A087-287-635

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

-

MATTER OF AUBREY HAVERLY

Petitioner

On behalf of

TATIANA ACEIJAS-QUIROZ

A087-287-635

Beneficiary

-

In Visa Petition Proceedings

Administrative Appeal of a Decision of a District Director

-

BRIEF OF AMICUS, AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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Introduction

It is an odd thing that the Department of Homeland Security does with the immigration provisions of the Adam Walsh Act.[1] When Tatiana Aceijas married Aubrey Haverly, a U.S. citizen, it almost certainly never crossed her mind that the DHS would swoop in to "protect" her by deporting her. The DHS prefers to separate this couple, ostensibly to protect her from her husband because many years ago he was convicted of a crime against another – and for no other reason. This undoubtedly unconventional result comes about because of the DHS's strained and flawed interpretation and implementation of the AWA's immigration provisions.[2]

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[1] *See* The Adam Walsh Child Protection and Safety Act of 2006, Title IV, § 402, Pub. L. No. 109-248, 120 Stat. 587 (July 27, 2006) (amending §§ 101, 204 of the Immigration & Nationality Act).

[2] *See* USCIS Standard Operating Procedures for Adjudication of Family-Based Petitions under the Adam Walsh Child Protection and Safety Act of 2006, (Sept. 24, 2008) ("USCIS SOP"), AILA InfoNet Doc.

In this case, and in others, the Board has requested supplemental briefing on questions surrounding the proper interpretation of the AWA.[3] In a recent liaison meeting, USCIS's Office of Public Engagement explained that it was anticipating the Board's resolution of these important issues. *See* USCIS, *Questions & Answers USCIS-American Immigration Lawyers Association Meeting*, 8 (Oct. 9, 2012), AILA InfoNet Doc. No. 12101045 (posted Oct. 10, 2012). To share its perspective, amicus, the American Immigration Lawyers Association ("AILA"), proffers this brief to explain how the AWA altered the family-based immigrant visa petition process. Relying on basic principles of

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No. 10041530 (posted 04/15/10). Citations referenced with an "AILA InfoNet Doc. No." are publicly available at http://search.aila.org by entering the document number.

[3] *See* Afanassiev, Barr, Garde, *Litigating a Petition Barred Under the Adam Walsh Act*, Immigration Practice Pointers 419, 422 (AILA 2012-13 Ed.), AILA InfoNet Doc. 12072350 (posted 07/23/12) (collecting questions from various supplemental briefing requests by the Board).

statutory construction, we address each of the questions raised by the Board and place them in the larger context of the AWA's structure. We take no position on the merits of the claim. Our references to the facts in this case are for illustrative purposes only.

Statement of Interest of Amicus

AILA is a national association with more than 12,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the

Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeals, and the Supreme Court.

Argument

This brief addresses each of the Board's queries and presents a framework for evaluating how the Adam Walsh Act affects family-based visa petitions submitted by United States citizens or lawful permanent residents. **Section (A)** reviews the AWA's amendments to the Immigration and Nationality Act and places them in context with other AWA provisions. It also emphasizes the novelty of the amendments, how they differ fundamentally from other immigration provisions, and why the Board must construe them narrowly. **Section (B)** explains why the Board has jurisdiction to review visa petition denials predicated on the AWA's amendments. **Section (C)** explains when the AWA amendments are triggered. Finally, **section (D)** reviews the standards by which the AWA's waiver provision should be applied.

A. The Adam Walsh Child Protection and Safety Act of 2006.

In structuring our immigration system, Congress has conferred upon United States citizens and lawful permanent residents the right to petition for their family members. *See* INA § 201(c) (setting forth family-sponsored immigration allocations); Thomas A. Aleinikoff, et al., *Immigration and Citizenship: Process and Policy*, 284 (7th ed. 2012) (explaining in non-technical terms how the allocation system functions). Family-sponsored immigration is responsible for a majority of visas issued each year; in recent years more than 65% of immigrant admissions are of family members of U.S. citizens and LPRs. *See* United States Department of Homeland Security, *Yearbook of Immigration Statistics: 2011*, Table 6, Washington D.C. (2012). It is no overstatement to say that family unification is a central principle underlying our immigration system.

The definitions of the eligible familial relationships are codified at different parts of the INA, *see, e.g.*, §§ 201(b), 203(a), while section 204(a) creates the procedural mechanism for the family-based selection system to work. Section 204(a)(1)(A)(i) of the INA provides that "any citizen of the United States" may initiate the classification of INA-defined family members by filing a petition with the government. Similarly, § 204(a)(1)(B)(i)(I) provides that "any alien lawfully admitted for permanent residence" may initiate a petition for classification of a preference relative.

Title IV of the Adam Walsh Child Protection and Safety Act of 2006, "Immigration Law Reforms to Prevent Sex Offenders from Abusing Children," modified the scope of § 204.[4] Section 402(a) of the AWA

[4] The relevant section reads:
Title IV—Immigration Law Reforms To Prevent Sex Offenders From Abusing Children
Sec. 402. Barring Convicted Sex Offenders From Having Family-Based Petitions Approved.

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(a) IMMIGRANT FAMILY MEMBERS.—Section 204(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)), is amended—
(1) in subparagraph (A)(i), by striking "Any" and inserting "Except as provided in clause (viii), any";
(2) in subparagraph (A), by inserting after clause (vii) the following:
"(viii)(I) Clause (i) shall not apply to a citizen of the United States who has been convicted of a specified offense against a minor, unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition described in clause (i) is filed.
"(II) For purposes of subclause (I), the term 'specified offense against a minor' is defined as in section 111 of the Adam Walsh Child Protection and Safety Act of 2006."; and
(3) in subparagraph (B)(i)—
(A) by striking "(B)(i) Any alien" and inserting the following: "(B)(i)(I) Except as provided in subclause (II), any alien"; and
(B) by adding at the end the following:
"(I) Subclause (I) shall not apply in the case of an alien lawfully admitted for permanent residence who has been convicted of a specified offense against a minor (as defined in subparagraph (A)(viii)(II)), unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that such person poses no risk to the alien with respect to whom a petition described in subclause (I) is filed.".
(b) NONIMMIGRANTS.—Section 101(a)(15)(K) (8 U.S.C. 1101(a)(15)(K)), is amended by inserting "(other than a citizen described in section 204(a)(1)(A)(viii)(I))" after "citizen of the United

added a subclause "(viii)" to INA § 204(a)(1), which makes the procedural filing mechanism inapplicable to a United States citizen convicted of a "specified offense against a minor." Section 402(a) also made a similar change to INA § 204(a)(1)(B)(i)(I) by creating – in what was apparently a scrivener's error – a second clause (I) that applies the same prohibition for LPRs. The prohibition shall not apply, however, in those cases where the citizen or LPR "poses no risk to the alien with respect to whom a petition…is filed." This determination is made at the "sole and unreviewable discretion" of the Secretary of the Department of Homeland Security.[5] Fairly read, the AWA amendments subject § 204(a)'s broad and important principle that "any citizen" may seek

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States" each place that phrase appears.

