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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: MAR 2 2 2013 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

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 with the field office or service center that originally decided your case by filing a 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,

Ron Rosenberg
Acting 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 petition will remain denied.

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

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 posed no risk to the safety and well-being of the beneficiary.

On appeal, the petitioner, through counsel, submits a statement and additional evidence.

Applicable Law

Section 101(a)(15)(K)(i) of the Act provides nonimmigrant classification to an alien who, in pertinent part:

> is the fiancée or fiancé of a citizen of the United States (other than a citizen described in section 204(a)(1)(A)(viii)(I)) and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission.

Section 204(a)(1)(A)(viii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(viii), describes, in pertinent part:

> (I) . . . a citizen of the United States who has been convicted of a specified offense against a minor, unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition . . . is filed.[1]
>
> (II) For purposes of subclause (I), the term "specified offense against a minor" is defined as in section 111 of the Adam Walsh Child Protection and Safety Act of 2006.

These provisions were amended by the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), which was enacted 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. Adam Walsh Act, Pub. L. 109-248, §§ 2, 102, 501 (Jul. 27, 2006).

Section 111(7) of the Adam Walsh Act states:

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[1] The Secretary has delegated to U.S. Citizenship and Immigration Services (USCIS) the authority to determine whether or not a petitioner convicted of a specified offense against a minor poses no risk to the beneficiary. *See* Department of Homeland Security (DHS) Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003).

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.

Section 111(14) of the Adam Walsh Act defines the term "minor" as an individual who has not attained the age of 18 years.

Factual and Procedural History

The petitioner filed the Petition for Alien Fiancé(e) (Form I-129F) with USCIS on June 28, 2010. The director subsequently issued a notice of intent to deny (NOID) because the evidence of record indicated that the petitioner was convicted in Louisiana of sexual battery and indecent behavior with a juvenile. The director requested that the petitioner submit evidence that he was not convicted of any "specified offense against a minor" as defined in section 111(7) of the Adam Walsh Act, or evidence that he posed no risk to the beneficiary of the visa petition despite his conviction. The director provided the petitioner with a detailed list of acceptable evidence.

In response to the director's NOID, the petitioner submitted: the complaint and commitment order from his conviction record; two personal statements addressing his conviction and the counseling he received; and a photocopy of a business card from [redacted] a clinical social worker. The director determined that the petitioner had been convicted of a specified offense against a minor and that the evidence was insufficient to demonstrate that the petitioner posed no risk to the safety and well-being of the beneficiary. Counsel filed a timely appeal.

The AAO reviews these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record, including the evidence submitted on appeal, fails to establish the petitioner's eligibility. The appeal will be dismissed for the following reasons.

The Petitioner's Conviction for a Specified Offense Against a Minor

The petitioner's record of conviction reflects that on November 15, 1990, the petitioner was convicted upon his guilty plea of sexual battery in violation of section 43.1 of the Louisiana Statutes and molestation of a juvenile in violation of section 81.2 of the Louisiana Statutes. The petitioner was given a suspended sentence of three years imprisonment and placed on active probation for three years under special conditions. The special conditions included: four months of weekends in prison;

payment of mental health bills for the victim; agreement to have no children under his control or supervision; mental health treatment; and payment of fees.

At the time of the petitioner's conviction, the Louisiana Statutes defined sexual battery as, in pertinent part:

> A. the intentional engaging in any of the following acts with another person, who is not the spouse of the offender, where the offender either compels the other person to submit by placing the person in fear of receiving bodily harm, or where the other person has not yet attained fifteen years of age and is at least three years younger than the offender:
>
> (1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender;
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> . . .
>
> C. Whoever commits the crime of sexual battery shall be punished by imprisonment, with or without hard labor, for not more than ten years.

La. Rev. Stat. Ann. § 14:43.1 (West 1990).

Molestation of a juvenile was, at the time of the petitioner's conviction, defined as, in pertinent part:

> A. Molestation of a juvenile is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person, by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile.
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> . . .
>
> C. Whoever commits the crime of molestation of a juvenile when the offender has control or supervision over the juvenile shall be fined not more than ten thousand dollars, or imprisoned, with or without hard labor, for not less than one nor more than fifteen years, or both.

La. Rev. Stat. Ann. § 14:81.2 (West 1990).

The complaint reflects that the petitioner sexually abused the victim from when she was 12 years old until she was 14 years old. The petitioner's offense is, therefore, the "specified offense against a minor" defined under subsection 111(7)(I) of the Adam Walsh Act: any conduct that by its nature is a sex offense against a minor.

