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 REPLY BRIEF

Oral Argument is not requested

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INTRODUCTION

Before the Court is the Adam Walsh Act ("AWA") which bars appellant from petitioning for his foreign spouse's Lawful Permanent Residence ("LPR") status unless he can meet the exception carved out by Congress by showing he poses "no risk" to her. Through informal guidance memoranda lacking in notice and comment appellees have instituted "policies and procedures" so onerous, they have effectively nullified Congress's "no risk" exception.

By agency decree appellees have determined Congress, although silent on the issue, intended the criminal law "beyond a reasonable doubt" ("BARD") standard of review must be met to show no risk. This BARD standard requires the highest proof and has never been applied in the civil immigration context before. It has traditionally been reserved as a standard the government must meet to take away the rights of citizens, not as a standard citizens must meet to be granted rights by the government.

Moreover, appellees' have biased adjudicators who are instructed in the memoranda to pre-judge applications with the direction approvals should be "rare." Again, this "rare" language appears nowhere in the statute or Congressional record.

Even in the "rare" case where a petitioner can convince an adjudicating officer "beyond a reasonable doubt" his case warrants approval, according to "policy and practice" that officer cannot approve it. Instead the officer must feel

the circumstances warrants approval so strongly that he would advocate to and convince two of his supervising officers to sign off on the approval.

Appellant now argues the "policies and procedures" announced by appellees through informal guidance memoranda violate the APA and US Constitution[1].

ARGUMENT

I. The District Court correctly found it had jurisdiction over Appellant's APA claims.

Appellant's procedural challenges to the AWA are subject to judicial review. Appellant does not challenge his specific denial but challenges the agency's practices as a whole. *McNary v. Haitian Refugee Center, Inc.*, 498 US 479, 487-88 (1991). Specifically he challenges appellees policies and procedures requiring a heightened beyond a reasonable doubt ("BARD") standard of review and their presumption of denial where they pre-judge applications by stating approvals should be "rare."

Under Article III of the Constitution, federal courts can hear "all cases, in law and equity, arising under this Constitution, [and] the laws of the United States..." US Const, Art III, Sec 2. The Supreme Court has interpreted this clause broadly, finding that it allows federal courts to hear any case in which there is a federal

[1] It should be noted that in addition to his APA claim in his opening brief appellant put forth arguments that the AWA violates his fundamental right to marry and is impermissibly retroactive. Although this reply brief only addresses his claims under the APA appellant does not waive these Constitutional claims, he simply relies on and reiterates the arguments put forth in his opening brief.

ingredient. *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824). As a rule when a Federal statute limits judicial review of certain discretionary decisions in particular visa adjudication, the Court is *not* precluded from reviewing "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *McNary*, 498 US at 491-92. The courts should not "impute to Congress an intent to preclude judicial review of the legality of INS action entirely," unless there is "clear and convincing evidence" that was Congress's intent. *Reno v. Catholic Soc. Servs., Inc.* 509 US 43, 63-64 (1993).

Here, appellant does not challenge his individual denial rather he makes a broad challenge against the agency's unlawful presumption of denial and *ultra vires* heightened BARD standard of proof announced via informal guidance memoranda.

Moreover, appellees claim that 8 USC § 1154(a)(1)(A)(viii) delegates "unfettered discretion to the agency." Appellee's Response Brief at 12. However, had Congress wished to grant USCIS "unfettered discretion" regarding the policies and practices *McNary* gave them the exact language to utilize. *McNary*, 498 US at 494. *McNary* states in no uncertain terms, "Congress could, for example, have modeled [the statute] on the more expansive language in the general grant of district court jurisdiction under Title II of the INA by channeling in the Reform Act's special procedures *'all causes. . .arising under any of the provisions'* of the

legalization program" or "It moreover could have modeled [the statute] on 38 U.S.C. §211(a), which governs review of veterans' benefits claims by referring to review *"on all questions of law and fact."* *Id.*(emphasis added). Thus, had congress wished for the agency to have "unfettered discretion" regarding the policies and procedures utilized in the AWA they could have assigned appellees sole, unreviewable discretion on "all causes. . .arising under any of the provisions" or "on all questions of law and fact" as *McNary* dictates. Congress chose not to use the language specifically outlined by *McNary* and thus did not intend to foreclose review.

For these reasons this Court has jurisdiction to hear appellant's claims.

