Case No. 16-3440

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AHMED BAKRAN,

Plaintiff-Appellant,

v.

JEH JOHNSON, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY, *et al*.,

Defendants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CASE NO. 2:15-cv-0127-JP

BRIEF FOR THE APPELLEES

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STATEMENT OF THE ISSUES

Under Section 402(a) of the Adam Walsh Child Safety and Protection Act of 2006 ("Adam Walsh Act" or "AWA"), USCIS is precluded from granting a United States citizen's I-130 Petition for Alien Relative to classify the petitioner's foreign national spouse or child as an immediate relative for the purpose of allowing the beneficiary to immigrate to the United States, if the petitioner has been convicted of any "specified offense against a minor," unless the Secretary of Homeland Security, in his "sole and unreviewable discretion," determines that the petitioner poses "no risk" to the beneficiary of the visa petition. 8 U.S.C. §§ 1154(a)(1)(A)(viii)(I) and (B)(i)(I). The issues presented are:

1. Whether the district court erred in finding that it had jurisdiction over the Plaintiff-Appellant's Administrative Procedures Act ("APA") challenge to U.S. Citizenship and Immigration Services' ("USCIS") discretionary selection of the standard of proof it applies in determining, in its "sole and unreviewable discretion," whether a petitioner poses "no risk" to the beneficiary.

2. Whether the district court correctly determined that USCIS's administration of the AWA complies with the APA's highly-deferential standard of review.

3. Whether the district court correctly determined that the AWA's requirement that USCIS make present-day assessments of the dangerousness of

petitioning individuals convicted of certain crimes against children does not violate the Ex Post Facto Clause as it is neither retroactive and serves the non-punitive purpose of protecting the beneficiaries to these immigration petitions.

4. Whether the district court correctly determined that the AWA's restriction on convicted individuals petitioning for alien relatives does not violate any substantive due process right to marriage.

STATEMENT REGARDING RELATED CASES AND PROCEEDINGS

The Defendants-Appellees are not aware of any related cases pending before any court or administrative body. The instant case has not previously been before this Court.

STATEMENT OF THE CASE

I. Statutory Background

The Immigration and Nationality Act ("INA") allows a United States citizen to file a Form I-130, Petition for Alien Relative ("I-130 petition") with the U.S. Citizenship and Immigration Services ("USCIS")[1] to classify the petitioner's foreign national spouse or child as an immediate relative for the purpose of

[1] Congress delegated the authority to adjudicate immigrant visa petitions to classify aliens as immediate relatives to USCIS. *See* Homeland Security Act of 2002, Pub. Law No. 107-296, § 451(b)(1) (Nov. 25, 2002) (codified at 6 U.S.C. § 271(b)(1)). Congress also delegated authority to USCIS to establish policies governing the adjudication of immigrant visa petitions. *Id*. § 451(a)(3)(A).

allowing the beneficiary to immigrate to the United States. *See* 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. §§ 204.1(a)(1), 204.2(a)(1). The citizen petitioner bears the burden of establishing that he or she is eligible to petition for the alien beneficiary of the petition. *See* 8 U.S.C. § 1361. If the beneficiary is in the United States, he or she may concurrently file a Form I-485, Application to Register Permanent Residence or Adjust Status ("I-485 petition"), to adjust status to that of a lawful permanent resident of the United States.[2] *See* 8 C.F.R. § 245.2(a)(2)(B). Because Congress has not imposed any numerical limitations on the number of visas that may be allocated to immediate relatives of United States citizens, *see* 8 U.S.C. § 1151(b)(2)(A)(i), if the beneficiary is otherwise eligible, USCIS may adjust the beneficiary's status to a lawful permanent resident concurrently with approving the I-130 petition. *See* 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(a); *Matter of Hashmi*, 24 I. & N. Dec. 785, 789 (BIA 2009).

However, under the Adam Walsh Child Safety and Protection Act of 2006 ("Adam Walsh Act" or "AWA"), USCIS is precluded from granting a United States citizen's I-130 petition if the petitioner has been convicted of any "specified offense against a minor," unless the Secretary of Homeland Security, in his "sole

[2] If the alien spouse is outside the United States, the alien spouse must apply for an immigrant visa at an appropriate United States Consulate. *See* 8 U.S.C. § 1202(a); 22 C.F.R. § 42.61(a). As an intending immigrant, the alien spouse must obtain an immigrant visa to seek admission to the United States. *See* 8 U.S.C. § 1181(a)(1).

and unreviewable discretion," determines that the petitioner poses "no risk" to the beneficiary of the visa petition. 8 U.S.C. §§ 1154(a)(1)(A)(viii)(I) and (B)(i)(I). The Adam Walsh Act defines the term "specified offense against a minor" to include, among other offenses, "[a]ny conduct that by its nature is a sex offense against a minor." 42 U.S.C. § 16911(7).

