

LITIGATING A PETITION BARRED UNDER THE ADAM WALSH ACT

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BRIEF SUMMARY OF THE ADAM WALSH ACT

On July 27, 2006, President George W. Bush signed into law H.R. 4772, the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act or AWA) [*Pub. L. No. 109-248, codified in large part at 42 USC §16911 et seq.*]. The premise of this legislation was to protect children from sexual exploitation and violent crimes, prevent child abuse and child pornography, and promote Internet safety.

However, AWA §402 also amended §204 of the Immigration and Nationality Act (INA) and effectively prohibited U.S. citizens and lawful permanent resident aliens who have been convicted of any "specified offense against a minor" from filing any family-based immigrant petition (including the Form I-130 and the Petition to Classify Orphan, Form I-600A or I-600) on behalf of any beneficiary, unless the Secretary of Homeland Security determines, in his or her sole and unreviewable discretion, that the petitioner poses "no risk" to the beneficiary. In interpreting the risk element, the U.S. Citizenship and Immigration Service (USCIS) currently requires an AWA petitioner to submit evidence that demonstrates, beyond a reasonable doubt (BARD), that he or she poses no risk to the beneficiary.

Additionally, AWA §402 also amended §101(a)(15) of the Immigration and Nationality Act (INA) [*Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 et seq.)*] to remove spouses or fiancé/es of U.S. citizens convicted of these offenses from eligibility to be petitioners for "K" nonimmigrant status. The Adam Walsh Act became effective on the date of its enactment, July 27, 2006, and was applicable to all petitions pending on or after that date.

As the short summary above demonstrates, the AWA raises multiple legal issues in the immigration context, many of which deal with due process and other constitutional matters. Therefore, practitioners should pay very close attention to any case in which a petitioner might face problems due to the AWA's restrictions, because such cases will undoubtedly prove quite challenging

WHAT IS A CONVICTION?

When a practitioner knows or suspects that a petitioner may be subject to prohibitions under the AWA, the first step is to determine (1) whether the petitioner was, in fact, convicted; and (2) if so, whether such conviction was for an AWA predicate offense.

Definition of “Conviction”

The AWA does not contain a definition of the term “conviction.” While the INA defines “conviction” under INA §101(a)(48)(A), it does so only “with respect to an alien.” This definitional issue highlights the first due process concern that the AWA presents in the immigration context. It should be asserted that for a U.S. citizen petitioner, a diversionary disposition of criminal charges resulting in something other than a judgment of conviction should prevent such a case from triggering an AWA bar.

As an example, one can look at the deferred adjudication provision under the Texas Code of Criminal Procedure (TCCP). TCCP Article 42.12§5(c) (1993) states that, “a dismissal and discharge under this section [deferred adjudication] *may not be deemed a conviction* for the purposes of disqualifications or disabilities imposed by law for conviction of an offense” (emphasis added).

It is true that the Board of Immigration Appeals (BIA) and the U.S. Court of Appeals for the Fifth Circuit (encompassing Texas) have repeatedly held that a deferred adjudication under Texas law is a conviction for immigration purposes. However, this interpretation has only been applied to an alien and never to a U.S. citizen petitioner. [See *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998); *Salazar-Regino v. Gonzales*, 415 F.3d 436, 448 (5th Cir. 2005); *Moosa v. INS*, 171 F.3d 994, 1006-10 (5th Cir. 1999)].

The Congressional Conference Committee Report that accompanied the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 [Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724] is especially illuminating in regards to the definition of “conviction” used in the INA:

This section *deliberately broadens* the scope of the definition of “conviction” beyond that adopted by the Board of Immigration Appeals in [*Matter of Ozkok*, 19 I&N Dec. 546 [1988 WL 235459] (BIA 1988)]. As the Board noted in *Ozkok*, there exist in the various States a myriad of provisions for ameliorating the effects of a conviction. As a result, *aliens* who have clearly been guilty of criminal behavior and whom Congress intended to be considered “convicted” have escaped the immigration consequences normally attendant upon a conviction ... This new provision, by removing the third prong of *Ozkok*, clarifies Congressional intent that even in cases where adjudication is “deferred,” the original finding or confession of guilt is sufficient to establish a “conviction” for purposes of the immigration laws. [*H.R. Conf. Rep. No. 828, 104th Cong., 2nd Sess. 1996 (emphasis added)*].

