Sham Marriages and Marriage Fraud:
A Summary of Recent Case Law and Tips for Practitioners

I. Introduction

This practice advisory provides background and analysis on recent decisions issued by the Board of Immigration Appeals (BIA) regarding immigrating through a marriage-based petition. From 2019 to 2021, the BIA published four decisions relating to sham, or fraudulent, marriages and INA § 204(c).[1] A sham marriage is one that the parties enter into not to establish a life together but rather to circumvent immigration laws.[2] Section 204(c) bars approval of a visa petition where the beneficiary has previously participated in a fraudulent marriage or has attempted or conspired to do so.[3] This bar has no temporal limitation and impedes a client's ability to obtain permanent resident status, regardless of how much time has passed since the alleged fraud or how compelling the equities are in the current case. If USCIS makes a section 204(c) finding, this finding will forever bar approval of an I-130 family visa petition, an I-140 employment-based petition, and a VAWA-based I-360 self-petition.[4]

In 2021, the BIA published another decision, which while not specifically addressing the section 204(c) bar, affirmed the immigration judge's ability to look behind the approval of an I-130 petition to consider the bona fides of an underlying marriage.[5]

This practice advisory summarizes the recent BIA case law, provides practice pointers and ethical considerations for advocates when representing clients with previously filed marriage-based petitions or where allegations of fraud may surface, and suggests possible solutions for clients who are subject to the 204(c) bar.

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[1] *Matter of P. Singh,* 27 I&N Dec. 598 (BIA 2019); *Matter of Pak,* 28 I&N Dec. 113 (BIA 2020); *Matter of Mensah,* 28 I&N Dec. 288 (BIA 2021); *Matter of R.I. Ortega,* 28 I&N Dec. 9 (BIA 2020).

[2] *Bark v. INS,* 522 F.2d 1200 (9th Cir. 1975).

[3] Section 204(c) of the INA reads: [N]o petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

[4] *P. Singh,* 27 I&N Dec. 598; *Joseph F. Risoli P.E., LLC v. Johnson,* 274 F. Supp. 3d 88 (D. Conn. 2017) (employer's I-140 petition denied where there was prior marriage fraud); *Oddo v. Reno,* 27 F. Supp. 2d 529 (E.D. Va. 1998) (I-360 VAWA petition denied where evidence existed that marriage prior to abusive marriage was fraudulent).

[5] 28 I&N Dec. 400 (BIA 2021).

II. Summary of Recent BIA Decisions on Marriage Fraud

Recent BIA decisions have clarified the burden of proof necessary for a section 204(c) bar to apply and have affirmed that the section 204(c) bars can be applied expansively. In addition, the BIA has affirmed the ability of immigration judges to look behind an approved I-130 petition and consider the bona fides of a marriage. The following is a summary of these recent decisions.

a. Matter of P. Singh and the "Substantial and Probative Evidence" Standard

In order for U.S. Citizenship and Immigration Services (USCIS) to make a section 204(c) finding, there must be "substantial and probative evidence" in the record that the beneficiary attempted or conspired to enter into a fraudulent marriage. In *Matter of P. Singh*, the BIA clarified the relevant standard of proof and set forth a burden-shifting analysis for determining whether a beneficiary is subject to the 204(c) bar.[6]

The BIA noted that the petitioner has the initial burden to prove the bona fides of the marriage by a preponderance of the evidence.[7] Where the record contains evidence of fraud, USCIS must advise the petitioner of any derogatory evidence, which the petitioner must rebut by the preponderance of the evidence. If USCIS denies the petition under section 204(c) based on marriage fraud, USCIS bears the burden of showing that there was substantial and probative evidence of such fraud in order for the visa petition denial to be upheld.

The BIA noted the severe consequences of a section 204(c) finding, which operates to permanently bar future approval of any visa petition. As such, the BIA adopted a relatively high standard of proof for finding that the section 204(c) bar applies to any visa petition, noting that "to be 'substantial and probative,' the evidence must establish that it is more than probably true that the marriage is fraudulent."[8] While the BIA noted that many of the federal circuit courts affirming the marriage fraud bar involved direct evidence of the fraud, circumstantial evidence alone may be sufficient to establish fraud under section 204(c), depending on the quantity and quality of that evidence.[9]

The BIA noted that where "there are some minor inconsistencies and the documentary evidence is limited, they should be considered in assessing whether there is fraud, but these factors, without more, would not likely be sufficient to satisfy the substantial and probative evidence standard for marriage fraud."[10] However, the Board noted the following types of evidence that would "strongly indicate" fraud:

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[6] 27 I&N Dec. 598 (BIA 2019),

[7] When a couple marries while the beneficiary is in removal proceedings, they face a higher burden of proof—the "clear and convincing evidence standard." INA § 245(e).

[8] *Singh.* 27 I&N at 607.

