U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32131294

Date: SEP. 18, 2024

Appeal of Vermont Service Center Decision

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

The Petitioner, a U.S. citizen, seeks classification of the Beneficiary as a "K-1" nonimmigrant under the fiancé(e) visa classification at section 101(a)(15)(K)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(K)(i).

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner's fiancée petition is subject to the provisions under sections 402(a) and (b) of the Adam Walsh Child Protection and Safety Act of 2006 (the Adam Walsh Act), and that a totality of the evidence did not establish he poses no risk of harm to the Beneficiary and her derivative minor child. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). 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

U.S. Citizenship and Immigration Services (USCIS) may not approve a fiancée petition filed by a U.S. citizen who has been convicted of a "specified offense against a minor" unless USCIS, "in [its] sole and unreviewable discretion, determines that the citizen poses no risk to the [intended fiancée]." Sections 101(a)(15)(K)(i) and 204(a)(1)(A)(viii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(viii). The term "specified offense against a minor" is defined as an offense against a minor involving any of the following: an offense (unless committed by a parent or guardian) involving kidnapping or false imprisonment; solicitation to engage in sexual conduct or practice prostitution; use in a sexual performance; video voyeurism as described in section 1801 of title 18, United States Code; possession, production or distribution of child pornography; criminal sexual conduct involving a minor or the use of the Internet to facilitate or attempt such conduct; or any conduct that by its nature is a sex offense against a minor. Section 111 of the Adam Walsh Act, Pub. L. 109-248, 120 Stat. 587 (2006). The list of applicable criminal activity is stated broadly to accommodate variances among Federal, state, and foreign criminal laws.

When a petitioner is subject to section 204(a)(1)(A)(viii) of the Act, they carry a presumption of risk to the beneficiary (and any derivative beneficiary) and the petition cannot be approved unless they overcome it. To overcome that presumption, a petitioner must clearly demonstrate their rehabilitation and show, beyond any reasonable doubt, that they pose no risk to their safety and well-being. *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* (Feb. 8, 2007), http://www.uscis.gov/laws/policy-memoranda (Aytes memo). The Aytes memo sets forth the adjudicatory guideposts followed when USCIS conducts no-risk assessments.

II. ANALYSIS

We note that the offense that triggered the Adam Walsh Act's presumptive bar is his Alford plea to sexual offense in the fourth degree under section 3-308 of Maryland's Criminal Law and that the victim of this offense, his stepdaughter, was between the ages of 9 and 13, when the allege offenses occurred.[1] As a consequence of the Petitioner's Alford plea, he received a (suspended) sentence of one year in jail, five years of supervised probation, and was prohibited from having any contact with his stepdaughter, among other penalties. The Petitioner does not contest that his conviction is for a specified offense against a minor under the AWA.

We begin our analysis by noting the high bar the Petitioner faces. To prevail, he must: (1) demonstrate that he poses no risk to the safety or well-being of the Beneficiaries;[2] and (2) he must do so beyond any reasonable doubt.[3] In assessing no-risk determinations, we look to the Aytes memo because it sets forth several guideposts for us to consider. *See* Aytes memo, *supra* at 6. The first guidepost instructs us to consider the nature and severity of the Petitioner's specified offense against a minor, including all underlying facts and circumstances. Thus, we will start there.

The Petitioner provided his criminal plea hearing transcript dated [redacted] 2010, containing an agreed upon recitation of the underlying facts leading to his Alford plea. The document indicates that the first time the Petitioner abused his stepdaughter, she was 9 years old, and that the offenses all occurred in the home they shared, and continued until the victim was 13 years old. The Petitioner's offenses

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[1] Under Maryland law, an Alford plea is a guilty plea in which a defendant concedes that there is sufficient evidence for a jury to find guilt beyond a reasonable doubt but does not admit to committing the crime. *See Browne v. State*, 486 Md. 169, 178 (2023); *see also State v. Faulkner*, 314 Md. 630, 633-35 (1989). Thus, in entering an Alford plea, the defendant waives a trial and accepts punishment, but he does not admit guilt, and the prosecutor's proffer of what the State would have proved at trial does not amount to an admission or acceptance of the facts by the defendant. Instead, it serves the role of providing the court with a basis by which to evaluate the voluntariness of the defendant's plea. *See North Carolina v. Alford*, 400 U.S. 25, 38 (1970).

