THE ADAM WALSH ACT'S IMMIGRATION PROVISIONS

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Adam Walsh was kidnapped in 1981 from a shopping mall by a stranger who then strangled him. No one was ever charged with his crime, though many suspects lingered long in the police records and the public fascination with the brutal and sad death of the child. His father, John Walsh, became a famous television personality on a precursor program to reality programming. The advocacy around the case of Adam Walsh, now officially closed by the police, altered – in many ways, for the better – the patchwork of local and state policies regarding missing and exploited children. In 2006, twenty-five years after Adam Walsh's kidnapping, Congress federalized in controversial ways the means and methods by which the United States will engage in it’s war against persons who abuse, mistreat, or exploit children. The act is called the Adam Walsh Child Protection and Child Safety Act of 2006.

The Adam Walsh Act was not the first federal statute regulating abuse crimes against children. The Wetterling Act and Megan's Law are two laws that provided the legislative foundation for the Adam Walsh Act. In contrast to the Wetterling Act and

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1 The Amicus Committee of the American Immigration Lawyers Association is collecting experiences and exploring litigation options for individuals adversely impacted by the Adam Walsh Act and the agency's implementation of it. Updates to this article, comments, and feedback are available at www.ailaspinionblog.org.

2 Our nation’s legislative responses, at both the federal and state level, generally play out in Hollywood-terms. A particular heinous crime is committed, the media machine kicks in, and a maelstrom surrounds the event with bellowing tones of regret, remorse, and reform. See, e.g., Note, Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences, 2008 Utah L. Rev. 697, 698-700 (providing examples of chilling stories that lead to legislative action). Whatever the intentions or motivations of the political branches in enacting these laws, it seems rather clear that most of the legislation is enacted without empirical evidence to back it up. Id. at 701. And the consequences of well-intended but poorly thought-out legislation can be devastating. See, e.g., Human Rights Watch, No Easy Answers: Sex Offender Laws in the United States (Sept. 2007), available at <http://www.hrw.org/en/reports/2007/09/11/no-easy-answers> (last visited Jan. 21, 2011).


Megan's Law, the Adam Walsh Act created an entirely federal approach (as opposed to a local jurisdictional system funded in part by federal dollars) to the perceived problem of sex crimes against children. See Corey Rayburn Yung, The Emerging War on Sex Offenders, 45 Harv. C.R.-C.L. L. Rev. 435, 451-52 (2010) (describing history of Adam Walsh Act). Expanding beyond the Wetterling Act, the Adam Walsh act criminalizes – at the federal level – broader types of crimes and increases the number of individuals who are subject to mandatory registration laws. It marshals resources on the civil side of government to permit the indefinite civil confinement of individuals after the completion of a prison sentence as well as changing the immigration worldwide selection system.

Immigration law, federal though it is, operates in tandem with both criminal law and family law. The worldwide immigration selection system allocated approximately 700,000 immigrant visas – permanent means of immigrating to the United States – based on family relations. A United States citizen or lawful permanent resident are anchor relatives who may sponsor relatives. Since its inception, the family-based selection system was focused on determining two things: (a) the validity of the qualifying relationship, that is, the relationship between the anchor relative and the intended immigrant and (b) the intended immigrant’s desirability, that is, his or her admissibility. The first inquiry was whether the relationship was legal and genuine. The second inquiry was whether the intended immigrant was admissible to the United States under section 212 of the Immigration and Nationality Act. Punitive immigration legislation – which seems to be a recurrent feature of every Congress since at least 1996 – generally has aimed at the desirability prong.

require public release of certain sex offender registration information.

5 The indefinite civil confinement regime has passed constitutional muster as a necessary and proper use of Congressional power, US v. Comstock, 130 S. Ct. 1949, 176 L.Ed. 2d 878 (2010). The Federal Defenders have published several useful articles describing litigation avenues to test the validity and constitutionality of the civil confinement regime as well as other questionable parts of the Adam Walsh Act. The Federal Defender analysis can be found here: <http://www.fd.org/pdf_lib/Adam%20Walsh%20MemoPt%201.pdf> (last visited Jan. 21, 2011).


7 The notable and unfortunate exception is the Defense of Marriage Act which barred recognition of same-sex marriages for immigration purposes. See Lynn D. Wardle, Section Three of the Defense of Marriage Act: Deciding,
The Adam Walsh Act’s amendments to the Immigration and Nationality Act are different – very different. For the first time in modern immigration legislation, the anchor relative's character is now being regulated.