[9] *Id.*

[10] *Id.*

- Evidence that the parties deliberately attempted to deceive immigration officials regarding their cohabitation, joint finances, or other aspects of the marriage;
- Detailed reports from on-site visits and field investigations;
- Evidence that the parties have other romantic partners with whom they may have children;
- Statements from family members, employers, or acquaintances indicating they do not know about the marriage or that the parties told them the marriage is a sham;
- Evidence that one or both parties have been filing taxes as single during the marriage; and
- Evidence that the petitioner has been married to several beneficiaries, especially if a connection between the petitioner and a former spouse has continued through joint property ownership, finances, or benefits.[11]

In addition, the BIA noted that all factors should be considered cumulatively and in their totality in order to determine whether it is "more than probably true" that the marriage is fraudulent.[12] The BIA noted that, if there is evidence of marriage fraud in the record, "affidavits alone will generally not be sufficient to overcome evidence of marriage fraud in the record without objective documentary evidence to corroborate the assertions made by the affiants."[13] Applying this legal standard to the case at hand, the BIA upheld the visa petition denial and 204(c) finding where the beneficiary married the mother of his long-time partner with whom he had children, where the beneficiary's wife admitted during a site visit that her marriage was a sham and this admission was recorded by Government officials, where the record contained multiple inconsistent and incredible statements by the beneficiary, and where a site visit showed physical evidence calling into question the validity of the marriage.

b. *Matter of R.I. Ortega* and Section 204(c)'s Application to K-1 Nonimmigrant Petitions

In *Matter of R.I. Ortega*, the BIA found that the section 204(c) bar may apply to a noncitizen beneficiary of a K-1 fiancé(e) petition, even when the beneficiary never married the petitioner.[14] In this case, the noncitizen sought permanent residency based on an approved I-130 petition filed on his behalf by his U.S. citizen mother. USCIS revoked the approval of the I-130 petition, finding that the noncitizen had previously conspired to enter into a fraudulent marriage when a K-1 fiancé petition was filed on his behalf, for which he submitted supporting documents and attended interviews at the consulate. The BIA upheld this revocation, finding that that the fiancé petition was based on a sham relationship. The BIA focused on the unique nature of the K-1 fiancé(e) program and noted that these visa holders have a direct path to permanent resident status and have traditionally been treated as "functional equivalents" of immediate relatives for purposes of immigrant visa eligibility and availability.[15] The BIA also found that the actions taken by the beneficiary when appearing at

[11] *Id.* at 609.
[12] *Id.* at 610.
[13] *Id.*
[14] 28 I&N Dec. 9 (BIA 2020).
[15] 28 I&N Dec. at 12.

interviews in connection with the K-1 visa application and falsely asserting a *bona fide* intention to marry the U.S. citizen petitioner necessarily meant that the beneficiary had "conspired" to enter into a fraudulent marriage, even though the marriage never took place. The BIA found that the statute did not intend to limit the applicability of 204(c) to cases where the beneficiary previously obtained or sought to obtain an immigrant visa.

In that same case the BIA also addressed the "conspiracy" prong of the statute, which applies to bar approval of a later visa petition even when the fraudulent marriage has not actually taken place.[16] The BIA found that in order for 204(c) to apply, there must be both an agreement and an overt act in furtherance of the conspiracy. The BIA noted that two parties can merely *agree* to enter into a marriage for purposes of evading the immigration law, which would not trigger the marriage fraud bar unless there was an affirmative act in furtherance of the conspiracy. The BIA found in this particular case that the filing of the nonimmigrant K-1 petition and the parties' conduct at consular interviews were overt acts in furtherance of the conspiracy. However, if two parties agree to enter into a marriage for the purpose of evading the immigration laws but never engage in any action or conduct that furthers that agreement, this does not trigger the bar without an overt act.

c. *Matter of Pak* and Section 204(c)'s Lack of Temporal Limitation

In another case decided in 2020, *Matter of Pak,* the BIA rejected the theory that the section 204(c) bar should not apply where the prior petition denial referenced only insufficient evidence without making a formal finding of marriage fraud.[17] The BIA determined that the bar to approval of a subsequent petition may apply regardless of whether the agency had explicitly made a finding of marriage fraud when it denied the first petition. The BIA found that "the broad phrasing and the absence of a temporal requirement" in the statute meant the bar could be applied anytime there is "substantial and probative evidence" of marriage fraud, which the BIA found present in this particular case.[18]

d. *Matter of Mensah* and the Intersection of Section 204(c) and the Fraud Inadmissibility Ground

The BIA has also considered the overlap and distinctions between section 204(c) and the inadmissibility ground for fraud or willful misrepresentation of a material fact found at INA § 212(a)(6)(c)(i). In *Matter of Mensah,* the BIA considered the case of a noncitizen seeking to readjust her status based on a second, approved I-130 petition filed on her behalf by a U.S. citizen spouse.[19] The noncitizen had obtained conditional permanent resident status based on her first marriage, but the I-751 petition to remove conditions on residence was denied when USCIS determined that the noncitizen could not show she had entered into a good faith marriage with her first

[16] *Id.* at 13.
[17] 28 I&N Dec. 113 (BIA 2020).
[18] 28 I&N Dec. at 117.
[19] 28 I&N Dec. 288 (BIA 2021).

husband. However, a subsequent I-130 petition filed by her second husband was approved, and USCIS did not assert the 204(c) bar.