[5] Section 402(b) of the AWA makes the prohibition for citizen-initiated petitions applicable to fiancée petitions.

unification with his or her family to an exception (the "conviction" clause) which is itself subject to an exception (the "no risk" clause).

The term "specified offense against a minor" is defined by § 111(7) of the AWA. A conviction for a specified offense triggers the AWA's "conviction" clause. In turn, the "no risk" clause creates an exception for U.S. citizens with such a conviction – if the Secretary of Homeland Security in her "sole and unreviewable discretion" finds that the citizen poses "no risk" to the beneficiary family member, then the prohibition does not apply.

The AWA amendments to the INA represent a radical departure from other INA provisions. Unlike the visa preference categories which scrutinize the intending immigrants in terms of their skills, experience, familial relationships, and past behavior, the prohibition on citizen-

initiated[6] petitions at § 204(a)(1) looks exclusively to the character of the *United States citizen* petitioner – a move of dubious constitutional validity. *See* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 Minn. L. Rev. 1625, 1646-47 (2007) ("[I]f the law in question has nothing to do with the exclusion of immigrants or the deportation of immigrants, but instead regulates the lives of citizens – then the plenary power doctrine may not apply at all, and Congress may be overstepping its bounds.") Authority to enact the AWA amendments – centered as they are directly on the fitness of the U.S. citizen – cannot find solid grounding in the plenary power doctrine. *See id.* at 1708, (analysis of whether the plenary power doctrine applies should look to "whether the immigration provision in question is advancing core immigration policy goals or instead has ventured

[6] For readability, our references to "citizen-initiated" petitions apply equally to lawful permanent resident-initiated petitions referenced at § 204(a)(1)(B).

outside these goals into an area that has traditionally been within the province of the states"). If Congress can strip U.S. citizens of their statutory right to petition for family members, it must do so through one of its enumerated powers, not based on its plenary power over immigration. Therefore, the AWA must survive full constitutional scrutiny. In interpreting the AWA's amendments to the INA, the Board should recognize that Congress is, at a minimum, legislating at the limits of its authority.

B. What is the scope of the Board's jurisdiction to review visa petitions denied under the Adam Walsh Act's amendments?

The regulation at 8 C.F.R. § 1003.1(b)(5) provides the Board jurisdiction to review "[d]ecisions on petitions filed in accordance with section 204 of the Act[.]" Nothing in the AWA alters this jurisdictional provision.

However, because INA § 204(a)(1)(A)(viii) provides that the "no risk" determination is made "in the Secretary [of Homeland Security]'s

sole and unreviewable discretion", the Board has questioned the scope of its review of denials of visa classification petitions. Did Congress intend the Adam Walsh Act amendments to modify the Board's appellate jurisdiction? The answer, under a plain reading of the statute, is no.

Congress made the "no risk" determination "unreviewable" because it sought to limit *judicial* review, not to circumscribe the Board's existing review of visa petition denials. There is a strong presumption that agency determinations are subject to judicial review; thus, despite Congress's attempts to circumscribe Article III judicial review of immigration decisions, *see generally* INA § 242, federal courts have narrowly construed these jurisdictional limitations. *See, e.g.*, *Kucana v. Holder*, 558 U.S. 233, 130 S. Ct. 827, 839 (2010) (noting the "familiar principle of statutory construction: the presumption favoring judicial review of administrative action"); *INS v. St. Cyr*, 533 U.S. 289,

298 (2001); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). One of these provisions – INA § 242(a)(2)(B)(ii) – provides that "no court shall have jurisdiction to review…any [] decision or action…which is specified…to be in the discretion of the Attorney General or the Secretary of Homeland Security." Though the text of this provision might suggest that it makes all discretionary decisions unreviewable by federal courts, courts have aggressively limited its reach in light of the presumption of reviewability. *See Kucana*, 130 S. Ct. at 831, (absent statutory language, decisions made discretionary by regulation are reviewable); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 689-90 (9th Cir. 2003) (a decision is only discretionary within the meaning of INA § 242(a)(2)(B)(ii) where the "language of the statute in question" explicitly confers discretion, and the act is a "matter[] of pure discretion, rather than discretion guided by legal standards."). Particularly where, as here, the abolishment of review would raise

potentially significant constitutional questions, Congress must make a clear statement of its intent to strip federal courts of jurisdiction. *See St. Cyr*, 533 U.S. at 299 ("when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result").

In contrast to Congress' wariness of judicial review, it has never interfered with established procedural mechanisms for inter-agency review. Authority to make the "no risk" determination was given to the Secretary of Homeland Security because visa petitions are adjudicated by DHS in the first instance. But the agency appeals process for visa petitions, which was in place when the AWA amendments were passed, provides the Board with the authority to review visa petition denials. 8 C.F.R. § 1003.1(b)(5). That this authority includes review of the "no risk" determination is reinforced by 8 C.F.R. § 1003.1(d)(3)(iii), which

provides that "[t]he Board may review *all questions* arising in appeals from decisions issued by Service officers *de novo*." (Emphasis added).[7]

Even if the AWA somehow abrogated *sub silentio* these regulatory provisions (which we think not), the Board at a minimum retains its authority to resolve the myriad questions of law surrounding the "no risk" determination. INA § 103(a)(1) divides authority among administrative agencies for the Act's implementation:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws

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[7] Absent Board review of the "no risk" determination, petitioners receive no review of a line officer's unfavorable "no risk" finding. In fact, USCIS guidance hardwires an institutional bias against the petitioner: while a finding that a petitioner poses risk to the beneficiary receives no supervisory review, a finding of *no* risk must clear two levels of supervisory review. *See* USCIS SOP, *supra* n.2, at 2. Moreover, petitioners are not guaranteed a hearing to demonstrate that they pose "no risk" to the beneficiary. In the absence of any agency review, these procedures violate the due process balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), because they create an impermissibly high risk of erroneous deprivation of "a right that ranks high among the interests" of the U.S. citizen-petitioner – namely the "right to rejoin [one's] immediate family." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

> relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

Under this provision, the responsibility for the execution of the INA defaults to the Secretary of Homeland Security, unless another agency head is explicitly so charged. However, the Act is clear that *notwithstanding* this division of labor, "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."[8] Thus, at most, the AWA narrows *the scope* of the Board's

[8] In this respect, USCIS gets the law backward. It interprets the statute to mean that "[d]eterminations and rulings of the Attorney General with respect to questions of law relating to the immigration and naturalization of aliens are controlling…*but only insofar as the Attorney General is authorized to make determinations and issue rulings*." USCIS Brief, 9 n.4 (emphasis added). The statute, however, plainly provides the Attorney General interpretive authority over

review from *de novo* to questions of law. Under this standard, the Board can review the standards of law applied in making "no risk" determinations, as well as the application of those standards to undisputed facts.

The Board has the authority to resolve *all* of the interpretive questions it has posed regarding the implementation of the "no risk" determination. Proper application of the burden of proof by an adjudicator is a pure question of law. *See*, *e.g.*, *Boluk v. Holder*, 642 F.3d 297, 301 (2d Cir. 2011); *Barakat v. Holder*, 621 F.3d 398, 403 (6th Cir. 2010); *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006). Thus, whether a conviction for a "specified offense" properly establishes a presumption of risk, the burden of proof by which a petitioner must establish that he or she poses "no risk" to the

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questions of law *even where* "administration and enforcement" of the law is delegated to other agencies.

beneficiary, and whether a petitioner has demonstrated "no risk" on an adequately developed record of undisputed fact are questions properly resolved by the Board. Importantly, though, even this alternative interpretation of Clause (viii) would engender inconsistencies within the administrative review scheme at odds with INA § 103. Accordingly, the most persuasive interpretation of Clause (viii) is that it applies, as explained *supra*, to judicial review of the Secretary's no risk determination.

C. When Does A Citizen-Initiated Petition Fall Under the Adam Walsh Act Amendments?

A number of principles limit when the conviction of a U.S. citizen triggers the AWA's conviction clause. First, a conviction triggers the AWA only if the judgment was entered on or after July 27, 2006 – the effective date of the AWA. Second, the conviction clause limits a citizen's ability to petition *only* for stepchildren where the child, at the time the petition is filed, is under the age of 18 – the age defining a

"minor" for purposes of the AWA.[9] *See* AWA § 111(14). Finally, before the conviction clause is triggered, the Secretary must carry the burden of demonstrating, using the categorical (and in some cases, modified categorical) approach, that the citizen's conviction constitutes a "specified offense."

1. Title IV of the Adam Walsh Act applies prospectively only to convictions entered after its effective date.

The AWA amendments apply only to citizens with convictions entered after the AWA's enactment. There are two related reasons why this is so: first, Congress indicated that Title IV of the AWA was to apply only prospectively and, second, applying Title IV to a citizen's pre-enactment conviction would produce an impermissible retroactive effect. *Vartelas v. Holder*, 132 S. Ct. 1479, 1486-87 (2012); *St. Cyr*, 533 U.S. at 313; *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).

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[9] For readability, our reference to "stepchildren" also includes the children of a citizen's fiancé(e) (but not the fiancé(e)) even though there is no legal step-relationship. *See infra* at note 12.

The first step in determining the temporal reach of § 402 of the AWA is to determine whether Congress has specified its intention that it apply to convictions entered prior to its enactment. The AWA itself contains no general provision providing for an effective date, though certain provisions – § 402 not among them – have particular effective dates. *See* AWA §§ 129(b), 152(c), 503. The default rule when an enactment lacks a clear expression of an effective date is that the act is effective on 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*, 533 U.S. at 320 n.45 ("a statute that is ambiguous with respect to retroactive application is construed under [Supreme Court] precedent to be unambiguously prospective"). Accordingly, § 402 of the AWA became effective on the date of enactment, that is, on 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 regarding proper application of the antiretroactivity principle. *See Vartelas*, 132 S. Ct. 1479. 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 antiretroactivity 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.*[10]

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 antiretroactivity 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

[10] In applying the antiretroactivity principle in *Vartelas*, the relevant event was the petitioner's conviction. While the government argued that the relevant event was the petitioner's international travel, not the conviction, the Court dismissed this assertion as "disingenuous", because the disabilities imposed by the new legal regime were on account of the conviction, not the travel. *Vartelas*, 132 S. Ct. at 1488-89.

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.[11]

2. The Conviction Exception Applies Only To Alien Relative Petitions Initiated On Behalf of Stepchildren.

The AWA was enacted by Congress to protect vulnerable minors from being sexually exploited by adults. The plain text of the conviction clause, the irrefutable purpose of the AWA's amendments, and the doctrine of constitutional avoidance demonstrate that Congress meant to prohibit citizens from initiating petitions only for principal and derivative beneficiaries who are non-blood related minors. In other words, the conviction clause is implicated only when a citizen initiates a petition for a stepchild.

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[11] Note that detrimental reliance is not a requirement under the antiretroactivity principle. *Vartelas*, 132 S. Ct. at 1491. Consequently, no citizen is required to demonstrate reliance on the *lack* of a prohibition on filing a petition.

We begin this explanation by looking to the manner in which Congress did *not* amend INA § 204(a)(1)(A). Although the Board's questions and USCIS's brief frame the issue as being what "beneficiaries" are targeted by the AWA, the term "beneficiaries" is not a statutory term at all; the term is used neither in INA § 204(a) nor the AWA. Nevertheless, "beneficiary" is a term we use in this brief (as do the parties and the Board) as a shorthand for describing the range of eligible noncitizens under the family selection system, but it is only that: a shorthand, not a statutory enactment. Indeed, while linguistically convenient, framing the question as one regarding "beneficiaries" creates an analytical trap into which the DHS falls.

