US District Court,
Eastern District of Pennsylvania 15-0127-JP

Court of Appeals No. 16-3440

IN THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

_____o_____

AHMED BAKRAN,

Plaintiff-Appellant

v.

SECRETARY UNITED STATED DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellees.

_____o_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

_____o_____

APPELLANT'S OPENING BRIEF

Oral Argument is not requested

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to 28 USC §1331. The Court of Appeals has jurisdiction pursuant to 28 USC § 1291 over the final judgment of the District Court entered on, June 28, 2016, granting Defendant-Appellees' ("Appellees") motion for Summary Judgment. Plaintiff-Appellant ("Appellant") appeals from a final order and judgment of the District Court.

STANDARD OF REVIEW

The appropriate standard of review is *de novo.*

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether barring a US citizen from petitioning his lawfully wed foreign spouse violates his substantive due process rights?

B. Whether applying a statute enacted in 2006 to a 2004 conviction is impermissibly retroactive?

C. Whether appellees presumptive denial of Adam Walsh Act ("AWA") petitions and heightened beyond a reasonable doubt standard of review violates the Administrative Procedures Act ("APA")?

RELATED CASES

Bremer v. Johnson, 15-1163, (8th Cir., August 25th, 2016)

STATEMENT OF THE CASE

In 2012 appellant filed Form I-130 ("I-130"), Petition for Alien Relative and Form I-485 ("I-485"), application for adjustment of status with the goal of obtaining his foreign spouse's Lawful Permanent Residence ("LPR") status in the United States. JA 34 – 35, ¶6 (complaint). On January 21, 2014 he received from US citizenship and immigration services ("CIS") a "Request for Evidence/Notice of Intent to Deny" ("RFE/NOID") regarding his applications. JA 4 (District Court memorandum). The RFE/NOID informed appellant that pursuant to the AWA he was barred from petitioning his spouse unless he could prove he was no risk to her him eighty seven (87) days to submit evidence in furtherance of this. *Id.* Appellant timely responded to the RFE/NOID but on December 9, 2014 both petitions were denied. *Id.; see also* JA 34, ¶7 (complaint).

On January 13, 2015 appellant filed his complaint in the instant action challenging the denial of his petition and on March 17, 2015 appellees filed a motion to dismiss said complaint for want of subject matter jurisdiction. *See* **Appendix D** (Complaint). On June 11, 2015 the district court denied appellees motion to dismiss. See **Appendix E** (District Court memo denying Motion to Dismiss). On October 5, 2015, the parties filed cross motions for summary judgment and on June 28, 2016 the District Court entered judgment in favor of appellees. *See* **Appendix A** (District Court memo on Summary Judgment).

STATEMENT OF FACTS

Prior to 2006, the Immigration and Nationality Act ("INA"), 8 USC §1101 *et seq.*, provided "any citizen of the United States claiming that an alien is entitled . . .to an immediate relative status under section 1151(b)(2)(A)(i) [including a citizen's spouse]. . .may file a petition with the Attorney General for such classification." 8 USC §1154(a)(1)(A)(i). However, on July 27, 2006 the Adam Walsh Child Protection and Safety Act of 2006 ("AWA"), Pub. L. No. 109-248, 120 Stat. 587 (2006), amended the INA to bar any citizen convicted of a "specified offense against a minor" from filing any family-based petition 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 [the] petition. . .is filed." 8 USC §1154(a)(1)(A)(viii)(I).

In the instant matter, in 2004 appellant plead guilty to one count of aggravated indecent assault in violation of 18 Pa. Cons. Stat. Ann. §3125, and one count of unlawful contact with a minor in violation of 18 Pa. Cons. Stat. Ann. §6318. JA 35, ¶¶8 & 9 (complaint). He accepted his plea before the AWA was enacted with no knowledge it would later bar him from petitioning for his foreign spouse. *Id.* Since the conviction, appellant served his time and has had no further run-ins with law enforcement. *Id.*¶10. In 2012 he married his foreign spouse and the couple has lived together since with no incidents or allegations of domestic violence or abuse of any kind. JA 35, ¶¶ 10-12 (complaint). His wife is fully

aware of the facts and circumstances of his conviction and freely chose to marry him. *Id.*¶11.

On February 8, 2007, CIS issued a policy memorandum ("Aytes memo") announcing the legal standard to be applied in all AWA cases. JA 66 – 74 (Aytes Memo). With no notice and comment, by agency decree the Aytes memo stated a petitioner falling under the AWA must prove "beyond a reasonable doubt" ("BARD") that they "pose no risk" to the intended beneficiary. JA 71¶3. The BARD standard of review was not designated by Congress, has historically been used in criminal proceedings and has never before been used in the civil immigration context.

On September 24, 2008, CIS issued a second policy memorandum ("Neufeld memo") regarding the AWA. JA 75-104. The Neufeld memo creates a presumption of denial, stating "approval recommendations should be ***rare***." JA 77 (emphasis added). Moreover, even where the "rare" instance of an adjudicator finding the petition warrants approval, they still cannot approve it. Instead they must "obtain and properly document two levels of supervisory concurrence" from a supervisor of at least the GS-13 and GS-15 levels. *Id.* Again nothing in AWA statute mentions this presumptive denial where approvals should be "rare" and the Neufeld memo was not subject to notice and comment.

SUMMARY OF THE ARGUMENT

Appellant has a fundamental right to marry a spouse of his choosing. In barring him from petitioning for his foreign spouse this right is violated. Moreover, appellees application of a 2006 law to appellant's 2004 conviction is impermissibly retroactive. Finally, appellees' presumptive denial and application of the BARD standard is *ultra vires* and violates the APA. Likewise, the District court erred in applying *Chevron*[1] deference to the Aytes and Neufeld memos, finding them a permissible construction of the statute.

ARGUMENT

I. Plaintiff's substantive due process rights have been violated.

Plaintiff's complaint pleads he has a fundamental right to marry a spouse of his choosing. This right has been violated because the AWA effectively bars him from enjoying any benefit which would naturally flow from marrying his foreign spouse.

Although the Supreme Court has never specifically ruled on the right to marry in the substantive due process context pertaining to immigration, it has repeatedly held that the right to marry is more than just the right to receive a

[1] *Chevron* deference refers to the deference afforded agency interpretations of statutes outlined in *Chevron v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984).

marriage certificate. This right necessarily incorporates the right to intimacy with a spouse of one's choosing, and the right to build a family as husband and wife.

For example, in *Maynard v. Hill,* 125 US 190, 210-211 (1888*)*, the Supreme Court dismissed a technical view of marriage stating, "It is also to be observed that marriage "is something more than a mere contract."

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court recognized that the right "to marry, ***establish a home and bring up children***" is a central part of the liberty protected by the Due Process Clause, *id.*, at 399 (emphasis added).

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court observed the right to marry necessarily incorporates the right to privacy:

> "We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.* at 486.

Here, although appellant is technically married to his spouse, the AWA effectively bars him from legally enjoying any benefit naturally flowing from his marriage because he cannot petition for his spouse's legal status in the US. His family is tasked with the difficult decision to either live out their marriage in

separate countries or his spouse must reside in the United States illegally without status and hope she is not deported.

While many laws have denied admission to the foreign spouse of a US citizen and courts have generally upheld these laws, the instant matter is distinguishable because in those cases Congress was acting pursuant to their plenary power to "exclude or expel all aliens." *See FongYue Ting v. United States*, 149 US 698, 711 (1893) (the "right to exclude or expel all aliens, of any class of aliens, [is] an inherent and inalienable right of every sovereign and independent nation. . ." Here, the AWA does not exclude or expel any alien rather it bars a US citizen from petitioning their lawfully wed foreign spouse.

Interestingly, to our knowledge no Federal law has ever denied a US citizen the right to petition for their spouse until the AWA. Perhaps, the closest analogous law was the Defense of Marriage Act ("DOMA") which denied lawfully married US citizens petitions for their spouse because the spouse was of the same sex. Not coincidentally DOMA was found to be unconstitutional by the US Supreme Court in *United States* v. *Windsor*, 133 S. Ct 2675(2013). In *Windsor*, the Plaintiff brought suit because she was denied a Federal benefit, in spite of a lawfully recognized marriage[2]. In *Windsor* the Supreme Court specifically touches the

[2] In *Windsor* the specific federal benefit denied by DOMA was an estate tax exemption for surviving spouses, however, DOMA also denied same sex US

issue of denying Federal benefits to those lawfully married stating, "Its unusual deviation from the tradition of recognizing and accepting state definitions of marriage operates to deprive. . .couples of the benefits and responsibilities that come with federal recognition of their marriages." 133 S. Ct. at 2681. Appellant's claim is analogous to the claim made in DOMA as it is a Federal law that bars plaintiff from enjoying his rightful Federal benefits, specifically the immigration benefits of a lawful state sanctioned marriage.

