U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27966478

Date: SEP. 29, 2023

Appeal of California Service Center Decision

Form I-129F, Petition for Alien Fiancé(e)

The Petitioner seeks to classify the Beneficiary as his K-1 nonimmigrant fiancée. Immigration and Nationality Act (the Act) section 101(a)(15)(K)(i), 8 U.S.C. § 1101(a)(15)(K)(i). If a fiancée visa petitioner has been convicted of a specified offense against a minor, the petition cannot be approved unless the petitioner establishes, beyond a reasonable doubt, that they pose no risk to any of the petition's beneficiaries. *Id.*; section 204(a)(1)(A)(viii)(I) of the Act, 8 U.S.C. § 1154(a)(1)(A)(viii)(I).

The Director of the California Service Center denied the petition, concluding that the record did not establish, beyond any reasonable doubt, that the Petitioner poses no risk to the Beneficiaries[1] of the petition. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof in these proceedings. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 103.2(b)(1). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Under section 101(a)(15)(K) of the Act, a U.S. citizen may file a fiancée visa petition unless that citizen is described in section 204(a)(1)(A)(viii)(I) of the Act, which applies to any U.S. citizen who has been convicted of a specified offense against a minor. The only exception to this prohibition is if USCIS determines, in its sole discretion, that the citizen poses no risk to the petition's beneficiary or beneficiaries. *Id.*

The term "specified offense against a minor" is defined by the Adam Walsh Act (AWA) as, among other things, criminal sexual conduct against a minor or any conduct that by its nature is a sex offense against a minor. Section 111(7) of the Adam Walsh Child Protection and Safety Act of 2006 (AWA), Pub. L. 109-248, 120 Stat. 587 (2006). Section 111(14) of AWA defines a "minor" as an individual under 18 years old.

[1] The petition was filed on behalf of the primary Beneficiary, who is the Petitioner's fiancée, and the derivative Beneficiary, who is the primary Beneficiary's child. Section 101(a)(15)(K)(iii) of the Act.

The Petitioner in this case pleaded guilty in 1992 to aggravated sexual assault under Tex. Penal Code Ann. section 22.021 (1989) (amended 2017), which states in relevant part:

> (a) A person commits an offense:
> (1) if the person:
> . . .
> (A) intentionally or knowingly:
> (i) causes the penetration of the anus or female sexual organ of a child by any means; [and]
> (2) if:
> . . .
> (A) the victim is younger than 14 years of age.
> (b) In this section, "child" has the meaning assigned that term by Section 22.011(c) of this code.
> . . .
> (e) An offense under this section is a felony of the first degree.

The law at Tex. Penal Code Ann. section 22.011(c)(1) (1991) (amended 2009) defined a "child" as "a person younger than 17 years of age who is not the spouse of the actor." The Petitioner's conviction constitutes a "specified offense against a minor" for AWA purposes, and his petition cannot be approved unless USCIS determines that he poses no risk to any of its Beneficiaries. Section 204(a)(1)(A)(viii)(I) of the Act.

If a fiancée visa petitioner has been convicted of a specified offense against a minor, USCIS can only make a no-risk determination if that petitioner demonstrates their rehabilitation and shows, beyond any reasonable doubt, that they pose no risk to the safety and well-being of their intended beneficiary, as well as any derivative beneficiary permitted to apply for an immigrant visa on the basis of their relationship to the principal beneficiary. *See generally* USCIS Policy Memorandum 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* (Feb. 8, 2007), https://www.uscis.gov/sites/default/files/document/memos/adamwalshact020807.pdf (Aytes memo). The Aytes memo sets forth the evidentiary guidance used to make no-risk assessments.

II. ANALYSIS

The Petitioner does not dispute that he has been convicted of a specified offense against a minor and that section 204(a)(1)(A)(viii)(I) of the Act is applicable to the present petition. Therefore, the sole issue on appeal is whether the Petitioner has provided sufficient evidence to demonstrate, beyond any reasonable doubt, that he poses no risk to any beneficiary of his fiancée visa petition.

The petition in this case includes a derivative Beneficiary, the child of the Petitioner's fiancée, who qualifies as a child as defined by section 101(b)(1) of the Act, 8 U.S.C. § 1101(b)(1). When any intended beneficiary of a fiancée visa petition is a child, the Aytes memo directs us to automatically presume the petitioner poses a risk to them, regardless of the nature of the petitioner's specified offense and irrespective of whether the petitioner and the child beneficiary will reside in the same household or in close proximity to each other. *See generally* Aytes Memorandum, *supra*, at 6-7. It is then the petitioner's burden to overcome that presumption by providing credible and persuasive evidence of

rehabilitation and any other evidence that proves, beyond any reasonable doubt, that they pose no risk to the child beneficiary. *Id* at 7. The memo further states that the factors to be considered when making a no-risk determination include, but are not limited to:

- The nature and severity of the petitioner's specified offense(s) against a minor, including all facts and circumstances underlying the offense(s);
- The petitioner's criminal history;
- The nature, severity, and mitigating circumstances of any arrest(s), conviction(s), or history of alcohol or substance abuse, sexual or child abuse, domestic violence, or other violent or criminal behavior that may pose a risk to the safety or well-being of the principal beneficiary or any derivative beneficiary;
- The relationship of the petitioner to the principal beneficiary and any derivative beneficiary;
- The age and, if relevant, the gender of the beneficiary;
- Whether the petitioner and beneficiary will be residing either in the same household or within close proximity to one another; and
- The degree of rehabilitation or behavior modification that may alleviate any risk posed by the petitioner to the beneficiary, evidenced by the successful completion of appropriate counseling or rehabilitation programs and the significant passage of time between the incidence of violent, criminal, or abusive behavior and the submission of the petition.

Id. at 6. Upon examination of the entire record and consideration of all of the factors stated in the Aytes memo, we conclude that the Petitioner has not met his burden of proof for the reasons below.

First, we consider the nature and severity of the Petitioner's offense against a minor. The Petitioner pleaded guilty to aggravated sexual assault for intentionally and knowingly causing the penetration of the sexual organ of a child under 14 years of age with his penis. He was 19 years old at the time of the offense. We note that the Petitioner's offense was a first degree felony, the second-most serious of four levels of felony under Texas law. Tex. Penal Code Ann. section 12.04 (1974), *see also* Tex. Penal Code Ann. section 12.32 (1974) (stating that first-degree felonies are punishable by five to 99 years of imprisonment and a fine of up to $10,000).

Regarding the facts and circumstances underlying his offense, the Petitioner states that he met his victim when she was a middle school student and he was a high school junior. According to the Petitioner, the parties met in their schools' shared cafeteria and began a relationship. The Petitioner further states that he was arrested because his victim's parents did not approve of the relationship and reported him to the police. However, this statement is not persuasive because is not corroborated by objective, probative documentation such as arrest reports or trial transcripts supporting his account of the facts and circumstances of the offense. *See generally* Aytes Memorandum, *supra*, at 5-6.

The provided documentation of the Petitioner's offense consists of a charging document, a guilty plea agreement document with an accompanying agreed punishment recommendation, an order deferring adjudication and placing the Petitioner on probation, a list of the conditions of that probation, a motion for discharge of probation, and an order terminating the probation and dismissing the charges against

the Petitioner.[2] These documents state nothing about the Petitioner's arrest or the behavior underlying the offense except that he admitted to intentionally and knowingly causing the penetration of the sexual organ of a child under 14 years of age with his penis. We acknowledge the Petitioner's statement on appeal that he submitted all of the criminal history documents he was able to obtain from every agency involved in his case, and that since he committed the offense over thirty years ago, some of the pertinent records may have been purged. However, the burden of proof still lies with the Petitioner in these proceedings. Without documentary records of the circumstances of the Petitioner's arrest, we lack sufficient information to weigh those circumstances as directed by the Aytes memo.

The court documents provided indicate that the Petitioner stipulated and judicially confessed to the facts in the charging document and pleaded guilty in [redacted] 1992 in exchange for the imposition of deferred adjudication and five years of probation.[3] Had he violated his probation, the punishment would have been five years of imprisonment, the minimum permitted for first-degree felonies. Tex. Penal Code Ann. section 12.32 (1974). In [redacted] 1993, the court, district attorney, and county probation department agreed to terminate the Petitioner's parole after he served one third of the imposed term, since he had complied with the parole conditions and paid all required fees. Tex. Crim. Proc. Ann. art. 42.12 sections 5(c), 23 (1979) (repealed 2015).

We acknowledge that the Petitioner appears to have received the minimum possible punishment for his offense. However, the record does not contain any documentation of the court's specific reasoning in assigning this punishment, such as the existence of mitigating factors. The petition's only account of the facts and circumstances of the Petitioner's offense is the Petitioner's statement. There is therefore insufficient objective evidence regarding the specifics of the offense for us to conduct a meaningful analysis of its nature and severity.

Next, we note that apart from the 1992 offense, the Petitioner has no criminal history. There is also no indication in the record that he has any history of alcohol or substance abuse, sexual or child abuse, domestic violence, or other behavior that may pose a risk to the Beneficiaries. The Petitioner provided a divorce decree and child custody agreement from 2014 indicating that he and his ex-wife share equal custody of their children, who are now teenagers. Nothing in this document indicates any concerns about the Petitioner's behavior. However, the divorce decree is over eight years old, and apart from the Petitioner's statements, there are no documents in the record that directly address his behavior and character as of the time the petition was filed.[4] As such, we do not have sufficient evidence to determine whether the Petitioner has engaged in behavior that may pose a risk to the safety or well-being of the Beneficiaries. Furthermore, as noted above, the record does not contain sufficient documentation of the Petitioner's offense for us to analyze its nature, severity, and any mitigating circumstances.