The relevant question is more aptly presented as whether "the alien with respect to whom a petition" is submitted captures every alien described in § 204(a)(1)(A)(i), or only the aliens whom Congress intended to protect with the AWA?

First, nothing in the text or legislative history of the AWA suggests that it was intended to protect any class of individuals other than vulnerable children. The stated purpose of AWA 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." Besides the immigration provisions at issue here, the AWA expands the scope of the National Sex Offender Registry, increases 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 provided the following helpful encapsulation of relevant legislative history:

> 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). And, to reemphasize this point, § 402(a) of the AWA is titled "Immigration Law Reforms To Prevent Sex Offenders From Abusing *Children*[.]"

Second, construing the conviction clause to preclude a citizen from filing a petition for a spouse, parent, sibling, or natural child based on

the *citizen's* character raises substantial constitutional questions. Given the lack of legislative correspondence between "preventing sex offenders from abusing children" and uniting a husband with his wife, an adult son with his mother, or a brother with his sister, Congress cannot have intended to strip a citizen of his or her right to family unification absent some connection to the purpose underlying the AWA.

The protection of the marital bond is a substantive constitutional right with which Congress cannot easily interfere. "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quotation marks and citation omitted). Indeed, the Supreme Court has time and again emphasized the fundamental nature of the institution, and the concomitant protection provided by constitutional due process. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 726 (1997) (declaring "personal decisions relating to marriage" among "certain fundamental rights"

subject to substantive due process review); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (marriage entails "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…."), *Turner v. Safley*, 482 U.S. 78, 96 (1987) (right to marry for prisoners); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (marriage is among "the most important relations in life"); *Ali v. INS*, 664 F. Supp. 1234, 1250 (D. Mass. 1986) (and cases cited therein).

Congress has broad authority to create classifications that impact family unification and the rights of U.S. citizens, but these classifications are subject to constitutional review, *see Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977), and involve a less searching inquiry only because the classifications scrutinize the characteristics of the alien seeking admission. *See Kleindienst v. Mandel*, 408 U.S. 753 (1972). Here though, the inquiry centers exclusively on the character of the U.S. citizen petitioner, and thus the Constitution's substantive due process protections apply with full force. Considering a beneficiary other than a child derivative beneficiary as an "alien with respect to whom a petition" is submitted would trigger substantial constitutional questions.

These questions can easily be avoided, however, and therefore must be. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 688–702 (2001) (interpreting post–final order detention statute to avoid unconstitutionality raised by possible indefinite detention); *Clark v.*

Martinez, 543 U.S. 371 (2005) (construing same statute as *Zadvydas* as applying to inadmissible persons); *United States v. Witkovich*, 353 U.S. 194, 199 (1957). There is no legislative record suggesting that Congress thought that marriage between two adults would lead to sex offenders abusing children.

Third, apart from the constitutional questions a broad reading would implicate, it is arbitrary and capricious to interpret a statute in a manner that is "unmoored from the purposes and concerns of the immigration laws." *Judulang v. Holder*, 132 S. Ct. 476, 489 (2011). Interpretation of the AWA amendments "must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." *Id.* at 485. Title IV of the AWA is centered on protecting children from sex offenders and no one else. "A method for disfavoring" *all* citizen-initiated petitions "that bears no relation to these matters" would be arbitrary and capricious. *Id.*

There is, however, a more functional and nuanced approach that would read all the words of the statutory phrase together to mean only those petitions affecting an alien whom the AWA was intended to protect are covered by the conviction clause. Under this reading, Congress did not directly specify which petitions are barred because any petition filed under § 204(a)(1)(A)(i) may include an "alien" protected by the AWA. Reading "an alien with respect to whom" to mean "a vulnerable minor" gives the amended statute a meaning fully tied to its purpose without raising serious constitutional questions. It adheres perfectly to the text of the statute by making use of each of the words in the phrase. *See, e.g., Bailey v. United States*, 516 U.S. 137, 145 (1995). Whereas the alternative, broader interpretation requires an unconventional logical leap that Congress would act arbitrarily without

a legislative record, the interpretation we propose here tacks closely to congressional intent.[12]

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[12] For § 402(b) of the AWA, Congress was seeking again to protect unrelated children from the reaches of sexual predators. The regulatory focus of § 402(b) as it relates to the fiancé(e) visa process is on the children of the citizen's fiancé(e), not the adult fiancé(e). Thus, only a child who would qualify as following-to-join or accompanying the fiancé(e) would be considered a relationship subject to the AWA's immigration provisions. Congress has elsewhere provided for protections of the fiancé(e) directly. *See* International Marriage Broker Regulation Act of 2005 ("IMBRA"), Pub. L. No. 109-162, 199 Stat. 3066 (2006). IMBRA requires a U.S. citizen to disclose a whole range of prior criminal convictions including crimes related to domestic violence, abusive sexual contact, stalking, and controlled substances or alcohol. The AWA provisions, if applied to fiancé(e)s, would negate the effect of IMBRA's disclosure requirements. Under IMBRA, Congress recognized that people marry in spite of our pasts. That is, an adult fiancé(e), when given the informed choice, may decide to continue with a loving relationship in spite of the citizen's prior criminal record. The difference between IMBRA and the AWA is that for the AWA, the focus is on vulnerable children. Accordingly, Congress could not have intended the AWA to supersede IMBRA's disclosure provisions to adult fiancé(e)s (making them a near nullity because many AWA § 117 offenses would coincide with an offense requiring disclosure under the IMBRA). If the AWA's provisions are read only to apply to unrelated children, then IMBRA's statutory purpose is preserved as well as giving full effect to the AWA.

Finally, one more reason counsels in favor of narrowing the range of alien relative petitions subject to the AWA. Only a short time ago, Congress sought to simplify and regularize the acquisition of United States citizenship for minor children. *See* Child Citizenship Act of 2000, § 101(a), Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000) (CCA). With the CCA, Congress meant to provide citizenship to minors in a systematic, purposeful way to benefit and protect those minors. The definition of "child" is different for Title II and Title III of the INA. *Cf.* §§ 101(b), 101(c) of the Act. Alien relative petitions are based on Title II's definition that includes non-biological children including "stepchildren". *See* § 101(b) of the Act. Citizenship and naturalization determinations are based on the Title III definition that excludes all non-biological children (except adopted children under certain conditions). *See* § 101(c) of the Act. The CCA premises its automatic acquisition of citizenship on Title II admissions procedures, however.