From this language in the congressional comments it is quite clear that the word “alien” was specifically included in INA §101(a)(48)(A) in order to prevent aliens from escaping any immigration consequences by broadening the definition of conviction within the INA. However, this broader definition was never intended to affect U.S. citizens. It is simply untenable to read §101(a)(48)(A)’s definition of “conviction” into the AWA, at least as it applies to U.S. citizens.

Notwithstanding the plain language of the INA, USCIS has been applying the INA definition of “conviction” to all petitioners in the AWA context, including U.S. citizens. While acknowledging the explicit reference to an “alien” in §101(a)(48)(A), USCIS has concluded that it would “be confusing for convicted to mean different things under the immigration laws for different types of cases.” The USCIS cites [*Lorillard v. Pons*, 434 U.S. 575 (1978)] to support this conclusion.

Upon further reading of *Lorillard*, however, one finds that it is inapposite to the situation faced by the U.S. citizen petitioner. *Lorillard* addressed whether or not an individual was afforded a right to a jury trial under the Age Discrimination in Employment Act. [Pub. L. No. 90-202, 81 Stat. 602 (Dec. 15, 1967).] In other words, the questions in *Lorillard* concerned procedure and history of implementation, and not statutory definitions. Moreover, in upholding the right to a jury trial, the court found that this was not a significant change because lower courts had already uniformly interpreted a prior labor act to afford a right to a jury trial.

The *Lorillard* rationale, therefore, is not at all analogous to USCIS’s new use of INA §101(a)(48)(A) against certain U.S. citizen petitioners. USCIS broadly interprets *Lorillard* to mean that when Congress, in a new statute, uses a term that already has a “settled meaning,” then Congress has implicitly adopted that settled meaning. However, unlike *Lorillard*, the definition of conviction does not deal with procedure, but the actual meaning and breadth of the statute. Perhaps more importantly, there is no settled meaning of the term “con-

viction” as applied to U.S. citizens in the immigration context, and therefore there can be no implied adoption from prior use, as there was in *Lorillard*.

Rather than any settled meaning, there is actually no history of consensus on whether the INA definition of “conviction” should be applied to U.S. citizen petitioners. In fact, any consensus on the matter favors petitioners. [See *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) (*Where no federal provision governs the timeliness of filing, the suit is to be governed by the appropriate state statute of limitations*); see also *J. Ray McDermott & Co. v. Vessel Morning Star*, 457 F.2d 815, 817 (5th Cir. 1972) (“*the federal law being silent on the subject, we are compelled to look to the mortgage and to state law governing rights of the parties under the mortgage*”).]

The conclusion here is simple: when federal law is silent, state law controls. Precisely because the AWA does not provide a definition for “conviction” and the INA limits its definition to “aliens,” a strong argument can be made that each individual State’s definition of “conviction” should control in the AWA context. Whether the AWA’s more expansive definition of “conviction” for a foreign national presents an equal protection problem remains to be seen. However, it is a valid argument that immigration practitioners can use against USCIS on appeal to the Board of Immigration Appeals (BIA) and/or federal courts.

Categorical vs. Fact Based Approach

If the AWA petitioner was in fact convicted of a crime, the next step would be to determine whether the crime in question is actually an AWA predicate offense. This inquiry, in turn, brings to light another legal issue facing practitioners—what analytical framework to use when assessing a crime. It would be logical to think that because the AWA references a specific list of offenses, the determination of whether a particular conviction comes within the AWA bar should be done using a categorical approach. Unfortunately, the U.S. Court of Appeals for the Ninth and Eleventh Circuits have disagreed, in cases interpreting the registration requirement incorporated in Title I of the AWA, the Sex Offender Registration and Notification Act (SORNA).