Based on the approved visa petition, the noncitizen argued that the immigration judge was precluded from determining that she was inadmissible for fraud for alleged misrepresentations made during her USCIS interview about her first marriage, which had taken place several years earlier. The noncitizen argued that approval of the subsequent visa petition constituted an implicit determination that she had entered into a good faith marriage with her first husband. The BIA disagreed and found that the immigration judge had not clearly erred in finding that the noncitizen had misrepresented her residential address at the time of her USCIS interview and was therefore inadmissible for fraud. While the noncitizen attempted to explain these discrepancies in her testimony, the immigration judge found them unpersuasive and therefore found her inadmissible under INA § 212(a)(6)(c)(i). The BIA also affirmed the immigration judge's conclusion that this misrepresentation about her residence with her ex-husband was material because it would either affect what conclusions the USCIS official who interviewed her drew regarding these issues, or it tended to shut off a line of inquiry that would have disclosed relevant facts.[20] The BIA upheld the immigration judge's finding that the noncitizen was inadmissible for fraud despite the fact that USCIS had made no formal 204(c) finding to bar approval of the subsequent petition and it noted that the noncitizen has the burden of showing her admissibility to the United States when she is seeking adjustment of status.[21]

The noncitizen in *Matter of Mensah* argued that she was not inadmissible for fraud and did not seek a waiver of inadmissibility in the alternative based on extreme hardship to her U.S. citizen spouse in her removal proceedings. Accordingly, the BIA determined that the immigration judge properly ordered her removal from the United States because she was inadmissible and had not applied for a waiver.

Mensah demonstrates that there may be circumstances when the 204(c) bar does not apply to bar approval of a visa petition, but the factfinder may still determine that misstatements about the marriage make the noncitizen inadmissible for fraud. There can be a scenario where false statements were made about a marriage that in itself was not fraudulent. It appears that the noncitizen in *Mensah* fell into that gray area: her initial marriage was not fraudulent, but she did misrepresent some aspects of her relationship with her first husband when she attended her USCIS interview.

e. *Matter of Kagumbas* and Authority to Look Beyond an Approved I-130 Petition

While not directly dealing with the section 204(c) bar, a recent BIA decision, *Matter of Kagumbas*, held that an immigration judge may inquire into the bona fides of a marriage when considering an application for adjustment of status, even when the underlying I-130 petition has been approved by USCIS.[22]

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[20] *Id.* at 295.
[21] 28 I&N Dec. at 293.
[22] 28 I&N Dec. 400 (BIA 2021).

The BIA looked to the statute and regulations to determine whether an immigration judge has the authority to determine the bona fides of a marriage. While noting that immigration judges lack the authority to cancel or revoke an I-130 petition, the BIA found that they do have the authority to determine when an applicant has met his or her burden of proof to show eligibility for relief from removal. The BIA noted that an approved I-130 visa petition is relevant and may constitute "some evidence of the validity of the marriage," but it is not the sole consideration.[23] Therefore, the judge may consider other evidence in making his or her determination, including the testimony of the witnesses and other corroborating evidence submitted by the parties.

The BIA pointed to its own prior precedent in *Matter of Bark*,[24] which held that approval of an immigrant visa petition does not entitle the individual to lawful permanent resident status. The BIA noted that while *Matter of Bark* focused on whether the applicant warranted a favorable exercise of discretion—an issue that the immigration judge did not reach in *Kagumbas*—the authority to deny an application was not limited to the exercise of discretion. The BIA also pointed to two courts of appeal that have considered this legal issue and have held that the immigration court may properly consider the bona fides of the underlying marriage.[25]

Matter of Kagumbas establishes that both the immigration judge and a USCIS officer have the authority to inquire into the bona fides of a marriage, even when the I-130 petition has been approved. Indeed, the BIA re-affirmed the authority of USCIS to do so as well, noting that there is "no credible claim that the approved I-130 visa petition prohibited the Department of Homeland Security (DHS) from considering the bona fides of the marriage as part of the adjustment of status application."[26]

III. Practice Pointers for Practitioners Representing Clients in Marriage-Based Petitions

For practitioners representing clients in any immigrant visa petition, it is crucial to be aware of the possibility that a section 204(c) bar or a fraud inadmissibility finding could be applied to their clients. Applicants for adjustment of status should be advised that USCIS will have access to any prior petitions or applications submitted to USCIS, the Executive Office for Immigration Review, and the Department of State. They should also be advised of the ways that the 204(c) bar or a fraud inadmissibility finding can impact their eligibility for permanent residency. Noncitizens seeking permanent residency should be aware that USCIS will scrutinize prior marriages and will pay special attention to any marriage where an I-130 petition was previously filed on their behalf. Thus, in addition to assessing the bona fides of the current marriage for spousal petitions, practitioners should screen carefully for any potential 204(c) issues, asking questions of the noncitizen such as:

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[23] 28 I&N Dec. at 405.
[24] 14 I&N Dec. 237, 240 (BIA 1972).
[25] *Id.* at 405. The two courts of appeal decisions are *Wen Yuan Chan v. Lynch*, 843 F.3d 539, 541 (1st Cir. 2016) and *Agyeman v. INS*, 296 F.3d 871, 879 n.2 (9th Cir. 2002).
[26] *Id.* at 404.

