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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

D6

[Redacted]

Date: OCT 18 2011

Office: CALIFORNIA SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

Beneficiary:

[Redacted]

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.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center (the director), denied the Petition for Alien Fiancé(e) (Form I-129F) and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision shall be withdrawn and the matter remanded for entry of a new decision.

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 petition because the petitioner failed to: (1) establish that he was not convicted of a specified offense against a minor as defined at section 111(7) of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 587(Adam Walsh Act); or (2) demonstrate that he poses no risk to the safety and well-being of the beneficiary and/or any derivative beneficiary. On appeal, counsel submits a brief and additional evidence.

Applicable Law

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 Act 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:

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.

Factual and Procedural History

The petitioner filed the Petition for Alien Fiancé(e) (Form I-129F) with U.S. Citizenship and Immigration Services (USCIS) on October 20, 2008. On October 6, 2009, the director issued a Notice of Intent to Deny (NOID) the petition, 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 in 1978 the petitioner was convicted of sodomy and sentenced to one to 15 years in the Utah State prison system. 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 a statement as well as letters from family and friends. In his personal statement, the petitioner did not explain the circumstances of his 1978 criminal conduct, provide the age of his victim, or otherwise address his conviction. The letters from the petitioner’s family and friends also did not shed any light on the petitioner’s conviction. As discussed above, the director denied the petition because the petitioner was convicted of a “specified offense against a minor” as defined at § 111(7) of the Adam Walsh Act, and he failed to demonstrate that he posed no risk to the safety and well-being of the beneficiary and/or any derivative beneficiary.

While the director and counsel stated that the petitioner was convicted of sodomy, the evidence in the record establishes that the petitioner was convicted of forcible sexual abuse. The petitioner’s record of conviction indicates that he was charged with forcible sodomy in the second degree in violation of § 76-5-403 of the Utah Criminal Code (U.C.A.); however, the petitioner was convicted only of forcible sexual abuse in violation of U.C.A. § 76-5-404 (1978). *Judgment and Sentence, Utah v. [Petitioner]*, Weber Cnty., Utah Dist. Ct., 2nd Dist. (No. 12819)(Oct. 19, 1978).

On appeal, the petitioner states through counsel that while the crime of sodomy is a sexual crime that would fall under the parameters of the Adam Wash Act, the petitioner did not commit his crime against a minor. In support of his claims, the petitioner submits the following evidence: the petitioner’s March 30, 2010 declaration regarding the circumstances surrounding his arrest and conviction; available court records relating to the petitioner’s 1978 conviction, including, but not limited to, a letter from the Ogden City, Utah Police Department, stating that the petitioner’s arrest reports from 1977 and 1986 have been purged according to the state’s records retention schedule; a copy of the Utah Criminal Code from

1978; and documents that counsel states relate to the petitioner's victim and establish that she was 21 years old at the time of the crime, including copies of her wedding announcement, marriage license registration announcement, birth announcement, high school yearbook, and Facebook profile.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the record, we find that there is insufficient evidence to conclude that the petitioner perpetrated his crime against a minor. Accordingly the director's decision shall be withdrawn; however, because the petition is not approvable, it shall be returned to the director for entry of a new decision.

Analysis

Utah law defines forcible sexual abuse as:

A person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

Utah Code Ann. § 76-5-404 (West 1978)

The statute under which the petitioner was convicted is not categorically a specified offense against a minor. Although an individual could be convicted under U.C.A. § 76-5-404 for forcible sexual abuse against a minor between the ages of 14 and 17, the language in the statute does not preclude an adult from also being a victim, as the only requirement is that the victim not be under the age of 14. Accordingly, we must look to the record of conviction as well as other relevant evidence to determine the victim's age at the time of the crime. The petitioner's record of conviction identifies a witness, C-A-¹ who testified at the petitioner's hearing and is not identified as a law enforcement officer. On appeal, the petitioner provides a statement in which he states that his victim was a woman named C-A-, who he met in a bakery in 1977 and who, according to the petitioner, told him that she was 22 years old. According to the petitioner, C-A- conducted herself as an adult and it was never alleged at any time during his interactions with law enforcement authorities that C-A- was a minor. The petitioner submits additional relevant evidence on appeal: a 1956 newspaper clipping from a local Utah paper that the petitioner states is the birth announcement for C-A-; a marriage license registration announcement from a local Utah paper, dated March 17, 1978, that the petitioner states relates to C-A- and her husband; a marriage announcement from a local paper, dated March 19, 1978, that the petitioner alleges relates to C-A-'s marriage; copies of relevant pages from a local Utah high school yearbook that the petitioner states show that C-A- graduated in 1974. The petitioner

¹ Name withheld to protect the individual's identity.

also states that the addresses reported in the birth and marriage announcements are consistent with the address of the witness, C-A-, who is listed in documents relating to his conviction.

The preponderance of the evidence indicates that the victim of the petitioner's 1978 conviction for forcible sexual abuse was not a minor at the time the crime was committed. Accordingly, we withdraw the director's conclusion that the petitioner was convicted of a specified offense against a minor.

Conclusion

We note that USCIS records indicate that the petitioner was arrested for assault on March 14, 2006; however, the petitioner has not provided a disposition for this arrest. As the petitioner's arrest may relate to the crimes listed at Part C.2 on the Form I-129F, the director should request a disposition of the arrest from the petitioner before entering a new decision into the record. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision, dated March 2, 2010, is withdrawn and the matter returned to the director for entry of a new decision which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.