U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-L-W-

DATE: FEB. 4, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129F, PETITION FOR ALIEN FIANCÉ(E)

The Petitioner, a citizen of the United States, seeks to classify the Beneficiary as a fiancé(e) of a United States citizen. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(K), 8 U.S.C. § 1101(a)(15)(K). The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before us on appeal. The appeal will be sustained.

The Director denied the nonimmigrant visa petition, finding that the Petitioner was convicted of a specified offense against a minor and did not show that he posed no risk to the safety and well-being of the Beneficiary. On appeal, the Petitioner contends that the denial was based on an abuse of discretion and applied the wrong legal standard and, further, asserts that he poses no threat to the Beneficiary.

I. 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.[*]

[*] 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).

> (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 [Adam Walsh Act or AWA].

The Adam Walsh Act 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. Pub. L. 109-248, §§ 2, 102, 501 (Jul. 27, 2006).

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 his sole and unreviewable discretion that the petitioner poses no risk to the beneficiary of the visa petition.

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

> The term "specified offense against a minor" means an offense against a minor that involves any of the following:
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> (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).

II. FACTUAL AND PROCEDURAL HISTORY

The Petitioner filed the Form I-129F on October 26, 2012. The Director issued a notice of intent to deny (NOID) on February 25, 2014, because the record indicated that the Petitioner was convicted on

plea of guilty in Virginia to a felony charge of Taking Indecent Liberties with Child by Person in Custodial or Supervisory Relationship, in violation of Section 18.2-370.1 of the Virginia Criminal Code. The Director requested that the Petitioner submit evidence he was not convicted of any "specified offense against a minor" as defined in section 111(7) of the Adam Walsh Act, and/or establish beyond any reasonable doubt 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 NOID, the Petitioner submitted court records showing he was convicted of an offense committed on 1994, involving the touching of his genitals by a four-year-old child attending the preschool of which he was administrative director. He does not contest having been convicted of a "specified offense against a minor" pursuant to the Adam Walsh Act, but rather seeks to establish that he poses no risk to his fiancée. The Petitioner also provided an article regarding sex offender rehabilitation by his therapist, receipts for counselling during 1995 and 1996, and evidence that his former psychotherapist had died in 2009 and that records from the therapist were not available. The Director deemed the evidence provided insufficient to demonstrate that he now poses no risk to the safety and well-being of the Beneficiary of the visa petition, and denied the petition accordingly.

On appeal, the Petitioner submits additional documentary evidence, including his updated statement, a brief, social worker's report, travel itinerary, proof of sex offender registration, and information about his living situation.

We review these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The Petitioner bears the burden of demonstrating, beyond any reasonable doubt, that he poses no risk to the Beneficiary.[1] Upon a full review of the record, the Petitioner has made such a demonstration and thus established the Petitioner's eligibility to file the instant visa petition.

III. ANALYSIS

The record of conviction reflects that the Petitioner was arrested on 1994, entered a guilty plea on 1994, and was convicted and sentenced for the aforementioned sexual offense on 1994, in the Circuit Court for the County of Virginia. The disposition reflects that the Petitioner was sentenced to three years confinement, with the sentence suspended after he served six months and payed court costs, followed by three years' probation,[2] and he was ordered not to operate a childcare facility, do private investigating, or have contact with minor children other than family members.

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[1] *See* Memorandum from Michael Aytes, Associate Director for Domestic Operations, USCIS, HQDOMO 70/1-P, *Guidance for Adjudication of Family-Based Petitions and I-129F Petition for Alien Fiancé(e) under the Adam Walsh Child Protection and Safety Act of 2006* 5-7 (Feb. 8, 2007), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/adamwalshact020807.pdf.

[2] The record shows the petitioner was discharged from probation after fully complying with all conditions as of 1997. Further, he fulfilled obligatory sex offender registration, as ordered.

At the time of the Petitioner's conviction, section 18.2-370.1 of the Virginia Criminal Code stated, in pertinent part:

> Any person 18 years of age or older who ... maintains a custodial or supervisory relationship over a child under the age of 18 and is not legally married to such child and such child is not emancipated who, with lascivious intent, knowingly and intentionally (i) proposes that any such child feel or fondle the sexual or genital parts of such person ... shall be guilty of a Class 6 felony.

The record contains the Petitioner's admission that he permitted a four-year-old student at his preschool to unzip his trousers and touch his genitals. The Director found the offense for which the Petitioner was convicted to constitute a "specified offense against a minor," as defined under section 111(7)(I) of the Adam Walsh Act, and the Petitioner does not dispute that his conviction is for a specified offense against a minor. We must therefore determine whether the Petitioner has established beyond a reasonable doubt that he poses no risk to the safety and well-being of the Beneficiary.

The Petitioner claims that it has been many years since his conviction and that he poses no risk to the Beneficiary. He focuses on the fact that the Beneficiary is a mature adult, not a minor child, and thus asserts he poses no risk to her and that the purpose of the Adam Walsh Act of protecting children does not apply in this case involving such a Beneficiary. The Petitioner states and his fiancée confirms that neither he nor the Beneficiary intend to have any children, that they are beyond childbearing years, and that no minor children will immigrate with the Beneficiary. He further asserts that he has maintained his required sex offender registration and that nothing in the record indicates he has deviant sexual feelings towards adults. The record contains letters submitted in response to the Director's NOID and on appeal which assert that the Petitioner is an asset to the community, a good father to his three daughters and one son, and not a threat to the Beneficiary.

The Director examined the evidence listed above and found deficient the evidence of rehabilitation. He stated that receipts for therapy sessions submitted by the Petitioner do not provide enough detail to determine that the Petitioner does not pose a risk because they do not discuss treatment methods, contain case notes, or track progression or completion of his rehabilitation program.