- Have you ever been previously married?
- How long were you married?
- Why did the marriage end?
- What was the immigration status of your former spouse?
- Did the spouse file any papers on your behalf? If so, what was the result of that filing?
- Did you ever attend an immigration interview with your prior spouse?

Some applicants may not understand that a long-ago marriage or immigration filing are still relevant to their current application for permanent residency. There is no statute of limitations or temporal limitation for when USCIS can scrutinize a prior marriage or a prior visa petition. This conversation should be part of the initial screening process, and noncitizens should be aware of the severity of the section 204(c) bar, no matter how strong or compelling their current family ties may be. Similarly, applicants should be warned that engaging in immigration fraud will likely lead to a referral to removal proceedings, as these cases are typically a high priority for enforcement.

a. Ethical Considerations

Representing clients in cases where there are allegations or concerns about marriage fraud can raise ethical issues for practitioners. Under the Model Rules, an attorney may not offer evidence that he or she knows to be false. If the attorney later becomes aware of the falsity of the evidence, he or she should take reasonable remedial measures, including, if necessary, disclosure to the tribunal.[27] A duty to disclose exists in many states even if compliance requires disclosure of information otherwise protected by the confidentiality provisions.[28] In addition, the Executive Office for Immigration Review's rules for attorney discipline forbid a lawyer from engaging in deceptive or misleading conduct in matters pertaining to legal status and, like the Model Rule, requires a lawyer to take remedial measures to prevent fraud or deception.[29] However, only *knowledge* of the falsity of evidence triggers this duty of candor; a mere reasonable *belief* of false evidence or fraud does not.

It is also important to remember the difference between a mandatory and permissive withdrawal of representation. In certain circumstances, a lawyer *must* seek to withdraw if the representation will result in a violation of the Rules or other law, including the prohibition on knowingly offering false evidence.[30] However, a lawyer *may* seek to withdraw if he or she reasonably believes that the client persists in criminal or fraudulent conduct, or the client has used the services of the lawyer to commit a crime or fraud.[31] Practically speaking, if a lawyer has concerns about evidence presented by clients in an ongoing case, a lawyer may decide to withdraw before gaining actual knowledge of the client's engagement in criminal or fraudulent conduct, which would trigger the obligation to take remedial

[27] ABA Model Rule of Professional Conduct 3.3(a)(3).
[28] ABA Model Rules of Professional Conduct 1.6.
[29] 8 CFR § 1003.102.
[30] ABA Model Rules of Professional Conduct 1.16(a).
[31] ABA Model Rules of Professional Conduct 1.16(b).

measures. Attorneys who are withdrawing from a case may also wish to reiterate to their clients how important it is not to present fraudulent information to any federal agency and the severe penalties for doing so.

Practitioners may also encounter clients who admit to previously having engaged in sham marriages or immigration fraud. A practitioner would be ethically prohibited from representing such an individual in a subsequent visa petition because the practitioner would know of the client's ineligibility for the benefit requested. However, a practitioner could represent a client in another application for which the prior sham marriage or fraud would not be a bar. Some of these possible applications for relief are discussed below. Generally, these applications would require disclosure of the prior fraud.

b. Freedom of Information Act (FOIA) Requests

It is advisable to file requests for copies of the client's "A" file with the Department of Homeland Security, particularly when an I-130 petition has previously been filed on behalf of the client. The I-130 filing should be held in the beneficiary's A file, although USCIS may redact identifying information relating to the petitioner. A FOIA can help practitioners understand prior immigration filings and flag any problem areas that may arise during the adjustment of status process.

The fastest way to obtain A file records is through submission of an electronic request to USCIS, but practitioners may also choose to submit the request through the mail or email.[32] FOIA requests are generally prepared by the practitioner by filing Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, and Form G-639, Freedom of Information/Privacy Act and Online FOIA Request, which provide USCIS the necessary information to obtain the individual's A file.[33] Practitioners should also request immigration court records through the Department of Justice, Executive Office for Immigration Review, for individuals currently or previously in removal proceedings.[34]

Practitioners should look for evidence that a prior marriage-based petition was filed on behalf of their client, as well as the supporting documentation that was submitted with the application. If a prior petition was denied, practitioners should understand the reasons for the denial. For example, if the parties failed to appear at the interview, they should speak to their client about the reasons for the failure to appear. Practitioners should also look to the language used by USCIS in its denial of the I-130 petition. Generic language used by USCIS may refer to "insufficient evidence" to establish the bona fides of the marriage and may not reference the section 204(c) bar outright. However, this would not prevent USCIS from raising the bar at a later time. Evidence that the petitioner on the previous I-130 petition provided a statement claiming the marriage was a fraud or evidence of a report by the

[32] The most up-to-date information on requesting A file records through USCIS can be found on its website. uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act.

