



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 20899697

Date: APR. 25, 2023

Certification of National Benefits Center Decision

Form I-130, Petition for Alien Relative

The Petitioner, a citizen of the United States, seeks to classify the Beneficiary, his spouse, as an immediate relative. *See* Immigration and Nationality Act (the Act) § 201(b), 8 U.S.C. § 1151(b). The Director of the National Benefits Center proposed denying the petition under section 204(a)(1)(A)(viii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(viii), and certified the decision for our review. The Director concluded that the record does not establish, beyond any reasonable doubt, that the Petitioner poses no risk of harm to the Beneficiary.

On certification, the Petitioner contests the Director's proposed decision and contends that the petition should be approved. We will affirm the Director's proposed decision. The petition will be denied.

## **I. SCOPE OF REVIEW**

The question before us on certification is narrow. We will not be addressing the merits of the underlying Form I-130, Petition for Alien Relative (I-130), because we have no jurisdiction over it,<sup>1</sup> and the Petitioner's concession that 204(a)(1)(A)(viii) of the Act is applicable narrows our scope even further. Since we do not need to examine the threshold question of whether that provision applies, the sole issue before us is therefore whether the Director correctly determined that the Petitioner did not establish, beyond any reasonable doubt, that he poses no risk of harm to the Beneficiary. As we will discuss below, we have determined that the Director's assessment was correct.

---

<sup>1</sup> Our authority was delegated by the Secretary of Homeland Security pursuant to the authority with which the Secretary was vested. DHS Delegation No. 0150.1 (effective Mar. 1, 2003) (delegation of appellate jurisdiction to USCIS); 6 U.S.C. § 112(b)(1); *see also* 8 C.F.R. § 2.1 (2003). We exercise appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on Feb. 28, 2003), with two changes: (1) petitions for approval of schools to accept foreign students are now the responsibility of U.S. Immigration and Customs Enforcement; and (2) denials of T and U nonimmigrant petitions and the related adjustment of status applications may be appealed to the AAO. *See* DHS Delegation No. 0150.1 (effective Mar. 1, 2003); 8 C.F.R. § 103.3(a)(iv). Relative petitions, such as the Petitioner's I-130, were not among the form types listed.

## II. LAW

The immigrant classification under which the Petitioner seeks approval for his spouse is located at section 201(b)(2)(A)(i) of the Act. However, pursuant to section 204(a)(1)(A)(i) of the Act, certain petitioners—including the one before us today—may not file:

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.

“Clause viii” refers to section 204(a)(1)(A)(viii) of the Act, which sets forth the requirement to conduct a no-risk assessment in certain cases as follows:

- (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 described in clause (i) is filed.
- (II) For purposes of subclause (I), the term “specified offense against a minor” is defined as in section 111 of the Adam Walsh Child Protection and Safety Act [(Adam Walsh Act)] of 2006.<sup>2</sup>

Since the Petitioner is subject to section 204(a)(1)(A)(viii) of the Act, he carries a presumption of risk to the Beneficiary and his I-130 petition cannot be approved unless he overcomes it. To overcome that presumption, he must prove, beyond any reasonable doubt, that he poses no risk to the safety and well-being of the Beneficiary. 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 conducting no-risk assessments.

Though the Petitioner’s record indicates several criminal convictions, his violation of Mass. Gen. Laws ch. 265, § 13B, constitutes a “specified offense against a minor” for Adam Walsh Act purposes. At the time of the Petitioner’s conviction, that provision stated, in relevant part, the following:

---

<sup>2</sup> 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 Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 587 (2006).

*Indecent assault and battery on child under fourteen; penalties; subsequent offenses; eligibility for parole, etc.*

Whoever commits an indecent assault and battery on a child under the age of fourteen shall be punished by imprisonment in the state prison for not more than ten years, or by imprisonment in a jail or house of correction for not more than two and one-half years.

Mass. Gen. Laws ch. 265, § 13B (West 1984).