The Ninth Circuit, in analyzing whether a specific conviction triggered the AWA Section XYZ offender registration requirements, rejected a categorical approach and instead inquired into the specific facts of the predicate offense, at least as to whether the victim was a minor. In [*United States v. Byun*, 539 F.3d 982, 992 (9th Cir. 2008)] the underlying conviction at issue was for importation of an alien for an immoral purpose. The AWA became law while Byun was on post-incarceration supervised release, and the federal probation office determined that she was subject to registration as a sex offender under section XYZ. The District Court of Guam upheld the probation office’s determination and the Ninth Circuit affirmed. The statutory criteria for triggering SORNA registration in *Byun* was the same list of “specified offenses against a minor” laid out at 42 USC §16911(7) for the AWA petitioner bar. In what it acknowledged was a case of first impression, the court found that it could sidestep a categorical approach and examine the underlying facts of Byun’s conviction to find that the victim of the offense was a minor for section XYZ purposes. The court reserved the question of whether a non-categorical approach would be permitted with regard to any facts other than the age of the victim.

The Eleventh Circuit in [*United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010)] expanded the *Byun* holding and completely rejected a categorical analysis for the determination of whether a specific conviction is a “specified offense against a minor” for section XYZ registration purposes. While noting that “[w]e generally apply a categorical or a modified categorical approach to statutory construction in the context of immigration law,” the Eleventh Circuit panel found *Byun*’s reasoning “persuasive and instructive” in rejecting categorical analysis and extended it to permit an examination of the facts of a defendant’s underlying conduct in determining what constitutes a “specified offense against a minor.”

While *Byun* and *Dodge* dealt with the offender registry piece of the AWA, they both involved the categorization of convictions as a “specified offense against a minor” as defined in 42 USC §16911(7), which is the same set of definitions referenced by the §402 petitioner bar. Therefore, practitioners should expect USCIS to rely on *Byun* and *Dodge* to try and apply a fact-based inquiry, rather than the categorical approach normal in immigration matters, to determinations under the AWA. Practitioners should be prepared to argue that, since *Byun* and *Dodge* relied on an explicit refusal to extend the categorical approach beyond the immigration con-

text, they should not be applied to reject the use of the categorical approach to the §402 petitioner bar, which is an immigration context.

WHAT IF IT IS A CONVICTION?

If it is in fact established that U.S. petitioner “has been convicted of a specified offense against a minor,” the law provides that an exception to AWA disability for a family petitioner with a qualifying conviction can only be made by the Secretary of Homeland Security if, in his or her “sole and unreviewable discretion,” the secretary determines that the petitioner presents “no risk” to the beneficiary of the subject petition.

While such broad discretionary power is a big concern to the practitioner, what is even more troubling is the requirement that USCIS imposes on the AWA petitioner when it requires them to submit evidence that demonstrates, beyond a reasonable doubt, that he or she poses no risk to the intended beneficiary. This formulation creates the most formidably unworkable and unconstitutional evidentiary standard, warranting judicial challenge.

Challenging DHS’s Discretion

Providing “sole and unreviewable discretion” to the Secretary of the U.S. Department of Homeland Security (DHS) has several legal and constitutional problems. For one, the BIA under the jurisdiction of the attorney general has sole jurisdiction over appealed denials of family based immigrant petitions, as provided in 8 CFR §1003.1(b)(5). However, the AWA exception seems to have effectively excluded the Board from the review process.