II. The District Court erred in applying *Chevron* deference[2].

As outlined in appellant's opening brief *Chevron* deference is not afforded to informal policy guidelines articulated by the Aytes and Neufeld memos. *US v. Mead Corp,* 533 US 218, 229 (2001); *Christensen v. Harris County,* 529 US 576, 587 (2000); *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*

[2] Appellant wishes to advise the Court that during the pendency of this litigation the US House of Representatives passed the Regulatory Accountability Act of 2017, H.R. 5, 115th Congress (2017). As per appellant's understanding, if this Bill becomes law it would repeal the *Chevron* standard.

deference); *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 510 (9th Cir. 2012) (informal USCIS guidance memorandum are not entitled to *Chevron* deference).

An informal agency guidance memorandum is "entitled to respect" only to the extent the interpretation has the "power to persuade." *Flores v. City of San Gabriel*, 2016 U.S. App. LEXIS 10018 (9th Cir June 2, 2016) quoting *Skidmore v. Swift & Co*, 323 U.S. 134, 140 (1944) and *Christensen*, 529 US at 587. An agency interpretation of a statute is entitled to a "measure of deference proportional to the "'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'"" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168-69 (2012) (quoting *United States v. Mead Corp.*, 533 U.S. at 228 (quoting *Skidmore* 323 U.S. at 140). We also consider the specialized and technical expertise of the agency, see *Skidmore* 323 U.S. at 140 (noting that the "rulings, interpretations and opinions" of an agency "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"), as well as whether the agency's guidance is longstanding or merely a litigating position. See *Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 487-88 (2004) ("We 'normally accord particular deference to an agency interpretation of "longstanding" duration . . . .'" (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002))).

Likewise *Chevron* deference is not appropriate where there is want of "agency expertise." *Yong Wong Park v. AG*¸ 472 F. 3d 66, 71 (3rd Cir. 2006). Here, appellees' do not have any particular expertise in determining risk. This has never been a determination which they have been tasked with before. While they have extensive experience in adjudicating visa petitions they have no experience in evaluating risk.

In sum, the informal guidance Aytes and Neufeld memoranda created the "beyond a reasonable" doubt standard and presumption of denial with no input from Congress and the agency has no expertise in determining risk. As such *Chevron* deference is not appropriate and the district court erred in not providing an analysis under *Skidmore.*

III. Appellees' policies and procedures are not persuasive under *Skidmore.*

Here, analyzing the *Skidmore* factors, the Aytes and Neufeld memos have no persuasive power.

a. The agency's reasoning is neither thorough nor valid, as they offer no reasoning whatsoever.

The Aytes memo announces the BARD standard with absolutely no discussion of the reasoning of how such a standard was arrived at. They simply state by agency decree that a petitioner must show "beyond any reasonable doubt, that he or she poses no risk to the safety or well-being" of the beneficiary. JA 71

¶¶2&3 & JA 73 ¶2. The Neufeld memo similarly lacks any reasoning simply stating "A petitioner convicted of a specified offense against a minor must submit evidence that clearly demonstrates, beyond any reasonable doubt, that he or she poses no risk" to the beneficiary. JA 84 ¶4.

Likewise the heightened BARD standard is normally reserved for criminal proceedings. *United States v. Regan*, 232 US 37, 49 (1914), quoting *Roberge v. Burnham*¸124 Massachusetts 277 (1878) ("The rule of evidence requiring proof beyond a reasonable doubt is generally applicable only in strictly criminal proceedings. If it is founded upon the reason that a greater degree of probability should be required as a ground of judgment in criminal cases. . ."). The BARD standard has never previously been utilized in the civil immigration context, certainly such a dramatic shift to utilizing the highest criminal standard in the civil immigration context warrants some explanation under *Skidmore*.

Likewise, the Aytes and Neufeld memo lack any reasoning as to whether Congress would have intended such a heightened standard and presumption of denial in petitions involving two adults when the law is overwhelmingly focused on protecting children. The stated purpose of the AWA is "[t]o protect ***children*** from sexual exploitation and violent crime and to prevent ***child*** abuse and pornography, to promote internet safety, and the honor the memory of Adam Walsh and other ***child*** crime victims." In addition to the immigration provisions at

issue in the instant case, the AWA expands the scope of the National Sex Offender Registry, expands federal penalties for crimes against ***children***, creates a National ***Child*** Abuse Registry, and expands federal funding to curb exploitation of ***minors*** on the Internet. President Bush described the AWA in his signing statement as a "S.W.A.T. team for kids." See President's Remarks on Signing the Adam Walsh Act in Washington, D.C., 2006 WL 2076691 (Jul. 27, 2006). The Ninth Circuit analysis of the legislative history states:

> 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, e.g. H.R. Rep. No. 109-218, at 22-23 (2005) (stating, in a section 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 "mak[e] sure that our children are safer" and target "***child*** predators"); id. At S8013 (statement of Sen. 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) (emphasis added).