[2] *See generally*, USCIS Policy Memo 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 (Aytes memo) at 5, February 8, 2007, http://www.uscis.gov/legal-resources/policy-memoranda. The Aytes memo explains that the critical purpose of section 402 of the Adam Walsh Act (AWA) is to ensure that a beneficiary is not placed at risk of harm from the person seeking to facilitate their immigration to the United States. It further explains that USCIS interprets the AWA's "poses no risk to the beneficiary" provision to mean that the petitioner must pose no risk to the safety or well-being of the beneficiary. *Id.*

[3] The Aytes memo explains that the "no-risk" standard of evidence of "beyond *any* reasonable doubt" used in AWA adjudications is not intended to set forth a distinguishable standard of evidence from the traditional "beyond *a* reasonable doubt." *See id.* at 5; *see also Matter of Aceijas-Quiroz*, 26 I&N Dec. 294 (BIA 2014).

against his stepdaughter came to light following a report to her school's guidance counselor. The offenses involved several instances of unwanted sexual touching over her clothing in the areas of her breasts and vagina. In addition, the Petitioner was also accused of between two and ten instances of rape, and an incident during which the victim was forced to perform oral sex on the Petitioner. The transcript also makes clear that because of the victim's age, the prosecution was aware that her testimony regarding these offenses might change in a trial and also admitted that there would be no scientific, or physical examination evidence admitted corroborating her testimony at trial.[4]

In addition to the offenses against his stepdaughter, the plea hearing transcript also references the Petitioner's prior assault of a different victim. The prosecutor notes that "[i]n looking at that police report, it was something that was described as a kiss or an attempted kiss and a touching of her clothing." We note that at the time of that conviction, in 1997, the Petitioner was in his thirties, and the victim was a teenage girl. No other facts are provided in the transcript to understand the extent of the Petitioner's actions however, it is apparent that he was convicted of assaulting a teenager when he was a man in his thirties, and that there was unwanted touching of a sexual nature during the commission of this crime. The Form I-129F's instructions require the Petitioner to submit "certified copies of all court and police records showing the charges and disposition for every arrest or conviction" even if the "records were sealed, expunged, or otherwise cleared, and regardless of whether anyone, including a judge, law enforcement officer, or attorney, informed you that you no longer have a criminal record." The Petitioner, however, asserts that because his records were expunged, he cannot meet his burden and provided a court document to show that these records are unavailable.

On appeal, the Petitioner asserts the nature of his 2010 conviction was "de minimis" based on the sentencing judge's decision to not incarcerate him or require him to register as a sex offender. Furthermore, he asserts that because his probation was changed to unsupervised 18 months after his sentence was imposed, and later his guilty plea was modified to a probation before judgment, which under Maryland law is not a conviction, these factors indicate that the nature and severity of his offense was low. However, we note that for purposes of our no risk assessment, probation before judgment is a conviction.[5] Moreover, prior to accepting his Alford plea, the court explained that a sex offense in the fourth degree includes "unconsented contact . . . between two individuals." The court also noted that if there is contact with the "breasts, the buttocks, the vaginal area or any other private part and it is deemed to be for sexual gratification that could be a fourth degree sex offense." The sentencing court also explained that while the Alford plea "allows [the Petitioner] to maintain [his] innocence, [he is] admitting or acknowledging that the State's evidence if believed beyond a reasonable doubt by a judge or a jury would be sufficient to convict [him]." The judge further noted that the reason for this plea is that "it is not worth the risk of going to trial where [the Petitioner] would face charges on every

[4] For purposes of brevity, we have not recited the totality of the plea hearing transcript, however, we have carefully considered all the facts and circumstances presented in this document to understand the Petitioner's decision to enter an Alford plea on the offenses against him.

[5] 8 U.S.C. §1101(a)(48)(A) defines a conviction for immigration purposes as a formal judgment of guilt of the individual entered by a court or, if adjudication of guilt has been withheld, where a judge or jury has found the individual guilty or the individual has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the individual's liberty to be imposed. Moreover, in Maryland, probation before judgment requires a finding of guilt or a plea of guilty or *nolo contendere* by the defendant. *See* Md. Code Ann., Crim. Proc. § 6-220(b)(1).

single count and it is in [the Petitioner's] best interest to recognize that [he] could be convicted on this offense. . . ." Finally, the sentencing judge explained that the maximum penalty for sexual offense in the fourth degree is one year in jail. As such, the sentencing judge imposed the maximum penalty under the statute, and we conclude that the nature and severity of the Adam Walsh Act offense is not "de minimis."