### III. BACKGROUND

In [ ] 1984, the Petitioner pleaded guilty to having violated Mass. Gen. Laws ch. 265 § 13B. He was sentenced to six months' confinement and ordered to register as a sex offender. While that specific behavior is the Petitioner's "specified offense against a minor" for Adam Walsh purposes, he has also been convicted of several other offenses:

- In 1980, he was convicted of consuming alcohol in public, in violation of [ ] Mass. Bylaws Art. 5, § 12 (1980). He paid a fine.
- In 1982, he was convicted of being a disorderly person in violation of Mass. Gen. Laws ch. 272, § 53 (1982). He paid a fine.
- In 1986, he was convicted of operating a motor vehicle without a license in violation of Mass. Gen. Laws ch. 90, § 10 (1986) and operating under the influence of liquor in violation of Mass. Gen. Laws ch. 90, § 24 (1986). He was sentenced to 12 months' probation and paid a fine.
- In 1997, he was convicted of breaking and entering with the intent to commit a misdemeanor in violation of Mass. Gen. Laws ch. 266, § 16A (1997). He was sentenced to six months' confinement and ordered to stay away from his victim and his victim's family.
- In 1999, he was convicted of Class B drug possession in violation of Mass. Gen. Laws ch. 94C, § 34 (1999). The record regarding the disposition of this matter is not entirely clear: though found guilty, the Petitioner appears to have been granted probation.
- In 2004, he was convicted of larceny over \$250 in violation of Mass. Gen. Laws ch. 266, § 30(1) (2004). The Petitioner was granted probation and ordered to stay away from his victim.
- In 2006, he was convicted of possession to distribute a class A drug in violation of Mass. Gen. Laws ch. 94C, § 32 (2006), and larceny of a motor vehicle in violation of Mass. Gen. Laws ch. 266, § 28(a) (2006). He was sentenced to substance abuse counseling.
- In [ ] 2007, he was convicted of larceny from a person, in violation of Mass. Gen. Laws ch. 266, § 25(b) (2007). He was sentenced to six months' confinement.
- In [ ] 2007, he was convicted of larceny over \$250 in violation of Mass. Gen. Laws ch. 266, § 30(1) (2007) and resisting arrest in violation of Mass. Gen. Laws ch. 266, § 32B (2007). He was sentenced to 10 months' confinement.

This is the second I-130 the Petitioner has filed on behalf of the Beneficiary. USCIS denied the first I-130 under section 204(a)(1)(A)(viii) of the Act and affirmed that decision in response to a subsequent motion. The Petitioner then filed the I-130 that is before us today.

In a notice of intent to deny (NOID) the petition under section 204(a)(1)(A)(viii) of the Act, the Director notified the Petitioner that his 1984 conviction rendered him ineligible to file an I-130 petition and requested evidence to establish, beyond any reasonable doubt, that he poses no risk of harm to the Beneficiary.

The Petitioner's NOID response included, in part, an affidavit from the Petitioner, an affidavit from the Beneficiary, certified copies of court documents, a copy of a "Massachusetts Criminal Offender Record Information" document listing the Petitioner's offenses and their dispositions, and evidence showing maintenance of the Petitioner's sex offender registration. Though the Petitioner did not dispute having been convicted of a crime carrying Adam Walsh implications, he argued that his conduct was not intentional; that it occurred once, over thirty years ago; that he is a reformed individual; and that he poses no danger to the Beneficiary.

The Director denied the petition, concluding that the Petitioner did not establish he posed no risk of harm to the Beneficiary. In arriving at that conclusion, the Director assigned heavy weight to the record's lack of: (1) precision regarding the facts and circumstances surrounding the Petitioner's relevant offense and 1984 guilty plea; and (2) corroborative evidence backing his assertions regarding the offense. The Director also noted the record's lack of evidence regarding the Petitioner's rehabilitation.

On certification, the Petitioner continues to assert that he poses no risk of harm to the Beneficiary. The Petitioner also provides additional evidence including an affidavit from a psychologist, a notice that the Petitioner has been reclassified to a lower-level sex offender, and several affidavits from friends and family. The Petitioner argues these documents corroborate his assertions that he did not have any sexual intentions toward the minor victim of his 1984 offense, and that he has reformed.