Section 402 of the Adam Walsh Act creates a system whereby certain United States citizens or lawful permanent residents may be precluded from ever petitioning for a spouse, child, sibling, or parent to immigrate to the United States under the worldwide family-based immigration system. This change, radical in its nature and unique in its scope, was enacted quickly and without much empirical evidence demonstrating its need or efficacy.

This article explores the statutory changes, the administrative implementation of the statute, and avenues for relief from the AWA’s preclusion.

I. THE STATUTE

Title V of the Adam Walsh Act makes two changes to the INA. First, it adds a new deportation ground, § 237(a)(2)(A)(v) that subjects a person to deportation if he is a federally convicted sex offender who fails to register under the applicable sex offender registration program. Second, it amends § 204(a)(1) of the INA to preclude the filing of an alien relative petition if the petitioner – either a United States citizen or lawful permanent resident – has been convicted of an enumerated offense.

Section 204(a)(1) of the INA provides the statutory mechanism by which the worldwide family-based immigration selection system is implemented. Prior to the Adam Walsh Act, “any” United States citizen or lawful permanent resident could initiate the process to seek immigrant classification for his or her family member: a parent, spouse, child, or sibling (depending under which subsection the petition is filed). The statute made no other restrictions on the personal qualifications of the petitioner – “any” meant “any” and the inquiry was on the legality and validity of the relationship – not on the character, history, or circumstances of the anchor relative. This makes good sense because the anchor relative is a member of our community right now. The immigration selection system was intended, originally, and for good policy purposes, to select from the rest of the world who gets the lucky shot at an immigrant visa. The worldwide selection system regulated the rest of the world's desire to immigrate to the United States vis-a-vis establishing a tie or connection to the nation. In the case of § 204(a)(1)(A), the connection is premised on a family relationship. That makes sense because immigration laws regulate immigrants and not citizens who are, by definition, not the rest of the world.

Section 402 of the Adam Walsh Act alters that analysis and subjects the personal characteristics of the anchor relative to scrutiny. It makes four specific changes to § 204 of the INA. First, it adds an introductory phrase at the beginning of § 204(a)(1)(A) that states “Except as provided in clause (viii), any” United States citizen or permanent resident may initiate an alien relative petition. It adds a clause, clause (viii), to the end of § 204(a)(1)(A) that provides:

(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.

AWA § 402(a)(2). Third, it amends § 204(a)(2)(B) of the INA in a similar way: it adds the “Except as provided in subclause (II)” language and then creates subclause (II) which reads identically to above change. Fourth, and finally, it makes a similar change to § 101(a)(15)(K) to create the same restriction for nonimmigrant fiancee visas.

Section 111(7) of the Adam Walsh Act defines "specified offenses against a minor" to mean:

An offense involving kidnapping (unless committed by a parent or guardian); An offense involving false imprisonment (unless committed by a parent or guardian); Solicitation to engage in sexual conduct; Use in a sexual performance; Solicitation to practice prostitution; Video voyeurism as described in 18 USC 1801; possession, production, or distribution of child pornography; Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct; or

Any conduct that by it's nature is a sex offense against a minor.

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8 AWA § 401

9 AWA § 402
A minor is defined for Adam Walsh purposes as a person under the age of eighteen. There is no general effective date for the legislation as a whole and no specific effective date for the immigration provisions in particular. The Adam Walsh Act's changes do not address, with specificity, whether they apply to relationships that existed prior to the amendment, to petitions filed prior to the amendment, to relationships that pre-dated the amendment but are the subject of a post-amendment filing, or whether both the existence of the relationship and the petition must occur after enactment.

II. AGENCY IMPLEMENTATION

The agency principally in charge of implementing the immigration provisions of the Adam Walsh Act is the United States Citizenship and Immigration Services – an agency formerly known as the Immigration & Naturalization Service. In April 2010, the American Immigration Lawyers Association obtained a copy of a 2008 USCIS memorandum that set forth the agency's standard operating procedures for processing and adjudicating claims under the Adam Walsh Act. From 2006 until 2008 when the SOP was issued, nearly every petition that raised or could be thought to raise a question under Adam Walsh Act was taken under advisement and adjudication was deferred.