Section 402(a) of the AWA is titled "Immigration Law Reforms to Prevent Sex Offenders from Abusing ***Children***." Thus, the overwhelming purpose of the AWA was clearly to protect children and there is no mention of the necessity for a BARD standard of review or presumed denial between two consenting adults.

Moreover, nothing in the reasoning of the Aytes or Neufeld memo addresses the importance of the petition to the US citizen, as such it is not persuasive under *Skidmore*. Even if the court does not find it rises to the level of a fundamental right the effect barring his petition has on his marriage, family, and life is monumental as it effectively nullifies any benefit flowing from his marriage. For a government agency to make such an intrusion into the life decisions of a US citizen warrants close scrutiny by this Court.

For the reasons expressed above the reasoning utilized by appellees is not only not valid but it is non-existent and warrants no deference under *Skidmore.*

b. The BARD standard is inconsistent with earlier pronouncements.

First, again to reiterate the BARD standard of review is inconsistent because it is a criminal standard never before appearing in the civil immigration context. *See Addington*, 441 US at 428 ("the beyond a reasonable doubt standard historically has been reserved for criminal cases. . .and we should hesitate to apply it too broadly or casually in noncriminal cases."). Likewise, it is almost universally a standard the government must meet to take away the rights of citizens rather than a standard citizens must meet to be afforded rights by the government. In this way the BARD standard is wholly inconsistent with previous pronouncements.

Second, the BARD standard of review is inconsistent with the standard of review used in all other visa petitions where Congress is silent. The long-standing default standard in immigration adjudications is a "preponderance of the evidence." *Matter of Soo Hoo*, 11I&N Dec. 151, 152 (BIA 1965) (finding that the petitioner had not established eligibility by a preponderance of the evidence because they were not credible); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) citing to *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997) (noting that the petitioner must prove eligibility by a preponderance of the evidence in visa petition proceedings). Thus, the "preponderance of the evidence" standard has been utilized in every other visa petition adjudication except where Congress specifically dictated a heightened burden. *Matter of Patel*, 19 I&N Dec. 774, 782-83 (BIA 1988) (noting that in § 204(a)(2)(A) of the INA, Congress explicitly requires a higher standard of clear and convincing evidence to rebut the presumption of a fraudulent prior marriage); see also *Russello v. United States*, 464 US 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) ("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.").

Appellees argue that although the preponderance of the evidence standard is the default standard in visa petitions, it is not in "risk" determinations. Appellees' Br. at 17. This is illogical because a "risk" finding is still pursuant to a visa petition adjudication. Had Congress intended a heightened standard they could have stated so, and they have done so in similar sections of the INA concerning visa petitions. For example where a visa petition is filed post removal proceedings Congress explicitly requires applicants to show by "clear and convincing" evidence their marriage is bona fide. 8 USC §§ 1154(g), 1255(e)(1), 1255(e)(3) Thus, Congress knows the default standard in visa petitions and has explicitly raised it in other sub-sections of the INA specific to visa petitions. Appellees offer no reason why Congress would expressly name a heightened "clear and convincing" standard in one section of the visa petition statute but remain silent in the AWA visa petition. The contention that Congress's silence somehow inferred their intent was utilizing the BARD standard reserved for criminal proceedings is nonsensical.

For these reasons the BARD standard is a criminal standard which has never been previously applied in the civil immigration context where the preponderance of the evidence standard is the rule. As such it is inconsistent with prior pronouncements and does not warrant deference under *Skidmore.*

c. There are no other factors which give the power to persuade.

Appellees policies and procedures have left the "risk" determination as an exercise in futility where they rubber stamp denials. In order to obtain approval the petitioner must convince an officer who has been instructed approvals should be "rare" that he meets the heightened BARD standard. Even where the petitioner meets this massive undertaking his claim still does not warrant approval. So predisposed to denial is the agency that even where the adjudicating officer feels a petition warrants approval they themselves cannot approve it. They must seek out, than advocate the merits to, and ultimately convince not one but two supervising officer's to sign off on approval. JA 97, ¶3-4.