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[2] The Petitioner's dismissal and discharge under Tex. Code Crim. Proc. Ann. art. 42.12 section 5(a) (1979) (repealed 2015) remains a conviction for immigration purposes. Section 101(a)(48)(A) of the Act, *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 330 (5th Cir. 2004); *Moosa v. INS*, 171 F.3d 994, 1005-6 (1999); *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998).

[3] Tex. Code Crim. Proc. Ann. art. 42.12 section 5(a) (1979) (repealed 2015) authorized the court to defer adjudication of guilt in this manner "when in its opinion the best interest of society and the defendant will be served . . .".

[4] Petitioners must establish eligibility for the requested benefit at the time of filing and continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1).

The next factors to consider are the relationship of the Petitioner to the Beneficiaries, as well as the ages of the Beneficiaries. The Petitioner is filing for his adult fiancée to come to the United States with her 16-year-old child to live in the same household as him as his wife and stepchild, respectively. The Petitioner will therefore live in close proximity to both Beneficiaries, one of whom is a minor child. Furthermore, as previously noted, the Aytes memo states that where a beneficiary is a child, we must presume that the petitioner poses a risk to that beneficiary regardless of whether they will live in the same household or in close proximity to each other. *See generally* Aytes Memorandum, *supra*, at 6-7. This factor therefore cannot be resolved in the Petitioner's favor.

The final factor to be considered is the degree of rehabilitation or behavior modification demonstrated by the Beneficiary. The Aytes memo states this should be evidenced by both successful completion of appropriate counseling or rehabilitation and by the significant passage of time between the incidence of offending behavior and the submission in the petition. *Id.* at 6. In this instance, 27 years passed between the Petitioner's offense and the filing of his petition. Furthermore, the 1993 order terminating the Petitioner's probation indicates that he complied with the probation's terms through that point. However, as noted above, the record does not contain sufficient probative documentation to establish whether the Petitioner has engaged in offending behavior since that time.

The Petitioner states that he knows his 1992 offense was wrong and deeply regrets it. He further states that after the offense, he turned his life around, fathered two children, and decided to work as a medical professional in order to give back to his community. The record includes documentation of the Petitioner's employment as a medical radiologic technologist. The Petitioner also states that he has worked with radiography students of all ages for years without incident, but does not provide an employer disciplinary record or other documentation to support this claim.

More crucially, however, the Petitioner has not provided any documentation indicating the successful completion of appropriate counseling or rehabilitation programs, as called for by the Aytes memo. *Id.* at 5. For example, the record does not contain any certified evaluation conducted by a licensed professional such as a psychiatrist, clinical psychologist, or clinical social worker attesting to the degree of his rehabilitation or behavior modification. *Id.* Given the heavy evidentiary burden of demonstrating eligibility beyond a reasonable doubt, the Petitioner's own account, standing alone, will not suffice to establish the degree of rehabilitation or behavior modification he has undergone or to what extent that rehabilitation mitigates the presumed risk to the child Beneficiary in this case.

We have reviewed all of the evidence contained in the record and considered it in line with the adjudicative guidance set forth in the Aytes memo. We acknowledge that in the thirty years since the pertinent offense, the Petitioner has parented two children and worked in a medical occupation, and that the record does not include evidence of further instances of concerning behavior. However, the record also does not contain objective documentation of the specific circumstances of the Petitioner's offense, evidence indicating that he successfully completed appropriate counseling or rehabilitation, or a certified evaluation conducted by a licensed professional which attests to the Petitioner's rehabilitation or behavior modification. Therefore, the Petitioner has not met the high evidentiary burden of overcoming the presumption of risk and establishing, beyond a reasonable doubt, that he poses no risk to the health or well-being of any of the Beneficiaries.

III. CONCLUSION

Because he has been convicted of a specified offense against a minor, the Petitioner is prohibited from filing a fiancée visa petition unless he establishes that he should receive a waiver of this prohibition in the exercise of discretion. Section 204(a)(1)(A)(viii)(I) of the Act. USCIS may only grant such a waiver if the Petitioner establishes, beyond any reasonable doubt, that he poses no risk to the safety and well-being of any of his petition's Beneficiaries. *Id.*; *see generally* Aytes Memorandum, *supra*, at 5. The Petitioner has not met this burden of proof and overcome the presumption that he poses a risk to the child Beneficiary of his petition or established that he poses no risk to the principal Beneficiary. The petition will therefore remain denied.

ORDER: The appeal is dismissed.