The SOP memorandum, which is reported at AILA InfoNet Doc. No. 10041530, provides definitive guidance on USCIS's interpretation of AWA § 402 provisions.

All I-130, I-129F, I-600, I-600A, I-800 and I-800A petitions are scrutinized for compliance with the Adam Walsh Act provisions. Although the statute precludes the filing of any one of these provisions, as a practical matter, USCIS permits the filing and will proceed to a merits adjudication. The preclusion rule applies to any of the enumerated petitions filed for any beneficiary, which is, exhaustively, a spouse, fiancée, parent, unmarried child, unmarried son or daughter over 21 years of age, an orphan, an adopted child, a married son or daughter of any age, a brother or sister and any derivative beneficiary of one of these individuals. It applies to stepchildren and natural children.

USCIS screens family-based petitions in two stages. First, all filed petitions are subject to an initial name-check and self-disclosure review. In this phase, USCIS runs the petitioner's name through a government operated database called IBIS.10 Likewise, the form is reviewed to determine if the petitioner self-disclosed a disqualifying offense. If derogatory information is discovered, USCIS will seek additional information, placing the burden on the petitioner, to demonstrate that he or she was not convicted of a disqualifying offense and, if so, that he or she does not pose a risk of harm to the intended beneficiary. The SOP does not specify the standard of proof the agency uses in determining if a disqualifying offense exists. The agency relies on documents from the record of proceedings as well as hearsay items such as news accounts, police reports related to the crime in question other unrelated crimes. The SOP does not elucidate why court or hearsay documents from unrelated crimes will aid in the determination if a disqualifying crime exists.

USCIS interprets the phrase "poses no risk" to mean risk of harm of any kind and not just harm related to criminal sexual activity. The agency presumes that there is a risk of harm if the intended beneficiary is a child (natural, adopted, or step) regardless of any other factor such as the nature, severity, or staleness of the disqualifying crime. USCIS requires a petitioner demonstrate beyond any reasonable doubt that he or she poses no risk. Once a petitioner has been determined to have been convicted of a disqualifying offense, his or her entire personal history, including any past arrests or convictions, are subjected to scrutiny.

The SOP presumes that most, if not all, Adam Walsh Act effected petitions will be denied. The agency bluntly states "approval recommendations should be rare." In instances where an approval is recommended, the recommendation to approve must be vetted at three separate, increasingly higher adjudicative levels.

Non-citizen petitioners who file family-based petitions and who may have been convicted of a disqualifying crime may be referred to Immigration and Customs Enforcement for the initiation of removal proceedings.

The SOP applies the Adam Walsh Act provisions to any petition, pending or approved, regardless of when it was filed, so long as an individual has not yet immigrated based on the petition. It is an incredibly expansive – and retroactive – application of the Adam Walsh Act’s provisions.

10 IBIS is the Interagency Border Inspection System. IBIS is an interagency lookout and inspections support system that was designed to facilitate and more effectively control the entry of persons into the United States. At least nine cabinet level departments, in addition to independent agencies and foreign governments, participate in IBIS. See USCIS, Immigration Security Checks – How and Why the Process Works, available at: http://www.uscis.gov/files/pressrelease/security_checks_42506.pdf (last visited Jan. 21, 2011)
III. OPEN QUESTIONS FOR ATTORNEYS PRESENTING ADAM WALSHE ACT CLAIMS

Surmounting the “beyond a reasonable doubt” standard for demonstrating “no risk is an impossible task. Accordingly, there appears to be no meaningful relief from the “no risk” preclusive effect. This author is unaware of any petition that has been approved under the Adam Walsh Act provisions.

This section of the article poses, but does not answer, a few important questions about the correctness of the USCIS SOP.

A. Determining if a disqualifying conviction exits

(1) Use of the categorical approach, modified categorical approach, and the circumstance specific approach.

In general, the categorical approach has been adopted by courts when analyzing deportation liability and benefit eligibility in the context of immigration law. Whether the categorization of a particular conviction as a “specified offense against a minor” is done using the categorical approach is an open question. There are two prongs to the analysis here. First, is the categorical approach used to determine whether the predicate conviction is categorically matched to one of the enumerated offenses in § 111(7) of the Adam Walsh Act? Second, is the “minority” element of the “specified offense against a minor” – that is, the offense was committed against a minor – an element that must appear in the predicate conviction?