[33] Form G-639 is not required, and practitioners may also choose to submit a letter describing the types of records they are seeking.

[34] Information on requesting immigration court or BIA records can be found on EOIR's website: justice.gov/eoir/foia-facts.

Fraud Detection and National Security Directorate (FDNS) outlining fraud would be of special concern to a practitioner deciding whether to proceed with a subsequent visa petition filing.

c. Preparation for an Interview or Individual Hearing

The best preparation for an interview or an individual hearing is through regular discussion with clients about the types of questions that they can expect to be asked during the interview. Even when an I-130 petition has already been approved, practitioners should carefully review the petition and adjustment of status application with clients, preparing them to answer questions about their address history, their spouse's family and employment history, and their current life together as a couple. Practitioners should submit updated evidence of the bona fides of a marriage to the adjudicator, including copies of jointly filed tax returns, proof of shared residence, proof of shared bank accounts, birth certificates of children they have in common, and updated photographs.

In a case involving a prior marriage or previous I-130 filing, the clients should know that they will not only be asked about the current marriage, but they will also likely be asked about the prior marriage. It is a good idea to obtain documentary proof of the bona fides of the prior marriage and be prepared to present them (if asked) at the interview, or in the event that a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) is issued.

d. Responding to an RFE or Notice of Intent to Deny

In the event that an RFE or a NOID is issued as to the bona fides of a prior marriage, practitioners should be prepared with any possible documentary evidence that could show that the prior marriage was in fact a good faith marriage. The timeline for responding to an RFE or NOID issued by USCIS may be as little as 30 days, and it may not be possible to put together a comprehensive response in such a short time period without advance preparation. Therefore, preparation for such a request prior to the interview will be crucial.

Practitioners should cite to the "substantial and probative evidence" standard of fraud established in *Matter of P. Singh,* which the BIA described as a relatively exacting standard given the implications for noncitizens of a 204(c) finding. The BIA explicitly stated in *Matter of P. Singh* that simple discrepancies in testimony and lack of good faith documentation, on their own, would not generally be sufficient to support a section 204(c) finding. Practitioners, to the extent it is supported by the record, should characterize their clients' cases as falling into this area where a 204(c) finding would not be warranted.

DHS will certainly give substantial deference to the results of FDNS investigations, and practitioners may find it challenging to overcome an FDNS report substantiating a finding of fraud. If there is no FDNS report, but there is adverse information provided by the petitioner in the prior marriage-based case, practitioners will want to explain the dynamics of the prior marriage. For example, the prior

marriage may have broken up due to physical or psychological abuse, and these statements may have been part of a pattern of abuse by the petitioner.[35]

Declarations on their own are unlikely to be sufficient evidence to refute evidence of fraud. On the other hand, evidence of shared financial responsibility, including jointly filed tax returns, shared bank accounts, shared credit cards, and bills in both names, are likely to be given more weight. Practitioners may also consider obtaining psychological evaluations or letters from counselors or therapists that might help to explain the dynamics of a prior marriage, particularly one that involved psychological or physical abuse.

IV. Strategies for Denials

a. Board of Immigration Appeals

If an I-130 petition is denied, the petitioner (or self-petitioner) may file an appeal within 30 days of the denial of the decision. The BIA generally has jurisdiction over family-based immigrant visa petitions.[36] However, the appeal is initially filed with DHS and then forwarded to the BIA.

Appeals of all visa petition decisions are made on Form EOIR-29, Notice of Appeal to the Board of Immigration Appeals from a Decision of a DHS Officer. Unlike appeals from IJ decisions, appeals of visa petition denials are filed directly with DHS in accordance with any instructions that DHS provides and the applicable regulations. The deadline for the appeal is 30 days from the date of service of the decision being appealed. The filing fee for a petition-based appeal is currently $110 and is paid directly to DHS. Supporting briefs are filed with DHS and in accordance with a briefing schedule set by DHS. Again, the practitioner should point to the relatively exacting legal standard of "substantial and probative evidence" necessary for DHS to make a section 204(c) finding and advance any arguments that the record did not contain such evidence.

The BIA does not consider new evidence on appeal. However, practitioners may consider submitting new evidence and request a remand for consideration of this evidence in the alternative. The petitioner should be prepared to articulate the purpose of the new evidence and its prior unavailability. This petition may include evidence of the bona fides of the current marriage, if that is the basis for the denial, or evidence of the bona fides of the prior marriage if a section 204(c) finding was made. It is possible that DHS will reconsider its initial decision based on the strength of the new evidence. However, if DHS declines to reconsider the decision, it will forward the record to the BIA for issuance of a written decision.

[35] For VAWA self-petitioners only, 8 USC § 1367(a)(1) prohibits officials from making adverse determinations of admissibility or deportability based solely on information provided by the abusive spouse or ex-spouse.
[36] EOIR Policy Manual, Part III-BIA Practice Manual, Chapter 9.3, Visa Petition Denials.

