U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-R-

DATE: FEB. 16, 2016

CERTIFICATION OF INDIANAPOLIS FIELD OFFICE DECISION

PETITION: FORM I-130, PETITION FOR ALIEN RELATIVE

The Petitioner, a citizen of the United States, seeks to classify the Beneficiary as the spouse of a United States citizen. *See* Immigration and Nationality Act (the Act) § 201(b), 8 U.S.C. § 1151(b). The Director, Indianapolis Field Office, denied the petition. The matter is now before us on certification. The initial decision of the Director will be affirmed and the petition will be denied.

The Director denied the petition, finding that the Petitioner was convicted of a specified offense against a minor and failed to demonstrate that he posed no risk to the safety and well-being of the Beneficiary. On certification, the Petitioner contends that the denial was based on an abuse of discretion and further asserts that he poses no threat to the Beneficiary.

I. APPLICABLE LAW

Section 201(b)(2)(A)(i) of the Act provides immigrant classification to an alien spouse who, in pertinent part, comes within its provisions:

> Immediate relatives.—For purposes of this subsection, the term "immediate relatives" means the children, spouses, and parents of a citizen of the United States ....

A U.S. citizen may file a Form I-130, Petition for Alien Relative, on behalf of an alien spouse through the provisions of section 204(a)(1)(A)(i) of the Act, which states, in pertinent part:

> Except as provided in clause (viii), any citizen of the United States claiming that an alien is entitled to classification by reason of ... an immediate relative status under section 201(b)(2)(A)(i) may file a petition with the Attorney General [Secretary of Homeland Security] for such classification.

However, the ability to file a petition is limited by section 204(a)(1)(A)(viii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(viii), which states, in pertinent part:

> (I) Clause (i) shall not apply to 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.

On July 27, 2006, the President signed the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act or AWA), 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 DHS Secretary finds 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).[1]

As referenced in sections 204(a)(1)(A)(viii)(II) and 204(a)(1)(A)(i) of the Act, section 111(7) of the Adam Walsh Act states:

> 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.

Section 111(14) of the Adam Walsh Act defines the term "minor" as an individual who has not attained the age of 18 years.

[1] *See* Department of Homeland Security (DHS) Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003).

II. FACTUAL AND PROCEDURAL HISTORY

The Petitioner filed the Form I-130, Petition for Alien Relative, on July 30, 2014. The Director issued a request for evidence (RFE) and notice of intent to deny (NOID) on February 25, 2015, because the Petitioner was convicted in Indiana of three counts of sexual misconduct with a minor in violation of Indiana Code § 35-42-4-9. At the time of the Petitioner's conviction, Indiana Code § 35-42-4-9 stated, in pertinent part:

> (a) A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits sexual misconduct with a minor, a Class C felony. However, the offense is: (1) a Class B felony if it is committed by a person at least twenty-one (21) years of age;
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> . . . .
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> (b) A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits sexual misconduct with a minor, a Class D felony. However, the offense is: (1) a Class C felony if it is committed by a person at least twenty-one (21) years of age . . . .

The Director indicated that the petition would be denied unless the Petitioner submitted evidence that he was not convicted of a "specified offense against a minor," as defined in section 111(7) of the Adam Walsh Act, or established 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 his response to the Director's RFE/NOID, the Petitioner referred to having filed together with the Form I-130 a "Request for Adam Walsh Act Waiver" and re-submitted evidence originally provided with the petition. He did not contest having been convicted of a "specified offense against a minor" pursuant to the Adam Walsh Act (an AWA offense), but rather sought to establish that he poses no risk to his spouse. The Director determined that the Petitioner, having been convicted of an AWA offense, failed to demonstrate that he poses no risk to the safety and well-being of the Beneficiary of the visa petition and denied the petition accordingly.

On certification, the Petitioner does not contest being convicted of an AWA specified offense. He contends, rather, that despite his AWA conviction record, he now poses no risk to his spouse due to having been rehabilitated. Claiming that his 1998 offense was an isolated occurrence, he also points out that his spouse is not a minor and that he has no history of violent behavior. In these proceedings, the Petitioner bears the burden of demonstrating, beyond any reasonable doubt, that he

poses no risk to the Beneficiary.[2] Upon a full review of the record, we find that the Petitioner has not overcome the basis for the denial.