In addition, in *Din v. Kerry* the Supreme court decision addressed marriage rights involving immigration in the context of procedural due. *Din* was a plurality[3] decision with three Supreme Court justices (Scalia, Roberts, and Thomas) finding no protected liberty interest was violated. Breyer, Ginsburg, Sotomayor and Kagan dissented finding Din "possesses the kind of liberty interest" to which the Due Process Clause protects. *Id.* at 2142 – 47. Justice Kennedy and Alito concurred

citizens the right to petition for their spouse. Interesting after *Windsor* USCIS no longer denied same sex marriage based petitions.

[3] As explained by the Ninth Circuit in *United States v. Puerta*, 982 F.2d 1297 (9th Cir. 1992), where "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgements on the narrowest grounds." 982 F.2d at 1304 (internal quotation marks and citations omitted). Thus, Justice Scalia's opinion announcing the judgment of the court is not controlling. It had only 3 votes. Instead Kennedy's concurrence controls. Kennedy plainly states "Today's disposition should not be interpreted as deciding whether a citizen has a protected liberty interest in the visa application of her alien spouse."

with the Scalia decision but refused to reach whether *Din* has a protected liberty interest in her spouse's visa application. *Id.*at 2139 – 42.

Thus, *Din* makes clear, at least four of the Supreme Court Justices certainly would agree with appellant's argument his fundamental right to marry is infringed, Justice Breyer states in his Dissent to which Kagan, Sotomayor, and Ginsburg joined, "As this court has long recognized, the institution of marriage, which encompasses the right of spouses to live together and to raise a family, is central to human life, requires and enjoys community support, and plays a central role in most individuals 'orderly pursuit of happiness.'" *Din,* 576 US at 2142.

Interestingly, Justice Kennedy, who withheld his opinion in *Din* but also addressed the fundamental right to marry in that same term of the Supreme Court would seem to agree. His language in *Obergefell* is worth noting. He states marriage's, "dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons." *Obergefell* 135 S. Ct. at 2594. Kennedy goes on to state that the fundamental liberties protected by the due process clause, "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. *Id*. at 2599 (internal citations omitted). He goes on to state, "A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy"… "Instead,

the Court has noted it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society" *Id.* (internal citations omitted).

Thus, barring a US citizen from petitioning his foreign spouse violates his fundamental right to marry.

II. Defendants' application of the AWA is impermissibly retroactive.

The AWA was enacted in 2006 two years after appellant plead guilty to the crime at issue here.

The first step in determining the temporal reach of the AWA is to determine whether Congress has specified its intention that it apply to convictions entered prior to its enactment. Clearly the statute contains no effective date, thus the default rule is that the act is effective on the date of enactment. *Johnson v. United States*, 529 U.S. 694, 702 (2000) ("when a statute has no effective date, absent a clear indication by Congress to the contrary, it takes effect on the date of enactment.") (internal cite and alterations omitted); *St. Cyr v. INS*, 533 U.S. 289, 320, n.45 (2001) ("a statute that is ambiguous with respect to retroactive application is construed under [Supreme Court] precedent to be unambiguously prospective"). Accordingly, the AWA became effective on the date of enactment, July 27, 2006.

The second step of the retroactivity analysis "demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321 (internal citation omitted). Applying § 402 of the AWA to bar a citizen-initiated petition because of a citizen's pre-enactment conviction is unlawful because it would almost always have an impermissible retroactive effect. The Supreme Court has recently reminded the Board of Immigration Appeals ("BIA") regarding proper application of the ant retroactivity principle. See *Vartelas v. Holder*, 132 S. Ct. 1479 (2010). In *Vartelas*, the petitioner, a lawful permanent resident, traveled outside of the United States after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). *Id.* at 1483. Upon presenting himself for readmission, Vartelas was deemed inadmissible based on a conviction that occurred before IIRIRA's enactment. *Id.* The question presented to the Supreme Court was which legal regime governs: "the one in force at the time of conviction, or IIRIRA?" *Id.* In *Vartelas*, "Congress did not expressly prescribe the temporal reach" of the statute in question. *Id.* at 1487. Accordingly, the Supreme Court analyzed whether applying IIRIRA's travel restraint to someone with a conviction predating its passage would have retroactive effect that Congress did not authorize. *Id.* In other words, the Supreme Court interpreted the lack of an express retroactive statement to mean that Congress did not intend for IIRIRA's

travel restraint to operate retrospectively. Retroactive application would violate Congress' intent. Using the date of conviction as the relevant event, the Supreme Court analyzed whether IIRIRA's travel restraint attached a new disability to the pre-enactment conviction. *Id.* at 1487. It explained that *Vartelas* "presents a firm case for application of the anti-retroactivity principle" because "[n]either his sentence, nor the immigration law in effect when he was convicted and sentenced" would have caused the travel restraint. *Id.* *Vartelas* is indistinguishable from the issue presented under § 402 of the AWA. The relevant event here, as in *Vartelas*, is the date of the citizen's conviction. And the disability imposed – here, the prohibition on filing citizen-initiated petitions – is based on the citizen's conviction. Where a conviction occurred prior to the enactment of the AWA, the anti-retroactivity principle means that the statute cannot be interpreted to attach a new disability to the conviction. Applying § 402 of the AWA to pre-enactment convictions would have an impermissible retroactive effect because it increases the penalty attached to the citizen's criminal conviction. Functionally, § 402 of the AWA adds an additional penalty to a citizen's pre-enactment criminal conviction, a penalty that existed neither at the time of the criminal conduct nor at the time the conviction was entered.

III. Appellees have violated the APA.

Appellees have unlawfully created a "beyond a reasonable doubt" ("BARD") standard of review when adjudicating "no risk" decisions under the AWA. In addition, appellees have created a presumption of denial in stating approvals should be "rare." Neither the BARD standard nor presumption of denial appear in the text of the statute or anywhere in the Congressional record. Rather they were created by decree when USCIS issued informal guidance memoranda without notice and comment. As such, defendants' have exceeded their delegated authority and the BARD standard and presumptive denial are *ultra vires* to the statute.

Congress was clearly silent to the standard of proof to be applied with the AWA in assessing risk. *See* 8 USC §§1154(a)(1)(A), (a)(1)(B). Unless Congress explicitly states otherwise the "preponderance of the evidence" standard is the norm[4] in administrative immigration adjudications. *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965).

[4] In a 2010 decision, the USCIS Administrative Appeals Office emphasized that "[e]xcept where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of the evidence that he or she is eligible for the benefits sought." *Matter of Chawathe,* 25 I&N Dec. 369 (AAO 2010) (citing *Matter of Martinez,* 21 I&N Dec. 1035, 1036 (BIA 1997))

Congress knows how to raise the standard of proof in the immigration context[5] and there is a long standing precedent of applying the "preponderance of the evidence" when Congress is silent. Despite this, through informal guidance memoranda not subject to notice and comment appellees created and applied the nearly impossible to meet BARD standard rubber stamping denials of AWA applications. See *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, Assoc. Dir. Domestic Operations, USCIS (HQDOMO 70/1-P) (February 8, 2007) ("Aytes Memo"); *Transmittal of SOP for Adjudication of Family-Based Petitions under the Adam Walsh Child Protection and Safety Act of 2006*, Donald Neufeld, Acting Assoc. Dir., USCIS (HQ 70/1-P) (September 24, 2008) ("Neufeld Memo")[6]. In addition, without notice and comment or any direction from Congress through these policy memoranda defendants' created a presumptive denial instructing adjudicating officers that approvals "should be rare." JA 86 (Neufeld Memo).

Likewise the District Court erred in applying *Chevron* deference. JA 22 (District Court memo on Summary judgment). The Supreme Court is clear agency

[5] See the heightened "clear and convincing" standard in marriage fraud cause of 8 CFR 204.2(a)(1).

[6] The Aytes and Neufeld memos were attached as exhibits to Plaintiff's amended complaint and can be viewed at JA 76 - 113.

interpretations that lack the force of law do not warrant *Chevron* deference[7]. *Alaska Dept. of Envtl. Cons. v. EPA*, 540 461, 487 (2004) (“”guidance memoranda, however, does not qualify for the dispositive force described in *Chevron); US v. Mead Corp*, 533 US 218, 229 (2001); *Christensen v. Harris County*, 529 US 576, 587 (2000) (“Interpretations such as those in . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference”); *Reno v. Koray*, 515 US 50, 61 (1995) (internal agency guideline, which is not “subject to the rigors of the APA, including public notice and comment,” not entitled to *Chevron* deference); *EEOC v. Arabian American Oil Co.*, 499 US 244, 256-58 (1991) (interpretive guidelines do not receive *Chevron* deference) *see also Garfias-Rodriguez v. Holder*, 702 F.3d 504, 510 (9th Cir. 2012) (informal USCIS guidance memorandum are not entitled to *Chevron* deference); *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 793 (9th Cir. 2004) (informal *INS* guidance memorandum are not entitled “to the rigorous deference”

[7] Deference is also inappropriate *inter alia:* where the agency does not have a permissible construction of the statute and there are compelling indications that the agency is wrong, *Espinoza v. Farah Mfg. Co.* 414 US 86, 94-95 (1973); where the agency acts contrary to governing regulations, *Morton v. Ruiz*, 415 US 199 (1974); where the agency’s current interpretation conflicts with previous interpretations, *INS v. Cardoza-Fonseca*, 480 US 421, 446, n. 30 (1987); where an agency’s position raises a substantial Constitutional question, *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1162-63 (9th Cir. 2004) and where any agency has no particular expertise on the issue, *Leocal v. Ashcroft*, 543 US 1 (2004). These examples are not exhaustive but are applicable to appellant’s case. For example he raises the Constitutional right to marry cited above. Another example defendants’ have no expertise in sex offender risk assessment.

afforded by *Chevron*); *Gonzales v. Dep't of Homeland Sec.*, 508 F3d 1227, 1237 (9th Cir. 2007) (rejecting application of *Chevron* to DHS guidance memorandum).

