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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



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Date: **MAY 11 2012** Office: VERMONT SERVICE CENTER

FILE:

IN RE: Petitioner:
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:

SELF-REPRESENTED

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 posed no risk to the beneficiary. On appeal, the petitioner submits a statement.

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 [REDACTED] 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 October 14, 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 on June 20, 1980 he was convicted of making an obscene display of his person to a minor child in violation of the Virginia Code. 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*: police reports and court records; a statement from the petitioner; supporting letters from the beneficiary, the beneficiary’s parents and the petitioner’s family members; employer recommendation letters; supporting letters from the petitioner’s pastor and members of his church; a certificate issued for the completion of an alcohol and drug awareness class; and a psychological evaluation and letter. 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, the petitioner asserts that he was not convicted of making an obscene display of his person to a minor child because there was no conviction since he pled *nolo contendere* to the charge. He contends that when he was 19 years old he was driving a taxi cab and urinated in a cup without knowing that there was a minor present. The petitioner states that there is no evidence that he has committed any act of physical assault or battery against a minor in violation of law.

The conviction record in this case reflects that the petitioner was charged in the Juvenile and Domestic Relations Court of the City of Charlottesville [REDACTED] 1980 with making an obscene display of his person or private parts to [REDACTED]¹, a minor female, age 13 years in violation of section 18.2-387 of the Code of Virginia. The record shows that the petitioner pled guilty to the charge [REDACTED] 1980 and was sentenced to a term of imprisonment for 12 months, which was suspended on the condition that he

¹ Name withheld to protect the individual’s identity.

undergo psychiatric treatment and have good behavior for 12 months. Although the petitioner claims he pled *nolo contendere* to the charge, the court's judgment of conviction explicitly states "Plea – Guilty." While the petitioner also asserts that he has never committed "any act of physical sexual assault or battery against any minor," for an offense to be substantially similar to a "specified offense against a minor" defined under section 111(7) of the Adam Walsh Act, there is no requirement that the offense involve an act of physical assault or battery against a minor. A "specified offense against a minor" defined under section 111(7)(I) of the Adam Walsh Act, includes any conduct that by its nature is a sex offense against a minor, and the petitioner's conduct of displaying his person or private parts to a 13-year-old child falls within this definition.

On appeal, the petitioner asserts that the director ignored the supporting letters from his pastor, friends, family members, the beneficiary and the beneficiary's parents, which show beyond a reasonable doubt that he is a good person who does not pose any risk to the safety and well-being of the beneficiary. He states that he is currently employed as a facilities manager with a country club and has an excellent work record. The petitioner contends that he was forthright about his two minor drug offenses, which were not physical assaults on any person. The petitioner contends that the psychological evaluation should have been given more weight as it proves that he has no emotional or behavioral problems or disorders which might pose a risk to the safety of the beneficiary.

In the petitioner's statement, dated March 4, 2010, he recounted that at the time of his arrest for making an obscene display of his person to a minor child he was employed as a cab driver. He stated that he had to pick up a passenger and there were no public restroom located in the vicinity. The petitioner claimed that he urinated in the driver's seat of his cab into a cup, and was surprised to see a girl looking at him through the passenger side window. He stated that he was embarrassed and immediately drove away. The petitioner stated that he has been a role model to his stepdaughter and his sister's children. He asserted that his intent has never been to expose himself to a minor. The petitioner stated that he wants the beneficiary to come to the United States so that they can start a family.

The supporting letters from the beneficiary's parents, his stepdaughter from his prior marriage, his pastor, his sister and two brothers, attest to his good moral character. The signed statements from members of the petitioner's church are identical form-letters which express support for the issuance of a visa to the beneficiary. The beneficiary stated in her letter, dated January 13, 2010, that she knows about the petitioner's arrests and she feels safe and comfortable with him. She indicated that she would like to marry the petitioner and start a family with him.

In the psychiatric evaluation, dated February 23, 2010, [REDACTED] M.D. reiterated the petitioner's account of events that led to his arrest and conviction. [REDACTED] reviewed the petitioner's history and concluded that the psychiatric examination "is negative for any danger or threat as implied by the charges from 1980 raised against him." She stated that "there is nothing about [the petitioner's] history in the 30 years following the charges to suggest he has any unusual sexual preferences or compulsions."

Upon a full review of the record, we find that the petitioner has not overcome the basis of denial. Although the petitioner claims that he was arrested for urinating in his cab, the statute under which he was convicted required that his offense involve an "obscene display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present." Va. Code Ann.

§ 18.2-387 (West 1980). In *Copeland v. Commonwealth*, 525 S.E.2d 9, 10 (Va. Ct. App. 2000), the court noted that “[t]o be obscene, conduct must violate contemporary community standards of sexual candor.” At the time of the petitioner’s offense, the term “obscene” was defined as “that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse” Va. Code Ann. § 18.2-372 (West 1980). The petitioner’s assertion that he was convicted for urinating in a cup in his closed cab is inconsistent with the underlying statutory basis of his conviction. This discrepancy detracts from the credibility of the petitioner’s explanation of the circumstances leading to his conviction.

In his statement, the petitioner fails to discuss his rehabilitation and does not take any responsibility for the serious nature of his crime as he fails to provide a credible account of the basis of his arrest and conviction. The petitioner has not provided any evidence that he completed the year-long psychiatric treatment ordered by the court or any other form of rehabilitation.² In the psychiatric evaluation, [REDACTED] also stated that the petitioner did not fulfill the psychiatric treatment condition of his criminal sentence because he moved to Florida. [REDACTED] psychiatric evaluation does not establish that the petitioner is of no risk to the beneficiary. While we do not question [REDACTED] general psychiatric expertise, the record does not indicate that she is a certified sex offender treatment provider or has a background in the assessment of sex offenders. Nor has she indicated that she conducted forensic psychological testing to reach her conclusion that the petitioner is not a danger or threat to the beneficiary.

The petitioner and beneficiary both state that they want to start a family after their marriage. However, the evidence does not demonstrate that the petitioner has informed the beneficiary of the true facts of his conviction for making an obscene display of his person to a minor child. The beneficiary simply states in her letter that she has knowledge of the petitioner’s arrest for “indecent exposure.” She does not indicate that she has knowledge that his conviction involved an “obscene display or exposure of his person, or the private parts” to a minor child. *De novo* review of the relevant evidence submitted below fails to demonstrate that the petitioner poses no risk to 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.