Taken in totality, these policies and procedures are so stringent they are nothing more than an exercise in futility where appellees have invalidated the will of the legislature for a petitioner who shows "no risk.". *See Addington v. Texas*, 441 US 418, 432 (1979) (concluding that the reasonable doubt standard is inappropriate in civil proceedings because it may impose a burden impossible to meet). Had Congress intended for appellant's "no risk" determination to be an exercise in futility they would have simply barred his petition without any risk analysis whatsoever. The fact that Congress bothered to create the "no risk" determination is clear evidence they intended such an exception to occur.

In *Matter of Aceijas-Quiroz*, 26 I&N Dec 294, 303 (BIA 2014) the dissenting opinion summarized appellants arguments against the BARD standard:

"The United States Citizenship and Immigration Services ("USCIS") has employed the standard of "beyond a reasonable doubt," which is neither authorized under the Adam Walsh Act nor the Immigration and Nationality Act. The USCIS has not implemented regulations interpreting the Adam Walsh Act. Rather, it simply states that based on the nature of the offenses to which the Adam Walsh Act relates and the potential risk of harm to the intended beneficiaries, it will interpret the "no risk" language of the statute to require a higher level of evidence than that required in general visa petition cases like marriage fraud cases. While I agree with the importance of the interests at stake in these cases, the Secretary's use of this standard of proof goes beyond the express terms of the Immigration and Nationality Act and the Adam Walsh Act. In section 402(a) of the Adam Walsh Act, 120 Stat. at 622−23, Congress imposed a heavy burden on petitioners to prove that they have not been convicted of a "specified offense against a minor" and, if they fail to meet that burden, to prove that they would pose no risk to the beneficiary in order to merit a favorable exercise of the Secretary's discretion. These statutory hurdles are substantial for a petitioner to surmount. Thus, the legitimate aims of the Adam Walsh Act would not necessarily be furthered by imposing the kind of burden of proof usually reserved for the Government to meet in criminal matters. The USCIS argues that "the 'preponderance of the evidence' standard is not inviolable within visa petitions adjudications." For example, the USCIS points out that in marriage fraud cases, a petitioner must establish by "clear and convincing evidence" that the beneficiary did not engage in a prior marriage fraud. In addition, in the context of the nondisclosure of a relative on a previous visa petition, a petitioner must submit "clear and convincing" evidence that the relationship is bona fide in light of the prior failure to disclose it to the Government. See *Matter of Ma*, 20 I&N Dec. 394, 398 (BIA 1991). These examples involve allegations of fraud that can only be rebutted with "clear and convincing" evidence that the relationship is bona fide. See, e.g., *Matter of Patel*, 19 I&N Dec. 774, 782−83 (BIA 1988). In marriage fraud cases, the standard of "clear and convincing" evidence is actually explicit in the statute at section 204(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1154(a)(2)(A)(ii) (2012), whereas here, the Secretary's choice of standard of proof lacks any statutory basis. Moreover, aside from these two examples, the USCIS has cited no case where the "beyond a

> reasonable doubt" standard has been used[3]. Based on the lack of explicit statutory or regulatory authority for the heightened standard, I would find that "beyond a reasonable doubt" is not an appropriate standard to apply in these cases."

In sum, appellees offer no thorough or valid reasoning in furtherance of their policies or procedures. Moreover, not only is the BARD standard inconsistent with the default standard of review in all other visa petitions but its sole application has traditionally been in the criminal context and it has never been utilized in any civil immigration proceeding. Likewise, appellees not only have no expertise in risk assessment but have never even previously been tasked with assessing any purported risk a US citizen may pose to a foreign spouse. Finally, appellees policies and procedures create exercise in futility effectively negating Congress's exception for a "no risk" determination. For these reasons under *Skidmore* their policies and procedures are not persuasive and warrant no deference.

CONCLUSION

[3] "The Adam Walsh Act provides for the civil commitment of "sexually dangerous person[s]" under 18 U.S.C. § 4248 (2012). Under § 4248(d), the Government has the burden of proving that the respondent is sexually dangerous by "clear and convincing evidence." See *United States v. Perez*, No. 5:11-HC-2015-BR, 2012 WL 5493614, at *3 (E.D.N.C. Nov. 13, 2012). This is a lesser standard than that which the USCIS applies to Adam Walsh Act visa petitions, even though the restriction of a person's liberty is at stake under § 4248. Id.; see also *United States v. Hunt*, 643 F. Supp. 2d 161, 179 (D. Mass. 2009) ("The clear and convincing evidence standard is an 'intermediate standard,' lying somewhere 'between preponderance of the evidence and proof beyond a reasonable doubt.'" (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979))." (footnote quoted from *Aceijas* dissent)

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

Dated:01/20/2017

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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 3831 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

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 1/20/2017 .

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.

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