The interpretations of an administrative agency that are not entitled to *Chevron* deference are "entitled to respect but only to the extent they have the "power to persuade." *Skidmore v. Swift*, 323 US 134, 140 (1944). Here, the Aytes and Neufeld memos have no persuasive power and do not warrant "respect." They offer no reasoning as to how they determined the BARD standard and presumption of denial were appropriate. The Neufeld Memo cites the statutory basis as the INA §204 and §402(a) of the Adam Walsh Act, Pub. L. 109-248. JA 87 (Neufeld Memo). Of course neither of these statutes explicitly state, much less infer BARD review or a presumption of denial. In addition, Neufeld cites the regulatory basis for their interpretation as 8 CFR 204.1. *Id.* Again this regulation neither explicitly nor implicitly leads to any BARD or presumptive denial conclusion. It does not even mention the AWA.

As already mentioned the default standard in immigration adjudications is a "preponderance of the evidence." If Congress meant to subject the AWA to a higher standard they certainly knew how. For example, as mentioned above, the "clear and convincing" standard of proof applies to the bona fide marriage determination for marriages entered post-removal proceedings being enacted. 8 USC §§ 1154(g), 1255(e)(1), 1255(e)(3).

However, in the adjudication of I-130 petitions under the AWA Congress did not mention any heightened standard, although it did so in other sections of the INA. "Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 US 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Thus, Congress intended for the "preponderance of the evidence" standard to apply here, otherwise they would have specified a more burdensome standard.

Even assuming *arguendo* Congress intended for a heightened standard to apply it is simply bizarre that defendants would arrive at a BARD standard. The general heightened standard used in civil cases is the "clear and convincing evidence" standard. The BARD standard is almost exclusively a criminal law standard which the government must meet to imprison an individual accused of a crime. *See Tyler v. Cain*, 553 US 656 (2001); *Addington v. Texas*, 441 US 418 (1979); *Kirby v. United States*, 174 US 47, 55 (1899). Defendants' have turned this standard on its head, neither the District Court, nor appellees have offered any other example or citation to a situation where the BARD standard was applied in the civil immigration context, requiring an individual citizen to show BARD the government should grant them some right or benefit.

Moreover, the BARD standard is essentially impossible to meet. It requires someone to prove a negative beyond any doubt, ie. that there is "no risk." Not only that but this BARD standard is addressed by an adjudicating officer's "unreviewable discretion." This officer is trained to presume denial and has been explicitly instructed approvals are to be "rare." JA 86 (Neufeld Memo). Moreover, the Neufeld memo puts the adjudicator in the awkward position when they do find approval is warranted they must obtain the concurrence of not one but two supervisors. *Id*. ("in the rare instance of an approval recommendation, the adjudicator must obtain and properly document two levels of supervisory concurrence"). This means that in order to obtain an approval appellant must convince an officer whom has been directed approvals should be "rare," to go to two of his supervisors and advocate he poses no risk beyond doubt. Practically speaking this will not happen. It is much less burdensome for the officer not to ruffle any bureaucratic feathers and simply deny the petition, particularly in light that the "no risk" assessment is left to their "sole unreviewable discretion" and cannot be challenged in any court.

Further the stated purpose of the AWA is to protect children from sexual predators[8]. Thus, arguably Congress intended a heightened standard should apply

[8] "The Act is entitled the "Adam Walsh *Child* Protection and Safety Act," and the legislative history reveals substantial discussion of the necessity of identifying all child predators. *See, eg.* HR Rep No 109-218, at 22-23 (2005) (stating, in a section

to a petition filed on behalf of a step-child, however, a heightened burden preventing two adults whom love each other from spending the rest of their lives together in the US was not Congress's intent.

For these reasons appellees' BARD standard and presumption of denial are unlawful under the APA.

CONCLUSION

For the above reasons this court should vacate the lower court decision and issue an order the Adam Walsh Act is unlawful.

Dated:10/27/2016

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entitled "Background and Need for the Legislation," that "[t]he sexual victimization of children is overwhelming in magnitude," and noting that the median age of the victims of imprisoned sex offenders in one study "was less than 13 years old"); 152 Cong. Rec. H657, H676 (daily ed. Mar. 8, 2006 (statement of Rep. Sensenbrenner) (purpose of the act is to "better protect our children from convicted sex offenders"; *id. at H682* (Statement of Rep. Poe) (bill will "make sure that our children are safer" and target "child predators"); *id.* at S8013 (statement Senator Hatch) (in explaining his support for the bill, stating "I am determined that Congress will play its part in protecting the children of . . . America")." *United States v. Mi Kyung Byun*, 539 F.3d 982, 993 (9th Cir. 2008).

CERTIFICATIONS

I, Nicklaus Misiti hereby certify:

A. that I am counsel of record and a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

B. that the foregoing brief complies with the type-volume limitation provided in Fed.R.App. P. 32(a)(7)(c). The foregoing brief contains 4669 words according to the word-count feature of the Microsoft Word word-processing program. Moreover, this brief complies with the typeface requirements of Fed. R. App. P. 32a(5) and 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in 14 point Times New Roman font; and

C. that the text of the electronically filed Brief and the text of the hard copies of the Brief are identical.

D. that a virus check has been performed on the PDF file of the brief. The virus check was completed using 2014 Kaspersky Lab ZAO Crypt C Version 2.0.

s/Nicklaus Misiti
Nicklaus Misiti

US District Court,
Eastern District of Pennsylvania 15-0127-JP

Court of Appeals No. 16-3440

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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Joint Appendix Vol. 1 (pgs 1-31)

Oral Argument is not requested

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Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AHMED BAKRAN	:	CIVIL ACTION
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v.	:	
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JEH JOHNSON, ET AL.	:	No. 15-127

MEMORANDUM

Padova, J. **June 28, 2016**

Plaintiff Ahmed Bakran, a United States citizen, commenced this action to challenge the denial of a Form I-130 immigrant visa petition that he filed on behalf of his new wife, seeking to have her designated as an immediate relative. Both Bakran and Defendants have filed Motions for Summary Judgment. For the following reasons, we grant Defendants' Motion, deny Bakran's Motion and enter judgment in favor of Defendants on all of Bakran's claims.

I. BACKGROUND

The undisputed facts are as follows. Bakran is a United States citizen who, in 2004, pleaded guilty to one count of aggravated indecent assault in violation of 18 Pa. Cons. Stat. Ann. § 3125, and one count of unlawful contact with a minor in violation of 18 Pa. Cons. Stat. Ann. § 6318. (Concise Statement of Stipulated Material Facts ("Stip. Facts"), at ¶¶ 1-2.) He was sentenced to 11½ to 23 months of imprisonment, ten years' probation, and lifetime sex offender registration. (Id. ¶ 2.) In addition, as part of his criminal sentence, he was required to undergo a psychosexual evaluation and is prohibited from any unsupervised contact with minors. (Id.) Bakran has complied with his sentence and has no prior or subsequent convictions. (Id.)

Prior to 2006 and currently, the Immigration and Nationality Act (the "INA"), 8 U.S.C. § 1101 *et seq.*, generally permits that "any citizen of the United States claiming that an alien is entitled . . . to an immediate relative status under section 1151(b)(2)(A)(i) [including a citizen's

spouse] . . . may file a petition with the Attorney General for such classification." 8 U.S.C. § 1154(a)(1)(A)(i); see id. § 1151(b)(2)(A)(i) (stating that "the term 'immediate relatives' means the children, spouses, and parents of a citizen of the United States"). On July 27, 2006, however, the Adam Walsh Child Protection and Safety Act of 2006 (the "Walsh Act"), Pub. L. No. 109-248, 120 Stat. 587 (2006), amended the INA to bar any citizen convicted of a "specified offense against a minor" from filing any family-based immigration petition 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 [the] petition . . . is filed." 8 U.S.C. § 1154(a)(1)(A)(viii)(I).

