U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 15 2014 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: [redacted]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially approved the preference visa petition. Subsequently, the director issued a 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 by Alien Entrepreneur (Form I-526). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part, that the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, 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 decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. *Id.* at 589. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

I. THE LAW

Section 204(c) of the Immigration and Nationality Act (the Act) provides in pertinent part:

> [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.

The regulation at 8 C.F.R. § 204.2(a)(1)(ii) states:

> *Fraudulent marriage prohibition.* Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

The legacy Immigration and Naturalization Service (INS), now U.S. Citizenship and Immigration Services (USCIS), does not recognize a marriage that the parties enter into for the purpose of circumventing the immigration laws or for the purpose of conferring immigration benefits. *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980); *see also, e.g., Lutwak v. United States*, 344 U.S. 604, 610-11 (1953); *Chan v. Bell*, 464 F. Supp. 125 (D.D.C. 1978); *McLat v. Longo*, 412 F. Supp. 1021 (D.V.I. 1976); *Matter of Pereira*, 19 I&N Dec. 169 (BIA 1984); *Matter of M-*, 8 I&N Dec. 217 (BIA 1958); *see also Johl v. United States*, 370 F.2d 174 (9th Cir. 1966).

The central question is whether the bride and groom intended to establish a life together at the time they were married. *See Bu Roe v INS*, 771 F.2d 1328 (9th Cir. 1985); *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975); *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of McKee*, 17 I&N Dec. at 332. Where neither party intended a bona fide husband-wife relationship, the marriage is invalid for immigration purposes regardless of whether the marriage would be considered valid under the domestic law of the jurisdiction where it was performed. *Matter of M-*, 8 I&N Dec. at 218.

The conduct of the parties before and after marriage is relevant to their intent at the time of marriage. *Matter of Laureano*, 19 I&N Dec. at 2 (*citing Lutwak v. United States*, 344 U.S. at 604); *Bark v. INS*, 511 F.2d at 1202; *see also Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979), *cert. denied*, 449 U.S. 828 (1980). Where there is reason to doubt the validity of the marital relationship, the petitioner must present evidence to show that the marriage was not entered into for the purpose of evading the immigration laws. Such evidence could take many forms, including, but not limited to proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences. *Matter of Laureano*, 19 I&N Dec. at 2; *Matter of Phillis*, 15 I&N Dec. 385, 387 (BIA 1975).

In making a determination that a prior petition comes within the purview of section 204(c) of the Act, as a marriage entered into for the purpose of evading the immigration laws, the director should not give conclusive effect to determinations made in prior proceedings. *See Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990). Rather, the director should reach an independent conclusion based on the evidence of record, although USCIS may rely upon any relevant evidence, including evidence having its origin in prior USCIS proceedings involving the beneficiary or in court proceedings involving the prior marriage. *Id.* A determination that a prior marital petition was filed for the purpose of obtaining immigration

benefits can only be sustained if there is substantial and probative evidence in the alien's file to the effect that the prior marriage was entered into for such purpose. *Id.* at 167.

II. PROCEDURAL AND FACTUAL HISTORY

The petitioner filed the Form I-526 on December 1, 2006. The Director, Texas Service Center, approved the petition on September 24, 2007. The director issued the Form I-526 NOIR on August 6, 2010. The petitioner responded to the Form I-526 NOIR on September 8, 2010, and the director subsequently revoked the petition on June 13, 2012.[1]

On June 28, 2012, the petitioner filed an appeal on the Form I-526 with the AAO. On appeal, counsel asserts: (1) the Form I-526 revocation did not comply with the procedural requirements set forth in *Matter of Estime*, 19 I&N Dec. at 450; and (2) the evidence supporting the Form I-526 revocation does not support a finding that the petitioner attempted to or conspired to enter his previous marriage for the purpose of evading immigration laws pursuant to section 204(c) of the Act.

III. ISSUES PRESENTED ON APPEAL

A. Proper Revocation

1. Procedural Issues

Matter of Estime, 19 I&N Dec. at 451-52, states: "[P]ursuant to 8 C.F.R. § 103.2(b)(2) (1987), the notice of intention to revoke must include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence (e.g., the investigative report)." Based on this language, counsel claims that the director did not issue a proper NOIR.

According to counsel, the director must not only provide the facts of the underlying proposed action, but also provide the investigative reports that contain the derogatory information. *Matter of Estime,* however, only requires the director to provide a NOIR that includes: (1) a specific statement of the facts underlying the proposed action; and (2) a specific statement of the supporting evidence. In this matter, the director provided a specific statement relating to the supporting evidence that established the derogatory information within the NOIR through the following: "On June 30, 1988, an investigative agent of this Service went to the home of [the petitioner's former spouse's parents] where [the petitioner's former spouse] was present and interviewed her. [The petitioner's former spouse] admitted to the agent that the marriage was fraudulent." The NOIR continued recounting that the petitioner's former spouse appeared before an agent of the Department of Justice (the department of which legacy INS was a part), and provided the specifics of the marriage fraud, her role in the scheme, and the payment she received for her role in the scheme. Such a summary of the investigative report and derogatory statement are sufficient. *See Ghaly v. INS*, 48 F.3d 1426, 1434 (7th Cir. 1995).