See INA § 320(a)(1). Under the CCA, a natural or adopted child classified as an immediate relative automatically becomes a citizen on his or her admission to lawful permanent residence. *Id*. It is difficult to imagine that Congress would, under the guise of "protecting children", use the AWA amendments to bar natural children born abroad from obtaining automatic citizenship by creating a barrier to their admission to the United States based solely on a prior conviction by the child's parent. There is nothing in the text, history, or purpose of the AWA that would ascribe to Congress the intent to divest a child of his or her citizenship rights under the CCA. Therefore, the "the alien with respect to whom a petition described" cannot be interpreted to frustrate the operation of the CCA with respect to citizen-initiated petitions for CCA-eligible natural or adopted children.

Accordingly, only stepchildren are encompassed within the phrase "the alien with respect to whom a petition described" at § 204(a) of the Act.

3. The categorical approach should be used to determine if a conviction constitutes a "specified offense against a minor".

Only certain convictions trigger the AWA's immigration provisions: those convictions that match one of the nine "specified offense[s] against a minor". INA § 204(a), as amended by the AWA, triggers petition ineligibility for individuals "convicted of a specified offense against a minor". The term "specified offense against a minor" is in turn defined by § 111(7) of the AWA, codified at 42 U.S.C. § 16911(7). [13]

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[13] Section 111(7) of the AWA states:

EXPANSION OF DEFINITION OF "SPECIFIED OFFENSE AGAINST A MINOR" TO INCLUDE ALL OFFENSES BY CHILD PREDATORS.—The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

Apart from the exception for kidnapping and false imprisonment "committed by a parent or guardian" at subsections (A) and (B), the Board should apply a categorical approach to determine whether a conviction is for a "specified offense". There are several indicia apparent on the face of the statute suggesting that a categorical approach is required as to the generic "offense against a minor" and the enumerated categories. *First*, and most importantly, § 204 requires a

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(B) An offense (unless committed by a parent or guardian) involving false imprisonment.
(C) Solicitation to engage in sexual conduct.
(D) Use in a sexual performance.
(E) Solicitation to practice prostitution.
(F) Video voyeurism as described in section 1801 of title 18, United States Code.
(G) Possession, production, or distribution of child pornography.
(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
(I) Any conduct that by its nature is a sex offense against a minor.

conviction. The "convicted of" textual predicate has a long history in the INA and is a well-accepted Congressional-shorthand for a categorical comparison of the crime of conviction with the generic offenses. *See Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (BIA 2008) ("For nearly a century, the Federal circuit courts of appeals have held that where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien has been *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*.") (emphasis added);[14] *see also* Alina Das, *The*

[14] Against this longstanding interpretive policy applied by the Board and federal courts, USCIS cites for support *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008), a decision that reversed the Board and attempted to synthesize BIA and circuit court decisions on the application of the categorical and modified categorical approaches in the "crime involving moral turpitude" context. The opinion, however, "makes clear [that] the framework it adopts for moral turpitude cases governs only immigration decisions based on the Act's moral turpitude provisions" *Id.* at 707 n.6. Moreover, multiple circuit courts have

Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U. L. Rev. 1669, 1689-91 (2011) (collecting cases); Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*,

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questioned the soundness of *Silva-Trevino*. *See Prudencio v. Holder*, 669 F.3d 472, 480 (4th Cir. 2012); *Fajardo v. U.S. Att'y. Gen.*, 659 F.3d 1303, 1309 (11th Cir. 2011) (rejecting logic of *Silva-Trevino* and noting the "considerable level of agreement, spanning several decades and across various amendments to the national immigration law" on use of the categorical approach); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 473 (3d Cir. 2009) (rejecting *Silva-Trevino*'s approach because "it is bottomed on an impermissible reading of the statute, which, we believe, speaks with the requisite clarity."); *see also Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010) ("to the extent Silva–Trevino is inconsistent, we adhere to circuit law."). *But see Godoy-Bobadilla v. Holder*, 679 F.3d 1052 (8th Cir. 2012) (labeling *Guardado-Garcia*'s refusal to follow *Silva-Trevino* dictum because unnecessary to the result).

62 U. Miami L. Rev. 979, 996-97 (2008) (describing elements approach).[15]

Notably, in enacting the INA in 1952, Congress reaffirmed its preference for categorical determinations when it considered and rejected a proposal to allow individualized determinations of immigrants' deportability based on criminal conduct. *See* S. 2250, 82d Cong., § 241(a)(4) (1952); *see also* 98 Cong. Rec. S5420, 5421 (1952) (statement of Sen. Douglas) (expressing concern that federal court review "is no protection if the matter to be received is as vague and

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[15] In its internal guidance, USCIS has recognized that the core principle of the categorical approach applies to the "specified offense" analysis. *See* Michael Aytes, Assoc. Dir. Domestic Operations, USCIS, *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* (Feb. 8, 2007), AILA InfoNet Doc. No. 07030669 (posted 3/5/2007) ("Aytes Memo"), 3 ("*As defined in the relevant criminal statute*, for a conviction to be deemed a specified offense against a minor, *the essential elements of the crime for which the petitioner was convicted* must be substantially similar to an offense defined as such in the Adam Walsh Act.") (emphasis added).

variable and arbitrary as the Attorney General's conclusion about a person's undesirability."). There is nothing to suggest that Congress's use of the term "convicted of" in § 204 would mean anything different from its use elsewhere in the INA. *See Lorillard Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978) (Congress is presumed to be aware of the legal landscape in which it legislates, including case law).

