U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-R-C-

DATE: FEB. 9, 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, and the matter is now before us on appeal. The appeal will be dismissed.

The Director denied the nonimmigrant visa petition because the Petitioner was convicted of a specified offense against a minor and the Director found he 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 erroneous and asserts having demonstrated 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, Petition for Alien Fiancé(e), on December 11, 2012. The Director issued a Notice of Intent to Deny (NOID) on April 30, 2013, because the evidence of record indicated that the Petitioner was convicted in [redacted] Florida Circuit Court of a felony charge of

Lewd or Lascivious Acts on or in the Presence of a Child under 16, in violation of section 800.04 of the Florida Criminal Statute. Florida Criminal Statute 800.04 states, in pertinent part:

> (7) LEWD OR LASCIVIOUS EXHIBITION.—(a) A person who:
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> 1. Intentionally masturbates;
> 2. Intentionally exposes the genitals in a lewd or lascivious manner; or
> 3. Intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including but not limited to, … the simulation of any act involving sexual activity
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> in the presence of a victim who is less than 16 years of age, commits lewd or lascivious exhibition.

The Petitioner claims that he was arrested for urinating in public at a time he claims that intoxication rendered him unaware he was being viewed by several teenage girls and their father, but he provides no police report or other evidence describing the conduct that led to the conviction. 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 arrested and charged in connection with the above-referenced offense on 1994, and pleaded guilty on 1995. He also provided documentation of criminal history that includes convictions for driving while intoxicated in 1994 and 1997, as well as for resisting arrest (for eluding an attempted traffic stop), and driving with a suspended license. The record shows he violated his probation more than once[1] and also reflects several arrests (cocaine possession and unspecified probation violations) for which the Petitioner has provided no evidence of disposition. 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 and Beneficiary state that they met in November 2008 while he was vacationing in Brazil, began dating, and became engaged in November 2011 while vacationing in Costa Rica. The record also contains letters from a psychologist who had been treating him for several years, statements of support (including one from his ex-wife), and character references. The Director deemed the evidence insufficient to demonstrate that the Petitioner 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 a 2014 psychological evaluation and the results of several supporting quantitative personality tests, updated Medicare documents, and additional support letters, including

[1] At the time of his 1994 sex offense arrest, the Petitioner was on probation for prior DUI and trespassing offenses, so his arrest and conviction violated his probation. Then, after his sex offense conviction, a subsequent DUI and associated offenses for evading arrest and driving with a suspended license again violated the terms of probation.

one from the attorney handling his financial affairs that confirms his treating psychologist's statement that the Petitioner has the means to continue receiving her treatment services.

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.[2]

III. ANALYSIS

The record of conviction reflects that the Petitioner was arrested on [redacted] 1994, was convicted of a sex offense against a minor on [redacted] 1995, and was sentenced to two years community control followed by three years' probation. The court ordered him to have no contact with children under 18 and to satisfy such counselling as required by his probation officer.

The Petitioner claims to have been diagnosed with bipolar disorder and never to have been in trouble with the law before 1993, when he began suffering manic episodes brought on by a business dispute over a valuable patent. He states that his self-medication with alcohol for a condition of which he was unaware caused the drunken display resulting in his Adam Walsh Act offense, traffic offenses, and probation violations. Further, there is evidence that the Petitioner has several arrests for which he has provided no explanation or disposition information. The Director found the sex offense for which the Petitioner was convicted to constitute a "specified offense against a minor," as defined under section 111(7) of the AWA. The Director determined the Petitioner did not submit evidence in response to the NOID demonstrating that the conviction was not for a specified offense against a minor under the AWA, and the Petitioner does not dispute that his conviction is for a sex offense against a minor. We must 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 1995 conviction and that he poses no risk to the Beneficiary. He focuses on the circumstances underlying this conviction as showing that he poses no risk more than 20 years after the offense. He states he was intoxicated at the time and thus unaware he was being observed urinating in public, but, as noted above, he provides no police report describing the offense and no evidence corroborating his account of the incident. He claims his ex-wife divorced him in 2003 due to his alcohol problems but the two remain close and she supports his relationship with the Beneficiary, and he further states that he is currently receiving treatment from a psychologist and taking medications to control his manic-depression. In addition, the Petitioner claims he has never been attracted to minors, states he did not intentionally expose himself, and notes that the Beneficiary is a mature adult in her late twenties. He thus asserts both having shown

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[2] *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.

he poses no risk to her and that the AWA's purpose of protecting children does not apply in this case involving such a Beneficiary. The record contains supportive letters from the Petitioner's friends, co-workers, and ex-wife. There is also evidence he violated his probation while under the influence of alcohol, possibly more than once.