On appeal, counsel asserts that the petitioner's conviction is "null and void" because the petitioner was granted a pardon under the Louisiana constitution. Counsel contends that the petitioner cannot be held to have violated the Adam Walsh Act because he was pardoned. Counsel submits a letter from [redacted] Probation and Parole Director, with the Louisiana Department of Public Safety and Corrections. [redacted] stated in his letter, dated December 20, 1993, that the petitioner completed his sentence and met all of the requirements for an automatic first offender pardon as delineated under section 572 of the Louisiana Statutes.[1]

Louisiana's first offender pardon does not erase the petitioner's conviction because it is not a full, gubernatorial pardon. *See State v. Adams*, 355 So.2d 917 (La. 1978), (distinguishing the automatic pardon provision from a full pardon, such that an automatic pardon does not preclude consideration of a first felony conviction in adjudicating a person as an habitual offender). *See also Touchet v. Broussard*, 31 So. 3d 986, 993-94 (La. 2010) (following *Adams* to hold that because an automatic pardon does not have the same effect as a full gubernatorial pardon, it does not restore a convicted felon's right to run for public office). The Louisiana Supreme Court has explained that the first offender pardon is automatically granted upon the completion of the offender's sentence whereas a full pardon has been granted by the governor and "presumably been given the careful consideration of several persons who have taken into account the circumstances surrounding the offense, and particular facts relating to the individual." *State v. Adams*, 355 So.2d at 922. The Court found that while a full pardon "restores the original status of the pardoned individual, i.e., a status of innocence of crime," the automatic pardon provision does not "restore[] the status of innocence to the convict who has merely served out his sentence." *Id.* (citation omitted). As the petitioner in this case has not been granted a full gubernatorial pardon under Louisiana law and his conviction has not been vacated, he remains convicted of a specified offense against a minor under section 204(a)(1)(A)(viii) of the Act.

Risk to the Beneficiary

Because the petitioner has been convicted of a specified offense against a minor, he is prohibited from filing this fiancée petition under section 101(a)(15)(K)(i) of the Act unless he establishes that he poses no risk to the beneficiary. Such risk is determined by USCIS in its sole and unreviewable discretion. Section 204(a)(1)(A)(viii)(I) of the Act, 8 U.S.C. § 1154(a)(1)(A)(viii)(I). Our full review of the record fails to establish that the petitioner poses no risk to the beneficiary. The petitioner submitted below two undated statements and a photocopy of a business card from [redacted] a clinical social worker. In his first statement, the petitioner claimed that the victim of his crime, his wife's granddaughter, had a history of making false statements against individuals. He asserted that he is innocent of the crime, but his attorney told him to plead guilty to get a shorter sentence and to prevent his wife from also being charged with a crime. The petitioner stated that he is now 80 years old and is of no harm to the beneficiary. In the petitioner's second statement, he noted that he had counseling with

[1] At the time the petitioner was granted an automatic first offender pardon, the statute provided, in pertinent part, "A first offender never previously convicted of a felony shall be pardoned automatically upon completion of his sentence without a recommendation of the Board of Pardons and without action by the governor." La. Rev. Stat. Ann. § 15:572(B) (West 1993).

[redacted] a clinical social worker, whom he contacted for his records. The petitioner stated that [redacted] informed him that records older than seven years are shredded, and therefore unavailable. The petitioner also stated that he told the beneficiary of the "situation" and she still wants to be with him.

The petitioner has not provided probative evidence to reflect that he has taken responsibility for his conviction, is fully rehabilitated, and consequently poses no risk to the beneficiary. Although the petitioner maintains his innocence, he was convicted of a specified offense against a minor and we cannot go behind the criminal proceedings to reassess his guilt or innocence. *See Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1034 (BIA 1999); *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996) (citing *Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974)). The petitioner noted that he has told the beneficiary about the "situation," however, he has not submitted a letter from the beneficiary that acknowledges the petitioner's criminal history or that specifies what, exactly, the petitioner has told her. Apart from [redacted] letter, the petitioner has submitted no additional evidence on appeal and the record is devoid of any supporting documents, such as, for example, evaluations by psychiatrists, clinical psychologists, clinical social workers or other mental health professionals with experience in assessing risk and recidivism of sexual offenders and attesting to the petitioner's rehabilitation or behavioral modification. The petitioner's statements do not overcome his failure to demonstrate that he is fully rehabilitated and poses no risk to the beneficiary. The petitioner is consequently barred from filing this petition or any other family-based visa petition on behalf of this beneficiary or any other beneficiary pursuant to sections 101(a)(15)(K)(i) and 204(a)(1)(A)(viii) of the Act.

Additional Ineligibility due to Marriage

On November 22, 2010, nearly five months after filing the Form I-129F to classify the beneficiary as a K-1 fiancée of a U.S. citizen, the petitioner and the beneficiary wed in the Dominican Republic. The petitioner's marriage to the beneficiary renders her ineligible for nonimmigrant classification as the fiancée of a U.S. citizen under section 101(a)(15)(K)(i) of the Act. Under section 214(d)(1) of the Act, 8 U.S.C. § 1184(d)(1), the approval of a fiancé(e) petition requires the petitioner and the beneficiary to be "legally able . . . to conclude a valid marriage in the United States. . . ." Since the petitioner and beneficiary are already married, the beneficiary is no longer eligible for nonimmigrant classification as a K-1 fiancée of a U.S. citizen because they would be unable to contract a valid marriage upon her arrival in the United States. *See Matter of Manjoukis*, 13 I&N Dec. 705 (Dist. Dir. 1971) (fiancée visa petition must be denied where the marriage of the petitioner and beneficiary would be invalid under the law of the state of the petitioner's residence); La. Civ. Code Ann. art. 88 (West 2012) (impediment of existing marriage). The appeal will be dismissed for this additional ground of ineligibility.[2]

[2] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

Conclusion

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. Consequently, the appeal will be dismissed and the petition will remain denied.

ORDER: The appeal is dismissed.