Not surprisingly, the BIA already showed its discomfort over their duty to review what Congress assigned to the DHS Secretary’s “unreviewable discretion.” It is evident from multiple remand orders that were issued by the BIA in those appeals where denials of the I-130 were based on AWA. In such remands BIA requested the USCIS to address possibly irreconcilable jurisdictional problems. These became known as “8 questions” remands. Specifically, BIA asked the USCIS to address:

1. Whether the government has the burden of proving that the petitioner’s conviction is for a “specified offense” against a minor under section 111 of the AWA?
2. Whether the categorical and modified categorical approaches should be used in making the foregoing determination?
3. If the petitioner was found to have been convicted of a “specified offense” against a minor, is there a rebuttable presumption that the petitioner will pose a risk to the principal beneficiary or a derivative beneficiary? Further, what is the basis for this presumption and does it apply only to visa petitions where the principal beneficiary or a derivative beneficiary is a minor?
4. If the petitioner is found to have been convicted of a “specified offense” against a minor, whether and under what authority, the government applies a “beyond a reasonable doubt” standard in determining—as a matter of discretion—if the petitioner is a risk to the safety or well-being of the principal beneficiary or a derivative beneficiary.
5. Whether the director must explain the rationale for his/her conclusion that the petitioner poses a risk to the principal beneficiary or a derivative beneficiary?
6. Where the principal beneficiary is not a minor beneficiary and where there are no minor derivative beneficiaries, does the AWA require the petitioner to prove only that he or she poses no risk to the adult principal beneficiary and any adult derivative beneficiaries? Finally, in the event that the Director denies this visa petition again under the AWA and the petitioner files an appeal to this Board, the parties are advised to include a jurisdictional statement.
7. Whether BIA has jurisdiction to review the question of whether the Secretary applied the correct standard in determining whether a petitioner has shown he or she is not a risk to the principal beneficiary or a derivative beneficiary?
8. What is the nature and scope of BIA jurisdiction over other aspects of the appeal?

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It remains to be seen how USCIS will respond to the BIA's questions. However, in the mean time, practitioners should be able to continue to bring up challenges to the BIA on such issues as determinations of whether the AWA even applies in the first place. The BIA would appear to have jurisdiction to consider issues such as: whether petitioner is "convicted" at all; whether the conviction is for a "specified offense;" whether the offense was "against a minor;" and other legal issues, because these questions are not committed to the "sole and unreviewable discretion" of the DHS Secretary.

Challenging the BARD Standard

Practitioners also should keep in mind that even if the Board rejects an appeal on the ground that a discretionary denial is not reviewable, there are still some potential legal arguments to be made before federal courts. As a "final agency action," a denial of an I-130 is reviewable in district court under the Administrative Procedures Act. [Pub. L. No. 79-404, 60 Stat. 237, 238; (codified at 5 USC §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521).] One area ripe for future litigation is whether USCIS went beyond the boundaries of the statute in adopting the "beyond a reasonable doubt" standard for evaluating the potential risk that an AWA petitioner poses to his or her beneficiary.

As mentioned, AWA prohibits those individuals who have been convicted of any "specified offense against a minor" from filing a family-based immigrant petition, unless the petitioner poses "no risk" to the beneficiary. AWA is silent with respect to the standard to be used in assessing the risk element of immigrant petitions subject to AWA.

In nearly all other administrative immigration proceedings, however, an applicant or petitioner must prove that she is eligible for the benefit sought through a preponderance of the evidence. That standard requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence" and to find the evidence "to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." [*Concrete Pipe Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 622 (1993)]. Put more simply, a petitioner operating under a preponderance standard must demonstrate that her assertion is "probably true." [*Matter of E-M-*, 20I&N Dec. 77, 79-80 (Comm'r 1989)]. Properly applied to the AWA, therefore, use of the preponderance standard should mean that an AWA petitioner must submit enough demonstrating the he or she "probably" poses no risk to the beneficiary.

In 2010, USCIS itself reaffirmed the long understood principle that the default standard in adjudicating applications for immigration benefits is a preponderance of the evidence: "except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a *preponderance of evidence* that he or she is eligible for the benefit sought." [*Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), citing *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997) (noting that the petitioner must prove eligibility by a preponderance of evidence in visa petition proceedings).]