Although a petitioner with a specified conviction is not precluded from seeking classification of his immediate relative, USCIS must determine that the petitioner poses "no risk" to the beneficiary as a condition for approving the petition. *Id*. § 402(a). USCIS interprets the statutory phrase "poses no risk to the beneficiary" to mean that the petitioner must pose no risk to the safety or well-being of the beneficiary or any alien derivative beneficiary. *See* Michael Aytes, USCIS Associate Director, Domestic Operations, *Guidance for Adjudication of Family-Based Petitions and I-129F Petition for Alien Fiancé(e) under the Adam Walsh Child Protection and Safety Act of 2006* (Feb. 8, 2007) ("Aytes Memorandum"); Donald Neufeld, USCIS Acting Associate Director, *Transmittal of SOP for Adjudication of Family-Based Petitions under the Adam Walsh Child Protection and Safety Act of 2006* (Sep. 24, 2008) ("Neufeld Memo"), both located at JA 67-104. Because the statute requires a finding of "no risk" to the beneficiary as a condition for approving the I-130 petition, USCIS interprets the statute to impose upon the petitioner the burden of proving "beyond any reasonable doubt,

that he or she poses no risk to the intended adult beneficiary." *Id*. The petitioner is required to carry the burden of persuasion and production by submitting evidence of rehabilitation and any other relevant evidence that clearly demonstrates, beyond any reasonable doubt, that he poses no risk to the safety and well-being of the intended beneficiary. *Id*. USCIS has published a non-exclusive list of documents that the petitioner may submit to carry his burden of showing no risk to the beneficiary. *Id*.

If USCIS denies an I-130 petition, the petitioner has the right to appeal the decision to the Board of Immigration Appeals. *See* 8 C.F.R. § 204.2(a)(3). The Board has jurisdiction to determine *de novo* issues of fact and law when reviewing USCIS's denial of an I-130 petition. *See* 8 C.F.R. § 1003.1(d)(3)(iii); 67 Fed. Reg. 54,878, 54,981 (EOIR) (Aug. 26, 2002). The Board lacks jurisdiction to review USCIS's assessment of "no risk" under the Adam Walsh Act, *see Matter of Aceijas-Quiroz*, 26 I. & N. Dec. 294, 300-01 (BIA 2014).

II. Factual Background

In 2004, Plaintiff-Appellant Ahmed Bakran pleaded guilty to Aggravated Indecent Assault, in violation of Pennsylvania Criminal Statute Section 3125, and Unlawful Contact with a Minor, in violation of Pennsylvania Criminal Statute Section 6318. *See* JA at 2 (citing Dist. Ct. Dkt. 14-3, Concise Statement of

Material Facts ("CSMF") at ¶ 2)). The Delaware County Court sentenced Bakran to 11.5 to 23 months' imprisonment, 10 years of probation, and lifetime sex offender registration. *Id*. As part of his criminal sentence, he was required to undergo a psychosexual evaluation and is prohibited from any unsupervised contact with minors. *Id*.

The conviction resulted from events that occurred when Bakran was twenty-two years old. *See* Dist. Ct. Dkt. 14-4, Concise Statement of Additional Facts ("CSAF") at ¶ 1. According to charging documents, in 2003, Bakran solicited two fifteen-year-old minors for sex in an internet chat room. *Id*. He picked the girls up, purchased alcohol for them, and brought them to his residence. *Id.* Court documents demonstrate that he knew the girls were intoxicated and, specifically, that one of the girls vomited during the encounter and one of the girls had to be carried from his residence following the encounter. *Id*. Despite this, he digitally penetrating both girls, performed oral sex on at least one of the girls, and had sexual intercourse with one of the girls. *Id*.

Two years later, in 2006, Congress passed the AWA, which amended the Immigration and Nationality Act ("INA") to bar citizens convicted of a "specified offense against a minor" from filing any family-based visa petitions unless the Secretary of Homeland Security finds in his discretion that the applicant poses no risk to the beneficiary. 8 U.S.C. §§ 1154(a)(1)(A)(i); 1154(a)(1)(A)(viii)(I).

Bakran's 2004 conviction qualifies as a specified offense against a minor under the INA as amended by the AWA. *See* JA at 110 (noting that Bakran did not contest this fact before the agency). As a result, under the INA, he is not able to petition for an alien relative absent satisfying the Secretary that he poses no risk to the beneficiary. 8 U.S.C. §§ 1154(a)(1)(A)(i); 1154(a)(1)(A)(viii)(I).

In 2012, Bakran married to Zara Qazi, a foreign national and citizen of India. JA at 3 (citing CSMF at¶ 4). Bakran has resided with her in the United States since 2012 and the couple has one child. *Id*. On July 30, 2012, Bakran filed an I-130 petition on behalf of Qazi. *Id*. at 4 (citing CSMF at ¶ 5). Qazi concurrently filed an I-485 application to adjust her status to lawful permanent resident. *Id*..

