



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF D-M-

DATE: JAN. 12, 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 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:

- (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 March 15, 2013. The Director issued a Notice of Intent to Deny (NOID) on April 2, 2014, because the evidence of record indicated

Matter of D-M-

that the Petitioner was convicted on plea of guilty in [REDACTED] Municipal Court to a felony charge of Unlawful Sexual Intercourse with a Minor, in violation of section 261.5 of the California Penal Code (CPC), for having sexual relations with a female not his wife who was under the age of 18. 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 an offense committed between [REDACTED], 1990 and [REDACTED] 1990. 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 provided proof that: he married the victim shortly after being arrested on the statutory rape charge when they were 20 and 16, respectively; he had two children with her; and they remained married for 15 years, until 2007. The record also contains a psychological evaluation, numerous statements of support (including two from his ex-wife, one from each of his two sons, and one from his fiancée indicating knowledge of the conviction), and evidence of strong community ties 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 documentary evidence that the aforementioned sex offense conviction and three other criminal counts to which he had pleaded guilty on [REDACTED] 1992, were vacated and dismissed on [REDACTED] 2015, pursuant to California Penal Code section 1385 ("The judge ... may ... in furtherance of justice, order an action to be dismissed."). We note that, while such a dismissal does not for immigration purposes remove a conviction from the record, it may provide evidence of rehabilitation that relates to the issue of risk to the Beneficiary.

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, we conclude that the Petitioner has made such a showing and thus established his eligibility to file the instant visa petition for the following reasons.

III. ANALYSIS

The record of conviction reflects that the Petitioner was arrested on [REDACTED] 1992, entered a guilty plea in Municipal Court on [REDACTED] 1992, and was sentenced to probation shortly thereafter in

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.

Matter of D-M-

Superior Court. The disposition reflects that on [REDACTED] 1992 the Petitioner had married the victim, with whom he was raising their child, who was born [REDACTED]. The California statutory rape provisions are at section 261.5 of the California Pena Code, which states, in pertinent part:

(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age.

(b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

The record establishes that the Petitioner and his ex-wife conceived a child together in [REDACTED] when he was 18 and she [REDACTED] years of age. Further, there is evidence that they were in a "boyfriend-girlfriend" relationship when they had consensual sex. 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) of the Adam Walsh Act. Further, 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 Adam Walsh Act, 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 1992 conviction and that he poses no risk to the Beneficiary. He focuses on the circumstances of the relationship underlying this conviction as showing that he poses no risk more than 23 years later: the victim was his girlfriend who began living with him in 1990; they had a child together in April [REDACTED], more than a year before his [REDACTED] 1992 arrest; they married in [REDACTED] 1992, had another child together in [REDACTED], and lived together as a family until divorcing in 2007; and his ex-wife trusted him enough to grant him custody of both children, who still live with him. In addition, the Petitioner claims that although his former wife, the victim of the offense that resulted in his conviction, was a minor when they began their relationship, he was not much older than her. He asserts that as the Beneficiary is a mature adult in her late twenties, he poses no risk to her, and he further states that the Adam Walsh Act's purpose of protecting children does not apply in this case involving such a Beneficiary.

The record reflects that upon his conviction the Petitioner was sentenced to probation, he continued living with the victim, and they remained together in a 15-year marriage. USCIS granted him lawful permanent resident in 2006, and he naturalized in 2013. The record contains both a 2005 letter written by his victim in support of his application for lawful permanent resident status and her 2014 letter on his behalf asking that he be permitted to bring his fiancée into the country. The Petitioner's fiancée confirms being aware of the Petitioner's conviction and believing that her fiancé poses no

threat to her safety. The record contains additional letters – from friends, co-workers, a nephew, his church -- which assert that the Petitioner is an asset to the community and performs volunteer work, is a good father to his two sons, and is not a threat to the Beneficiary.