On February 8, 2007, United States Citizenship and Immigration Services ("USCIS") issued a policy memorandum announcing a new legal standard for Walsh Act cases (the "Aytes Memo"). (Stip. Facts ¶ 9.) The Aytes Memo created a standard whereby a petitioner subject to the Walsh Act must show "beyond a reasonable doubt" that they "pose no risk" to the beneficiary of the petition. (Id.) The Aytes memo did not undergo any notice and comment procedure and became effective the day USCIS issued it. (Id.)

On September 24, 2008, USCIS issued another memorandum regarding Walsh Act cases (the "Neufeld memo"). (Id. ¶ 10.) The Neufeld memo states that "approval recommendations should be rare" because of "the nature and severity of many of the underlying offenses." (Id.) The Neufeld memo, like the Aytes memo, did not undergo any notice and comment review. (Id.)

In 2012, Bakran married Zara Qazi, a foreign national of India. (Id. ¶ 4.) Bakran has resided with Qazi since 2012, and they have one child together. (Id.) Qazi submitted sworn testimony to USCIS that she is aware of Bakran's conviction and the incidents surrounding it. (Id.)

On July 30, 2012, Bakran filed a Form I-130 immigrant visa petition ("I-130 Petition"), pursuant to the INA, 8 U.S.C. § 1151(b)(2)(A)(i), seeking to have Qazi classified as his immediate relative so that she could immigrate to the United States. (Stip. Facts ¶ 5); see also 8 C.F.R. §§ 204.1(a)(1), 204.2(a)(1). Qazi concurrently filed an I-485 application to adjust her status to a lawful permanent resident. (Stip. Facts ¶ 5.) On January 21, 2014, Bakran received from USCIS a "Request for Evidence/Notice of Intent to Deny" his I-130 Petition. (Id. ¶ 6.) In that Request for Evidence/Notice of Intent to Deny, USCIS informed Bakran that, pursuant to the Walsh Act, his 2004 convictions barred him from filing an I-130 petition on behalf of Qazi unless he could show that he posed no risk to her. (Id. ¶ 6.) USCIS afforded Bakran eighty-seven days to respond with evidence to meet that standard. (Id.) Bakran timely submitted records from his criminal case, notarized letters from family and friends attesting to his good character, a copy of his 2005 Sexuality Evaluation Study, his 2012 Psychosexual Evaluation, and a 2014 Psychological Report. (Id. ¶ 7.) However, after reviewing the totality of the evidence, on December 9, 2014, USCIS denied Bakran's I-130 petition and Qazi's I-485 application. (Id. ¶ 8.)

Bakran filed his Complaint in this action on January 13, 2015. The Complaint sets forth seven causes of action. Count 1 asserts that that Defendants' application of the Walsh Act to deny Bakran' I-130 petition violated the Ex Post Facto Clause of Article I the United States Constitution. Count 2 asserts that Defendants violated Bakran's due process right under the Fifth Amendment insofar as it burdens his constitutionally protected liberty interest in marriage. Count 3 asserts that Defendants violated Bakran's right pursuant to the Fifth and Eighth Amendments to be free of excessive punishment. Counts 4 and 5 assert that Defendants engaged in arbitrary and capricious conduct in violation of the Administrative Procedures Act (the "APA"), 5 U.S.C. § 701 *et seq.* Count 6 asserts that Defendants engaged in rule-making regarding the Walsh Act without

following the APA's notice and comment procedures. Count 7 asserts that the rules that Defendants issued regarding the Walsh Act were ultra vires, i.e., they were beyond USCIS's legislative authority.

Defendants previously filed a Motion to Dismiss Bakran's Complaint for lack of subject matter jurisdiction, which we denied in a Memorandum and Order entered on June 11, 2015. Both Bakran and Defendants have now filed Motions for Summary Judgment. Defendants seek judgment in their favor on all seven Counts of the Complaint. Bakran seeks judgment in his favor on all Counts except Count 4.

II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it "might affect the outcome of the suit under the governing law." Id.

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the nonmoving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court" that "there is an absence of evidence to support the nonmoving party's case." Id. at 325. After the moving party has met its initial burden, the adverse party's response "must support the assertion [that a fact is genuinely disputed] by: (A) citing to particular parts of materials in the

record . . . ; or (B) showing that the materials [that the moving party has cited] do not establish the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c)(1). Summary judgment is appropriate if the nonmoving party fails to respond with a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

III. DISCUSSION

A. Ex Post Facto (Count 1)

Count 1 of the Complaint asserts that Defendants' application of the Walsh Act to prohibit the filing of I-130 petitions by individuals with convictions of qualifying crimes against minors, absent a finding of "no risk," violates the Ex Post Facto clause in Article I of the Constitution when the petitioner, like Bakran, was convicted of his or her crime prior to enactment of the Walsh Act. Article I, Section 10 of the Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law . . . ." U.S. Const. art. I, § 10, cl. 1. An ex post facto law is one that "makes more burdensome the punishment for a crime, after its commission." Dobbert v. Florida, 432 U.S. 282, 292 (1977) (quoting Beazell v. Ohio, 269 U.S. 167, 169 (1925)). Accordingly, a law does not violate the Constitution's Ex Post Facto clause unless it is both punitive and retroactive. See Weaver v. Graham, 450 U.S. 24, 29 (1981). Defendants argue that judgment should be entered in their favor on this claim because the Walsh Act is neither retroactive nor punitive, while Bakran maintains that the Act is both retroactive and punitive.

1. Punitive

In determining whether legislation is punitive, we first consider whether the legislation is civil or criminal. Legislation that provides for criminal proceedings and penalties is punitive by its very nature. See Kansas v. Hendricks, 521 U.S. 346, 361 (1997); Smith v. Doe, 538 U.S. 84,

91 (2003) ("If the intention of the legislature was to impose punishment, that ends the inquiry.") When, on the other hand, Congress enacts legislation that it intends to be civil, we "'ordinarily defer to the legislation's stated intent,'" but may nevertheless examine "whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil.'" Smith, 538 U.S. at 92 (quoting Hendricks, 521 U.S. at 361). Factors we may consider in ascertaining whether a purportedly civil scheme is so punitive in purpose or effect to negate the legislature's civil intent include whether the scheme "[1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." Id. at 97 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). However, "'only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.'" Id. at 92 (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)).

The stated purpose of the Walsh Act is "[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims." Pub. L. No. 109-248, 120 Stat. 587 (2006). Moreover, Title IV of the Walsh Act, which amends the INA, is entitled "Immigration Law Reforms to Prevent Sex Offenders from Abusing Children," further demonstrating an intent to protect children. Id. At the same time, the text of the Walsh Act makes clear that it is ultimately designed to protect any beneficiary of a family-based immigration petition, whether child or adult, as it provides that USCIS may only permit an individual convicted of a qualifying offense against a minor to file such a petition if it determines that the individual "poses no risk to the alien with respect to whom the petition . . . is filed" without differentiating

between adult and child beneficiaries. 8 U.S.C. § 1154(a)(1)(A)(viii)(I); see Struniak v. Lynch, Civ. A. No. 15-1447, 2016 WL 393953, at *10 (E.D. Va. Jan. 29, 2016) (concluding that the "plain and unambiguous language of § 1154(a)(1)(A)(viii)(I) applies to all beneficiaries," not only children). Protecting individuals from sex offenders is plainly a legitimate civil objective as the Supreme Court has explicitly stated that "an imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive governmental objective and has been historically so regarded.'" Smith, 538 U.S. at 93 (quoting Hendricks, 521 U.S. at 363). Accordingly, we conclude that Congress's intent in enacting the Walsh Act was both civil and nonpunitive.

Bakran nevertheless argues that we should disregard this civil, non-punitive intent because the statute "'is so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil.'" Smith, 538 U.S. at 92 (quoting Hendricks, 521 U.S. at 361). Specifically, Bakran appears to argue that the Walsh Act imposes an "affirmative disability" insofar as it bars him from petitioning for his spouse; actually promotes a traditional aim of punishment, i.e., retribution for prior crimes; and does not protect children or the public, at least insofar as it was applied in his case, because the beneficiary of his petition was his adult wife.

In determining whether a statute imposes an affirmative disability, "we inquire how the effects of the Act are felt by those subject to it." Smith, 538 U.S. at 99-100. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." Id. at 100. Here, the Act "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." Id. (citing Hudson, 522 U.S. at 104). Moreover, its effects are plainly less harsh than those inflicted on sex offenders by sex offender registration and notification laws, which the Supreme Court has found not to impose an affirmative

disability. See id. at 99-102 (considering law requiring sex offenders to register with local law enforcement and providing for public access to central registry containing sex offenders' names, addresses and other identifying information). Indeed, Bakran has not developed any meaningful factual record as to how the Walsh Act's prohibition affects him and others, except to say that he is barred from petitioning on behalf of his wife. Under these circumstances, we cannot conclude that the Walsh Act imposes anything more than a minor disability, which does not support a conclusion that it is punitive rather than civil.