On January 21, 2014, USCIS sent Bakran a Request for Evidence/Notice of Intent to Deny his I-130 petition. *Id.* (citing CSMF at ¶ 6). The request stated that his conviction barred him from filing an I-130 on behalf of his wife unless he could show that he posed no risk to her. *Id*. USCIS afforded Bakran 87 days to respond with evidence to meet the standard. *Id*. Bakran timely responded to the request with 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*. (citing CSMF at ¶ 7).

After reviewing the totality of the evidence in the record, on December 9,

2014, USCIS denied Bakran's I-130 petition and Qazi's I-485 application. *Id*. (citing CSMF at ¶ 8). The agency relied on the seriousness of the offense, alleged inconsistencies in Bakran's story, gaps in the three evaluations, and Bakran's failure to provide information related to unfavorable polygraphs that reference additional victims. Agency Denial Decision, JA 111-116. The agency found that Bakran had not demonstrated, as required by Congress, that he posed no risk to the beneficiary. *Id*.

In 2015, Bakran initiated this litigation. He challenges the AWA as unconstitutional and USCIS's implementation as violating the Administrative Procedure Act. *Id*. On June 11, 2015, the district court denied the Government's motion to dismiss for lack of jurisdiction. JA at 118-127. The district court, following submission of the Certified Administrative Record and cross-motions for summary judgment, granted judgment in favor of the Government on all claims. JA at 1-14. Bakran appeals dismissal of three of his seven claims: (1) USCIS's "beyond all reasonable doubt standard" is arbitrary or capricious and violates the APA; (2) the AWA violates Bakran's substantive due process right to marriage; and (3) the AWA violates the Ex Post Facto Clause.

STANDARD OF REVIEW

This Court "employ[s] a plenary standard in reviewing orders entered on motions for summary judgment, applying the same standard as the district court."

Blunt v. Lower Merion School Dist., 767 F.3d 247 (3d Cir. 2014) (citing *Kelly v. Borough of Carlisle,* 622 F.3d 248, 253 (3d Cir. 2010)). As a result, the Court "may affirm the District Court on any grounds supported by the record, even if the court did not rely on those grounds." *Id*. (quoting *Nicini v. Morra,* 212 F.3d 798, 805 (3d Cir. 2000)).

SUMMARY OF THE ARGUMENT

The district court correctly granted judgment in favor of the Government. First, Bakran's sole remaining Administrative Procedures Act ("APA") claim is due to be dismissed for lack of jurisdiction as the Immigration and Nationality Act ("INA"), as amended by Section 402(a) of the Adam Walsh Act ("AWA"), bars judicial review over the Secretary's process for determining whether an individual petitioner poses any risk to the beneficiary to the immigration petition. This bar extends to Bakran's challenge to the standard or proof and presumptions the Secretary deems appropriate for application to individual cases. Accordingly, this Court—like the only other circuit court to have faced this question—must decline jurisdiction over the claim. Even if the Court reaches the merits of the APA challenge, however, it should affirm the district court's dismissal of the claim on the merits as the agency's application of a "beyond any reasonable doubt" standard is consistent with the discretion afforded the Secretary by statute, a reasonable interpretation of the statute, and not arbitrary or capricious.

Second, the Court should affirm the district court's dismissal of Bakran's substantive due process claim as legally insufficient. No court has ever recognized a right to reside in the United States with a foreign-born spouse as a fundamental marriage. Indeed, even if such a right were recognized, the Executive's well-established primacy over immigrant-admission decisions and Congress's legitimate goals underpinning the challenged provision are sufficient to overcome Bakran's challenge.

Finally, the Court should affirm the district court's dismissal of Bakran's Ex Post Fact challenge as the challenged provision is neither retroactive nor punitive. The provision, although applicable to individuals with pre-enactment convictions, requires a present-day risk assessment and, therefore, is not retroactive. Additionally, the provision has a legitimate, non-punitive civil purpose and fails to meet the legal standard for finding legislation punitive. Accordingly, the judgment of the district court must be affirmed.

ARGUMENT

I. The district court properly entered judgment in favor of the Government on Bakran's APA claim.

A. The AWA and INA bar jurisdiction over Plaintiff's APA claims.

Before the Court can review an agency's action under the APA, a plaintiff "must first clear the hurdle of [5 U.S.C.] § 701(a)," *Heckler v. Chaney*, 470 U.S.

821, 828 (1985), which provides that an agency's action is not subject to judicial review where a "statute[] preclude[s] judicial review" or where an "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(1)-(2). In this case, Congress specifically precluded judicial review of USCIS's discretionary decisions under the INA and AWA and, therefore, the Court lacks jurisdiction over the APA claim. *See* 8 U.S.C. § 1252(a)(2)(B)(ii); 8 U.S.C. § 1154(a)(1)(A)(viii).