On appeal, the Petitioner emphasizes that the sentencing court did not require him to register as a sex offender, however, the court transcript makes clear that the Petitioner was informed the Maryland legislature was likely to require him to register, and indeed, the record shows the Petitioner was later required to register as a sex offender from approximately [redacted] 2010, until approximately [redacted] 2011. As such, while the sentencing judge may not have considered it necessary to order him to register, the Maryland legislature appears to have done so. Moreover, while we also acknowledge that the criminal court granted the Petitioner's motion for a modification of his probation, this does not negate the seriousness of the Alford plea he entered for a sex offense in the fourth degree against a minor. *See Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. 2019) (standing for the proposition that a state court order that modifies, clarifies, or otherwise alters a sentence are only considered for immigration purposes if the order is based on procedural or substantive defects in the criminal proceeding). Furthermore, because the record indicates that his 1997 assault conviction concerned an unwanted touching of a sexual nature against a teenager, and he has not provided sufficient documentation to rebut this information, the totality of the evidence indicates the Petitioner's two convictions are sufficiently serious such that he cannot establish that he poses no risk to the Beneficiaries.

The Aytes memo instructs us to consider the nature, severity, and mitigating circumstances of any arrests, convictions, or history of alcohol or sexual abuse, domestic violence, or other violent or criminal behavior that could pose a risk to the Beneficiaries' safety and well-being. *See* Aytes memo at 6. The Petitioner provided two psychological evaluations to bolster his assertion that he poses no risk of harm to the safety and well-being of the Beneficiary and her minor derivative daughter. The Petitioner's 2013 psychological evaluation was based on one session with his evaluator. He was asked about his prior sexual behavior and "denied having ever had any sexual encounters with minors after he turned 18 years old." In addition, he denied "any sexual interest in or arousal by minors." However, we note a discrepancy in how the Petitioner describes his 1997 assault conviction. According to this evaluation, the Petitioner "reported that he had one prior charge, for second degree assault, when he slapped his cousin." This contradicts the prosecutor's account of the offense as noted above and casts doubt on the Petitioner's candor during his psychological evaluation. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (standing for the proposition that discrepancies in a record must be resolved with independent, objective evidence pointing to where the truth lies).

In his 2020 psychological evaluation report, which was based on two sessions (dated August 13, 2019, and November 18, 2019), we note that in the "Legal History" section, the Petitioner's 1997 assault conviction is not mentioned. *Id.* This omission lowers the probative value of the evaluation's conclusion that "[the Petitioner's] overall risk assessment results indicates that [he] is at low risk for present or future violence and low risk of recidivism . . . ." because it appears he omitted relevant information. *See Matter of Chawathe*, 25 I&N Dec. at 375-76 (standing for the proposition that to determine whether a petitioner has met their burden under the preponderance standard, we consider the quality, relevance, probative value, and credibility of the evidence). In addition, we note that the

evaluator found the Petitioner's emotional functioning to be impaired, stating that people like him "are at risk for social phobias." Notwithstanding this determination, the Petitioner presents no evidence of on-going therapy to address this concern, his past problems with the law, or how he intends to maintain positive familial relationships with the Beneficiaries. *Id.*

Most importantly, neither evaluation concludes the Petitioner poses no risk of harm to the safety and well-being of the Beneficiaries. The first evaluation concludes that the Petitioner "currently presents as low a risk of sexual offending as it is possible to indicate." The second evaluation concludes that his overall risk index score was in the fourth percentile, which is in the "low range, suggesting few risk variables," and indicates that his "overall risk level is lower than 4% of the Male Offender population between the ages of 40 and 75 who were diagnosed with a variety of disorders . . . ." However, because it is the Petitioner's burden is to show he poses *no risk* of harm to the Beneficiaries, beyond any reasonable doubt, these evaluations do not establish his burden. *See generally* the Aytes Memo.

