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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: AUG 0 6 2014 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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the nonimmigrant visa petition, and 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 Philippines, as the fiancée 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 the petitioner failed to demonstrate that he poses no risk to the beneficiary's safety and well-being. On appeal, the petitioner submits a brief and additional evidence.

Applicable Law

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

> 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.

The Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act) amended section 204(a)(1) and of the Act 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 victim.[2]

Section 111(7) of the Adam Walsh Act defines "specified offense against a minor" as 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] The Secretary has delegated the authority to U.S. Citizenship and Immigration Services (USCIS) to determine whether 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 (effective March 1, 2003): *see also* 8 C.F.R. § 2.1.

[2] Pub. L. 109-248, 120 Stat. 587, 622.

(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 April 30, 2009. The director subsequently issued a notice of intent to deny (NOID) because the evidence of record indicated that the petitioner was convicted in Colorado of sexual assault in the third degree. 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, and/or evidence that he poses 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, among other things: an arrest report; a criminal docket; a presentence report; court records regarding his probation and completion of probation; records for registration as a sex offender; two psychological evaluations; two discharge summaries from , a police records search; a letter from the beneficiary; and a letter from the petitioner. The director denied the petition, finding that the evidence established that the crime for which the petitioner was convicted was a specified offense against a minor, and that the petitioner failed to demonstrate that he poses no risk to the beneficiary's safety and well-being.

We review these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

The record of conviction reflects that on May 26, 2002, the petitioner was arrested and charged with sexual assault on a child by one in a position of trust, a felony, in violation of section 18-3-405.3(1) and (2)(b) of the Colorado Revised Statutes. On January 17, 2003, the petitioner pled guilty to and was convicted of sexual assault in the third degree, a misdemeanor and an extraordinary risk crime,[3] in violation of Colo. Rev. Stat. Ann. § 18-3-404. The petitioner was sentenced to serve 30 days in jail

[3] The maximum sentence is increased by six months for misdemeanors that present an extraordinary risk of harm to society. Colo. Rev. Stat. Ann. § 18-1.3-501(3)(a).

and placed on probation for two years. He was required to register as a sex offender. At the time of the petitioner's conviction, the criminal statute stated: "(1) Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact . . . ." The term "sexual contact" is defined as "the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse." Colo. Rev. Stat. Ann. § 18-3-401(4).

The presentence report to the court, dated April 2, 2003, shows that the victim of the offense was the petitioner's 16-year-old stepdaughter, who stated that the petitioner had sexually her on multiple occasions since April 2002. The presentence report stated that the petitioner admitted to committing offenses against his stepdaughter. The petitioner's crime is substantially similar to the "specified offense against a minor" defined under section 111(7)(I) of the Adam Walsh Act: any conduct that by its nature is a sex offense against a minor. The petitioner does not dispute this determination on appeal.[4]

The Applicability of the Adam Walsh Act

The petitioner makes several assertions regarding the general applicability of the Adam Walsh Act to him. First, the petitioner states that he is not subject to the Adam Walsh Act because his conviction predates the Act's effective date and the beneficiary and her daughter are both adults. Second, the petitioner claims that "preponderance of the evidence" is the evidentiary standard to apply to the no risk determination.

Section 402(a)(2) of the Adam Walsh Act does not have an impermissible retroactive effect when applied to convictions that occurred before its enactment. *See Matter of Jackson*, 26 I &N Dec. 314 (BIA 2014). Additionally, the statute does not limit the application of section 204(a)(1)(A)(viii) of the Act to instances where a beneficiary and/or derivative beneficiary is a minor. It requires petitioners who have been convicted of specified offenses to establish that they pose no risk to the alien with respect to whom a petition is filed. Congress has chosen not to limit the application to child beneficiaries and USCIS declines to do so. By the plain language of the statute, the provision applies to all petitions – regardless of the age of the intended beneficiary – where the petitioner has been convicted of a specified offense.

Regarding the evidentiary standard, Congress assigned responsibility for the "no risk" determination to the Department of Homeland Security, unreviewable by the Board or other executive branch agencies, to include the appropriate standard of proof to apply in these matters. *See Matter of Aceijas-Quiroz*, 26 I&N Dec. 294 (BIA 2014). USCIS has determined that the statute requires petitioners who have been convicted of specified offenses against minors to demonstrate beyond any reasonable doubt that they pose no risk to their beneficiaries. Thus, risk determinations under section 204(a)(1)(A)(viii)(I) of the Act are not subject to the general preponderance of the evidence standard that applies to other immigration proceedings.

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[4] In assessing whether a petitioner has been convicted of a "specified offense against a minor," we may apply the "circumstance-specific" approach, which permits an inquiry into the facts and conduct underlying the conviction to determine if it is for a disqualifying offense. *Matter of Introcaso*, 26 I&N Dec. 304 (BIA 2014).

