U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

B3

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Outstanding Professor and Researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. The director subsequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a university. It seeks to employ the beneficiary permanently in the United States as an assistant professor of art. The petition was filed for classification of the beneficiary under section 203(b)(1)(B) of the Immigration and Nationality Act (the Act) as an outstanding professor and researcher.

The petitioner's Form I-140 was filed with CIS on November 14, 1996, and was approved on February 19, 1997.[1] An application for lawful permanent residence (Form I-485) in connection with the approved Form I-140 was pending at the time the director issued the NOIR.

The approval of this petition was revoked as a result of the beneficiary's other immigrant visa petition. A Form I-130, Petition for Alien Relative (Form I-130), was filed on the beneficiary's behalf on May 2, 1992. Concurrent with the filing of Form I-130, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a U.S. citizen. The file contains the completed forms, signed by the beneficiary, photographs, and a copy of a Certificate of Marriage between the beneficiary and ("Ms. . The forms submitted indicate that the beneficiary and Ms. lived a

In connection with the Form I-130, an interview was conducted at Arlington CIS (formerly INS). Notes taken by the interviewing immigration officer of the interview indicate that the beneficiary and Ms. answered questions under oath pertaining to their relationship, residence, and intimate details of their lives such as how they met, performance of daily chores, knowledge of relatives, location of clothing, and configuration of their bedroom. The beneficiary also re-stated his residential address in Washington, D.C. Those notes were signed by the beneficiary after a paragraph read to the beneficiary that the answers were "true and correct to the best of [his] knowledge and belief and that this statement is a full, true, and correct record. . . ." The Form I-130 was approved and the beneficiary was granted conditional residence status as the immediate relative (spouse) of a U.S. citizen on November 27, 1992.

On March 14, 1994, the beneficiary's U.S. citizen spouse withdrew her support of the Form I-130 stating in a handwritten note that she "filed on the basis of marriage but the marriage was done under false pretence [sic]." She further stated, "I found out that it's illegal to get married for the purpose of getting a green card. We're currently not living together since January of 1993."

On September 12, 1994 a criminal complaint was filed with the United States District Court, Eastern District of Virginia, charging the beneficiary with "knowingly and willfully enter [sic] into a marriage for the purposes of evading the immigration law" in violation of 8 U.S.C. § 1325(b). Attached to the criminal complaint is an affidavit by William J. Congleton ("SA Congleton"), Special Agent for CIS (then called INS).

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[1] The director issued a request for evidence but ultimately approved the petition. While the merits of the Form I-140 are not before the AAO, upon additional review, it is unlikely that the beneficiary is qualified as an outstanding professor and researcher as envisioned by the statute. This decision will not address those merits since the case will be decided based upon the director's reason for revoking the petition: section 204(c) of the Act.

In the affidavit, SA Congleton details the facts of his investigation against the beneficiary. After Ms. withdrew her support of the immediate relative petition, SA Congleton interviewed her on August 30, 1994 and September 2, 1994. SA Congleton also interviewed her brother, ("Mr.). During those interviews, Ms detailed how she grew up in Nigeria but had U.S. citizenship through birth. She stated she and was basically homeless, in an "unfamiliar country," and in need of assistance at the time Ms was befriended by the beneficiary and his then girlfriend (now wife), ("Ms [2] According to the affiant's interview with Ms. the beneficiary and Ms. offered Ms. a place to live and then immediately began pressuring her to marry the beneficiary so he could obtain lawful permanent resident status. Additionally, the beneficiary and Ms. shared a bed while Mr. and Ms slept on a sofa or the floor. The four resided in an apartment in Maryland but lied on their immigration paperwork that they lived in Washington, D.C. so they could utilize a CIS local office perceived to be more lenient. Through the affiant, Ms. stated that there was never a bona fide marriage between her and the beneficiary. Through the affiant, Ms. also stated that she moved out of the Maryland apartment in January 1993, but that the beneficiary had moved to Norfolk, Virginia in September 1992.