The only exceptions to this general principle would be those instances where Congress explicitly imposed a more burdensome standard (as for example, in the use of the "clear and convincing" standard applied to marriages entered into after the initiation of removal proceedings).

Despite the fact that Congress had not designated a more difficult standard in the AWA, USCIS crafted one as a matter of policy. In agency memoranda, it has interpreted the statutory provision, "poses no risk to the beneficiary," to mean that an AWA petitioner must provide evidence that establishes "beyond a reasonable doubt" that he or she poses no risk to the safety and well-being of the intended beneficiary. [*Guidance for Adjudication of Family-Based Petitions and I-129F Petition for Alien Fiance(e) under the Adam Walsh Child Protection and Safety Act of 2006*, Michael Aytes (Feb. 8, 2007); *Transmittal of SOP for Adjudication of Family-Based Petitions under the Adam Walsh Child Protection and Safety Act of 2006*, Donald Neufeld (Sep. 24, 2008).]

The BARD standard, of course, is significantly more onerous than the preponderance standard. As the Supreme Court has recognized, it is a standard of proof "designed to exclude as nearly as possible the likelihood of an erroneous judgment." [*Addington v. Texas*, 441 U.S. v. 418, 424 (1979).] The incorporation of the heightened standard is not simply a matter of semantics, but one that could disqualify a large percentage of AWA petitioners—those that might be able to meet the preponderance standard, but are simply unable to

meet the heightened demands of the BARD standard. This is particularly true where licensed medical professionals evaluating the rehabilitation and behavior modification efforts of AWA offenders are unable to attest that their clients have *no* possibility of reoffending. Even the most compliant and reformed offenders are tagged with a “low” risk of recidivism.

USCIS’s incorporation of a heightened standard for the ‘no risk’ determination—beyond a reasonable doubt—is therefore *ultra vires* and should be challenged. While USCIS’s ‘no risk’ determination is discretionary, and the agency is allowed to issue guidelines and factors to be used when employing that discretion, the adoption of the BARD standard creates a bright-line rule preventing otherwise eligible petitioners for filing visa petitions, and should therefore be challenged as a legal issue, rather than a blanket discretionary determination.

In sum, although legal review of AWA claims appears severely limited, several avenues are open for constitutional and legal challenges to the application of the AWA. Doubtless, many parties will find it easier and more efficient to direct resources toward meeting the “no risk” exception. However, where the exception is unlikely to be met, or where there are good constitutional and legal arguments in favor of not applying the AWA, practitioners ought to consider advising clients to challenge the application of the AWA in the first place.

OTHER CHALLENGES TO THE AWA

Outside of challenges to the definition of “conviction” and the “no risk” exception standard, practitioners may also want to consider attacking the AWA validity on other constitutional grounds.

The AWA, especially in cases involving marriage-based family petitions, arguably infringes on the petitioner’s constitutional right to marry and the married couple’s pursuit of happiness. The U.S. Supreme Court has held consistently that the right to marry is a fundamental right. It is a basic right, and is fundamental to humanity’s very existence and survival, and part of the fundamental right of privacy. [See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967)].

The right to marry is guaranteed to those subject to American law by the Fourteenth Amendment to the U.S. Constitution, and that choices about marriage are among the associational rights ranked as of basic importance in our society. [*Id.*]

A heightened level of review, strict scrutiny, applies when legislation burdens a group’s exercise of a fundamental right in violation of substantive due process. The regulation of marriage must satisfy strict scrutiny, whereby the government must show the law is narrowly tailored to achieve a compelling governmental interest. [See *Washington v. Glucksberg*, 521 U.S. 702, at 726 (1997) (declaring “personal decisions relating to marriage” among “certain fundamental rights” subject to substantive-due-process review); see also *Plyler v. Doe*, 457 U.S. 202 (1982)].