III. ANALYSIS

The record reflects that on [redacted] 2000, the Petitioner was convicted of three counts of the aforementioned sexual offense for having sexual intercourse and/or engaging in oral sex with a ninth grade member of the high school girls soccer team of which he was a coach. The conduct occurred on four occasions during [redacted] 1998 at the Petitioner's residence. A judge sentenced the Petitioner on [redacted] 2000, to 20 years in prison on each count with 10 years suspended, later modified on [redacted] 2003, to a 10-year sentence with three years of probation and completion of intensive sex offender counselling required. The Petitioner was originally released from prison in [redacted] 2003 to a one-year work release program but was returned to prison in [redacted] 2003 for the remainder of his 10-year term for probation violations involving use of alcohol and controlled substances. He was again released on parole on [redacted] 2005, subject to several constraints on liberty, including being restricted from visiting or coming within proximity to a place frequented by children, and required to register as a sex offender.[3]

Between 2007 and 2012, the Petitioner was charged four times with parole violations and jailed several times, but only found to be in violation once. This occasion involved revocation of his parole for having unsupervised parenting time in 2012 with his daughter [redacted] and resulted in re-incarceration for six months. In total, he has been imprisoned for over five years, undergone over eight years of sex offender counselling, and received an order ending his obligation to register as a sex offender as of [redacted] 2013, as well as removing his profile from the Indiana Sex and Violent Offender Registry on [redacted] 2013.

To support the claim he poses no risk to the Beneficiary, a 45 year-old female, the Petitioner submitted a brief detailing compliance with all requirements of his sentence, letters of support, progress reports regarding participation in twice monthly Sexual Misconduct Group counselling program meetings during 2006 and 2007, and a report dated October 28, 2013, by a clinical psychologist assessing the Petitioner's psychosexual risk profile.

The therapist conducting the Petitioner's assigned group counselling program recommended in 2006 that the Petitioner have no contact with anyone under 18 and attend weekly Sex Addicts Anonymous (SAA) meetings during the course of group treatment. There is no evidence he attended SAA meetings and notes from the group counselling indicate he did not consider himself a sex addict.

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[2] *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.

[3] The record shows the Petitioner fulfilled obligatory sex offender registration, as ordered, until obtaining a judicial order relieving him of continued compliance with the relevant Indiana statute. *See* Findings of Fact, Conclusion of Law and Judgment for Removal From the Indiana Sex and Violent Offender Registry, [redacted], 2013.

The October 2013 psychosocial evaluation reports that the Petitioner acknowledged his criminal behavior, took responsibility for his actions, and successfully completed treatment. The assessment notes that, despite admitting to committing sex offenses and wishing to be seen as taking responsibility, the Petitioner to some degree holds the victim responsible and blames his behavior on his abuse of drugs and alcohol. The psychologist observes that the Petitioner's efforts to present himself in a positive light in this type of situation are common, but that the resulting risk profile may thus underestimate present symptoms and not reflect accurately the degree of psychological adjustment. Specifically, the psychologist notes that test results indicate moderate risk for chemical addiction, personality traits consistent with clashing with authority,[4] and defensiveness common among sex offenders. He reports that the Petitioner represents "low risk to re-offend sexually," and concludes that "[the Beneficiary] and her son do not appear to be at significant risk for physical abuse at the hands of [the Petitioner] either." The evaluation notes the Petitioner's past problems have caused him to develop coping strategies allowing him to adapt and regulate his emotions and reports he has realized that by his actions he took advantage of his minor victim.

The record indicates that the Petitioner married the Beneficiary on , 2009, and fathered a daughter, who was born Regarding the Petitioner's other family relationships, the record contains no evidence that he has maintained contact either with the wife he divorced in 1995 or their 23-year-old son. The record reflects that, after being released on parole, he was remanded to custody for six months for having prohibited contact with a minor as a result of unsupervised parenting time with his infant daughter.

The record contains supportive letters from family and friends of the Petitioner. Only those from his mother and sister reference his AWA offenses, the former as a "terrible decision" and the latter as "legal trouble," although a letter from the family priest notes having "learned of [the Petitioner's] past." Character references from friends do not indicate their knowledge of the Petitioner's criminal history, and there is no statement on the record from the Beneficiary concerning the Petitioner's criminal history or their current relationship.

IV. CONCLUSION

We find the totality of the evidence insufficient to show beyond a reasonable doubt that the Petitioner poses no risk to the safety or well-being of the Beneficiary. The record reflects that the Petitioner occupied a position of authority and responsibility as the victim's coach at the time he had an illicit sexual relationship with her, which lasted one to two months. The number of sexual encounters and span of time in which they occurred reflect that the Petitioner's criminal behavior was not an isolated occurrence or the product of drug-induced loss of awareness. After conviction, his initial release was followed shortly by re-incarceration for a parole violation. We note that upon re-incarceration for his first parole violation, he obtained two college degrees and, after release, completed several years of group counselling required by his parole agreement. However, he was again incarcerated in 2012 for

[4] These include "thrill seeking, impulsivity, proneness to rule infractions, and high-risk behavior...." Psychosocial Evaluation, p. 5.

violating the terms of his parole. While aware that the psychological evaluation assesses the Petitioner as posing a low recidivism risk, there is no statement on the record from the Beneficiary concerning the Petitioner and his criminal history, and we conclude that the record as a whole does not demonstrate beyond a reasonable doubt that he poses no risk to the Beneficiary.

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 initial decision of the Director, Indianapolis Field Office, is affirmed and the petition is denied.

Cite as *Matter of W-R-*, ID# 15215 (AAO Feb. 16, 2016)