The INA identifies "[m]atters not subject to judicial review," including "any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii). Under section 1252(a)(2)(B)(ii), courts are precluded from reviewing any "decision or action" of USCIS that is committed to the agency's discretion by statute. *See Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005).[3] Therefore, under section 1252(a)(2)(B)(ii), the Court must examine the wording of the statute setting forth the nature of the administrative discretion at

[3] Section 1252(a)(2)(B)(ii) is not limited to discretionary decisions made within the context of removal proceedings, but applies to all discretionary determinations identified in the statute. *CDI Information Serv. v. Reno*, 278 F.3d 616, 620 (6th Cir. 2002). The "title" referred to in section 1252(a)(2)(B)(ii) covers sections 1151-1378. *Id*. at 619. The AWA amended section 1154 and therefore is covered by section 1252(a)(2)(B)(ii).

issue to determine whether it has jurisdiction over the agency's decision. *See Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196, 199 (3d Cir. 2006).

The relevant statutory provision in this case grants authority to USCIS to determine in its "sole and unreviewable discretion" whether an I-130 petitioner with a conviction for a specified offense against a minor has established that he poses no risk to the intended beneficiary. 8 U.S.C. § 1154(a)(1)(A)(viii). Because this provision delegates unfettered discretion to the agency to determine risk on a case-by-case basis, the Court is precluded under section 1252(a)(2)(B)(ii) from reviewing USCIS's discretionary process for determining whether an individual has satisfied the Secretary in his "sole and unreviewable discretion" that he or she poses no risk to the intended beneficiary. 8 U.S.C. § 1154(a)(1)(A)(viii). Indeed, even without Section 1252(a)(2), the AWA itself bars judicial review in its unambiguous directive that the no-risk determination be left to the Secretary's *unreviewable* discretion. Accordingly, the Court lacks jurisdiction over any challenge to USCIS's denial of an I-130 petition based on the petitioner's failure to demonstrate that he poses no risk to the intended beneficiary.

Plaintiff's APA claim falls squarely within the scope of the AWA's and INA's jurisdictional bars. Bakran's APA claim challenges USCIS's alleged presumption of denial and the standard of proof it employs to make the discretionary no-risk determination. Appellants' Br. at 13-18. These challenges are

inextricably intertwined with the agency's no-risk determination because these procedures guide the agency's discretionary process and its adjudicative decisions on individual petitions. *See Matter of Aceijas-Quiroz*, 26 I. & N. Dec. 294, 299 (BIA 2014). To allow review would effectively allow the petitioner to challenge the ultimate determination and would thwart Congress's clear intent to bar review in this area. Similarly, if a court were to review USCIS's standard of proof and other adjudication procedures, it could essentially dictate the manner in which USCIS must exercise its discretion. That is precisely what Congress sought to prevent here. *Id.*

The only other circuit court to address this issue has agreed. In *Bremer v. Johnson*, 834 F.3d 925, 930-31 (8th Cir. 2015), the Eighth Circuit found it lacked jurisdiction over an identical APA claim:

> Finally, Count V alleges that the USCIS acted in excess of statutory authority by requiring applicants to prove beyond a reasonable doubt that they pose no risk to visa beneficiaries. The Bremers rely on a USCIS administrative decision issued in a different context, which states 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 evidence that he or she is eligible for the benefit sought." *In re Chawathe,* 25 I. & N. Dec. 369, 375 (USCIS Admin. Appeals Office 2010). The Adam Walsh Act, however, allows for a different standard of proof: the standard may be chosen in the "sole and unreviewable discretion" of the Secretary. As the Board of Immigration Appeals has observed, the appropriate standard of proof is "part and parcel of the ultimate exercise of discretion" accorded to the Secretary under § 1154(a)(1)(A)(viii). *In re Aceijas-Quiroz,* 26 I. & N. Dec. 294, 299 (B.I.A. 2014). The Act allows the Secretary to determine

> what quantum of evidence is necessary to satisfy him that an applicant poses no risk to a visa beneficiary. It would usurp the Secretary's discretion to require the agency to exercise discretion in favor of a person who meets only some lower standard of proof.

The district court, in denying Defendants' motion to dismiss for lack of jurisdiction, applied too narrow of a reading of the jurisdictional bar and failed to specifically analyze the APA claim. *See* JA at 126-26. For the reasons identified by both the Board of Immigration Appeals and the Eighth Circuit, this was error. The provision at issue here does not limit the Secretary's discretion to only its ultimate finding of an individual's risk; rather, it is phrased to broadly encompass all aspects of the Secretary's exercise of discretion in making that determination, including decisions regarding the level of proof necessary to satisfy the Secretary that an individual poses no risk. *See Bremer*, 834 F.3d at 931-32; *Matter of Aceijas-Quiroz*, 26 I. & N. Dec. at 299. Accordingly, this Court should find that the challenged standard and policy memorandum are both part of the discretion delegated to USCIS by statute and beyond the scope of the Court's jurisdiction.