The procedures for appeals of revocations of visa petition approvals are very similar. The main difference is the timing in that the petitioner or self-petitioner must file the appeal within 15 days after service of the notice of the revocation.[37]

b. Federal Court Review

If the denial is affirmed following the administrative appeal, the applicant may consider challenging this agency action in federal district court pursuant to the Administrative Procedure Act.[38] However, review of final agency action is limited to instances where the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[39] Final agency action is arbitrary and capricious when the "evidence not only supports a contrary conclusion bur compels it."[40]

While this standard of review is quite deferential to the agency's determination, some courts have found due process violations when the agency does not provide the complete administrative record to the couple or provide them with the opportunity to refute any adverse evidence. For example, the Ninth Circuit held in *Zerezghi v. U.S. Citizenship and Immigration Services* that the BIA violated due process by not disclosing an adverse piece of evidence, a rental agreement, which called into question whether the beneficiary had lived with her ex-husband during the time she claimed.[41] Because the evidence of marriage fraud in that particular case was equivocal, the Ninth Circuit found that the couple should have been provided the opportunity to respond to the government's strongest evidence that the prior marriage was in fact a sham. Similarly, the Ninth Circuit found a procedural due process violation when USCIS and the BIA relied on only a short declaration provided by the beneficiary's ex-spouse claiming that the marriage was a fraud, without providing the beneficiary to cross-examine either her ex-husband or the USCIS officer who took the statement.[42]

In other cases, federal courts have deferred to agency findings as long as the parties were provided with due process. For example, in a case where a couple received a Notice of Intent to Deny that provided an opportunity to present additional evidence as well as a statement of reasons for the denial, the court found no due process violation and deferred to the agency's findings under the deferential "arbitrary and capricious" standard of review.[43]

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[37] EOIR Policy Manual, Part III-BIA Practice Manual, Chapter 9.4, Visa Revocation Appeals.
[38] *Ginters v. Frazier*, 614 F.3d 822, 825-29 (8th Cir. 2007) (finding that district court could review denial of I-130 petition).
[39] 5 USC § 706(2)(A).
[40] *Abdille v. Ashcroft,* 242 F.3d 477, 483–84 (3d Cir. 2001)).
[41] 955 F.3d 802 (9th Cir. 2020).
[42] *Ching v. Mayorkas*, 725 F.3d 1149 (9th Cir. 2013).
[43] *Zizi v. Bausman*, 306 F. Supp. 3d 697 (E.D. Pa. 2018).

c. Alternative Applications for Relief

If a section 204(c) finding is made, or if a client has otherwise engaged in marriage fraud, there may be some limited applications for relief available under the immigration laws. Note that the benefits described below are all discretionary. Having engaged in prior marriage fraud would be an extremely serious adverse factor for most adjudicators, and practitioners need to be prepared with significant countervailing evidence showing that the positive factors in their clients' cases outweigh the negative factors of the prior marriage. The benefits listed below are those that may remain available even to clients who have engaged in marriage fraud.

Section 237(a)(1)(H) waiver (for LPRs or conditional residents only): INA § 237(a)(1)(H) authorizes an immigration judge to grant a discretionary waiver of removability to a noncitizen who is removable under INA § 237(a)(1)(A) for being inadmissible at the time of admission for fraud or willful misrepresentation of a material fact under INA § 212(a)(6)(C)(i). A noncitizen who adjusted his or her status in the United States is eligible to apply for a waiver pursuant to INA § 237(a)(1)(H); it is not limited to those who entered the United States on immigrant visas.[44] The applicant for a 237(a)(1)(H)(i) waiver must establish that he or she is the spouse, parent, son, or daughter of a U.S. citizen or lawful permanent resident (LPR). There is no requirement of showing extreme hardship to a qualifying family member. The qualifying spousal relationship cannot be based on a sham marriage. For those statutorily eligible for the waiver, this can be a way to clear the underlying defect and pave the way for naturalization, particularly since once granted, the waiver renders the LPR status valid from the date of the initial grant.[45] Several circuit courts have held that 237(a)(1)(H) waivers are also available to conditional permanent residents in addition to lawful permanent residents.[46]

> ***Example:*** Kelly obtains her LPR status through a fraudulent marriage to a U.S. citizen. When she applies for naturalization, USCIS becomes aware of discrepancies in her address history. After a fraud investigation, USCIS denies her naturalization application and refers her to removal proceedings as an individual who was inadmissible at the time of admission for fraud. Kelly has a two-year-old U.S. citizen daughter and applies for a section 237(a)(1)(H) waiver in removal proceedings with evidence of her relationship with her daughter and the positive factors warranting a favorable exercise of discretion. If granted, Kelly's LPR status is rendered valid from the date she initially became an LPR.