Bakran also argues that the purpose of the Walsh Act's prohibition on the filing of petitions is retributive, which is a traditional aim of punishment. We cannot, however, find any evidence in the summary judgment record to support such a conclusion. Indeed, as explained above, the Act, on its face, makes clear that its overriding purpose is to ensure public safety, as it only prohibits the filing of petitions by those who are deemed to pose a risk to the beneficiaries of the petitions. While Bakran perceives a punitive intent in the Act's decision to prohibit the filing of petitions on behalf of adult beneficiaries like his wife, who need no protection, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." Id. at 103 (rejecting argument that a statute that is not narrowly drawn to accomplish its stated purpose is necessarily punitive). Moreover, we cannot simply accept Bakran's argument that his wife needs no protection, when USCIS was unable to conclude that Bakran posed "no risk" to his wife and we have no jurisdiction to review that determination. See 8 U.S.C. § 1154(a)(1)(A)(viii) (granting the Secretary of Homeland Security "sole and unreviewable discretion" to determine whether a petitioner poses "no risk" to the petition's beneficiary); see Bakran v. Johnson, Civ. A. No. 15-127, 2015 WL 3631746, at *3 (E.D. Pa. June 11, 2015) (explaining that no review is available where agency decision is "'committed to agency discretion

by law'" (quoting 5 U.S.C. § 701(a))). Under all of these circumstances, we reject Bakran's unsupported arguments that the Act serves no protective purpose and is retributive.

In sum, Plaintiff has failed to submit "'the clearest proof'" that the purpose or effect of the law negates the legislature's intention to establish a civil regulatory scheme. Smith, 538 U.S. at 92 (quoting Hudson, 522 U.S. at 100). Accordingly, we conclude that Bakran has failed to establish that the Walsh Act is so punitive in purpose or effect that we should deem it to be a criminal penalty. Accord Suhail v. U.S. Att'y Gen., Civ. A. No. 15-12595, 2015 WL 7016340, at *9 (E.D. Mich. Nov. 12, 2015) ("[A]pplication of the [Walsh Act] to [plaintiff] is not a penalty, but rather a civil matter to prevent future additional sex offenses against children, complete with a means by which the Secretary may override that protection.")

2. Retroactive

Generally, we presume legislation to have only prospective application. Vartelas v. Holder, 132 S. Ct. 1479, 1486 (2012) (citation omitted). Moreover, the Supreme Court has specifically stated that where a statute addresses dangers that arise after its enactment, it does not operate retroactively. Id. at 1489 n.7 (stating that "statutes do not operate retroactively [when] they address dangers that arise postenactment"). For instance, the Court noted, a statute that "prohibit[s] persons convicted of a sex crime against a victim under 16 years of age from working in jobs involving frequent contact with minors" addresses a post-enactment danger and, thus, is not retroactive. Id.

Here, the Walsh Act, like the statute limiting the job opportunities of prior sex offenders, addresses a danger that arises post-enactment, i.e., the danger that a petitioner poses to the proposed beneficiary of his family-based immigration petition. Thus, contrary to Bakran's understanding, the Walsh Act simply does not operate retroactively. Reynolds v. Johnson, 628 F.

App'x 497, 498 (9th Cir. 2015) (concluding that the Walsh Act "'address[es] dangers that arise postenactment' and therefore 'do[es] not operate retroactively'" (alterations in original) (quoting Vartelas, 132 S. Ct. at 1489 n.7)); Matter of Jackson, 26 I. & N. Dec. 314, 318 (B.I.A. May 20, 2014) ("Because the Adam Walsh Act addresses the potential for future harm posed by . . . sexual predators to the beneficiaries of family-based visa petitions, we find that the application of its provisions to convictions that occurred before its enactment does not have an impermissible retroactive effect."); see also Naik v. Dir. U.S Citizenship & Immigration Servs. Vt., 575 F. App'x 88, 92 (3d Cir. 2014) (stating that the question of the Walsh Act's retroactivity "appear[s] to now be conclusively resolved by [the] . . . precedential opinion[] regarding the Walsh Act" in Matter of Jackson); accord Makransky v. Johnson, Civ. A. No. 15-1259, 2016 WL 1254353, at *6 (E.D.N.Y. March 29, 2016) ("[I]t is clear that the [Walsh Act] 'address[es] dangers that arise postenactment' and thus 'do[es] not operate retroactively.'" (third and fourth alterations in original) (quoting Vartelas, 132 S. Ct. at 1489 n.7, and citing Smith, 538 U.S. at 103); Burbank v. Johnson, Civ. A. No. 14-292, 2015 WL 4591643, at *7 (E.D. Wash. July 29, 2015) ("[T]he Adam Walsh Act provision regarding a no-risk determination is not a retroactive disability that attached to [plaintiff's] prior conviction; rather, the act protects aliens from convicted sex offenders and provides a means for the Secretary to override that protection when appropriate.")

In sum, we conclude, based on the summary judgment record before us, that the Walsh Act is neither punitive nor retroactive, and thus it does not violate the Constitution's Ex Post Facto clause. Accordingly, we grant Defendants' Motion for Summary Judgment insofar as it seeks judgment in their favor on the Ex Post Facto claim in Count 1, and deny Bakran's Motion for Summary Judgment insofar as it seeks judgment in his favor on that same claim.

B. Substantive Due Process (Count 2)

Count 2 of the Complaint asserts that the Walsh Act's statutory prohibition on Bakran's filing of his I-130 petition on his wife's behalf violates his substantive due process rights under the Fifth Amendment because it impermissibly burdens his fundamental constitutional right to marriage.[1] Bakran argues in his summary judgment motion that we should enter judgment in his favor on this claim, asserting that the fundamental right to marry incorporates the right to live with one's spouse, and that the Government's limitation on his ability to petition on behalf of his wife has deprived him of this fundamental right and cannot survive strict scrutiny, i.e., it is not the least restrictive means of advancing a compelling governmental interest. Defendants argue in their cross-motion that we should enter judgment in their favor on this claim because the prohibition on Bakran's filing of a petition on behalf of his wife in no way infringes on Bakran's right to remain married to his wife but, rather, only restricts his right to reside with her, which is simply not a constitutionally-protected right.

The Supreme Court has interpreted the due process guarantees in the Constitution's Fifth Amendment "to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 301-02 (1993) (citations omitted). One right that is "'so rooted in the traditions and conscience of our people as to be ranked as fundamental'" is the right to marry. Id. at 303. (quoting United States v. Salerno, 481 U.S. 739, 751 (1987)). Indeed, "[t]he freedom to marry

[1] Bakran's Complaint also appears to assert a procedural due process claim. (See Compl. ¶¶ 69-72.) However, Bakran has apparently abandoned that claim as he addresses only substantive due process in his Motion for Summary Judgment and Memorandum in Opposition to Defendants' Motion for Summary Judgment. Moreover, we find no evidence in the record that Bakran was denied any procedural due process protections to which he was legally entitled.

has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Loving v. Virginia, 388 U.S. 1, 12 (1967)

Here, however, it is undisputed that Bakran married his wife in 2012 and remains married to her. (See Stip. Facts ¶ 4.) Accordingly, Bakran's claim that the Walsh Act's restriction on his right to file an I-130 petition on his wife's behalf has infringed upon his right to marry is plainly meritless. See Makransky, 2016 WL 1254353, at *6 (rejecting claim that Walsh Act infringed upon plaintiff's constitutional right to marry, stating: "to be sure, [plaintiff] has a constitutional right to marry – and he has done just that"); see also Bains v. United States, Civ. A. No. 13-1014, 2014 WL 3389117, at *4 (N.D. Ohio July 9, 2014) (holding that plaintiff's "constitutional right to marry is not infringed upon by denying [an] immediate relative visa, as [plaintiff] and his wife were able to be married").

Bakran nevertheless contends that the fundamental right to marry incorporates a fundamental right to live with one's spouse, upon which the Government has impermissibly infringed. However, precedent dictates that there is simply no such fundamental constitutional right. As the United States Court of Appeals for the Third Circuit has observed, "[t]he Constitution 'does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country.'" Fasano v. United States, 230 F. App'x 239, 240 (3d Cir. 2007) (quoting Bangura v. Hansen, 434 F.3d 487, 496 (6th Cir. 2006), and citing Burrafato v. U.S. Dep't of State, 523 F.2d 554, 555 (2d Cir. 1975)). Moreover, district courts that have specifically considered whether the Walsh Act's restriction on the filing of family-based immigration petitions infringes upon the right to marry have concluded that it does not. See Burbank, 2015 WL 4591643, at *7 (rejecting substantive due process claim that the Walsh Act contravenes plaintiff's "fundamental right to marry and live with his spouse," because "it is undisputed that [plaintiff] has married his wife, such

that Defendants have not violated any fundamental right to marry" (citations omitted)); Suhail, 2015 WL 7016340, at *10 (rejecting claim that Walsh Act "unreasonably restricts Plaintiffs' marital rights and their constitutionally protected liberty interest in 'establishing a home' in the United States," because "U.S. citizens do not have a protected liberty interest in residing in the United States with their noncitizen spouses" (citations omitted)).