B. The APA claim also fails on the merits.

Agency action can be set aside only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). The standard is highly deferential. *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43. In matters of statutory interpretation, the Court follows the familiar two-step

procedure set forth in *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984): First, it determines whether the statute's plain terms "directly addres[s] the precise question at issue"; "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If the statute is ambiguous, however, a federal court must accept the agency's construction of the statute if it is "reasonable." *Id.* at 843-44. The Court should uphold the agencies' administration of the statute and find the agency's applied standards easily satisfy the APA's deferential standard.

Bakran claims that USCIS cannot require a petitioner with a specified criminal conviction to show "beyond any reasonable doubt" that he poses no risk to the intended beneficiary as a condition for approving an I-130 petition. Appellant's Br. at 13-18. He argues that USCIS must apply the lower preponderance of the evidence standard of proof because the agency applies it in other contexts. The district court correctly disagreed and found that the language of the statute indicates a legislative intent to set a higher standard of proof than the preponderance of the evidence standard. See JA at 17-18. The district court also indicated that to the extent the statute left a gap as to the specific standard of proof, the statute left it to the Secretary to fill that gap, and USCIS's standard is a reasonable interpretation of the statute. JA at 20-21.

When Congress has not prescribed the degree of proof that must be adduced by the proponent of an order to carry his burden of persuasion in an administrative proceeding, the Supreme Court has indicated that it is appropriate for the courts to prescribe a standard. *See Steadman v. SEC*, 450 U.S. 91, 95 (1981). However, when Congress has directly spoken to the issue, the Court must defer to its legislative judgment. *Id*. In this case, Congress directly spoke to the issue of the standard of proof by setting a "no risk" threshold for the approval of petitions. In passing the Adam Walsh Act, Congress set the standard of proof for a convicted petitioner very high by requiring the petitioner to show "no risk" to his alien beneficiary. Pub. Law No. 109-248, § 402(a). Based on the legislative intent to protect the public, *see* 42 U.S.C. § 16901, the "no risk" language in the statute serves to ensure a factually correct assessment of the risk of harm to a foreign national who is a stranger to this country, *cf. In re Winship*, 397 U.S. 358, 370 (1970). Congress's directive that the petitioner demonstrate "no risk" to the beneficiary is a legislative directive to the factfinder concerning the degree of confidence the agency must have in the correctness of its factual conclusions. *Id*. Thus, USCIS's "beyond any reasonable doubt" standard of proof is simply an implementation of Congress's directive regarding the high degree of confidence the agency must have in a petitioner's factual assertion that he poses no risk to the intended beneficiary.

Notwithstanding the plain legislative directive that the petitioner demonstrate a lack of risk to the beneficiary, Bakran claims that the agency must use the preponderance of the evidence standard because the agency has traditionally applied this lower standard of proof in visa petition proceedings and is required to do so where no other standard is specified. Appellant's Br. at 12-13 (citing *Matter of Martinez*, 21 I. & N. Dec. 1035, 1036 (BIA 1997)). Here, however, Congress's express requirement that the beneficiary face "no risk," constitutes a clear indication that a different standard apply, or alternatively that the Secretary have sole and unreviewable discretion to set the standard. Under either interpretation of the statute, it is not appropriate to read *Matter of Martinez* as requiring a preponderance of the evidence standard in this situation. *See* Pub. Law No. 109-248, § 402(a).

Even if the Court found the "no risk" language ambiguous as to the appropriate standard of proof, it would still be appropriate, based on the purpose of the statute, to require a higher level of proof for the approval of petitions filed by petitioners with convictions for certain sex offenses. The Supreme Court has required higher levels of proof beyond a preponderance of the evidence where particularly important individual interests are at stake. *See Addington v. Texas*, 441 U.S. 418, 423 (1979) (involuntary commitment proceedings); *Woodby v. INS*, 385 U.S. 276, 285-86 (1966) (deportation). The

Court has also set a higher standard of proof in the absence of an express directive from Congress where the relevant statutory language reflects background principles. *See Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238, 2245-46 (2011) (common law background shows Congress's intent to set a higher standard of review in patent validity cases). Based on the harm that Congress meant to address under the Adam Walsh Act, and given the importance of protecting vunerable foreign national beneficiaries from harm, Congress did not intend to set a lower standard of proof to require that the Government share the risk of error in an equal fashion with the petitioner. *Cf. Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (preponderance of the evidence appropriate where the balance of interest between the parties is in equipoise). By requiring a showing of "no risk," Congress intended the petitioner to bear the risk of error in the fact finding process because the petitioner's sex offense conviction triggers the legislative concern that harm may befall an unsuspecting foreign national who is a stranger to this country. The Government's interest in protecting beneficiaries warrants the heightened standard of proof that may otherwise be inappropriate in the context of licensing or business regulation. *Cf. Bender v. Clark*, 744 F.2d 1424, 1430 (10th Cir. 1984) (preponderance of the evidence appropriate for the granting of leases).

