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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D6

Date: MAY 0 9 2012 Office: VERMONT SERVICE CENTER [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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a citizen of the United States who seeks to classify the beneficiary, a native and citizen of the Philippines, as the fiancé(e) 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 he failed to demonstrate that he poses no risk to the safety and well-being of the beneficiary. On appeal, the petitioner, through counsel, submits a brief and additional evidence.

A "fiancé(e)" is defined at Section 101(a)(15)(K) of the Act as:

> Subject to subsections (d) and (p) of section 214, an alien who -
>
> (i) is the fiancée or fiancé of a citizen of the United States . . . and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission.

On July 27, 2006, the President signed the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. 109-248, 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.

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 her sole and unreviewable discretion that the petitioner poses no risk to the beneficiary of the visa petition. Pursuant to 8 C.F.R. § 103.1, the Secretary has delegated that authority to U.S. Citizenship and Immigration Services (USCIS).

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

> 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).

The petitioner filed the Petition for Alien Fiancé(e) (Form I-129F) with USCIS on May 19, 2008. The director subsequently issued a notice of intent to deny (NOID), indicating that the petitioner may be prohibited from filing a family-based visa petition on behalf of the beneficiary because the evidence of record indicated that the petitioner was convicted of statutory rape in the second degree, and he was sentenced to serve 90 days in jail, two years of probation, and complete 24 months of an outpatient sex offender treatment program. The director requested that the petitioner submit evidence that he was not convicted of any "specified offense against a minor" as defined in § 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, *inter alia*: a psychological evaluation; conviction records; a child custody order; a divorce decree; a letter from his former spouse; a letter from his employer; and a certificate of achievement from his employer. The director determined the evidence failed to demonstrate that the petitioner posed no risk to the safety and well-being of the beneficiary.

On appeal, counsel asserts that the petitioner's conviction occurred nearly 25 years ago. Counsel states that the petitioner's custody of his two daughters reflects that a family law court has been assured of his rehabilitation. Counsel contends that the petitioner has established his good moral character and poses no risk to the beneficiary. Counsel submits a letter from the psychologist who conducted the initial psychological evaluation; a support letter from the petitioner's friend; a second letter from the petitioner's employer; and a letter from the petitioner.

The record of conviction reflects that on October 25, 1985, the petitioner pled guilty in the Superior Court of the State of Washington, Benton County, to statutory rape in the second degree in violation of former section 9A.44.080(1) of the Revised Code of Washington.[1] The petitioner was sentenced to a

[1] The statute under which the petitioner was convicted was later repealed in 1988. *See* 1988 Wash. Laws ch. 145, § 24.

term of 15 months imprisonment, which was suspended. The petitioner was placed on community supervision for two years under the conditions that he serve a period of 90 days imprisonment, undergo out-patient sex offender treatment for 24 months, and not have any unsupervised contact with any children under the age of 16 years. The petitioner submitted a court order issued on January 13, 1998 discharging him from confinement and supervision pursuant to his completion of the requirements of his sentence.

At the time of the petitioner's conviction, the criminal statute stated: "A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old." Wash. Rev. Code § 9A.44.080(1) (1985). The petitioner's offense is, therefore, a "specified offense against a minor," as defined under subsections 111(7)(H) and (I) of the Adam Walsh Act: criminal sexual conduct involving a minor and conduct that by its nature is a sex offense against a minor.

The petitioner submitted in response to the NOID a psychological evaluation from a licensed psychologist and certified sex offender treatment provider, [redacted], dated May 28, 2010. [redacted] reported that the petitioner was convicted of the statutory rape of a 14-year-old girl. [redacted] conducted psychological testing in a risk assessment of the petitioner and determined that "[a]lthough test results did not suggest pedophilic interests, sexual compulsivity, the use of thinking errors commonly used by sexual offenders in the commission of their crimes, or a sense of sexual entitlement, the results did suggest a potential to confuse affection expressed by others as being sexually motivated." [redacted] concluded that "the dynamics of that offense, interview material, testing, diagnoses, and [the petitioner's] apparent lack of further sexual or general criminal recidivism suggest that he is at very low risk to individuals in the community or to his fiancée in particular."