Furthermore, while Bakran extensively discusses the Supreme Court's recent plurality decision in Kerry v. Din, 135 S. Ct. 2128 (2015), that case actually supports our conclusion that judgment should be entered in Defendants' favor on Bakran's substantive due process claim. In Din, the Supreme Court addressed a procedural due process claim by Fauzia Din, a United States citizen whose alien spouse's visa application was denied. Din argued that "the Government denied her due process of law when, without adequate explanation of the reason for the visa denial, it deprived her of her constitutional right to live in the United States with her spouse." Id. at 2131. In a plurality opinion, Justice Scalia, joined by Justices Roberts and Thomas, unequivocally opined that there is no constitutional right to live with one's spouse. Id. ("There is no such constitutional right.") Meanwhile, in a dissenting opinion, Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, opined that Din has a liberty interest in residing with her spouse, but that only procedural due process protections attach to that interest, and that it is not a fundamental interest that gives rise to substantive due process protections. Id. at 2142 (citation omitted). Accordingly, seven of the nine Justices clearly found there to be no fundamental constitutional right to live with one's spouse, [2] and thus recognized no constitutional right that

[2] In a concurring opinion in Din, Justice Kennedy, joined by Justice Alito, stated that "rather than deciding, as the plurality does, whether Din has a protected liberty interest [in residing with her spouse], my view is that, even assuming she does, the notice she received regarding her husband's visa denial satisfied [procedural] due process." Id. at 2139. Consequently, neither Justice Kennedy nor Justice Alito expressed an opinion as to whether there is a constitutional

could give rise to the substantive due process protections that Bakran seeks to enforce here.

For all of these reasons, we conclude that Bakran has no fundamental constitutional right to live with his spouse and further conclude that the Walsh Act does not infringe upon his fundamental constitutional right to marry. Accordingly, we grant Defendants' Motion for Summary Judgment insofar as it seeks judgment in their favor on the due process claim in Count 2, and deny Bakran's Motion for Summary Judgment insofar as it seeks judgment in his favor as to that same claim.

C. Excessive Punishment (Count 3)

Count 3 of the Complaint asserts that the Walsh Act, as interpreted by USCIS, violates Bakran's right to be free from constitutionally excessive punishment because it, in effect, banishes his spouse from the United States for life. Both Bakran and Defendants seek summary judgment on this claim.

For purposes of the Eighth Amendment, punishment includes "'a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retribution or deterrent purposes.'" Austin v. United States, 509 U.S. 602, 610 (1993) (quoting United States v. Halper, 490 U.S. 435, 448 (1989)). Where, as here, we have concluded in connection with the Ex Post Facto analysis that the Walsh Act is "not 'punitive' in nature, 'the law is not a cruel and unusual punishment in violation of the Eight Amendment.'" Conover v. Main, 601 F. App'x 112, 115 (3d Cir. 2015) (quoting Doe v. Miller, 405 F.3d 700, 723 n.6 (8th Cir. 2005)); see also Makransky, 2016 WL 1254353, at *6 (holding that the Walsh Act does not impose excessive punishment because it is not punitive (citation omitted)). Consequently, we grant Defendants' Motion for Summary Judgment insofar as it seeks judgment in their favor on the

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liberty interest in residing with one's spouse.

excessive punishment claim in Count 3, and deny Bakran's Motion for Summary Judgment insofar as it seeks judgment his favor on that same claim.

D. Arbitrary and Capricious Conduct (Counts 4 and 5)

In Counts 4 and 5, the Complaint asserts that Defendants acted arbitrarily and capriciously in violation of the APA by (1) interpreting the Walsh Act's prohibition on the "filing" of family-based immigration petitions by certain convicted individuals to permit USCIS to address the question of whether a petition should be approved or denied after it is successfully filed (Count 4), and (2) creating a presumption of denial of such petitions (Count 5). Both Bakran and Defendants move for summary judgment on Count 5, but only Defendants move for judgment in their favor on Count 4.

Under the APA, we are to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "To determine whether an agency acted arbitrarily and capriciously, a court looks to whether the agency relied on factors outside those Congress intended for consideration, completely failed to consider an important aspect of the problem, or provided an explanation that is contrary to, or implausible in light of, the evidence." NVE, Inc. v. Dep't of Health & Human Servs., 436 F.3d 182, 190 (3d Cir. 2006) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)). "Generally, '[t]he scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency.'" Baugh v. Sec'y of Navy, 504 F. App'x 127, 130 (3d Cir. 2012) (alteration in original) (quoting State Farm, 463 U.S. at 43). In the end, "[a]gency action may not be set aside on grounds that it is arbitrary and capricious if the action is rational, based on relevant factors, and within the agency's statutory authority." Frisby v. U.S. Dep't of Hous. & Urban Dev., 755 F.2d

1052, 1055 (3d Cir. 1985) (citing State Farm, 463 U.S. at 42-43).

1. Assessment of Risk After Filing

The Complaint asserts that USCIS acted arbitrarily and capriciously, and in excess of its statutory authority, in adjudicating already-filed petitions when the Walsh Act provides that individuals with specified convictions shall not be permitted to file family-based immigration petitions unless the no-risk requirement is satisfied. See 8 U.S.C. § 1154(a)(1)(A)(i), (viii)(I). Specifically, the Complaint alleges that "[t]he plain language of the [Walsh Act] infers that, once USCIS accepted the I-130 as 'filed,' the [Walsh Act] no longer applies, and the agency's interpretation of the [Walsh Act] as requiring that properly filed I-130 visa petitions be 'denied' was arbitrary and capricious." (Compl. ¶ 87.) It further alleges that "USCIS does not have the authority to ignore the plain meaning of the statute" and that "[b]y considering [Walsh Act] petitions as 'filed,' the USCIS has fulfilled the requirement of Congress and any further action is ultra vires." (Id. ¶ 90.)

However, the Neufeld Memo both acknowledges the statutory language on which Bakran relies and explains USCIS's determination to assess already-filed petitions. Specifically, the Neufeld Memo explains: "The statute states that a petitioner convicted of any specified offense against a minor is prohibited from filing a family-based petition. As a practical matter, however, we need to accept the petition and conduct the necessary analysis to determine whether the [Walsh Act] provisions apply." (Neufeld Memo at 4, attached as Ex. 2 to Compl.) We can only conclude that this determination is rational and within USCIS's statutory authority in light of the obvious practical difficulties inherent in creating a pre-filing procedure for assessing a prospective petitioner's criminal record and risk profile. See Burbank, 2015 WL 4591643, at *8 (finding USCIS's explanation that, as a practical matter, it needed to accept the petition and then conduct

the necessary analysis to determine whether the Walsh Act provisions apply, to be a "much more reasonable interpretation" of the Act than the plaintiff's "technical reading of the law, which only would preclude petitioner from applying for an I-130 visa and would hamstring the USCIS from enforcing the provision after the agency had an opportunity to review a filed petition"). We therefore conclude that the summary judgment record does not support Bakran's claim that USCIS's post-filing procedures for the assessment of risk are arbitrary and capricious, and we grant Defendants' Motion for Summary Judgment insofar as it seeks judgment in their favor on Count Four of the Complaint.

2. Presumption of Denial

The Complaint asserts that USCIS also acted arbitrarily and capriciously insofar as it created a presumption of denial of all Walsh Act petitions. In this regard, Bakran notes that the Neufeld Memo provides that "approval recommendations" for petitions filed by individuals convicted of the specified offenses against minors "should be rare." (Neufeld Memo at 2.) He argues that there is no such presumption of denial in the statute, and thus the application of such a presumption is improper and unlawful.

However, as USCIS explains in the Neufeld Memo, it created the guidance that approval recommendations "should be rare" because of "the nature and severity of many of the underlying offenses and the intent of the [Walsh Act]," which is "to ensure that an intended alien beneficiary is not placed at risk of harm from the person seeking to facilitate the alien's immigration to the United States." Id. at 2; Aytes Memo at 5; see also Neufeld Memo at 6. Moreover, while the Walsh Act does not explicitly state that USCIS should employ any presumption, it is surely rational for USCIS to conclude that the burden must be on the petitioner to show that he or she poses no risk, and that a "no risk" determination should be the exception rather than the rule,

because the Act requires that USCIS deny the petition of an individual with a specified conviction "unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien . . . ." 8 U.S.C. § 1154(a)(1)(A)(viii)(I) (emphasis added). Indeed, as another district court has observed, "[a]lthough the . . . Walsh Act does not expressly create a presumption of denial, it is permissible to construe from this language that the default rule is to deny petitions from a citizen who has been convicted of a specified offense and that deviations from that rule should be rare." Burbank, 2015 WL 4591643, at *9; see also Makransky, 2016 WL 1254353, at *7 (stating that the "Aytes and Neufeld Memos make the reasonable conclusion that the default rule is to deny any petitions filed by a citizen convicted of [a qualifying offense]" (citing Burbank, 2015 WL 4591643, at *9)).