[1] The Director, California Service Center, revoked a Form I-130 filed by the petitioner's sister classifying the petitioner as the brother of a U.S. citizen on May 7, 2013, also pursuant to section 204(c) of the Act. That matter is not before the AAO.

In view of the foregoing, the petitioner has not established on appeal that the director committed a procedural error relating to the documentation that the director was required to provide to the petitioner pursuant to *Matter of Estime,* 19 I&N Dec. at 451-52.

Counsel also cites to 8 C.F.R. § 103.2(b)(16), which provides in part: "An applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision." Counsel quoted only this portion of the regulation. The first exception set forth in subparagraph (i) states:

> *Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

The director provided the source of the derogatory information contained within the record, and as the decision was adverse and based on this derogatory information, the director afforded the petitioner the opportunity to rebut the derogatory information. As such, the director sufficiently complied with the complete regulation at 8 C.F.R. § 103.2(b)(16), including subparagraph (i). *See Mullaj v. Napolitano,* 2013 WL 2397390, *5-7 (E.D. Mich. May 31, 2013) (*citing Ghaly*, 48 F.3d at 1434). Furthermore, while counsel explains that she did not initiate the request, she acknowledges that she viewed the redacted contents of the record as the result of a Freedom of Information Act (FOIA) request. Accordingly, the petitioner has failed to establish that the director committed a procedural error by not providing the investigative report with the NOIR.

2. Substantive Issues

Counsel's appellate brief also asserts that when the director revoked the Form I-526 approval, the director did not issue the decision in accordance with section 204(c) of the Act. Specifically, counsel asserts that the record did not contain "substantial and probative evidence" that the petitioner attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. Counsel asserts that the petitioner's former spouse and other relatives developed the fraudulent scheme without the petitioner's knowledge. For the reasons discussed below, the spouse's statement constitutes substantial and probative evidence.

On September 28, 1988, the petitioner's former spouse, [redacted] provided a sworn statement to a legacy INS agent regarding her marriage to the petitioner. Within this statement, Ms. [redacted] admitted that she accepted employment from the petitioner's sister, [redacted], and the petitioner's brother-in-law, [redacted] in October 1986. In November, the petitioner's brother-in-law and sister offered [redacted] money, a car for personal use, an oriental rug, and an offer to place [redacted] in their will in exchange for marrying the petitioner. [redacted] agreed to marry the petitioner to help [redacted] and in December 1986, [redacted] and married the petitioner. In March 1987, [redacted] returned to

Belgium where she filed immigration paperwork on behalf of the petitioner and attended an interview on his behalf at the U.S. Consulate.

After returning to the United States in April 1987, no longer wished to work at the and changed her mind about following through with the marriage. had not informed her family or her friends about the marriage and she was in a relationship. She stated that she "did not want anyone to know about the marriage." Subsequently, began to receive threats from the petitioner's sister and brother-in-law that they would inform her family and boyfriend of the marriage. also stated that she entered the marriage "solely for the purpose of obtaining immigration papers" to enable the petitioner to live in the United States, the two never lived together as husband and wife, and they did not consummate the marriage.

As evidence in rebuttal to statement, the petitioner provided a statement in response to the director's NOIR. Within this statement, the petitioner stated that while he resided in Belgium, his sister suggested an arranged marriage, which is common in his country of birth. The petitioner also stated that he had no knowledge that the marriage was fraudulent until he returned to the U.S. Consulate more than one year after the marriage occurred.

A sworn statement from the petitioner's former spouse indicating that the purpose of the marriage was to evade the U.S. immigration laws is substantive and probative evidence regarding the bona fides of the marriage. The petitioner's statement filed in response to the NOIR is not sufficient to overcome the evidence provided by his former spouse. *See Ghaly*, 48 F.3d at 1431. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* Simply providing a written explanation is insufficient to rebut detailed sworn statement.

The petitioner also provided an August 20, 1987 sworn statement from in which she asserted that she married the petitioner because she loved him, an undated letter addressed to the petitioner's pastor in Belgium, and a letter from congressional representative inquiring about the status of the case. This evidence came into existence during a period in which later admitted that she had falsely claimed that the relationship was bona fide. Such evidence is not sufficient to overcome the detailed account of the fraud contained within September 28, 1988 sworn statement. *Cf. Ghaly,* 48 F.3d at 1432.

Counsel also asserts that the director based the decision on impermissible inferences of fraud on the petitioner's part. *Matter of Tawfik*, 20 I&N Dec. at 168. The *Tawfik* decision states:

> It is to be noted, however, that in the determination of the first visa petition submitted on behalf of the beneficiary, it was not found that the beneficiary had attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. Rather, the district director involved in the determination of that petition noted that the record contained evidence, which had not been rebutted, "from which it [could] reasonably be inferred" that the beneficiary entered into a marriage for the primary purpose of obtaining immigration benefits. Such a reasonable inference does not rise to

> the level of substantial and probative evidence requisite to the preclusion of approval of a visa petition in accordance with section 204(c) of the Act.