The Petitioner contends that despite his conviction record, he poses no risk to his fiancée, with whom he has spent extended periods of time since January 2009. To support the claim he poses no risk to the Beneficiary, a 63-year-old female, the 87-year-old Petitioner submitted the judicial record showing compliance with all requirements of his sentence, letters of support from family and friends stating he is an asset to the community, and a sex offender evaluation dated May 6, 2015, from the licensed clinical social worker and Certified Sex Offender Treatment Provider (CSOTP) who, due to the unavailability of the psychologist who treated the Petitioner during 1995-1996,[3] reviewed available records and administered a new risk assessment test. The record shows that the Petitioner pled guilty to the criminal charges, complied fully with the sentence imposed, completed a sex

[3] The licensed, certified counsellor who originally treated the Petitioner died on [redacted] 2009.

offenders' counselling program, and gained the support of friends and family by admitting his criminal behavior, and that his fiancée knows the details of his criminal behavior.

This new therapist noted that the Petitioner acknowledged his criminal behavior, took responsibility for his actions, and claimed to have successfully completed treatment. The therapist stated that, because in Virginia neither a mental health treatment provider nor the Department of Corrections (VADOC) is required to retain records longer than 10 years, the original 20-year-old records are not available. However, he concludes that, as offenders are only released from supervision after completing successful treatment, the Petitioner's claim to have completed treatment is consistent with Virginia penal practices where the record reflects that the Petitioner was released from probation on [redacted] 1997. We note that detailed notes on the back of therapy receipts show that the Petitioner listened to the sessions he regularly attended. In 2015, the CSOTP administered the STATIC-99R Actuarial Risk Assessment that state law requires VADOC to use in assessing an individual's risk to reoffend and notes that the Petitioner scored in the lowest risk category. He states that "individuals who commit sexual offenses against children are typically of a very different typology than those who commit sexual offenses against adults," and thus concludes that there is "no clinical reason to suspect or be concerned about his current risk for sexual offense against an adult…." CSOTP Evaluation, May 6, 2015. The social worker's conclusion also takes into account his meeting with the Petitioner and the Petitioner's lack of any other arrests or convictions for sexual offenses.

The record also contains an evaluation submitted as part of the 1994 Presentence Investigation ordered by the court in which a clinical interview, psychological and other testing, and record review led the Director of the [redacted] to note that the Petitioner answered without apparent effort to deceive and that Petitioner's presentation "is most consistent with a situational child molester." The report states that his "offense appears to be the result of poor personal restraint and gross bad judgment about the appropriate course of action to take regarding his concerns about [the victim], . . . and [he] is able to recognize the inappropriate decisions he made." Evaluation Report, [redacted] 1994. Stating that "[the Petitioner's] conduct is notably lacking of any distinct predatory quality," the report concludes that he "represents a low risk to the general community…." We note that, during this timeframe, the STATIC-99 had not yet been developed.[4]

The record contains letters from all four of the Petitioner's children, already adults in 1994, submitted to the court at the time of his conviction. The letters state that he had never behaved inappropriately toward them or others when they were children, with the youngest asserting, "It is inconceivable to me that my father could act in any maliscious [*sic*] way towards any human being. He has never caused harm to me or any other member of my family." The Petitioner's wife at the time also supplied several statements detailing the good character of her husband.

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[4] The Static-99 was created in 1999 by combining items in two prior sex offender risk assessment measures published, respectively, in 1997 (Rapid Risk Assessment for Sex Offence Recidivism, or RRASOR) and 1998 (Structured Anchored Clinical Judgement [sic], or SACJ) by the Static-99's developers. *Static 99: Improving Actuarial Risk Assessments for Sex Offenders*, R.K. Hanson and David Thornton.

Besides the therapist's recent evaluation finding the Petitioner presents with no appreciable risk to the Beneficiary, the record contains supportive letters from people aware of his history that attest to his integrity and request that he be given a second chance. While the Director concluded that these documents failed to establish the Petitioner posed no risk to the well-being of the Beneficiary, we find the weight of the evidence sufficient to show that his single past sexual offense does not indicate a safety risk to his fiancée, particularly in light of the CSOTP's "no clinical cause for concern" conclusion, findings in the sex offender-specific evaluation that the Petitioner is in the lowest risk category, and the lack of any arrests or allegation that he has re-offended since his 1994 conviction. There is also no indication on the record that the Petitioner has been abusive to any of his prior spouses, children, stepchildren, or grandchildren. Further, the Beneficiary is aware of the seriousness of the Petitioner's offense, but still professes her love and support for him. She states that she does not believe the Petitioner represents any danger to her or anyone else and confirms they will not have children in the household.

The record indicates that the Petitioner acknowledged his behavior was wrong and displayed an awareness that he exercised poor judgment. He is now 87 years old, completed sex offender counselling nearly 20 years ago, and otherwise complied with the terms of his probation by 1997. He has been in a relationship with the Beneficiary for the past six years, and the record indicates that he has traveled overseas several times and spent time with her and that she has traveled to the United States.

Although not excusing the Petitioner's crime, a recent psychological evaluation contains a substantive assessment of the petitioner's low recidivism risk, while bolstering his contention that he poses no actuarial risk to an adult female with whom he has a long-term relationship and to whom he has fully disclosed his criminal history.

IV. 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 met that burden. Consequently, the appeal will be sustained.

ORDER: The appeal is sustained.

Cite as *Matter of P-L-W-*, ID# 15051 (AAO Feb. 4, 2016)