The petitioner also provided a divorce decree and child custody order, which reflect that the petitioner and his first wife, W-H-[2], with whom he had two children, terminated their marriage in a divorce on July 22, 2004 in the Superior Court of Washington, County of Benton. On November 23, 2004, the petitioner was granted full custody of one child and joint custody of the other child. The petitioner submitted a letter from W-H-, in which she referred to him as a "wonderful man and an outstanding father." W-H- further stated that the petitioner "made sure the kids were always taken care of." The petitioner also submitted an undated and unsigned letter from his supervisor [redacted] in which he stated that the petitioner "has proven himself to be a truly valued employee and exceptionally competent CDL Certified Driver."

In denying the petition, the director stated that the evaluation from [redacted] did not conclude that he is at "no risk" to the beneficiary. The director noted that the petitioner failed to submit any documentation related to the 24 months of sexual offender counseling he attended as a requirement of his sentence. The director further noted that the letters from the petitioner's employer and his former spouse do not attest to his behavior modification or rehabilitation or whether or not he poses a risk to the beneficiary.

On appeal, the petitioner asserts in a statement, dated March 7, 2011, that he "made a grave mistake" in 1985, but has since shown that he is a "responsible member of the community." He states that his

[2] Name withheld to protect the individual's identity.

record over the past 26 years of "no trouble with the law should show positive behavior modification." The petitioner notes that he was granted full custody of his one-year-old daughter after his divorce, and he now has full custody of his second daughter. He states that he is proud of his daughters, who are now eight- and ten-years-old, and he feels that his "kind and thoughtful manner and as a father" shows his positive behavior. The petitioner contends that he has always been truthful to the beneficiary and he will be a kind and thoughtful husband to her.

The petitioner submits a March 2, 2011 letter from [redacted] in which he asserts that the petitioner's "risk for sexual reconviction appears to be extremely low." [redacted] stated that the petitioner "would be considered at very low risk to individuals with similar characteristics in his sexual offense, i.e., young teenage girls [and] [h]e does not appear to present a risk to his fiancée." [redacted] concluded that the petitioner's record of having not reoffended over the past 25 years is suggestive of his rehabilitation. However, [redacted] did not determine that the petitioner poses no risk to the beneficiary.

The petitioner also submits a letter from his friend, [redacted], and a signed and dated letter from his employer [redacted] stated that he has known the petitioner for 20 years and finds him to be "a very upstanding, honest and moral person." He opined that the beneficiary "will be at absolutely NO risk" with the petitioner. [redacted] stated that he is aware of the petitioner's past issues, but hopes "that his demonstrated actions as an employee would reflect positively on those making the decisions on his petition." He opined that the petitioner "has clearly demonstrated through his actions that he can be a valued member of this community."

Upon a full review of the record, we find that the petitioner has not overcome the basis of denial. The conviction records reflect that the petitioner was ordered to undergo out-patient sex offender treatment for 24 months with quarterly progress reports given to the court and prosecutor as a condition of his placement on community supervision. The conviction records further reflect that the petitioner requested a discharge from supervision based upon a report stating he completed sexual offender counseling. The director noted in the denial notice that the petitioner failed to submit any documentation related to his sexual offender counseling. On appeal, the petitioner does not submit his progress report(s), evidence that such report(s) are unavailable, or otherwise address this issue.

The factual basis of the petitioner's conviction remains unclear. The petitioner does not provide the details of his arrest in his statement. The petitioner has not submitted the information, indictment, or guilty plea from his conviction record to reveal the factual basis of charge filed against him. In the psychological evaluation, [redacted] noted that the petitioner claims he disclosed the details of his conviction to the beneficiary. The petitioner also asserts in his statement that he has been truthful with the beneficiary. The record, however, does not contain a letter from the beneficiary that acknowledges the petitioner's criminal history. [redacted] evaluation also reflects that during the psychological examination the petitioner stated that he had sexual contact with a 14-year-old girl who told him that she was 18 years old. However, statutory rape in the second degree under then section 9A.44.080(1) of the Revised Code of Washington criminalized sexual intercourse with a child who was eleven years of age or older but less than fourteen years old. The victim of the petitioner's offense must, therefore, have been between 11 years old and 13 years old, and the record shows that the petitioner was nearly 26 years old at the time. This discrepancy detracts from the credibility of the petitioner's explanation of the circumstances leading to his conviction.

The petitioner's professional accomplishments and the statements from his friend, former spouse and employer attesting to his good moral character do not overcome his failure to provide a credible account of the factual basis of his conviction. Therefore, the petitioner has failed to establish that he is of no risk to the beneficiary and/or any derivative beneficiary.

Based on the foregoing, the evidence of record does not support the petitioner's assertions that he poses no risk to the safety and well-being of the beneficiary. Consequently, the appeal will be dismissed.

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.

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