Extreme Hardship Waiver (for conditional residents only): If a conditional resident cannot meet the joint filing requirements of INA § 216(c)(1), he or she may file a Form I-751 waiver petition.[47] Section 216(c)(4) provides three separate and independent bases for a waiver of the joint filing requirement: divorce, battery or extreme cruelty, and extreme hardship. However, only the extreme hardship waiver

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[44] *See Matter of Agour*, 26 I&N Dec. 566 (BIA 2015).
[45] *See Matter of Sosa-Hernandez*, 20 I&N Dec. 758 (BIA 1993).
[46] *Vasquez v. Holder*, 602 F.3d 1003, 2008-19 (9th Cir. 2010); *Acquaah v. Sessions*, 874 F.3d 1010, 1015-1019 (7th Cir. 2017).
[47] INA § 216(c)(4); 8 CFR § 1216.5.

lacks a requirement that the underlying marriage was entered into in good faith.[48] In considering an application for a section 216(c)(4)(A) waiver based upon a claim of extreme hardship, the adjudicator may only consider those factors that arose between the alien's entry as a conditional permanent resident and the end of the conditional residence period.[49]

> ***Example:*** Marina is a conditional resident of the United States. She initially filed a joint petition to remove the conditions on her residence with her husband. However, the petition is denied a year later after it comes to light that her husband had informed USCIS that the marriage was a sham. Marina's conditional resident status is terminated, and she is referred to immigration proceedings. Marina files a new I-751 petition with USCIS based on the extreme hardship she would suffer if she were not allowed to remain in the United States. Marina includes evidence that she is bisexual and the country that she is from is known for repressive treatment of LGBTQ individuals. She is not required to show that she had a good faith marriage. If USCIS does not grant the waiver petition, she can renew the application before the immigration judge.

Non-LPR Cancellation of Removal: Cancellation of removal is available to non-LPRs who can show the following: continuous physical presence in the United States for ten years immediately preceding the date of the application; good moral character during the ten-year period; no disqualifying criminal offenses; and that removal would result in exceptional and extremely unusual hardship to the applicant's U.S. citizen or LPR spouse, parent, or child.[50] Having engaged in marriage fraud is not a *per se* bar to cancellation of removal. However, practitioners should be aware of the statutory bar to establishing good moral character to those who have given false testimony for the purpose of obtaining any immigration benefit.[51] Thus, clients who provided testimony to USCIS during the past ten years may face questions about whether they provided false testimony for the purpose of an immigration benefit.

For an applicant's false testimony to preclude a finding of good moral character under INA § 101(f)(6), "the testimony must have been made orally and under oath, and the witness must have had a subjective intent to deceive for the purpose of obtaining immigration benefits."[52] Therefore, if a client never appeared at a USCIS interview or was never interviewed under oath, the false testimony bar would not apply to that individual. In addition, misrepresentations made for reasons other than an intent to obtain immigration benefits, including "embarrassment, fear, or a desire for privacy," do not fall under the INA § 101(f)(6) bar.[53] Finally, the ten-year period for evaluating good moral character

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[48] INA § 216(c)(4); 8 CFR § 1216.5(a)(i)-(iii). The other two waivers, based on a marriage that terminated by divorce or annulment, or a VAWA I-751 waiver petition, do require a showing that the qualifying marriage was entered into in good faith by the noncitizen spouse.
[49] INA § 216(c)(4)(C); 8 CFR § 1216.5(e)(1).
[50] INA § 240A(b)(1).
[51] *See* INA § 101(f).
[52] *Ramos v. INS,* 246 F.3d 1264, 1266 (9th Cir. 2001).
[53] *Kungys v. United States,* 485 U.S. 759, 780 (1988); *see also Gonzalez-Maldonado v. Gonzales,* 487 F.3d 975 (5th Cir. 2007).

is "calculated backward from the date on which the application is finally resolved by an IJ or the Board."[54] A non-LPR cancellation applicant may find that any false testimony provided falls outside the ten-year period, particularly given the long delays in scheduling immigration court proceedings. Thus, false testimony provided outside the ten-year statutory period would not serve as an absolute bar to cancellation of removal, even if provided with the subjective intent of obtaining an immigration benefit.

> ***Example:*** Mauricio was married to Elena in 2007. She filed an I-130 petition on his behalf that was denied after the couple appeared together at an interview in 2008. Mauricio and Elena divorce, and he remarries Fernanda in 2015. Fernanda files an I-130 petition on his behalf, which is denied pursuant to the section 204(c) bar. Mauricio is placed in removal proceedings in 2020, where he indicates an intent to apply for cancellation of removal based on hardship to Fernanda and their two U.S. citizen children. Mauricio is scheduled for his individual hearing in 2022. Even if DHS raises the issue of false testimony that Mauricio provided at his 2008 interview, this would not serve as a statutory bar to cancellation because it was not provided within the past ten years.

VAWA Cancellation of Removal: VAWA cancellation may be a possible option for individuals subject to the 204(c) bar who cannot obtain approval of an I-360 self-petition. An individual must be in removal proceedings to apply for cancellation of removal under VAWA.

A noncitizen may be eligible for VAWA cancellation of removal if he or she: 1) has been battered or subjected to extreme cruelty by a U.S. citizen or LPR spouse or parent, or has a child who was subjected to such abuse; 2) has been physically present in the United States for three years preceding the date of their application; 3) has been a person of good moral character during this period; 4) is not inadmissible or deportable under certain criminal or national security grounds; and 5) has established that removal would result in extreme hardship to the applicant, the applicant's child, or the applicant's parent.[55]

Like with standard non-LPR cancellation, providing false testimony for the purpose of an immigration benefit during the statutory period serves as a bar to establishing good moral character. However, the relevant statutory period for VAWA cancellation is just three years, and this period is counted backwards from the date the application is resolved by the immigration judge or the BIA.