The Aytes memo instructs us to consider the Petitioner's arrest history in evaluating his risk to the Beneficiaries. *See* Aytes memo at 6. We acknowledge that the Petitioner has two convictions (in 1997 and 2010), and no other arrest history, however because both of these criminal matters involved sexually inappropriate behavior with young girls, the lack of any additional arrests or convictions, while favorable, is insufficient to meet his burden of proving, beyond any reasonable doubt, he poses no harm to the safety and well-being of the Beneficiaries (one of whom is a teenager). As stated above, the Petitioner provided a court document to establish that records related to his 1997 assault conviction were unavailable. However, it is the Petitioner's burden to establish the facts and circumstances of this conviction for purposes of our analysis of whether he poses a risk to the Beneficiaries. *See Matter of Chawathe*, 25 I&N Dec. at 375-76. And, because there is discrepant information in the record related to this conviction, his prior arrest history is a negative factor in our no risk assessment. *Id.*

The Aytes memo instructs us to consider the degree of rehabilitation or behavior modification that could alleviate the risk posed by the Petitioner, as demonstrated by successful completion of appropriate counseling or rehabilitation programs, and the passage of time between relevant incidents and the instant petition's filing. *Id.* We acknowledge the Petitioner's successful completion of probation and the modification of his sentence for his 2010 conviction. We further acknowledge his work history, his positive relationships with coworkers, neighbors, the Beneficiary's family members, and the Beneficiary and her minor daughter. We consider the information provided by these individuals in their affidavits and in particular, the Petitioner's fiancée and her daughter's viewpoint that he does not pose any risk of harm to them. However, as the Director explained, some of these individuals do not appear to understand the exact nature of the Petitioner's prior criminal matters. *Id.* Furthermore, because the Petitioner does not acknowledge or accept any culpability for the crime of sex offense in the fourth degree and because he has not provided the documentation necessary for us to evaluate his prior assault conviction, the character letters do not establish he poses no risk to the Beneficiaries' safety and well-being, beyond any reasonable doubt. *Id.*

The Aytes memo explains "the fact that a petitioner's past criminal acts may have been perpetrated only against children . . . may not . . . in and of themselves, be sufficient to convince USCIS that the petitioner poses no risk to the adult beneficiary." Here, one of the Beneficiaries is a child, therefore,

our no risk assessment must consider the vulnerabilities that both Beneficiaries may face in the Petitioner's home, which is an additional factor that weighs against the Petitioner. The Aytes memo further instructs us to consider whether the Petitioner and Beneficiaries will be residing either in the same household or within close proximity to one another. Here, because the parties will reside together and the Petitioner has been accused of two criminal acts against young women, we find this factor alone weighs heavily against the Petitioner's burden to demonstrate he poses no risk of harm to the Beneficiaries' safety and well-being, beyond any reasonable doubt.

We acknowledge the evidence of the Petitioner's professional achievements, his honorable discharge from military service, his firearms permit requiring good standing for issuance, and his social and professional memberships. These achievements, while notable, may vouch for the Petitioner's ability to maintain a positive professional profile, however the evidence does not establish he poses no risk of harm to the Beneficiaries beyond any reasonable doubt. Moreover, we considered the Petitioner's assertion that because he has held professional positions in law enforcement, has ties to the military, and has not reoffended, he has therefore established he is rehabilitated. However, these facts alone do not establish that in a family setting, he will present no risk of harm to the physical and emotional well-being of the Beneficiaries, beyond any reasonable doubt.

On appeal, the Petitioner asserts that the judge overseeing his Alford plea and sentencing had doubts about the veracity of the allegations against him. However, we do not go into the mind of a judge based on a hearing transcript. *See Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996) citing to *Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974) (standing for the proposition that "we cannot go behind the judicial record to determine the guilt or innocence of the [individual].") For purposes of our no risk assessment, we acknowledge that the sentencing court accepted the Petitioner's voluntary Alford plea upon discussing the risks of going to trial, and in consideration of the State's evidence. And, because the Petitioner appears to have been represented by competent legal counsel in his criminal proceeding, and under Maryland law, an Alford plea requires a defendant to voluntarily concede that there is sufficient evidence for a jury to find guilt beyond a reasonable doubt, his assertion is not persuasive. *See Browne v. State*, 486 Md. 169, 178 (2023); *see also State v. Faulkner*, 314 Md. 630, 633-35 (1989).

III. CONCLUSION

Upon de novo review, we have considered all evidence contained in the record and reviewed it in line with the adjudicatory guidance set forth in the Aytes memo. Due to the nature and severity of the Petitioner's offense, and the insufficient evidence to establish rehabilitation, he has not met the high burden of establishing, beyond any reasonable doubt, that he poses no risk to the Beneficiaries. The petition therefore must remain denied.

ORDER: The appeal is dismissed.