The Director examined the evidence listed above, noted factual discrepancies between the actual facts and the history recounted by the Petitioner, and found deficient the evidence of rehabilitation. Upon full review of the record, however, we find the Petitioner has overcome the basis for the denial. As noted, the Petitioner pleaded guilty to the charged offense in 1992, married his victim and supported their family during marriage, and continued supporting their two sons, who by agreement of their mother lived with him after the divorce. Therefore, we proceed directly to consideration of evidence presented in support of the assertion that the Petitioner poses no risk to the Beneficiary and, therefore, should be permitted to file a nonimmigrant petition on her behalf.

To support the claim he poses no risk to the Beneficiary, the Petitioner submitted the judicial record showing he was granted and completed probation after his 1992 conviction and that on June 18, 2015, the same California judge who accepted the 1992 guilty plea granted the Petitioner's motion to dismiss the case in furtherance of justice. The record also contains letters of support stating he is a respected member of the community and a psychological evaluation dated June 2, 2014 from a clinical psychologist retained to determine whether the Petitioner poses any risk to his fiancée, as well as a letter from the Beneficiary detailing her awareness since 2012 of the Petitioner's statutory offense. There is no indication the Petitioner's conviction and sentence of probation carried any requirement of sex offender registration or treatment, and the record contains no evidence of prior counselling or therapy.

On the basis of a battery of general tests, the psychologist observed that the Petitioner demonstrated a notable degree of rehabilitation or modification of his behavior. The report indicates the psychologist was aware that the Petitioner committed several criminal offenses in the 1990s, but had no sex crime arrests since 1992. He noted that the Petitioner acknowledged his criminal behavior, took responsibility for his actions, and later married his victim. The report does not show that the use any sex offender risk assessment tools, such as the STATIC-99R Actuarial Risk Assessment.² Nor does the psychologist offer a conclusive statement regarding the risk posed by the Petitioner to others. Similarly absent from the record is any explanation of the factual basis for Counts 2 and 3 of the original 1992 criminal complaint regarding domestic violence against his then-future wife. We note that charges were brought at the behest of the victim's mother, the Petitioner's conviction resulted in no jail time, and the involvement of the legal system did not prevent the Petitioner and his girlfriend from beginning a marriage that lasted 15 years. In addition, during their marriage, the now ex-wife submitted a Petition for Alien Relative (Form I-130), and based on this petition the Petitioner was granted lawful permanent resident status.

² 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.

Matter of D-M-

The record indicates that the Petitioner's 1992 sex offense resulted from a consensual relationship and that both he and his victim were teenagers,³ and, as noted above, after two years and one child together they married and remained married for 15 years. Both the Petitioner's ex-wife and his children state that the Petitioner was a good husband and parent. We note that they provided supportive statements despite the breakup of the marriage in 2007. The Beneficiary is well 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.

Besides the ex-wife, children, and fiancée all asserting the Petitioner represents no appreciable risk to the Beneficiary, the record contains supportive letters from people aware of his history that attest to his integrity and good character. While the Director found that the record did not include a conclusive psychological 'no risk' assessment and otherwise failed to establish the Petitioner posed no risk to the well-being of the Beneficiary, we find the evidence sufficient to show that his single past sexual offense does not indicate a safety risk to his fiancée. There is no evidence he has reoffended against any other minor, and in light of the age of the Petitioner at the time of the offense, the consensual nature of the relationship, and the statements in support of the Petitioner from his former spouse and from other individuals, we find the evidence establishes that the Petitioner poses no risk to the Beneficiary.

Although not excusing the Petitioner's crime, a recent psychological evaluation indicates his judgment is intact, he is a responsible adult, and he suffers from no measurable emotional or psychological problems that might threaten the well-being of 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-M-*, ID# 14789 (AAO Jan. 12, 2016)

³ We note that, had they been four months closer in age, the Petitioner's offense would have come within section 111(5)(C) of the Adam Walsh Act, which states in relevant part, "An offense involving consensual sexual conduct is not a sex offense for the purposes of this title if the victim ... was at least 13 years old and the offender was not more than 4 years older than the victim." The Petitioner, born [REDACTED] and the victim, born [REDACTED] are four years and four months apart in age.