The Director examined the evidence, noted factual discrepancies between the actual facts and the history recounted by the Petitioner, and found there was insufficient evidence of rehabilitation. Upon full review of the record, we concur with the Director and find that the Petitioner has not overcome the basis for the denial of the petition.

To support the claim he poses no risk to the Beneficiary, Petitioner submitted the judicial record showing he was granted probation in 1995 on the original AWA offense and letters from a treating psychologist stating the Petitioner "is unlikely to cause willful harm to the beneficiary...." *See* Psychologist Letter, December 15, 2014. However, the record shows that he violated probation, that the 1997 probation violations involved driving while intoxicated, and that the Petitioner reported he was consuming alcohol 15 days per month during the months preceding his 2014 risk evaluation by a clinical psychologist. As a result of his 1997 arrests, which resulted in a conviction for DUI, fleeing arrest, and driving with a suspended license, the Petitioner's probation was revoked, and he was sentenced to 20 months in prison for the AWA offense of Lewd or Lascivious Acts.[3]

The Petitioner submits no progress notes from his treating psychologist describing the conditions diagnosed, treatment provided, or prognosis. Further, we note that this psychologist refers generally only to "treating [the Petitioner] for mental health issues," and the record contains no medical records documenting he was diagnosed with bipolar disorder or showing that medication was prescribed. The clinical psychologist retained to evaluate risk posed by the Petitioner to his fiancée, after noting the Petitioner's claim to have bipolar disorder with alcohol and drug problems and be taking prescription medications,[4] reports only that he "may possibly have Bipolar Affective Disorder" but that clinical testing "may be showing some exaggeration of symptoms." The clinical psychologist recommends that the Petitioner and Beneficiary be required to complete couples counselling and that the Petitioner continue individual therapy, which he calls "the only real way to attempt to prevent risk to the beneficiary...." *Id.* The report further states that the Petitioner regularly consumes alcohol, reports "noteworthy signs and symptoms indicating life functioning disruptors," and "shows little awareness of an alcohol use problem."

We note that the clinical psychologist did not administer the STATIC-99R Actuarial Risk Assessment,[5] a widely-used sex offender risk assessment tool, nor offer a conclusive statement

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[3] There was an additional charge of cocaine possession, but it appears it did not result in a conviction, although the disposition is not specified by court documents submitted by the Petitioner.

[4] The Petitioner reported to the psychologist being prescribed two drugs for anxiety and panic attacks. The record contains no indication of medications prescribed to treat manic-depression or any diagnosis of this condition pursuant to guidelines in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM).

[5] 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

regarding the risk posed by the Petitioner to his fiancée. On the basis of three tests related to sexual adjustment and sexual history, the clinical psychologist states only that he "does not view [the Petitioner] as a child sexual predator or as having an interest in having sexual relations with children." The report concludes with the observation that the psychologist "does not see any reason why a beneficiary would be in any danger of marrying or living with an individual diagnosed with bipolar [who] is taking their [*sic*] medication correctly and limiting or preferably eliminating the use of any mood altering substances, such as alcohol." The report does not address the risk posed to this specific Beneficiary by this Petitioner, determine whether he is taking appropriate medication correctly, or discuss the impact of his ongoing use of alcohol.

While the psychological report notes the Petitioner's claim to have informed his fiancée of his status as a convicted sex offender, statements of the Beneficiary do not confirm she is aware either of his criminal record or of the bipolar disorder he claims was associated with his alcohol problems. Neither the Petitioner's nor the Beneficiary's 2012 statement mentions his criminal record or medical problems, with the fiancée's letter characterizing the Petitioner as a very stable person whom she loves very much. Although professing her love, the Beneficiary's letter does not indicate knowledge of her fiance's sex offense. Nor do character references indicate the declarants' knowledge of the Petitioner's criminal history.

Based on the circumstances of the Petitioner's 1995 sex offense, his probation violations, and subsequent interaction with the criminal justice system and alcohol use, we find he has not established beyond a reasonable doubt that he represents no risk to the Beneficiary. Although the psychologist concludes that the Petitioner represents a low recidivism risk for sexually deviant behavior, we note that the Petitioner admits to traveling overseas to engage in sexual conduct that would be illegal in the United States, continues to consume alcohol regularly, and provides insufficient evidence of treatment for a bipolar disorder. There is no indication that his fiancée is aware either of his sex offender status or the medical/psychological conditions to which he attributes his legal problems. We find the totality of the evidence insufficient to demonstrate beyond a reasonable doubt that the Petitioner poses no risk to the Beneficiary's safety or well-being.

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 not met that burden. Consequently, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Cite as *Matter of E-R-C-*, ID# 15339 (AAO Feb. 9, 2016)

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.