#### IV. ANALYSIS

We begin our analysis by noting once more the high bar the Petitioner faces today. To prevail, he must: (1) demonstrate that he poses no risk to the Beneficiary; and (2) he must do so beyond any reasonable doubt. We will also note once again: (1) that the offense that triggers the Adam Walsh presumption was his admitted violation of Mass. Gen. Laws ch. 265, § 13B (indecent assault and battery on a child under the age of 14), and (2) that he was sentenced to six months' confinement and ordered to register as a sex offender.

Via the record's combination of his testimony, his ex-wife's statement, and his other supporting documents and appellate brief, the Petitioner explains that on the night of the incident in question, his son and the victim (referred to variously as his ex-wife's foster daughter and foster sister<sup>3</sup>) were fighting. He tried to break up the fight, "scooped" the victim off the floor, and placed her into her bed. He claims that as he did so, he touched her inadvertently.

The Petitioner, therefore, is claiming he did not *intend* to touch the victim inappropriately. His ex-wife (with whom he lived at the time) backs that explanation: she states that she was in the home on

---

<sup>3</sup> The record is not clear regarding the victim's familial relationship to the Petitioner's ex-wife. His ex-wife refers to the victim as her foster sister, but Counsel repeatedly refers to the victim as his ex-wife's daughter.

the night in question, and that she is certain nothing inappropriate happened. His ex-wife also states that the Petitioner is “very good” with their grandchildren, and that she has no concerns with him being around them.

The Aytes memo sets forth several guideposts for us to consider as we conduct our no-risk determination. Aytes memo, *supra* at 6. Since the memo first instructs us to consider the nature of the Petitioner’s specified offense against a minor, including all underlying facts and circumstances, we will start there.

But that very starting point is where the Petitioner hits an insurmountable barrier. Though we acknowledge the testimony from the Petitioner and his ex-wife we just discussed, the record lacks objective evidence regarding the Petitioner’s offense, arrest, charges, punishment, or other aspects of the judicial proceeding. Without that type of documentary evidence, we have nothing against which to weigh the referenced testimonial evidence regarding the incident. It is therefore difficult to even *conduct* the requisite analysis of the “nature and severity of the petitioner’s specified offense,” let alone conclude such an analysis with a finding in favor of the Petitioner.

In other words, that testimonial evidence is not enough to carry the very high burden the Petitioner shoulders. As noted, the Aytes memo’s first guidepost specifically instructs us to consider the nature of the Petitioner’s specified offense against a minor, including all underlying facts and circumstances. *Id.* Absent records surrounding the arrest, charge, and court proceedings, we cannot properly assess the “nature and severity” of the crime, nor can we consider “all facts and circumstances underlying” it. If we cannot do that, we certainly cannot then go on to consider how they intersect with the Petitioner’s version of events. While the Petitioner’s difficulty locating the relevant documents is acknowledged,<sup>4</sup> he makes no argument as to how, in the absence of those documents, we are to weigh the factors outlined in the first guidepost outlined at page 6 of the Aytes memo.<sup>5</sup>

And that is only the first evidentiary problem the Petitioner faces in his attempt to demonstrate that he did not *intend* to touch the victim inappropriately. Even if the record did contain all relevant information relating to the Petitioner’s arrest, charge, and plea, he would still be relying upon our ability to go behind his 1984 guilty plea. We cannot do that. That proceeding’s disposition is a matter between the Petitioner and the State of Massachusetts, and we are not the venue to update, correct, or otherwise amend his Massachusetts criminal record.

The Petitioner’s statute of conviction included, as elements, an assault and battery that was both indecent and committed upon a child under the age of fourteen. Mass. Gen. Laws ch. 265, § 13B; *see also* 6.520 Mass. Crim. Jury Instr., *Indecent Assault and Battery on a Child under Fourteen* 1-2 (June 2018), <https://www.mass.gov/doc/6520-indecident-assault-and-battery-on-a-child-under-14-gl-c-265-s-13b/download> (clarifying that the following three elements must be met to establish a finding a guilt

---

<sup>4</sup> We acknowledge the email stating that only the docket information is available.