Second, the Supreme Court recently outlined the exception to the categorical approach that proves the rule. In *Nijhawan v. Holder*, 557 U.S. 29 (2009), the Court held that to determine whether a noncitizen's conviction was "an offense that ... involves fraud or deceit in which the loss to the ... victims exceeds $10,000", thereby triggering the aggravated felony provision at INA § 101(a)(43)(M)(i), adjudicators could look beyond the elements of the statute of conviction to determine whether the $10,000 loss threshold had been crossed. In so holding, however, the Court emphasized that this "circumstances-specific"

approach was required in order to give the provision effect, because at the time it was added to the aggravated felony definition, virtually no state or federal laws contained the $10,000 monetary threshold as an element of the offense. *Id.* at 39. Departure from the categorical approach is appropriate when the departure is the only way to give practical effect to a provision. *Id.* at 38.[16] The Court reaffirmed that other "aggravated felony" provisions, including INA § 101(a)(43)(A), "sexual abuse of a minor", "must refer to generic crimes" and are properly applied using a categorical approach. *Id.* at 37. Indeed, the Supreme Court did not disturb use of the categorical approach for the "involves fraud or deceit" elements of the provision at issue,

[16] Examples of such provisions include the loss requirement for the tax evasion aggravated felony ground, 8 U.S.C. § 1101(a)(43)(M)(ii); the "if committed for commercial advantage" qualifier in the aggravated felony ground relating to transportation for the purpose of prostitution, INA § 101(a)(43)(K)(ii); and the exception to the passport fraud and smuggling aggravated felony grounds for offenses committed to assist family members, INA §§ 101(a)(43)(P) and (N).

demonstrating that even within a specific offense provision, the analysis proceeds on a clause-by-clause basis.

Applying the *Nijhawan* framework to the AWA's "specified offense against a minor definition", it becomes clear that only two provisions are partially susceptible to a circumstances-specific inquiry – namely, the exception for kidnapping and false imprisonment "committed by a parent or guardian" outlined at subsections (A) and (B). To determine whether a parent or guardian "committed" the offense, use of the circumstances-specific approach is required because the elements of kidnapping and false imprisonment do not necessarily make the relationship between the victim and perpetrator an element of the crime; limiting the analysis to these elements alone would therefore negate the exception.

Besides the "committed by a parent or guardian" exception described above, each of the nine specified offense provisions describes

conduct that readily corresponds to the elements of specific criminal offenses. Resort to *Nijhawan*-style circumstances-specific treatment is unnecessary and therefore inappropriate.

Third, the so-called "catch all" provision at § 111(7)(I) of the AWA only reinforces this conclusion.[17] Again, the Supreme Court's interpretation of an analogous statutory provision is instructive. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court was presented with the question of what it means "to be convicted at any time after admission of[,]" INA § 237(a)(1)(A)(iii), "'any other offense that is a felony and that, by its nature, involves a substantial risk'" of violence. *Leocal*, 543 U.S.

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[17] USCIS cites to *United States v. Colson*, 683 F.3d 507 (4th Cir. 2012), to support a "broad analysis of the underlying crimes" specified by the AWA. USCIS Brief, at 22. But the court in *Colson* applied the categorical approach to determine whether a state conviction "relates to sexual abuse and abusive sexual conduct involving a minor" as required for sentence enhancement. *Id.* at 509. The court looked not to the underlying actions of the defendant, but rather to the state's interpretations of its own statute to determine the minimum conduct required for a conviction.

at 4 (quoting 18 U.S.C. § 16(b)). The Supreme Court explained that "[t]his language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [the underlying] crime." *Id.* at 7. The parallel with § 111(7)(I) of the AWA is unmistakable.[18] Nor does the reference to "conduct" in §§ 111(7)(H) and (I) suggest that departure from the categorical approach is warranted. Another similarly-phrased statutory provision, the so-called "residual clause" of the Armed Career Criminal Act, provides for enhanced penalties for certain criminal defendants who have been convicted in the past of "any crime that . . . *involves conduct* that presents a serious potential risk of physical injury to

[18] Thus, USCIS's suggestion that the legislative purposes of the Act support a circumstances-specific approach, *see* USCIS Brief at 22-23, lacks merit; the Board has rejected precisely this argument in the child abuse ground of deportation context, noting that "the statute's general purpose cannot supersede its language, which plainly focuses on those crimes of which an alien has been 'convicted'" *Velazquez-Herrera*, 24 I. & N. Dec. at 513.

another." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). The Supreme Court has repeatedly reaffirmed that in determining whether to apply this enhancement, Congress intended that adjudicators "consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the *specific conduct* of [the] particular offender." *James v. United States*, 550 U.S. 192, 202 (2007) (emphasis added); *see also Sykes v. United States*, 131 S. Ct. 2267, 2272 (2011); *Chambers v. United States*, 555 U.S. 122, 125 (2009); *Begay v. United States*, 553 U.S. 137, 141 (2008).

Fourth, moreover, use of the language "an offense involving a minor" at subsection (H) indicates that it is a generic description of a categorical offense. In *Carlos-Blaza v. Holder*, 611 F.3d 583 (9th Cir. 2010), the Ninth Circuit, when confronted by similar language in the aggravated felony context, noted that "[t]he word 'involves' broadens the *scope* of crimes" to include those crimes for which the conduct "is a

necessary element." *Id.* at 589 n.9 (emphasis added). *Accord Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012) (noting that "offenses that 'involv[e]' fraud or deceit" refers to "*offenses with elements* that necessarily entail fraudulent or deceitful conduct.") (emphasis added).[19]

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[19] In *United States v. Mi Kyung Byun*, 539 F.3d 982, 993-94 (9th Cir. 2008), the Ninth Circuit held that "as to the age of the victim, the underlying facts of a defendant's offense are pertinent in determining whether she has committed a 'specified offense against a minor'". Because this case arises in the Ninth Circuit, the Board – if it reaches the question – must determine whether the Ninth Circuit's holding was based on the statute's clear language, or whether it merely filled an interpretive gap left by Congress. If the latter, the Board may reach the contrary, and proper, conclusion that the minority of the victim must be an element of the particular specified offense. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). But even if *Byun* was based on a conclusion that the text of the statute was clear, the Board should decline to extend its logic nationwide (assuming it is controlling on the immigration question at issue here) because the Ninth Circuit did not have the benefit of the Supreme Court's reasoning in *Nijhawan* and failed to address the Supreme Court's reasoning in *Leocal*. Indeed, the Ninth Circuit recently concluded that the "circumstances-specific" approach outlined in *Nijhawan* is properly applied in only a "very narrow class of cases", *Aguilar-Turcios v. Holder*, 691 F.3d 1025, 1033 (9th Cir. 2012), substantially undermining *Byun*'s holding.