The SOP appears to adopt a categorical approach in determining whether any particular conviction is for a disqualifying crime. According to the SOP, “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.” However, the evidence the agency believes is relevant to such a determination runs far afield from the record of proceedings to which the categorical approach is generally limited.

In Nijhawan v. Holder, 129 S.Ct. 2294 (2009), the United States Supreme Court explained that there is an alternative analytical method for making comparisons between INA categories and criminal statutes. This alternative method to the categorical approach is called the circumstance-specific approach. Id. at 2300. It is based on a plain language interpretation of the statute that some elements giving rise to deportation liability under the INA may be demonstrated factually as opposed to a pure element to element comparison. Id. When making a fact-based determination, only findings which are tied to a specific count covered by the conviction, tethered to the criminal proceedings, and determined in a fundamentally fair procedure are admissible in a circumstance-specific approach. Id. at 2303.

Both the Ninth Circuit and the Eleventh Circuit appear to have adopted the circumstance-specific approach regarding the minority element for Title I of the Adam Walsh Act (the sex offender registration regime). United States v. Byun, 539 F.3d 982 (CA9 2008); United States v. Dodge, 597 F.3d 1347 (CA11 2010).

This article does not suggest that the circumstance specific approach is the appropriate analytical model to be used in Adam Walsh Act cases. There are notable similarities between the aggravated felony section at issue in Nijhawan and the enumerated description of offenses that are disqualifying crimes with regard to determining the minority element. In any event, the agency has rejected the open-ended “heads-they-win-tails-you-lose” approach of Matter of Silva-Trevino, 24 I&N Dec. 687 (AG 2008).12

(2) Availability of diversion and rehabilitative relief to avoid the consequences of a criminal conviction.

How deferred adjudications, such as diversion agreements, and other rehabilitative relief such as expungements, were treated under immigration law has been an evolving analysis since at least 1976. In 1988, the BIA set out a three-pronged definition in


12 For an excellent analysis of Matter of Silva-Trevino, see Das, Immigration Penalties, supra, at 37-39.

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Matter of Ozkok, 19 I. & N. Dec. 546 (BIA 1988) for what it means to be “convicted” for immigration purposes. In 1996 Congress mostly codified the Ozkok “definition of conviction” at § 101(a)(48)(A) of the INA. Since 1996, once an individual has been found guilty and some type of restraint is placed on his or her liberty, then a conviction will exist for immigration purposes in perpetuity. This is so even if the predicate court does not enter a judgment of conviction because the accused participates in a deferred adjudication scheme or if the conviction is later expunged. However, the 1996 statutory codification of the “conviction” definition applies – or should only apply – “with respect to an alien[.]” INA § 101(a)(48)(A).

It is an open question how the agency will treat deferred adjudications or expunged convictions.

B. Burden of proof

There are three open questions respecting the burden of proof in Adam Walsh Act cases.

First, generally, the burden applicable in visa petitioning proceedings is that of a preponderance of the evidence. Matter of Martínez, 21 I&N Dec. 1035, 1036 (BIA 1997) However, the SOP has adopted the highest possible burden of proof: a petitioner must demonstrate beyond a reasonable doubt that he poses no risk of harm.

There appears to be no statutory basis for adopting this standard. The Adam Walsh Act contains no language heightening the standard of proof. Accordingly, the SOP’s standard appears to be unlawful.

Second, it is unclear which party – USCIS or the petitioner – bears the burden of proving that a conviction is, or is not, a specified offense against a minor? The burden of proof is a default rule that creates a win for the opposing party if the burden is not satisfied. In visa petition proceedings, if court records are old, unavailable, or inconclusive on the Adam Walsh Act issues, if the burden falls on the petitioner, then his petition will be denied.

Third, where a petitioner is found to have been convicted of a “specified offense against a minor,” and the intended beneficiary is a minor, the SOP applies a rebuttable presumption of risk. This presumption does not appear to have any statutory basis. Accordingly, the legality of this presumption is an open question.

IV. CONCLUSION

If you have a case that raises one of these issues, if you are litigating one of these claims, or if you have had a claim decided by the Board of Immigration Appeals, a district court, or any court of appeals, please contact the AILA Amicus Committee at amicus@aila.org. This article is a work-in-progress and will be updated with additional analysis. Updates are available at aialslipinionblog.org.