioner had submitted identical evidence in

[1] The petitioner had previously filed an alien relative petition (Form I-130) on the beneficiary's behalf with USCIS on February 14, 2007, which was approved on December 23, 2009.

support of both the Form I-130 and Form I-129F. Although he did not concur with the California Service Center Director's decision to approve the Form I-130, the director recommended approval of the instant Form I-129F for administrative efficiency. The director notified the petitioner that he was certifying his decision to the AAO for review, and that he had 30 days to supplement the record with any additional evidence he wished the AAO to consider. More than 30 days have passed since the notice of certification was served on the petitioner, and the AAO has not received any additional evidence.

Analysis

In proceedings for a Form I-129F petition, the petitioner bears the burden of proving eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met because the petitioner has failed to establish that he poses no risk to the beneficiary.

The record of conviction reflects that on December 19, 2002, the petitioner was convicted of one count of indecent exposure to a child under the age of fifteen in violation of section 18-7.302(2)(b) of the Colorado Revised Statutes (2002). The petitioner was sentenced to five years of probation for the offense. He was also ordered to undergo psycho-sexual evaluation and treatment, to register as a sexual offender and to avoid contact with anyone under the age of the eighteen. The petitioner has not provided an account of the circumstances surrounding his arrest and conviction for the record, other than to state in his undated declaration: "Five years ago, I had my worst couple of minutes."

When responding to the director's NOID, counsel stated the following about the petitioner's offense: "In a moment of great misjudgment, he exposed himself in public, an act which happened to be viewed by a group of children." According to counsel, "[w]hile [the petitioner] exposed himself in public, he did not intend to be seen by children." However, counsel's characterizations of the offense as little more than a spontaneous act of public indecency that was accidentally viewed by children are belied by evidence in the record. The news article from the [redacted] in Boulder, Colorado, dated November 19, 2002 and submitted below, states: "Police said [the petitioner] drove up and down [redacted] which ends in a cul-de-sac. Some of the children said with each slow pass, the man in a black Ford pickup truck touched himself and smiled as he drove by." This article not only contradicts the petitioner's claim that his public indecency lasted only "a couple of minutes," but also contradicts counsel's statements that the petitioner's public indecency was inadvertently done in the presence of children. The news article describes the petitioner slowly driving down a dead-end street deliberately looking at the children while touching his genitals. According to the police report submitted below, the children who witnessed the petitioner's offense ranged in age from six to fourteen.

The deliberate act of the petitioner's offense is also supported by the court transcript of the petitioner's sentencing hearing. The transcript shows that the petitioner pled guilty to "knowingly" exposing his genitals to "the view of a person under the age of 15 years." The petitioner also stated at the time of his sentencing: "[I] kind of think it was a - - some sort of subconscious way of giving myself a kick to get help. . . . [M]y actions that day were all about getting pulled over and getting caught." Furthermore, if the petitioner's offense had been nothing more than a momentary lapse in judgment, he would not have needed to develop "a lifetime Relapse Prevention Plan," as described by [redacted] in his July 24,

2007 letter. In the court transcript of the petitioner's sentencing, the presiding judge referred to the petitioner's offense as a "Class 1 extraordinary risk misdemeanor." While counsel notes that the petitioner did not touch his victims and that it was a nonviolent offense, the lack of these elements in the petitioner's criminal activity does not necessarily demonstrate that he poses no risk to the safety and well-being of the beneficiary.

In addition, the petitioner's sentence for the offense, which consisted of five years of probation as well as psycho-sexual evaluation and treatment, also required him to register as a sex offender with the State of Colorado and avoid contact with any individual under the age of 18. Although the record contains evidence that the petitioner completed his probation and court-ordered therapy, it does not contain any evidence that he is no longer required to register as a sex offender or refrain from contacting anyone under the age of eighteen.

The beneficiary indicates in her statement submitted below that long before they decided to marry, she and the petitioner were "well acquainted with each other[2]" and that he told her about "the past incident which perhaps he still regrets." The beneficiary does not specify what the petitioner told her, including whether she is aware of the petitioner's victims' ages. The beneficiary also does not disclose that she is aware that the court ordered the petitioner to undergo a psycho-sexual evaluation, that he underwent therapy, and that the court required him to register as a sex offender and avoid contact with any person under the age of eighteen. [redacted] July 24, 2007 letter states that the petitioner was in treatment with him from February 2003 until he was "successfully discharged" in December 2004. Although [redacted] stated that "[b]y continuing a path of recovery, his prognosis at the time of discharge was good," he did not specify the diagnosis to which the petitioner's prognosis related. [redacted] also noted that the petitioner's offense was "hands off" and that the petitioner was "not considered a violent threat to the community;" however, the lack of any physical contact with the victim or the non-violent nature of the offense does not demonstrate that the petitioner poses no risk to the beneficiary. [redacted] who states that the petitioner attended therapy sessions with him from December 11, 2002 until December 12, 2003, submitted a similarly deficient letter. He states that the petitioner is not a "danger to [himself] or others at this time," but does not provide any probative information regarding his year-long therapy with the petitioner, including any diagnoses of the petitioner. The petitioner's community service is laudable, but such service does not demonstrate that he poses no risk to the beneficiary.

Conclusion

De novo review of the relevant evidence fails to demonstrate that the petitioner poses no risk to the beneficiary. While the California Service Center Director approved the Form I-130 that the petitioner filed on the beneficiary's behalf, her determination on that petition is not binding on the adjudication of the separate Form I-129F petition currently before the AAO. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Accordingly, the director erroneously relied upon

[2] According to the record, the beneficiary entered the United States in July 2006 as a K-1 nonimmigrant based a fiancée petition filed on her behalf by another man. The petitioner and the beneficiary married less than six months after her arrival in the United States.

"administrative efficiency" as a basis for approving the Form I-129F and his decision will be withdrawn.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. *Matter of Chawathe*, 25 I&N Dec. 369 at 375 n.7. The petitioner has not met that burden.

ORDER: The director's recommendation to approve the Form I-129F is withdrawn and the petition is denied.