On September 14, 1994, an arrest warrant was issued by the United States District Court, Eastern District of Virginia, to arrest the beneficiary, who was subsequently arrested at 6 a.m. at his residence in Chesapeake, Virginia. A judgment in a criminal case was entered against the beneficiary on August 3, 1995 finding the beneficiary guilty of one count of criminal information. The nature of the offense is described as "possession of unlawfully issued identification document" in violation of 18 U.S.C. § 1028(a)(4) for an offense committed on May 12, 1992. The attached "Criminal Information" states that the beneficiary "did knowingly and unlawfully possess an identification document other than one issued lawfully for the use of the possessor with the intent such document be used to defraud the United States, to wit: an employment Authorization Document (I-688-B) issued by and under the authorities of the United States . . . ."

Attached to the judgment was a plea agreement signed by the beneficiary and dated March 18, 1995. Attached to the plea agreement is a Statement of Facts also signed by the beneficiary and dated March 18, 1995. The Statement of Facts states that the United States would prove the facts stated in the document beyond a reasonable doubt. One fact was that the beneficiary married Ms for the purpose of petitioning for immigration benefits and in exchange for free accommodations at the beneficiary's apartment in Maryland. Another fact was that the beneficiary signed forms relating to the immediate relative petition that indicated that they lived together in Washington, D.C. when they really lived in Maryland. The third fact was that as a result of filing the immediate relative petition, the beneficiary was immediately issued, received and possessed an employment authorization card giving the beneficiary the right to work in the United States. The fourth fact was that the immediate relative petition was approved after an interview. The fifth fact is that Ms. filed a signed statement withdrawing the immediate relative petition because the marriage was entered into under false pretenses. The final facts state the following:

> 6. If the petition was not filed by [Ms for [the beneficiary], he would not have been entitled to an employment authorization document.
> 7. In the above noted instances, *[the beneficiary] acted knowingly and willfully and did not act out of accident, mistake, inadvertence, or any other innocent reason.* (Emphasis added.)

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[2] Ms. Udeze was also arrested for violation of 8 U.S.C. § 1325(b).

The plea agreement states that the maximum penalty for the beneficiary's offense is one year of imprisonment, a fine of $100,000, and one year of supervised release. Paragraph 15 of the plea agreement on page 8 states that "[t]he defendant agrees to cooperate fully with [CIS] in other investigations involving marriage fraud. He further agrees to cooperate in a determination of his own immigration status in the United States." For his cooperation, instead of incarceration and a $100,000 fine, the beneficiary received a $1000 fine and $25 assessment fee.

S.A. Congleton has additional memoranda in the file concerning his interrogation of the beneficiary and his current spouse, Ms SA Congleton states that upon advice from their attorneys, the beneficiary and Ms agreed to cooperate with authorities. In SA Congleton's memorandum, the beneficiary and Ms. stated that their criminal venture began when they were referred to an attorney named ("Mr. The beneficiary and his spouse went to Mr to obtain an H-1B visa for a professional employment-based non-immigrant visa.[3] The beneficiary relayed to SA Congleton that Mr. dissuaded the beneficiary from pursuing lawful immigration means and procedures for obtaining lawful immigration status, and encouraged the beneficiary and his spouse to enter into marriages with U.S. citizens as an easier way to obtain permanent residency. According to the beneficiary's story, Mr. knew that the beneficiary and Ms intended to marry, and that their marriages to Mr. and Ms were not bona fide. It was Mr who encouraged the beneficiary and Ms. to use a Washington, D.C. address because Mr. believed the Arlington CIS office was more lenient than the Baltimore CIS local office. Mr helped prepare the beneficiary and Ms. for their interview. Mr recommended that the beneficiary generate a "paper trail" for lifting his conditional residence status two years after the immediate relative petition would be approved. After her arrest, the beneficiary's current spouse, Ms agreed to meet with Mr with a wiretap and recorded their conversation, which later assisted with Mr prosecution and disbarment.