<sup>5</sup> A petitioner’s burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *also see Black’s Law Dictionary* (11th ed. 2019) (reflecting that burden of proof includes both the burden of production and the burden of persuasion). First, a petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form of documents, testimony, or other evidence that adheres the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits.

under Mass. Gen. Laws ch. 265, § 13B: (1) that the alleged victim was under the age of 14 at the time of alleged offense; (2) that the defendant in fact committed an assault and battery (intentional touching of another person without legal justification or excuse) on that victim; and (3) that the assault and battery was “indecent” as that word is commonly understood, measured by common understanding and practices (indecent act is one that is fundamentally offensive to contemporary standards of decency)).

Through his guilty plea, the Petitioner acknowledged his commission of each these elements. The version of events he now provides via his statement and the other evidence of record conflicts directly with that plea. Without additional objective evidence regarding the specifics of his arrest, charge, and plea, it is simply impossible for us to conduct a meaningful analysis under the guidance set forth in the Aytes memo’s first guidepost.

Our consideration of much of the Aytes memo’s remaining adjudicatory guidance is similarly constrained. For example, another guidepost 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 Beneficiary. *Id.* But just as before, without the relevant documentation surrounding his arrest, charge, and punishment, it is unclear how we could make those assessments, and the Petitioner offers no suggestions.<sup>6</sup> Another guidepost instructs us to consider his entire criminal history. *Id.* That history was set forth above, and it is both lengthy and further weighs against a determination that he poses no risk to the Beneficiary. And the Petitioner’s ongoing requirement to register as a sex offender, which suggests the State of Massachusetts does not share the view that he poses no danger, complicates things yet further.

Another adjudicatory guidepost from 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.* Like above, we must emphasize at the outset of our analysis under this guidepost that without relevant documentation regarding his criminal activity, it is impossible for us to weigh from what he has rehabilitated himself, and which behaviors he has modified. The Petitioner does, however, submit an affidavit prepared by [REDACTED] a licensed psychologist with whom he video-conferenced for 75 minutes in May 2021. According to [REDACTED], it is “extremely unlikely” that similar charges of indecent assault and battery against the Petitioner will arise in the future. However, as stated, the Petitioner’s burden is to demonstrate, beyond any reasonable doubt, that he poses *no* risk. Moreover, [REDACTED] affidavit does not demonstrate rehabilitation on the Petitioner’s part. It only incorporates the Petitioner’s version of the events leading to his arrest and conviction, does not address treatment or rehabilitation, and does not indicate whether she administered any tests or assessments to measure the Petitioner’s rehabilitation. In sum, the affidavit does not establish the Petitioner has rehabilitated or is no risk to the Beneficiary.

---

<sup>6</sup> The Petitioner’s criminal history after the specified offense is also relevant for consideration under this guidepost. However, since the Petitioner cannot prevail on this guidepost when it comes to the specified offense, we see no purpose in weighing the specifics of that subsequent criminal history.

We acknowledge the record's many reference letters that attest to the Petitioner's good character. We acknowledge the submitted letters vouching for the Petitioner's character. But none of these letters, save for the ones from the Beneficiary and the Petitioner's ex-wife, acknowledge the Petitioner's indecent assault and battery conviction, the nature of his crime, or his time served.<sup>7</sup> And neither the Beneficiary nor his ex-wife acknowledges his continuing requirement to register as a sex offender. The record accordingly remains unclear as to whether each of these people—including the Beneficiary—understands the exact nature of the Petitioner's conviction.

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 lack of objective evidence regarding the specifics of the Petitioner's offense, as well as his extensive criminal record, the lack of meaningful evidence regarding any treatment and rehabilitation, and his ongoing status as a registered sex offender together, the Petitioner has not met the high burden of establishing, beyond a reasonable doubt, that he poses no risk to the Beneficiary.

## V. CONCLUSION

The record of proceeding does not establish, beyond any reasonable doubt, that the Petitioner poses no risk of harm to the Beneficiary. The petition therefore must remain denied.

**ORDER:** The petition is denied.

---

<sup>7</sup> The record includes a letter from the Petitioner's granddaughter. Though the letter appears to be more than one page long, the record contains only the first page.