Accordingly, we conclude, based on the summary judgment record, that USCIS's guidance that approval recommendations "should be rare" is not arbitrary and capricious. We therefore grant Defendants' Motion insofar as it seeks judgment in Defendants' favor on the claim in Count 5 of the Complaint, and deny Bakran's Motion insofar as it seeks judgment in his favor on that same Count.

F. Notice and Comment (Count 6)

Count 6 of the Complaint asserts that Defendants violated the APA by engaging in rule-making regarding the Walsh Act without employing the notice and comment procedures that the APA requires. See 5 U.S.C. § 553(b)-(c). Both Bakran and Defendants seek summary judgment in their favor on this claim.

Under the APA, when an agency seeks to implement a "legislative" rule, which is a rule that imposes new duties and has the force and effect of law, it must follow the procedures under the APA. Chao v. Rothermel, 327 F.3d 223, 227 (3d Cir. 2003) (citing Beazer East, Inc. v. EPA, 963

F.2d 603, 606 (3d Cir. 1992)). Those required procedures include that the agency must provide general notice of the proposed rule in the Federal Register and give interested persons the opportunity to comment on the proposed rule. Id. (citing Beazer, 963 F.2d at 606); 5 U.S.C. § 553(b)-(c). Where, however, an agency seeks to enact an "interpretive" rule, which is a rule that merely interprets language already in a statute, the notice and comment procedures need not be followed. Id. (citing 5 U.S.C. § 553 (b)(A)); see also Bailey v. Sullivan, 885 F.2d 52, 62 (3d Cir. 1989) ("If the rule in question merely clarifies or explains existing law or regulations, it will be deemed interpretive."); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206 (2015) (same).

Bakran contends that Defendants violated the notice and comment requirements in the APA's rule-making procedures when they issued the Aytes and Neufeld memos, which declare rules that (1) require petitioners to prove beyond a reasonable doubt that they pose no risk; (2) define risk under the Walsh Act as risk to the beneficiary's "safety and well-being," rather than merely a risk to physical safety; (3) created a presumption of denial for I-130 Petitions filed by individuals with convictions of sexual offenses against minors; and (4) interpreted the Walsh Act to govern the adjudication of petitions after they were successfully filed.

However, as another district court has correctly concluded, these rules do not impose new duties but, rather, "merely explain the statutory duties outlined in Section 1154." Makransky, 2016 WL 1254353, at *8. Indeed, as noted above, it is only logical and "reasonable that the USCIS must adjudicate already-filed petitions to determine whether the [Walsh Act] applies" rather than making a determination regarding the permissibility of the petition before the petition is even filed. Id. Likewise, "imposing a presumptive denial [and] a high burden of proof is [entirely] consistent with the construction of the [Walsh Act]," which demands that USCIS determine that the petitioner poses absolutely "no risk" to the beneficiary before permitting the

petitioner to pursue an I-130 petition. Id.; see also Burbank, 2015 WL 4591643, at *10 ("[T]he heightened standard of proof and presumption of denial" are "interpretations [that] clarify the USCIS's application of its broad discretion rather than make new law." (citation omitted)). "Further, requiring the petitioner to prove that he poses no risk to the 'safety or well-being' of the intended beneficiary is [surely] a fair interpretation of Section 1154's [no risk] language." Makransky, 2016 WL 1254353, at *8 (citing Burbank, 2015 WL 4591643, at *10); see also Burbank, 2015 WL 4591643, at *10 ("USCIS's consideration of the risk 'to the safety or well-being' of a beneficiary is consistent with Congress's instruction to the agency to determine whether a citizen posed no-risk to the alien," and thus does "not amend the statute but instead explain[s] the agency's interpretation of it.")

Accordingly, we conclude that the rules at issue are interpretive rules that are not subject to the APA's notice and comment procedures, rather than substantive rules for which such procedures are mandated. We therefore grant Defendants' Motion insofar as it seeks judgment in their favor on the claim in Count 6 that they violated the APA by not submitting the challenged rules for notice and comment, and we deny Bakran's Motion insofar as he seeks judgment in his favor on that same claim.

G. Ultra Vires Regulation (Count 7)

Count 7 of the Complaint asserts that the Defendants violated the APA by issuing an ultra vires rule, i.e., a rule that is beyond Defendants' legislative authority. Specifically, Bakran asserts that USCIS did not have the authority to require petitioners to prove "beyond a reasonable doubt" that they pose no risk to the beneficiaries of the petitions, when the Walsh Act does not specify a "beyond a reasonable doubt" standard. Both Bakran and Defendants seek judgment in their favor on this claim.

The Supreme Court, in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., set forth a two–step analysis for determining whether an agency acted in an ultra vires fashion. 467 U.S. 837, 842-43 (1984). "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . ." Id. However, "[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843.

Here, the Walsh Act does not delineate the specific standard of proof that USCIS should use in making its "no risk" determination. Nonetheless, as noted repeatedly, the Act clearly states that family-based immigration petitions should only be allowed where USCIS determines that the petitioner poses "no risk" to the alien beneficiary, and the assessment of risk is left to USCIS's "sole and unreviewable discretion." 8 U.S.C. § 1154(a)(1)(A)(i), (viii)(I). Under these circumstances, it is certainly a permissible construction of the statute for USCIS to require petitioners to meet a high burden of proof in establishing that they pose no risk. Suhail, 2015 WL 7016340, at *10 ("'[T]he . . . Walsh Act's instruction that a family-based visa petition should be allowed . . . only where the citizen poses no-risk, and the delegation of that judgment to the sole and unreviewable discretion of agencies, supports the USCIS' understanding that the factual showing should be high.'" (quoting Burbank, 2015 WL 4591643, at *9)); see also Makransky, 2016 WL 1254353, at *7 (quoting Burbank, 2015 WL 4591643, at *9).

In sum, we conclude, based on the record before us, that USCIS's adoption of a beyond the reasonable doubt standard was not ultra vires. Consequently, we grant Defendants' Motion insofar as they seek judgment in their favor on Count 7, and we deny Bakran's Motion insofar as he seeks judgment in his favor on the same claim.

IV. CONCLUSION

For the foregoing reasons, we grant Defendants' Motion for Summary Judgment and deny Bakran's Motion for Summary Judgment. We therefore enter judgment in favor of Defendants and against Bakran on all of Bakran's claims. An appropriate Order follows.

BY THE COURT:

/s/ John R. Padova, J.

John R. Padova, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AHMED BAKRAN	:	CIVIL ACTION
	:	
v.	:	
	:	
JEH JOHNSON, ET AL.	:	No. 15-127

ORDER

AND NOW, this 28th day of June, 2016, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 15), Plaintiff's Motion for Summary Judgment (Docket No. 14), and all documents filed in connection therewith, and for the reasons stated in the accompanying Memorandum, **IT IS HEREBY ORDERED** as follows:

1. Defendants' Motion is **GRANTED.**
2. Plaintiff's Motion is **DENIED**.
3. **JUDGMENT IS ENTERED** in favor of Defendants and against Plaintiff.
4. The Clerk of Court shall mark this case **CLOSED**.

BY THE COURT:

/s/ John R. Padova, J.

_____
John R. Padova, J.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AHMED BAKRAN,	)	
	)	
Plaintiff	)	
	)	
	)	
	)	
-against-	)	
	)	
JEH JOHNSON, Secretary,	)	
Department of Homeland Security; and	)	Civ. No. 15-0127-JP
	)	District Court Judge:
LEON RODRIGUEZ,	)	Hon. Judge John Padova
Director, U.S. Citizenship and Immigration	)	
Services; and	)	
	)	
ROBERT COWAN,	)	
Field Office Director	)	
Lee's Summit, MO Field Office,	)	
US Citizenship and Immigration Services,	)	
; and	)	
	)	
ERIC HOLDER, U.S. Attorney General,	)	
US Department of Justice,	)	
Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that Ahmed Bakran, plaintiff in the above-named matter, hereby appeals to the United States Court of Appeals for the Third Circuit from the June 28, 2016 order granting defendants' motion for summary judgment.

Respectfully submitted,
/s/Nicklaus Misiti
Nicklaus Misiti
Attorney for Plaintiff
Law Offices of Nicklaus Misiti
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CERTIFICATE OF SERVICE

I certify that on August 22, 2016 I electronically filed the foregoing NOTICE OF APPEAL with the Clerk of Court by using the CM/ECF system, which will provide notice and an electronic link to this document to the attorneys of record.

/s/Nicklaus Misiti
Nicklaus Misiti
Attorney for Plaintiff

Appendix C

CLOSED,APPEAL,STANDARD

United States District Court
Eastern District of Pennsylvania (Philadelphia)
CIVIL DOCKET FOR CASE #: 2:15-cv-00127-JP

BAKRAN v. JOHNSON et al
Assigned to: HONORABLE JOHN R. PADOVA
Case in other court: USCA, 16-03440
Cause: 05:0701 Maritime Subsidy Board

Date Filed: 01/13/2015
Date Terminated: 06/28/2016
Jury Demand: None
Nature of Suit: 465 Immigration: Other Immigration Actions
Jurisdiction: U.S. Government Defendant

Plaintiff

AHMED BAKRAN

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PRO HAC VICE
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V.