Even if something less than *Chevron* deference is owed to USCIS's memorandum, *see Skidmore v. Swift*, 323 U.S. 134, 140 (1944), the agency's interpretation still satisfies the APA standard. Here, it was wholly reasonable for USCIS to reject the preponderance of the evidence standard as incompatible with the mandatory no-risk determination. If a petitioning individual were adjudged to be simply "more likely than not" to pose no risk to the beneficiary, there would still remain a substantial—indeed even a 49% chance—that the petitioner *is* a risk to the beneficiary. It was not unreasonable for the Secretary, as the individual the statute makes answerable for any incorrect risk predictions, to decline to assign the burden in a manner that would erroneously treat such an individual as no risk. Accordingly, the Aytes and Neufeld memoranda, as well as USCIS's standards and presumptions, are not arbitrary, capricious, or otherwise contrary to law. The judgment of the district court on this count should be affirmed.

II. The district court correctly concluded that the AWA does not intrude on Appellant's substantive due process rights.

Bakran appears to acknowledge that the AWA has not restricted his fundamental right to marry, but instead claims that the right to marry includes a right to have the Executive lawfully admit a foreign spouse for residence. Bakran's claim fails as no court has ever so broadly applied the right to marriage. Here, it is undisputed that Bakran and Qazi are married, and that the AWA does not prohibit

them from residing together outside of the United States, or otherwise bar Qazi from obtaining lawful status through an alternative means that doesn't leave her dependent upon Bakran. Therefore, Bakran cannot show a violation of any right, much less a fundamental one.

Courts recognize substantive due process claims only when a liberty interest "so rooted in the traditions and conscience of our people as to be ranked fundamental" is at stake. *Reno v. Flores*, 507 U.S. 292, 303 (1992). A U.S. citizen may have a fundamental right to marry, but he has no fundamental right to live in the United States with an alien spouse, or to sponsor his alien spouse for an immigrant visa. Consistent with that precedent, the vast majority of circuits have held that a U.S. citizen does not have a constitutionally-protected interest in the presence of an alien relative in the United States. *See*, *e.g., Bangura v. Hansen*, 434 F.3d 487, 495-96 (6th Cir. 2006); *Garcia v. Boldin*, 691 F.2d 1172, 1183 (5th Cir. 1982); *Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 555 (2d Cir. 1975); *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970); *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958); *see also Flores*, 507 U.S. at 303 ("The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it."); *Din v. Kerry*, 135 S. Ct. 2128, 2138 (2015) (op. of Scalia, J.) (noting that refusal to admit an alien into the United States does not implicate any due process right of that alien's U.S. citizen spouse); *Marin-Garcia v. Holder*, 647 F.3d 666, 673-74

(7th Cir. 2011) (holding that "removal of an illegal alien does not work a constitutional violation on the alien's citizen-children"). The lone circuit to address this question in the context of the AWA concluded that the statute did not infringe any right, reasoning the provision "does not restrict the ability to marry" and "merely denies [the beneficiary] one avenue of obtaining permanent residency in the United States." *Bremer*, 834 F.3d at 932.

Furthermore, aliens seeking initial entry (such as Bakran's foreign spouse) have no constitutional right to obtain an immigrant visa because "[t]he power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *see also De Avila v. Civiletti*, 643 F.2d 471, 477 (7th Cir. 1981); *Morales- Izquierdo v. Dep't of Homeland Security*, 600 F.3d 1076, 1091 (9th Cir. 2010) (alien has no "fundamental right to reside in the United States simply because other members of [his] family are citizens or lawful permanent residents"). As this Court has observed in an unpublished decision, "[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)). Because Bakran has no liberty interest in his spouse's residence in the United States, and his

spouse, as an alien, has no liberty interest in remaining in the United States, Bakran cannot support a substantive due process claim.

As the district court noted, the Supreme Court's recent plurality decision in *Din* supports this conclusion. *See* JA at 14. In *Din*, the Supreme Court concluded that that a statute denying a foreign-national spouse entry into the United States does not infringe upon a protected liberty interest. *Din*, 135 S. Ct. 2128. Although Bakran devotes a significant portion of his due process argument on *Din*, it is clear that a majority of Justices agreed that the right to marriage does not extend so far as to include a fundamental right to reside in the United States with a foreign spouse. Even the dissenting justices determined that whatever right was at stake was not absolute, but turned on whether sufficient procedural protections are in place. *Id*. at 2142. Although Justices Kennedy and Alito expressly declined to take a position on the substantive due process question, in affirming they found that the Government has the authority to exclude a foreign spouse with only minimal notice to the citizen spouse. *Id*. at 2139. Such a conclusion strongly suggests that Bakran's denial, which included substantially more detail and came with the opportunity to respond and appeal, likewise satisfies due process.