The beneficiary was divorced from Ms on April 29, 1996, and he married Ms on May 29, 1997. Ms also divorced Mr prior to her marriage to the beneficiary.

On February 5, 1997, the beneficiary's conditional residence status pursuant to his sham marriage to Ms. was terminated effective November 28, 1994. On Form I-213, Record of Deportable Alien, SA Congleton recommended voluntary departure for the beneficiary until March 19, 1996.[4] The voluntary departure date was subsequently extended to March 29, 1996, March 13, 1997, and June 21, 1997. Each time the beneficiary received his notice directing him to voluntarily depart the United States evidenced by certified return receipt mail signed by the beneficiary.

Instead of voluntarily departing the United States, the beneficiary became the recipient of the petitioner's employment-based immigrant petition filed in November 1996 and approved in February 1997.

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[3] According to the beneficiary's Form ETA 750B, Statement of Qualifications of Alien, submitted in connection with his employment-based immigrant visa, the beneficiary has a Bachelor degree in Fine Arts from Howard University; a Master of Fine Arts from Howard University, and a Ph.D. "in progress" at Virginia Commonwealth University.

[4] A Memorandum to Investigations cites the beneficiary's participation as a witness in disbarment proceedings against Mr as the reason for also granting the beneficiary work authorization.

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides for the following:

> Notwithstanding the provisions of subsection (b)[5] no 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 [director] to have been entered into for the purpose of evading the immigration laws or
> (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

On June 14, 2001, the director sent a NOIR to the petitioner stating the following:

> It has now come to the attention of [CIS] that the beneficiary has previously sought to be accorded an immediate relative status as the spouse of a citizen of the United States by reason of a marriage determined to have been entered into for the purpose of evading the immigration laws.
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> . . .
>
> A copy of the investigative report or memorandum that is the basis for this letter is enclosed.

Attached to the NOIR was a memorandum to the director from the Officer in Charge, Norfolk office, stating the following:

> This file is returned to you for consideration of revocation of the approved I-140 because of the provisions of Section 204(c). A review of the file establishes that [the beneficiary] and his present wife, [Ms entered into sham marriages with U.S. citizen sibling and in 1992. As a result, they were granted CR-6 status.
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> In March 1994, the U.S. citizen siblings appeared at the Washington District Office in Arlington, Virginia and stated that they wished to "withdraw" the visa petitions they had filed. They also testified before a grand Jury in Alexandria, Virginia regarding the marriages and their involvement with attorney
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> In September 1994, agents from the Washington District Office as part of "Operation Filter Tip" arrested [the beneficiary and Ms In August 1995, they entered guilty pleas to possession of unlawfully issued identification documents in U.S. District Court.

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[5] Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

The file contains statements, affidavits, plea agreement and conviction record.

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record that would warrant a denial if unexplained and unrebutted, and thus was properly issued for good and sufficient cause.

In response to the NOIR, the beneficiary provided a notarized affidavit in which he states that advised me against the H-1B because it would be extremely difficult, and I would have to return to Nigeri [sic]." He also states that "I now know that I could have obtained the H-1B visa by returning home to Nigeria without a lot of trouble . . . ." The beneficiary acknowledges that "[w]hen serious problems were brought to my attention, I fully cooperated with [CIS] in their investigation of Winston Tsai by providing as much information as I could about Mr erroneous and misleading representations made to me, and likely to other unsuspecting clients." He finished with "We were purposely misled by a dishonest attorney, and are now in a position of serious hardship. . . . [P]lease consider how severely we were victimized by Mr extremely poor advice, combined with our extensive and full cooperation with the [CIS] investigation of Mr.