Defendant

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Defendant

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SARAH S. WILSON
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ATTORNEY TO BE NOTICED

Defendant

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Defendant

ERIC HOLDER
U.S. ATTORNEY GENERAL, US DEPARTMENT OF JUSTICE

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ATTORNEY TO BE NOTICED

SARAH S. WILSON
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/13/2015	1	COMPLAINT against ROBERT COWAN, ERIC HOLDER, JEH JOHNSON, LEON RODRIGUEZ (Filing fee $ 400 receipt number PPE114343), filed by AHMED BAKRAN. (Attachments: # 1 Complaint Part 2)(jmv,) (Entered: 01/13/2015)
01/13/2015		Summons Issued as to ROBERT COWAN, ERIC HOLDER, JEH JOHNSON, LEON RODRIGUEZ. Forwarded To: 5 Origs given to counsel; 1 to AUSA on 1/13/15 (jmv,) (Entered: 01/13/2015)
01/13/2015	2	APPLICATION BY NICKLAUS MISITI, ESQ. FOR ATTORNEY SEEKING ADMISSION PRO HAC VICE FILED BY AHMED BAKRAN. (FEE PAID $40.00 receipt PPE114343)(jmv,) Modified on 1/16/2015 (afm,). (Entered: 01/13/2015)
01/16/2015	3	Acceptance of Service by U.S. Attorney Re: accepted summons and complaint on behalf of the United States Attorney (only). (jl,) (Entered: 01/16/2015)
01/20/2015	4	ORDER THAT THE APPLICATION OF NICKLAUS MISITI TO APPEAR PRO HAC VICE IS GRANTED; ETC.. SIGNED BY HONORABLE JOHN R. PADOVA ON

		1/20/15. 1/20/15 ENTERED AND COPIES MAILED, E-MAILED AND COPY TO US ATTORNEY OFFICE.(jl,) (Entered: 01/20/2015)
01/22/2015	5	NOTICE of Appearance by GEOFFREY FORNEY on behalf of ROBERT COWAN, ERIC HOLDER, JEH JOHNSON, LEON RODRIGUEZ with Certificate of Service(FORNEY, GEOFFREY) (Entered: 01/22/2015)
03/17/2015	6	MOTION to Dismiss for Lack of Jurisdiction filed by ROBERT COWAN, ERIC HOLDER, JEH JOHNSON, LEON RODRIGUEZ.Memorandum, Certificate of Service. (Attachments: # 1 Brief Memorandum In Support of Motion)(WILSON, SARAH) (Entered: 03/17/2015)
03/31/2015	7	RESPONSE in Opposition re 6 MOTION to Dismiss for Lack of Jurisdiction filed by AHMED BAKRAN. (MISITI, NICKLAUS) (Entered: 03/31/2015)
06/11/2015	8	MEMORANDUM AND ORDER THAT DEFENDANTS MOTION TO DISMISS IS DENIED; ETC.. SIGNED BY HONORABLE JOHN R. PADOVA ON 6/10/15. 6/11/15 ENTERED AND E-MAILED.(jl,) (Entered: 06/11/2015)
06/11/2015	9	ORDER THAT DEFENDANTS MOTION TO DISMISS IS DENIED; ETC.. SIGNED BY HONORABLE JOHN R. PADOVA ON 6/10/15. 6/11/15 ENTERED AND E-MAILED.(jl,) (Entered: 06/11/2015)
06/25/2015	10	ANSWER to 1 Complaint by ROBERT COWAN, ERIC HOLDER, JEH JOHNSON, LEON RODRIGUEZ.(WILSON, SARAH) (Entered: 06/25/2015)
06/25/2015	11	NOTICE of Hearing: PRELIMINARY PRETRIAL CONFERENCE SET FOR 8/4/2015 AT 11:00 AM IN JUDGE CHAMBERS ROOM 17613 BEFORE HONORABLE JOHN R. PADOVA. (Attachments: # 1 Notice to Counsel, # 2 Scheduling Information Report) (paf,) (Entered: 06/25/2015)
07/28/2015	12	NOTICE of Hearing: NOTICE OF DATE AND TIME CHANGE:PRELIMINARY PRETRIAL CONFERENCE HAS BEEN RESCHEDULED FOR 8/11/2015 AT 02:00 PM IN JUDGE CHAMBERS ROOM 17613 BEFORE HONORABLE JOHN R. PADOVA. (paf,) (Entered: 07/28/2015)
08/13/2015	13	FEDERAL RULE OF CIVIL PROCEDURE 16 PRETRIAL SCHEDULING ORDER THAT DISPOSITIVE MOTIONS SHALL BE FILED NO LATER THAN 10/5/15; ETC.. SIGNED BY HONORABLE JOHN R. PADOVA ON 8/13/15. 8/13/15 ENTERED AND E-MAILED.(jl,) (Entered: 08/13/2015)
10/05/2015	14	MOTION for Summary Judgment filed by AHMED BAKRAN.Memorandum, Certificate of Service. (Attachments: # 1 Exhibit Notice of Motion, # 2 Memorandum Brief in Support, # 3 Exhibit Stipulated Facts, # 4 Certificate of Service)(MISITI, NICKLAUS) (Entered: 10/05/2015)
10/05/2015	15	MOTION for Summary Judgment filed by ROBERT COWAN, ERIC HOLDER, JEH JOHNSON, LEON RODRIGUEZ.Memorandum, Certificate of Service. (Attachments: # 1 Memorandum In Support of Motion, # 2 Exhibit A - Concise Statement of Material Facts, # 3 Exhibit B - Concise Statement of Additional Facts, # 4 Text of Proposed Order) (WILSON, SARAH) (Entered: 10/05/2015)
10/26/2015	16	Consent MOTION for Extension of Time to File Response/Reply as to 15 MOTION for Summary Judgment , 14 MOTION for Summary Judgment filed by ROBERT COWAN, ERIC HOLDER, JEH JOHNSON, LEON RODRIGUEZ.Certificate of Service. (Attachments: # 1 Text of Proposed Order)(WILSON, SARAH) (Entered: 10/26/2015)
10/26/2015	17	ORDER THAT DEFENDANTS MOTION TO EXTEND THE PARTIES OPPOSITION BRIEFING DEADLINE FROM 10/26/15 TO 10/28/15 IS GRANTED; ETC.. SIGNED

		BY HONORABLE JOHN R. PADOVA ON 10/26/15. 10/27/15 ENTERED AND E-MAILED.(jl,) (Entered: 10/27/2015)
10/28/2015	18	Memorandum IN OPPOSITION re 15 MOTION for Summary Judgment filed by AHMED BAKRAN. (Attachments: # 1 Appendix TABLE OF CONTENTS, # 2 Appendix TABLE OF AUTHORITIES, # 3 Certificate of Service)(MISITI, NICKLAUS) (Entered: 10/28/2015)
10/28/2015	19	RESPONSE in Opposition re 14 MOTION for Summary Judgment *and in support of Defendants' motion for summary judgment* filed by ROBERT COWAN, ERIC HOLDER, JEH JOHNSON, LEON RODRIGUEZ. (WILSON, SARAH) (Entered: 10/28/2015)
06/28/2016	20	MEMORANDUM AND ORDER THAT DEFENDANTS MOTION FOR SUMMARY JUDGMENT IS GRANTED. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS DENIED; ETC.. SIGNED BY HONORABLE JOHN R. PADOVA ON 6/28/16. 6/28/16 ENTERED AND E-MAILED.(jl,) (Entered: 06/28/2016)
06/28/2016	21	ORDER THAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS DENIED. JUDGMENT IS ENTERED IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFF. THE CLERK OF COURT SHALL MARK THIS CASE CLOSED; ETC.. SIGNED BY HONORABLE JOHN R. PADOVA ON 6/28/16. 6/28/16 ENTERED AND E-MAILED.(jl,) (Entered: 06/28/2016)
08/22/2016	22	NOTICE OF APPEAL as to 21 Order (Memorandum and/or Opinion), by AHMED BAKRAN. Filing fee not paid. Copies to Judge, Clerk USCA, Appeals Clerk. (Attachments: # 1 Certificate of Service)(MISITI, NICKLAUS) Modified on 8/23/2016 (fb). (Entered: 08/22/2016)
08/24/2016		NOTICE of Docketing Record on Appeal from USCA re 22 Notice of Appeal filed by AHMED BAKRAN. USCA Case Number 16-3440 (dmc,) (Entered: 08/24/2016)
08/26/2016		USCA Appeal Fees received $505 receipt number PPE145840 re 22 Notice of Appeal filed by AHMED BAKRAN. (aeg) (Entered: 08/26/2016)

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09/19/2016 14:13:20			
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CERTIFICATE OF SERVICE

CASE# 16-3440

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on 10/31/2016 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Nicklaus Misiti
Nicklaus Misiti