Indeed, even if a protected liberty interest were at stake, federal courts do not apply strict scrutiny review in constitutional challenges to substantive immigration statutes, even if it is a U.S. citizen whose rights are being infringed.

Fiallo v. Bell, 430 U.S. 787, 798-99 (1977) (finding immigration statutes constitutional despite allegations that the provisions burdened the rights of U.S. citizen fathers to establish a home and raise their children). The AWA provision here easily withstands this standard of review because Congress has a legitimate interest in protecting individuals from sexual abuse and exploitation and the provision is conceivably related to achieving that interest because it serves to protect the alien from abuse by the petitioner. Thus, this Court should affirm the district court decision. *See, e.g.*, *Fiallo*, 430 U.S. at 799-800.

III. The AWA is not impermissibly retroactive.

Bakran claims that the Adam Walsh Act as applied to his 2004 conviction violates the Ex Post Facto Clause. To violate the Ex Post Facto Clause, a law must be both retrospective and penal. *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994). The district court correctly determined that Bakran's Ex Post Facto Claim fails on both accounts.

A. The statute is not penal.

The framework for determining whether a statute is punitive within the meaning of the Ex Post Facto Clause, is well-established. *Smith v. Doe*, 538 U.S. 84, 92 (2003). First, the Court must determine whether the legislature intended the statute to establish a criminal or civil legislative scheme. Second, if the Court

determines that the legislature intended the statute to enact a regulatory scheme that is civil and non-punitive, then the Court must examine whether the legislation is so punitive either in purpose or effect as to negate legislative intent. *Id*. at 92-93. The Supreme Court has repeatedly held that "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) and *United States v. Ward*, 448 U.S. 242, 248-249 (1980)). Because Bakran cannot overcome the "considerable deference" accorded to Congress's designation of this statute as "civil," his ex post facto claim fails as a matter of law. *See id*. at 93.

The first step of this inquiry is governed by the Supreme Court's decision in in *Smith v. Doe*, 538 U.S. 84 (2003), where the Supreme Court upheld a sex offender registration statute against an ex post facto challenge. In *Smith*, the Court recognized public safety is "historically" a "legitimate non-punitive government objective." *Smith*, 538 U.S. at 93. Like the statute upheld in *Smith*, this statute's purpose – to protect the public – is facially evident. *See* Pub. Law 109-248, 120 Stat. 587 ("An Act [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."). Here, Congress's public safety objective is clear both from the title of the Act – the

Adam Walsh Child Protection and Safety Act of 2006 – and of the specific title in which the statute appears – Immigration Law Reforms to Prevent Sex Offenders from Abusing Children. Further, Congress's decision to insert the provision into the Immigration and Nationality Act is a clear indication of civil, non-punitive intent. *See Kansas v. Hendricks,* 521 U.S. 346, 361 (1997) (placement of civil commitment provision in probate code – rather than criminal code – was evidence of the legislature's non-punitive intent); *Zadvydas v. Davis,* 533 U.S. 678, 690 (2001) ("[Immigration] proceedings "are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."). Notably, the statute is identical to a provision approved by the Senate in its version of the 2006 Comprehensive Immigration Reform Act of 2006. *See* S.2611, 109th Cong. § 228 (as passed by Senate May 25, 2006). It was left out of the compromise legislation, enacted in 2007, because it became law in 2006 as part of the AWA.

Bakran cannot meet his burden of presenting the "clearest proof" to overcome Congress's stated intent. *Smith*, 538 U.S. at 92. In the complaint, Bakran asserts the statute is so punitive in its effect that it should be deemed "penal." In *Smith*, the Supreme Court referred to the factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), to evaluate the punitive effects of a legislative scheme. Those factors include whether the scheme (1) inflicts a traditional punishment, (2) imposes an affirmative disability or restraint, (3) promotes the

traditional aims of punishment, (4) is rationally related to a non-punitive purpose, and (5) is not excessive in respect to its stated purpose. *Smith*, 538 U.S. at 97. Application of these factors do not support Bakran's claim, much less demonstrate "clear[] proof" of punitive intent. *Id*. at 93.

The statute's required "no risk" assessment does not function like the traditional forms of punishment discussed in *Smith*. *Id*. at 97-99. The statute does not impose any physical restraint or corporeal consequences on the petitioner. *See Smith*, 538 U.S. at 99; 8 U.S.C. § 1154(a)(1)(A)(viii)(I). It does not impact the mobility of the petitioner or his ability to seek and obtain employment. *See Smith*, 538 U.S. at 100; 8 U.S.C. § 1154(a)(1)(A)(viii)(I). The only effect of the statute is a restriction on a petitioner's ability to sponsor a foreign national for admission into the United States as a family-based immigrant unless the agency determines that the petitioner poses no risk to the foreign national. There is no historical entitlement to alien-sponsorship, nor is there a history of punitive revocations of that entitlement.