4. DHS must demonstrate by clear and convincing evidence that the Adam Walsh Act amendments apply to a citizen petitioner.

Generally, an "applicant or petitioner must establish that he or she is eligible for the requested benefit", 8 C.F.R. § 103.2(b). The AWA provisions do not alter the burden of proof for the core, affirmative criteria that each citizen must prove to classify a relative under § 204(a)(1)(A). A citizen must still establish (1) that he or she is in fact a U.S. citizen, and (2) that the qualifying relationship exists between the petitioner and the relative.

Notably, the AWA does not add an additional ground of "eligib[ility]" subject to 8 C.F.R. § 103.2(b). Rather, it creates a ground

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The Eleventh Circuit's decision in *United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010), is similarly flawed. Its emphasis on the phrases "involving" and "conduct" as requiring a circumstance-specific inquiry, *id.* at 1354, cannot be squared with the Supreme Court authority discussed above interpreting materially equivalent language.

of *disqualification* that precludes an otherwise eligible citizen or LPR from submitting a family-based petition, absent receipt of a waiver. Rather than adding an additional substantive requirement to the definition of an immediate relative, or an additional ground of eligibility for petitioners, the AWA provides that the applicable statutory section "shall not apply" to U.S. citizens. *See* INA § 204(a)(1)(A)(viii)(I). Thus, rather than establishing an additional affirmative requirement for eligibility a *petitioner* must demonstrate pursuant to 8 C.F.R. § 103.2(b), the AWA establishes a ground of *disqualification* for an otherwise-eligible petitioner. 8 C.F.R. § 103.2(b) is therefore inapplicable. With this red-herring regulation to one side, it becomes clear that to square the AWA with other immigration provisions, DHS must prove a "specified offense" conviction by clear and convincing evidence.

In the absence of express Congressional direction, federal courts and this Board place on the government the burden of establishing by

clear and convincing evidence facts that lead to the abridgement of important individual rights. Thus, in removal proceedings, the government must show by clear and convincing evidence that an alien has been convicted of a crime triggering deportability. *See* INA § 240(c)(3). While this requirement is now codified by statute, *id.*, it has its roots in Supreme Court precedent interpreting a statute that, like the AWA, was silent on the question. *See Woodby*, 385 U.S. at 286 (interpreting § 241(a)(2) of the 1952 INA). Likewise, when the rights of LPRs are implicated at the border, the burden falls on the government to prove the adverse evidence. *See Matadin v. Mukasey*, 546 F.3d 85, 90-91 (2d Cir. 2008) (government must prove by clear and convincing evidence that LPR status has been abandoned); *Hana v. Gonzales*, 400 F.3d 472, 475 (6th Cir. 2005) (same); *Singh v. Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997) (same); *Molina v. Sewell*, 983 F.2d 676, 678 (5th Cir. 1993) (government bears the burden of proving that a returning

LPR is excludable); *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011) ("we find no reason to depart from our longstanding case law holding that the DHS bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident is to be regarded as seeking an admission"); *Matter of Sosa*, 15 I&N Dec. 572 (BIA 1976) (government bears the burden of proving that a returning LPR is inadmissible). These decisions demonstrate the presumption that when a government classification implicates important rights, the government bears a heightened burden of demonstrating the adverse facts.

The liberty interests protected by imposing the burden of proof on the government in the above cases are significant; as the Court in *Woodby* recognized, "drastic deprivations [] may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no

contemporary identification." 385 U.S. at 285. But the inability to petition for a stepchild (and natural child, spouse, parent, and siblings under USCIS's interpretation of the statute) implicates liberty interests that are equally compelling. In both intent and effect, petitioners precluded by the AWA from filing petitions for their own children are stripped of the right to raise their own families, even if they enjoy legal custody of the children with whom they seek to reunite. As the Supreme Court has noted, "The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '(r)ights far more precious . . . than property rights[.]' 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'" *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *May v. Anderson*, 345

U.S. 528, 533 (1953); and *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). Permanent separation from one's family is a "hardship" comparable to exile from one's adopted country.

That a "specified offense" conviction constrains the rights of U.S. citizens further supports placing the burden on the government to establish such a conviction. Apart from perhaps denaturalization, which requires the government to support findings of fact by clear and convincing evidence, *see Schneiderman v. United States*, 320 U.S. 118, 123 (1943), no provision in the INA contains consequences more severe for a U.S. citizen than the inability to petition for one's own family.[20]

[20] To fulfill its burden of showing that a U.S. citizen "has been convicted of a specified offense against a minor" under AWA § 401, the government may not rely on the statutory definition of "conviction" in § 101(a)(48)(A) of the Act as it applies only with respect to "an alien".

D. The "No Risk" Determination.

While the AWA amendments presumptively bar certain citizen-initiated petitions, even those petitions are authorized when the petitioner demonstrates that he or she poses "no risk" to the intending immigrant (a stepchild, as we explain above). In executing its congressionally-delegated responsibility to manage this exception, USCIS has ignored the driving purpose of the amendments, applied an unbounded interpretation of "risk" that exceeds any application Congress could have contemplated, and required that a petitioner prove "no risk" to the beneficiary beyond a reasonable doubt, a standard reserved to protect, not constrain, the liberty interests of citizens. The Board should correct these legal errors.

1. The meaning of "no risk".

USCIS's current interpretation of "risk" is legally impermissible. According to USCIS, the "[f]actors that should be considered [in the risk

determination] include" *inter alia* "the petitioner's criminal history" (apart from any specified offenses) and "[t]he nature, severity, and mitigating circumstances of any arrest(s), conviction(s), or history of alcohol or substance abuse…domestic violence, or other violent or criminal behavior." *See* Aytes Memo, n.15 *supra*, at 40. These factors implicate behavior without any logical connection to sexual violence or the abuse of minors, and they are thus beyond the purview of concerns that animated the AWA. Moreover, the guidance provides that adjudicators are "not limited to" consideration of the enumerated risk factors, *id.*, and thus may consider any factor which relates to the "safety or well-being of the beneficiary". *Id.* at 5.