> ***Example***: Vanessa files an I-360 VAWA self-petition based on severe abuse that she has suffered by her U.S. citizen husband John, with whom she has one child. The I-360 petition is denied based on a finding that Vanessa is subject to the 204(c) bar due to a prior sham marriage to Ivan. Vanessa divorced her first husband five years ago. Vanessa is referred to removal proceedings in 2019 and she applies for VAWA cancellation of removal. There are no statutory bars to her establishing good moral character.

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[54] *Matter of Ortega-Cabrera*, 23 I&N Dec. 793, 797-98 (BIA 2005).
[55] INA § 240A(b)(2).

Asylum: Having engaged in a sham marriage is not a bar to asylum, although a willingness to lie to immigration officials will call into question the applicant's credibility as to the underlying basis for asylum. The BIA and federal courts have generally distinguished between fraud committed in the asylum application and fraud committed when fleeing persecution. Presentation of a false document or false information with the asylum claim indicates an overall lack of credibility in the asylum claim.[56] However, the commission of fraud when fleeing persecution does not necessarily impugn the applicant's credibility with respect to the asylum claim itself.[57] In cases involving severe past persecution in the home country, practitioners may try to argue that a sham marriage is more akin to a desperate attempt to remain safe from persecution as opposed to an indication of a lack of credibility with respect to the asylum claim.

> ***Example:*** Atta endured severe gender-based violence, including Female Genital Mutilation, in her home country. She arrives in the United States in 2015 and marries a U.S. citizen. She is terrified to return to her home country and believes that this marriage is the only way she can obtain lawful status. The I-130 petition and her I-485 application are denied when evidence of fraud in the marriage surfaces. Atta is placed in removal proceedings before the immigration court. She obtains counsel who advises her for the first time about asylum, and Atta submits her I-589 applications to the court. Atta obtains evidence of the psychological harm she endured as a result of the persecution, which explains why she did not file for asylum within a year of her arrival and why she felt desperate enough to engage in a sham marriage.

U or T Visas: A sham marriage would not be a bar to obtaining either a U visa pursuant to INA § 101(a)(15)(U)[58] or INA § 101(a)(15)(T).[59] While an applicant may be inadmissible for fraud under INA § 212(a)(6)(c)(i), both the T and U visa statutes provide for generous waivers of inadmissibility of nearly all inadmissibility grounds, including fraud.[60] Obtaining T or U nonimmigrant status sets the applicant on a path to permanent residency.[61]

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[56] *Matter of O-D-*, 21 I&N Dec. 1079, 1083 (BIA 1998)).

[57] *Matter of Pula,* 19 I&N Dec. 467 (BIA 1987) (the use of fraudulent documents by an asylum seeker in entering the United States is just one factor to be used in the totality of the circumstances analysis); *Gulla v. Gonzales,* 498 F.3d 911, 917 (9th Cir. 2007) (noting that individuals may lie and use false documentation to enter the United States to escape their persecutors and this does not warrant a discretionary denial of asylum). *Akinmade v. INS,* 196 F.3d 951, 955 (9th Cir.1999) (noting that genuine refugees may lie to immigration authorities and use false documents).

[58] U nonimmigrant status is available to victims of serious crime that resulted in substantial physical or mental abuse. A law enforcement certification is required confirming that the victim has been helpful in the investigation or prosecution of the crime.

[59] T nonimmigrant status is for survivors of human trafficking who have complied with any reasonable request for assistance from law enforcement in the detection, investigation, or prosecution of human trafficking.

[60] INA §§ 212(d)(13), (d)(14).

[61] At the adjustment of status stage for T and U visa holders, applicants may need to submit substantial evidence of equities as USCIS has recently applied a strict standard when assessing T and U visa holders' eligibility for adjustment.

Example: Ana is a victim of severe domestic violence by her partner. She is able to fulfill the requirements for a U visa, including obtaining the law enforcement certification. Ana tells you that she was previously married to a U.S. citizen, who filed an I-130 petition on her behalf. They attended an interview together, and the petition was denied. Ana admits she provided false testimony to the immigration officer about her relationship with her ex-husband. Ana files Form I-918, Petition for U Nonimmigrant Status, together with Form I-192, Application for Advance Permission to Enter as a Nonimmigrant, in which she requests a waiver of inadmissibility for fraud.

V. Conclusion

It is vitally important that practitioners and their clients understand the far-reaching effects of a marriage fraud finding and the bar that attaches. Even a long-ago marriage—or a conspiracy to enter one—can gravely impact a client's ability to obtain a green card, no matter how compelling the current family ties may be. While there may be some limited relief available to clients, these applications are generally discretionary, and having engaged in fraud is an extremely serious adverse factor. Therefore, applicants must be prepared to provide substantial positive equities in those cases and understand the risk of denial notwithstanding the submission of that evidence.