U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-A-T-

DATE: FEB. 17, 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 petition, and the matter is now before us on appeal. The appeal will be sustained.

The Director denied the nonimmigrant visa petition upon finding 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, Petition for Alien Fiancé(e), on August 5, 2009. The Director issued a notice of intent to deny (NOID) on October 21, 2010, because the record indicated the Petitioner was convicted in Washington state of Communicating with a Minor for Immoral Purposes, in

violation of section 9.68A.090 of the Revised Code of Washington (RCW). At the time of the Petitioner's conviction, RCW Section 9.68A.090 stated, in pertinent part:

Communication with minor for immoral purposes—Penalties.

> (1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.
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> (2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state or if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes, including the purchase or sale of commercial sex acts and sex trafficking, through the sending of an electronic communication.

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, and supplementing documentation filed with the fiancée petition (including a 2007 psychological evaluation, criminal records, and the Beneficiary's supportive statement), the Petitioner submitted additional evidence including an updated 2010 psychological assessment, updated Beneficiary statement, birth records of the Petitioner and Beneficiary's child, and supportive statements. He does not contest having been convicted of a "specified offense against a minor" pursuant to the Adam Walsh Act (AWA offense), but rather seeks to establish that he poses no risk to his fiancée. 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 further documentary evidence, including a 2015 psychological evaluation and supplemental data regarding the 2010 psychological evaluation. Among documents previously submitted are proof of sex offender registration, as well as a court order removing the Petitioner from the sex offender registry and ending his 10-year obligation to register as a sex offender.

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 for the following reasons.

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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*

III. ANALYSIS

The record of conviction reflects that in 1997 the Petitioner entered an Alford plea to the charge of Communicating with a Minor for Immoral Purposes. The Petitioner was sentenced to 365 days confinement with 180 days suspended, court costs, restitution, limitations on liberty including restricted contact with his daughter, and required to register as a sex offender for 10 years. The record shows that after the Petitioner's release, he was discharged from 24 months' probation after fully complying with all conditions. Further, he continued to fulfill obligatory sex offender registration until this requirement was ordered expunged in 2007 by a court in Virginia, where the Petitioner lived at the time and continues to reside.

The record shows the conviction was for a gross misdemeanor, and there is no indication the Petitioner had any prior sex offense convictions. 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 because it involved conduct that by its nature is a sex offense against a minor. The Petitioner does not dispute that his conviction is for a sex 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 1997 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 both having shown 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 Petitioner states and his fiancée confirms that he has divulged his criminal history and discussed it with her. While maintaining his innocence of the charge of which he was convicted nearly 19 years ago, he further asserts that nothing in the record indicates he has deviant sexual feelings towards adults. The evidence shows the Beneficiary is 35 years old, met the Petitioner in person almost 10 years ago, and has at least one child with him who is six years old.[2] The record contains three psychological assessments from two different psychologists who conclude the Petitioner is neither a threat to public safety nor a threat to the Beneficiary. The record also contains letters submitted in response to the Director's NOID and on appeal asserting that the Petitioner is an asset to the community, a good father, and not a threat to the Beneficiary.

The Director examined the evidence listed above and found there was insufficient evidence of rehabilitation. The Director found that the psychological reports submitted with the Form I-129F filing did not address the Petitioner's rehabilitation efforts or recidivism risk. The Director observed that, while the psychologist determined the Petitioner posed no risk to his fiancée or their child,

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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] Documentation shows they have a son together who was born in Thailand on . The 2015 psychological evaluation indicates they also have a daughter, but no documentation concerning a second child is in the record.

testing had focused on personality traits and the actual test results on which the "no risk" conclusion was based were not included with the report. Upon full review of the record, however, we find the Petitioner has overcome the basis for the denial. On appeal, the Petitioner provides documentation of the actual 2010 testing he underwent, as well as the detailed 2015 psychological assessment of a second psychologist specializing in sexual offender evaluation. The 2015 report specifically addresses the Petitioner's "overall risk of committing a sexual re-offense," deeming him "to pose no risk of a sexual re-offense [to] a reasonable degree of professional certainty." Psychosexual Risk Assessment, May 4, 2015.

To support the claim he poses no risk to the Beneficiary, a 35-year-old female, the 50-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, a psychological assessment dated October 12, 2007, an updated psychological evaluation dated December 28, 2010, and a sex offender evaluation dated May 4, 2015. The record shows that the Petitioner complied fully with the sentence imposed, completed 24 months of court supervision, gained the support of friends, continued to provide financial support to his children by his estranged former wife, and that his fiancée knows the details of his criminal behavior.

We note that a Virginia court confirmed the Petitioner met the criteria for expungement from the Virginia SOR by showing he posed no threat to public safety before terminating his obligation to continue registering as a sex offender. *See* Circuit Court Order, 2007. In support of his Form I-129F, the Petitioner submitted the updated evaluation noted above in which, based on a clinical interview and several psychological tests, the psychologist observed that the subject was "psychologically, emotionally, and behaviorally well adjusted" before stating that the Petitioner "does not pose any risk to the safety and well-being of either his fiancée or their old son." In 2015, responding to the Director's Denial faulting prior personality profiles and psychological testing as insufficiently focused on the issue of sexual recidivism, a Virginia Certified Sex Offender Treatment Provider (CSOTP) administered the STATIC-99 Actuarial Risk Assessment that state law requires the Virginia Department of Corrections (VADOC) to use in assessing an individual's risk to reoffend.[3] After detailing how the Petitioner's scores on each section of that ten-part instrument place him in the lowest possible risk category, the CSOTP states that

> [n]ot only do [the Petitioner's] scores from the Static-99 present a person with no risk of a re-offense, his life prior to the offense as well as after the offense presents a person with strong morals, values, and beliefs. He served his county [sic] for 6 years and received an honorable discharge and has maintained a solid work history since his discharge from the Navy. He is a practicing Catholic and has participated in multiple volunteer related events in the community. There is no evidence of recent or

[3] 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.

> remote history of violence at any level. [...] There is no indication of any form of potential violence or non-consenting sexual practice with his fiancée.

Psychosexual Risk Assessment, May 4, 2015. The CSOTP's conclusion also takes into account his clinical interviews with the Petitioner, the Petitioner's lack of any other arrests or convictions for sexual offenses, and his family life with the Beneficiary.

The Beneficiary is aware of the Petitioner's offense, but still professes her love and support for him. She has started a family with the Petitioner, states that she does not believe he represents any danger to her or anyone else, and confirms they have had an ongoing relationship for nearly 10 years.

Besides the therapist's recent evaluation finding the Petitioner presents no 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 evidence sufficient to show that the Petitioner does not pose a safety risk to his fiancée or other members of their household, particularly in light of the CSOTP's finding that there is no clinical cause for concern, conclusions in the sex offender specific evaluation that the Petitioner is in the lowest risk category, and the lack of any arrests or allegations that he has reoffended since 1993.

The record indicates that the Petitioner complied with the requirement that he register as a sex offender while moving to his home state of New Mexico to complete his college education and to Virginia upon accepting employment after graduation, and was judicially discharged in 2008 from the obligation to register as a sex offender. He has established a support network of family and friends and has started a family with the Beneficiary, whom he has known for 10 years. 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 D-A-T-*, ID# 15234 (AAO Feb. 17, 2016)