Surely, the USCIS can take the position that the AWA does not prevent couples from marriage, but rather it limits the U.S. citizens’s ability to sponsor their spouses for immigration purposes on the basis of the U.S. citizen’s criminal record. However, in a case analogous to spousal petitions adjudicated under the AWA jurisdiction, the Supreme Court invalidated a sterilization law, because it impinged on the fundamental right to marriage and procreation of some criminals, but not others. [*Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535 (1942)].

By the same token, where a U.S. citizen and a foreign national are legally married, and the foreign national is forced to leave this country the marriage is functionally dissolved as the petitioner would be generally unable to immigrate to the beneficiary’s country of citizenship or nationality with an AWA criminal record. The government would be hard pressed to put forward the position that this is Congress’s intended result when it enacted the AWA; namely, that protecting the beneficiary adult, who is presumably of age for voluntary consent, from their petitioning spouse, whom he or she loves and has voluntarily chosen, on account of past unrepeatable sex crimes, requires deporting the beneficiary to a country where the petitioner will be ineligible to immigrate.

It is not a giant leap to conclude that application of the AWA without sufficient safeguards may *de facto* criminalize the right to lawful marriage in violation of the fundamental right to marry protected by the Fourteenth Amendment. [See *Cooper v. State of Utah*, 684 F. Supp. 1060 (D. Utah 1987), related reference, 894 F.2d 1169 (10th Cir. 1990) (declined to follow on other grounds by, *Meister v. Regents of University of California*, 67 Cal. App. 4th 437 (6th Dist. 1998))].

It is not required to obtain prior approval from federal or state government as to the general “suitability” of the parties to a marriage (nor likely intended by the AWA). Distinct from the federal government, a state may restrict marriage for such reasons as the presence of communicable disease of public health significance or to prevent bigamy. [*Salisbury v. List*, 501 F. Supp. 105 (D. Nev. 1980)]. However, a state’s interest in regulating marriage is tightly circumscribed; for example, a state statute prohibiting or voiding marriage between persons with Acquired Immune Deficiency Syndrome (AIDS) has been held to violate the Americans with Disabilities Act and the Rehabilitation Act. [*Pub. L. No. 93-112*, 87 Stat. 394 (Sept. 26, 1973), codified at 29 USC § 701 et seq.; see also *T.E.P. v. Leavitt*, 840 F. Supp. 110 (D. Utah 1993)].

Therefore, it can be clearly argued that the AWA, if not properly applied, might end up regulating who is permitted to marry whom! This is not and cannot be the purpose of the AWA, because such an effect would be unconstitutional. Accordingly, the application of the AWA to viable loving marriages fails to satisfy a compelling interest as necessary for the law’s application and therefore should be challenged in federal courts.

Finally, it is questionable that the AWA is even applicable to beneficiaries who are not children. The AWA was enacted in 2006 to protect children from sexual exploitation and violent crimes. Where there are no children involved in a marriage, the petitioner falls outside the purpose of the AWA. Given that regulations have not been issued to guide AWA’s application to family based petitions, and case law has not yet been promulgated, the USCIS should clarify how the AWA is rationally applicable to cases not involving child beneficiaries and should stay adjudication of petitions until regulations are promulgated to do so. Rather than ruling the AWA unconstitutional, the doctrine of constitutional avoidance should be applied to interpret the AWA in a constitutionally permissible light, [see e.g. *INS v. St. Cyr*, 533 U.S. 289, 299–300], and absent workable regulations, denied petitions are ripe for litigation.

CONCLUSION

The full impact of the AWA in the Immigration context is just now being felt by immigration practitioners and their clients. Unfortunately, precedent decisions addressing multiple constitutional issues that were raised by the passage of the AWA in the immigration context are seemingly scarce or absent altogether.

As a result, it is left to the immigration practitioners themselves to step out of the comfort zone of everyday dealings with the DHS and Executive Office for Immigration Review and into the federal courtrooms in order to address troubling consequences of AWA implementation. In short, ladies and gentlemen, we call you to arms!