Risk to the Beneficiary

The determination of whether a petitioner's evidence is credible, and the weight and probative value to be given that evidence, shall be within the sole and unreviewable discretion of USCIS. *See Aceijas-Quiroz* at 299. The relevant evidence submitted below and on appeal fails to demonstrate that the petitioner poses no risk to the safety and well-being of the beneficiary.

To show that he poses no risk to the beneficiary, the petitioner submitted below a psychological evaluation from Dr. dated February 4, 2013; a discharge summary, dated April 5, 2005, from , a licensed clinical social worker with ; a discharge summary, dated March 11, 2010, from a licensed clinical social worker and licensed addiction counselor with containing the same information as Ms. s letter; a letter from the beneficiary; a court record showing the termination of the petitioner's probation and successful completion of treatment; and a police records search.

Dr. stated that based on the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) test and a review of the petitioner's conviction record, he believed that the petitioner poses no risk to the beneficiary or to the public. Ms. and Ms. stated in their letters that the petitioner's prognosis is good if the petitioner abstains from alcohol and uses the skills that he learned through sex-offender treatment. In his letter, the petitioner stated that the beneficiary and her daughter are adults and he poses no risk to them. He stated that he no longer abuses alcohol, and has had no other contact with the police since his conviction. The beneficiary stated in her letter that she is 53 years old and the petitioner told her about his conviction for sexual assault and recovery from alcoholism. She stated that she feels safe with the petitioner and has been in a seven-year relationship with him.

On appeal, the petitioner provides: a letter, dated July 22, 2013, from Dr. Clinical Director at a letter from Dr. dated July 9, 2013, and his curriculum vitae; USCIS memoranda regarding the Adam Walsh Act; documents from American Immigration Lawyers Association (AILA); a document from Ballout Immigration law; a Board of Immigration Appeals (BIA) decision, dated May 8, 2012, remanding the case for further development of the record; and an amicus brief from AILA.

The record does not contain a probative statement from the petitioner discussing his offense against his stepdaughter and his rehabilitation. He briefly stated that he poses no risk to the beneficiary because he has committed no other criminal offenses, there are no derivative child beneficiaries of his intended spouse, and he has been sober for many years. As part of his sentencing, the petitioner underwent a mental health evaluation that the petitioner submitted for the record, dated March 24, 2003, from This evaluation indicated that documents available to the evaluators "suggest a pattern of physical abuse on the part of [the petitioner] towards his wife, the current victim, and her sister." The evaluation further noted that: "[The petitioner] emphasized that he believes the victim is responsible for his current difficulties with the criminal justice system. He noted that she made up these reports to 'get back at him'."

The petitioner has not addressed this evaluation for the record, which contains information that the petitioner was physically abusive to his spouse and two stepdaughters at the time of the offense, as

well as his lack of remorse and failure to take responsibility for his criminal behavior by blaming his victim for his conviction.

In his February 2013 letter submitted below, Dr. stated that his conclusions and recommendations regarding the beneficiary's risk to the beneficiary were based on results of the MMPI-2 test as well as the documents "that pertain to [the petitioner's] April 10, 2003 Misdemeanor conviction"; however, none of the documents that Dr. lists as having been reviewed includes the March 2003 Progressive evaluation, which refers to "a pattern of physical abuse" against the petitioner's wife and stepchildren. Accordingly, while we don't question Dr. expertise, his conclusions and recommendations do not appear to be based on all aspects of the petitioner's past behaviors, as documented in the petitioner's conviction records.[5]

Similarly, the letters in the record from the three evaluators do not discuss or refer to the documentation regarding the pattern of physical abuse that the Progressive evaluators noted were contained in the petitioner's record. The letters provide information about the petitioner's treatment, stating that he was compliant, and concluded that on a scale from poor to excellent his prognosis was "good." None of the evaluators explain the bases for qualifying an individual's prognosis as "poor," "fair," "good," or "excellent" or why the petitioner was given his particular rating of "good." The July 2013 letter from Dr. indicates that "[a]s far as known by [the petitioner] has continued to follow a path of recovery . . . . " However, Dr. does not state what resources he consulted to make this assertion.

Overall, the evidence from Dr. and the evaluators has diminished evidentiary weight in demonstrating that the petitioner poses no risk to the beneficiary.

The evidentiary value of the beneficiary's statement is also diminished. Although the petitioner contends that the beneficiary stated that she feels safe with him, even after he disclosed his conviction and problem with alcohol to her, the beneficiary, in her statement, does not specify what the petitioner has told her about his crime, and whether she knew of the victim's age and relationship to the petitioner. While the beneficiary states that she does not feel threatened by the petitioner, her statement does not establish that the petitioner poses no risk to her safety and well-being.

Conclusion

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. When we consider the evidence of record in its totality, the petitioner fails to meet his burden of establishing that he poses no risk to the safety and well-being of the beneficiary.

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

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[5] Dr. s July 9, 2013 letter submitted on appeal to address the director's comments about the lack of the STATIC-99 test result is noted, as is his submission of his curriculum vitae.