Congress has a legitimate interest in protecting all visa beneficiaries. Establishing an additional requirement before approving a family-based visa is a reasonable means for achieving the goal of protecting the public – and especially new immigrants – against sexual violence. As the *Smith* Court held, the Ex Post Facto Clause does not preclude a legislature from making reasonable categorical

judgments that a conviction for specified crimes should give rise to a regulatory consequence. 538 U.S. at 103. The Adam Walsh Act may have undesirable consequence for convicted petitioners, but this limited disability in light of the goal of protecting a vulnerable population does not render the statute punitive for purposes of the Ex Post Facto Clause. The statute is not punitive and, therefore, the Ex Post Facto Claim fails.

B. The statute is not retroactive.

"A statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'" *Landgraf v. USI Film Products*, 511 U.S. 244, 270 n.24 (1994) (quoting *Cox v. Hart*, 260 U.S. 427, 435 (1922)). In *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), the Supreme Court opined laws "address[ing] dangers that arise post-enactment" do not operate retroactively. *Vartelas v. Holder*, 132 S. Ct. 1479, 1489 n.7 (2012). The *Vartelas* Court's examples of non-retroactive statutes within this category include "laws prohibiting persons convicted of a sex crime against a victim under 16 years of age from working in jobs involving frequent contact with minors, and laws prohibiting a person 'who has been adjudicated as a mental defective or who has been committed to a mental institution' from possessing guns." *Id*. Additionally, in *Kansas v. Hendricks,* 521 U.S. 346, 371 (1997), the Court upheld a statute "permit[ing] involuntary confinement based upon a determination that the person *currently* both suffers from a 'mental abnormality' or

'personality disorder' and is likely to pose a future danger to the public" as "clearly . . . not hav[ing] retroactive effect."

Like these statutes, the AWA provision is limited to addressing the post-enactment danger posed by petitioners with sex-offense convictions and "to the extent that past behavior is taken into account, it is used . . . solely for evidentiary purposes." *Hendricks,* 521 U.S. at 371. The statute calls for a post-enactment evaluation of the petitioner's dangerousness before granting a new, post-enactment benefit, making the statute purely prospective in application. *Landgraf*, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."). Additionally, unlike the statutes approved of by the *Vartelas* Court, under this AWA provision, a petitioner with a qualifying conviction is not subject to an automatic bar based on the fact of the conviction alone. *Vartelas*, 132 S. Ct. at 1489 n.7. The petitioner has the opportunity to show the lack of risk to the intended beneficiary. *See* 8 U.S.C. §§ 1154(a)(1)(A)(viii)(I). Thus, the AWA's application to post-enactment benefit adjudications through use of an evidentiary presumption brings it squarely within the category of statutes the Supreme Court has upheld as

not having a retroactive effect.[4] Therefore, it does not violate the Ex Post Facto Clause and the judgment of the district court must be affirmed.

[4] Although Bakran makes the argument within his Ex Post Facto Claim, it appears at times that he contends that the agency erred in interpreting the statute to apply to convictions antecedent to the passage of the AWA and to applications filed before the statute's effective date. For the same reason the statute is not retroactive for purposes of the ex post facto analysis, the agency's interpretation of the statute is legitimate. An agency does not give a statute retroactive effect when it uses a past event as evidence to determine current eligibility for a benefit. *See, e.g., Boniface v. DHS*, 613 F.3d 282 (D.C. Cir. 2010) (upholding regulation requiring drivers with certain criminal convictions antedating the regulation to overcome presumption of ineligibility for hazardous materials license); *Association of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 860 (D.C. Cir. 1992) (upholding regulation using a school's past student loan default rate in order to determine future eligibility for the agency's program). Further, the agency's interpretation of the statute as applying to crimes committed prior to the passage of the Act, as set forth in *Matter of Jackson*, 26 I. & N. Dec. 314 (BIA 2014), is reasonable and, therefore, entitled to deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

CONCLUSION

This Court should affirm the district court's judgment of dismissal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,057 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point, Times New Roman font.

3. Pursuant to Third Circuit Local Appellate Rule 28.3(d), I hereby certify that the attorneys for the Appellee on this brief represent the United States Government and, accordingly, the requirement that at least one attorney must be a member of the Bar of this Court is waived.

4. The text of the electronically filed Brief and the text of the hard copies of the Brief are identical.

5. The electronic brief has been scanned for viruses with Trend Micro Office scan for Windows and no virus was detected.

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2016, I filed the foregoing brief with the clerk of this Court by electronic case filing system, which will deliver a copy to all counsel of record. Counsel also prepared paper copies of the brief which will be sent to the Court via FedEx on December 20, 2016, for delivery by December 23, 2016.

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