Additionally, the beneficiary provided an affidavit from SA Congleton in which he states that he is currently assigned as a criminal investigator with CIS and writes the affidavit at the request of the beneficiary. SA Congleton recalls the facts of the case and states the following:

> As a result of [the beneficiary] and Ms cooperation a criminal indictment containing more than thirty specific counts was filed against Mr. At the trial both [the beneficiary] and Ms were witnesses for the government.
>
> From my twelve years of experience as a criminal investigator with [CIS], I know that the cooperation provided [CIS] and the United States Attorney's office by [the beneficiary] and Ms. was far beyond the normal cooperation received from people in their situation. The evidence revealed during the investigation of Mr. disclosed that [the beneficiary] and Ms were the victims of an attorney who did not properly understand the immigration and naturalization law and who sought out improper and unlawful means to obtain residence status for his clients.

Counsel states the following in his response:

> [CIS] policy has always been to avoid holding innocent people responsible for the activities of unscrupulous attorneys and visa consultants. [CIS] has always recognized that such individuals often create serious and difficult hardship situations for people in the immigrant community. [The beneficiary and Ms. were clearly victims of such improper activities and continue to suffer the consequences.
>
> . . . .

> Section 204(c) leaves it to the [director] to determine whether the marriage was entered into for the purpose of evading the immigration laws. This statutory language provides the [director] considerable discretionary authority in this matter. The law does not require the [director] to find marriage fraud in every situation, but rather gives the [director] a power similar to "Prosecutorial Discretion" that is used in criminal proceedings to not go forward in every single case. . . . We respectfully request that you seriously consider the following facts: 1) that [the beneficiary and Ms. had a valid legal basis for obtaining legal status; 2) the unscrupulous attorney from whom they sought advice from proposed an illegal way of dealing with [CIS] and deterred them from seeking the H-1B and H-4 visas; 3) the [beneficiary and Ms provided significant and timely cooperation . . . .
>
> By showing flexibility in such cases it encourages other immigrants to fully cooperate with the [CIS] Investigation Section because the real culprits are the arrangers of such marriages.

Counsel did not cite any legal authority for the propositions he asserted.

On October 20, 2000, the director revoked the approval of the I-140 visa petition stating that the evidence the petitioner submitted was not sufficient to overcome the grounds of revocation pertaining to 204(c) of the Act.

On appeal, counsel for the petitioner essentially reiterates his assertions in his response to the NOIR and states that the director erroneously failed to recognize its discretionary authority regarding 204(c) revocations and cites *Matter of Lozada*, 19 I&N Dec. 1998 for the premise that effective assistance of counsel ensures an alien's right to due process in the U.S. immigration system. Counsel also cites *Matter of Malone*, 11 I&N Dec. 730 (BIA 1966) for the premise that "[r]elief from adverse immigration situations can be obtained when they are necessary to avoid a miscarriage from justice." Counsel cites the beneficiary's detrimental reliance upon Mr. improper and unlawful advice when the beneficiary could have pursued an H-1B visa.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

The beneficiary is subject to the first prong of 204(c) because he was accorded immediate relative preference status as the spouse of a U.S. citizen based upon a marriage entered into for the purpose of evading immigration laws. There is indisputable substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. Counsel asks the AAO to evade the immigration laws again for the beneficiary because of his "cooperation" with the prosecution of Mr. Contrary to counsel's unsupported assertions, no such leniency is required by the statutory language of 204(c) nor the case law interpreting it. Section 204(c) clearly states that no petitions "*shall*" be approved if the alien has previously been accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws. There is no language qualifying the statutory language, such as counsel suggests, that exempts aliens who cooperate with law enforcement authorities from the application of section 204(c) of the Act. Indeed, the beneficiary already

received a reward for cooperation: he was not jailed for one year or fined $100,000, and he was released on an order of supervision for an additional year.

Counsel would also have CIS ignore the statutory language and interpretive case law to provide the beneficiary with absolution of his fraudulent conduct. Contrary to counsel's unsupported assertions, no statutory or regulatory provision or case law holding grants CIS the authority to determine that an alien did not enter into a marriage for the purpose of evading immigration laws when criminal indictments and admissions by the beneficiary unequivocally state that the beneficiary did.