Given the statute's text and overall purpose, Congress clearly contemplated some nexus between the type of risk associated with the "specified offense against a minor" for which the petitioner was convicted, and the prospective risk to the beneficiary. Moreover,

Congress has *not* prohibited U.S. citizens with the "risk factors" described above from petitioning for their family members. Thus, U.S. citizens with convictions for DUIs, domestic violence, and other crimes unrelated to specified offenses may petition for their family members without any restrictions. No rational basis exists to think that Congress, in passing the AWA, sought to shield the family members of sex offenders only from the "risk" incident to such unrelated conduct. Indeed, Congress has introduced other provisions to the INA to protect against the "risk" posed by some of these factors. For example, Congress, through the Violence Against Women Act, Pub. L. 103-322, 108 Stat. 1902-55 (1994), and subsequent acts reauthorizing and expanding it, has introduced special provisions to the INA for noncitizens battered by a U.S. citizen or LPR petitioner. *See, e.g.*, INA § 204(a)(1)(A)(iii)-(vii) (allowing the spouse or child of a U.S. citizen or LPR, or the parent of a U.S. citizen, who is battered to file a self-petition independently of the

abusive citizen or LPR spouse or parent). This suggests that Congress intended the Secretary to adopt an interpretation of "risk" tailored to the purposes of the AWA.

In short, a finding of risk requires some *nexus* between the kind of risk suggested by the specified offense for which the petitioner was convicted, and the determination that the petitioner poses a risk to the beneficiary for whom he or she is petitioning.

2. The standard of proof by which "no risk" must be shown.

The "constitutional safeguard of proof beyond a reasonable doubt," *In re Winship*, 397 U.S. 358, 368 (1970), is a "unique standard of proof" and "a critical part of the moral force of the criminal law." *California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93 (1981). It serves as a check on the potential for government wrongly to deprive individuals of liberty, and "manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are

guilty might go free." *Addington v. Texas*, 441 U.S. 418, 428 (1979). By imposing this burden on a U.S. citizen-petitioner, USCIS has turned the liberty-protecting purpose of the standard on its head. The "no risk" determination is properly made under the default civil standard, the one applicable to nearly all evidentiary questions in the immigration context – namely, a "preponderance of the evidence."

The Supreme Court has "never required," as USCIS does here, "the 'beyond a reasonable doubt' standard to be applied in a civil case." *Mitchell Brothers'*, 454 U.S. at 93. While the Court has occasionally applied the higher "clear and convincing" standard in civil proceedings, it has done so to *protect* a citizen's rights from government intrusion – not to facilitate government action to the citizen's detriment. *See, e.g.*, *Addington*, 441 U.S. 418 (civil commitment of the mentally ill); *Woodby v. INS*, 385 U.S. 276 (1966) (standard to prove deportability); *Schneiderman v. United States*, 320 U.S. 118 (1943) (denaturalization).

In contrast to *Woodby* or *Schneiderman*, the imposition of a higher standard here is not "to protect particularly important individual interests," *Addington*, 441 U.S. at 424, or "rights," *Santosky v. Kramer*, 445 U.S. 745 (1982) (higher standard to terminate parental rights). Rather, the government seeks to impose a higher standard on a U.S. citizen to his or her *detriment*.

As USCIS concedes, "'preponderance of the evidence' has long been recognized as the general evidentiary standard applied to visa petitions," USCIS Brief, at 14 (citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)). Nothing in the text or legislative history of the AWA suggests that Congress intended any deviation from this baseline standard, let alone authorized use of "beyond a reasonable doubt." To support its extraordinary position, USCIS claims "Congress' choice of the '*no* risk' language over a lesser degree of risk reflects intolerance for any risk to an intended beneficiary." *Id.* at 15. This reasoning, however,

confuses the substance of what must be shown with the *standard of proof* by which it must be shown. The two are independent inquiries, and the former is not probative of the latter.

Indeed, other provisions of the INA demonstrate that when Congress intends to raise the evidentiary burden for those seeking an immigration benefit, it knows how to do so. For example, INA § 245(e)(3) explicitly provides that when a spouse is in removal proceedings and seeks to adjust status based on marriage, the alien must prove the validity of the marriage by "clear and convincing evidence." Likewise, INA § 101(a)(43)(N) creates an exemption for the "alien smuggling" aggravated felony, but places the burden on the alien "affirmatively [to] show[] that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual)." Congress's failure, therefore, to establish a textually-defined burden of proof for the AWA's "no risk" provision showing

strongly suggests that it did not intend deviation from the "preponderance of the evidence" default.

USCIS can point to only one circumstance in which the BIA has imposed on a petitioner a standard above "preponderance of the evidence" absent explicit statutory instruction: where an individual fails to name a relative on an immigration application that requires such disclosure, the petitioner must demonstrate the familial relationship by clear and convincing evidence if he or she later files an immigrant petition for that relative. *Matter of Ma*, 20 I& N Dec. 394.[21] Imposition

[21] USCIS also cites to *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988), as an example of a case in which "the burden is shifted back to the petitioner to show by clear and convincing evidence" that the beneficiary's application was not based on an instance of prior marriage fraud. USCIS Brief, at 14. In fact, the BIA in *Kahy* employed the "clear and convincing" standard *in favor* of the petitioner, but nevertheless found that the petitioner's previous marriage was fraudulent. *Id.* at 805-06. And while this fact shifted the burden of proof from the government to the petitioner to prove that the current marriage was valid, it did not impose on the petitioner a "clear and convincing" burden.

of this burden, however, differs fundamentally from USCIS's heightened burden in this context in that the failure to disclose a specific relative on an earlier application bears directly on the specific evidentiary fact in question in the later immigrant petition for that alleged relative – namely, whether the claimed "relative" truly is related to the petitioner. The same is not true in the context of the "no risk" determination, where the petitioner's former conviction for a "specified offense" triggers an entirely different, independent inquiry – whether the petitioner poses "no risk" to the beneficiary. *Matter of Ma* therefore does not support USCIS's heightened standard of proof, and the Board should ensure that USCIS applies the proper standard – preponderance of the evidence.

Conclusion

The Board should articulate a standard for adjudicating petitions that may implicate the provisions of the Adam Walsh Act in a manner

consistent with the statutory language in light of the issues addressed in this brief.

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CERTIFICATE OF SERVICE

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