In his plea agreement, the beneficiary admitted to entering into a marriage with a U.S. citizen with the purpose of evading immigration laws. In the Statement of Facts recorded with the U.S. District Court of the Eastern District of Virginia and signed by the beneficiary, the beneficiary admitted that he "acted knowingly and willfully and did not act out of accident, mistake, inadvertence, or any other innocent reason." The AAO accords minimal weight to the beneficiary's current assertions that a lawyer took advantage of him, or that his assistance prosecuting a lawyer should result in another evasion of immigration laws.

The beneficiary received an immigration benefit, an employment authorization document (EAD), which temporarily enabled him to live and work in the United States. The beneficiary is highly educated. In a news article submitted with his employment-based immigrant visa petition, he states that he originally studied law in Nigeria until he decided to pursue art in a professional capacity.[6] He entered the United States in 1987 on a visitor's visa, which he subsequently changed to a student visa where he studied for a bachelor's degree and a master's degree at Howard University. He had been in the United States in an academic setting for almost five (5) years before he met Mr. It is most improbable that the beneficiary is as naïve as counsel and the beneficiary would have the AAO believe. The beneficiary studied law and had advanced degrees. It is improbable that the beneficiary was duped by Mr. and had no will to resist engaging in criminal activities to evade immigration laws. According to SA Congleton, it was the beneficiary and Ms who victimized others. They pressured two U.S. citizens, who were in desperate financial straits, to engage in illegal activities.

The AAO notes that a proper *Lozada* application is not in the record of proceeding as there is no properly filed complaint against Mr or other documentation meeting the elements set forth in *Lozada*. Even if there was a proper *Lozada* application, however, the beneficiary was a willing and active participant, who deliberately engaged in a lie for a number of years, whose only moment of honesty arose when he was caught. There is no indication that the beneficiary had no idea what he was doing was wrong or that he was the unwitting dupe of an unethical attorney's scheme. Additionally, there is no evidence in the record of proceeding that the beneficiary was eligible for an H-1B visa and would have had a lawful means available to him but for Mr. recommendations. To assume the beneficiary's eligibility for an H-1B visa in 1992 is entirely speculative.

The AAO also notes that counsel's unsupported assertions concerning CIS policy to reward immigrants who cooperate against unethical immigration attorneys and visa consultants is misplaced. Counsel cites no authority for this premise. State and federal criminal prosecutors are separate entities with separate laws and interests than the Department of Homeland Security's CIS. Contrary to counsel's assertions, the AAO

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[6] Ironically, the beneficiary states in the same news article that his pet peeve is "I hate lies." *See* Victoria Hecht, *Up close and personal*, CHESAPEAKE POST, June 28, 1996, at 3.

believes there is ample incentive for immigrants to cooperate with authorities when a crime has been committed to reduce their own criminal culpability and consequent penalties. Additionally, there is ample disincentive to evade immigration laws when the consequences of doing so are enforced.

Finally, counsel cites *Matter of Malone* to plead leniency for the beneficiary. However, *Malone's* fact pattern is very distinguishable from this case. *Malone* involved a deportation of a woman accused of prostitution; however, there was never any evidence that she engaged in prostitution. Unlike *Malone*, there is ample documentation of the beneficiary's criminal wrongdoing in this case. *Malone* was not followed in the case of *Lara v. Tronminshi*, 216 F. 3rd 487 (5th Cir. 2000) where the circuit court cited the BIA that *Malone* was applicable only in rare and exceptional circumstances. Additionally, the circuit court determined that *Malone* was inapplicable where the application or interpretation of law was factually correct. The case at hand is similar to *Lara v. Tronminshi* since there is no factual dispute concerning the beneficiary's criminal activities. Thus, there is no miscarriage of justice from the beneficiary's own complicity in bringing about an adverse immigration situation for himself.

Therefore, an independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. The director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by CIS to have been entered into for the purpose of evading the immigration laws is affirmed.

ORDER: The appeal is dismissed. The approval of the employment-based immigrant visa petition is revoked.