The fact patterns of the present case and that of *Matter of Tawfik* are not similar. In *Matter of Tawfik*, the director inferred that the marriage was not bona fide based solely on a determination that the parties never resided together, a determination that the record did not support. 20 I&N Dec. at 170. The record in the present case contains substantive and probative evidence that demonstrates a fraudulent scheme was involved in setting up the marital relationship. Specifically, the petitioner's prior wife gave a detailed statement outlining the scheme. Therefore, this case involves more than a reasonable inference of marriage fraud based solely on living arrangements.

Ultimately, counsel asserts on appeal that the petitioner had no knowledge of the fraudulent scheme and references the petitioner's statement that he thought the marriage in question was an arranged marriage as is common in his culture. Counsel asserts that section 204(c) of the Act requires the petitioner to have attempted or conspired to enter the marriage for the purpose of evading the immigration laws. Counsel's unsupported assertion that the petitioner lacked a fraudulent intent does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported assertions of counsel in a brief are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). Further, the petitioner's statement that he had no knowledge that the marriage was fraudulent is not sufficient evidence to overcome his former spouse's sworn statement indicating that their marriage was to evade the U.S. immigration laws.

The recent case, *Zemeka v. Holder*, __ F. Supp. 2d __, 2013 WL 6085633, *6 (D.D.C. Nov. 20, 2013), holds that a beneficiary's statement that he did not intend to enter into a fraudulent marriage is insufficient to overcome the USCIS's finding, based on substantial evidence, that he had entered into a fraudulent marriage, or the denial of a visa petition under section 204(c) of the Act. Specifically, the court states:

> The Court need not decide whether the statute focuses on the intent of either party to a marriage, or only the alien's intent, because even if the latter is the case, the result here would be the same: it was reasonable for the [USCIS] to issue the NOID. This is because [the USCIS's] decision is supported by substantial evidence in the record that Zemeka entered into a fraudulent marriage with Stephens for the purpose of evading the immigration laws. To reiterate, substantial evidence is "more than a scintilla, but . . . something less than a preponderance of the evidence."
>
> The [USCIS]'s evidence demonstrating Zemeka's fraudulent intent was: his marrying a woman who had wed another Cameroonian man in the same month, Stephens's submission of visa petitions for both of them, her unusual behavior and failure to appear for either I-130 hearing, and the failure of Zemeka and Stephens to submit any documentary evidence of a joint life in response to the 2008 NOID (regarding Zemeka's first I–130 petition). Indeed, Zemeka's failure to offer any corroborating information after the 2008 NOID is quite damning on its own. As the [Board of Immigration Appeals] concluded after reviewing all of this evidence, moreover, Zemeka's claim to

> have had no knowledge of the fraudulent scheme "lacks credibility, as [Stephens] would appear to have no motive to defraud the United States on his behalf without his knowledge." In light of the [USCIS]'s evidence, this was not an irrational conclusion and is supported by substantial evidence. The decision to issue the NOID – and thus to place the burden upon Zemeka to establish the bona fides of his prior marriage – was therefore reasonable.

Zemeka, 2013 WL 6085633 at *6 (internal citations omitted). The court then concluded that the USCIS properly denied the visa petition under section 204(c) of the Act, because Zemeka's rebuttal evidence – a GEICO insurance policy, a letter from AT&T and Zemeka's affidavit – was insufficient to overcome the USCIS's finding that he entered into a fraudulent marriage to evade immigration laws.

Similarly, in this case, the record contains substantial and probative evidence that the petitioner entered the marriage with the intent to circumvent U.S. immigration laws. Marriage fraud is a rational determination where the former spouse received two all-expense paid trips to Belgium to marry the beneficiary and where the only rebuttal evidence is the beneficiary's own statement. *See Ghaly*, 48 F.3d at 1432. Counsel's appellate brief indicates that *Ghaly* is not applicable because the U.S. citizen wife in the *Ghaly* case claimed that the alien was the party who gave her the money to enter into the marriage, while in the present case, it was the petitioner's family members who facilitated the monetary exchange. However, the findings of *Ghaly* still hold that marriage fraud can be found if one of the parties to the marriage admits to colluding to evade the immigration laws and the only rebuttal evidence is the alien's statement.

Finally, on appeal, the petitioner files a document titled, "Iranian Marriage Ceremony, Its History & Symbolism," dated December 2001. This document indicates that it is normally the grooms' parents or other relatives who "formally ask for the bride and her family's consent." [redacted] September 28, 1988 sworn statement indicates that her family was unaware of her marriage to the petitioner. The document explaining Iranian marriages also describes several ceremonial exchanges that occur between the two families. The petitioner has not provided any corroborating evidence that his family followed the traditions described in the evidence. Thus, the petitioner has not established that this document is relevant and probative evidence that overcomes the director's determination.

In summary, the record contains substantive and probative evidence that the petitioner's previous marriage was entered into for the purpose of evading U.S. immigration laws, specifically the prior wife's sworn statement. The record does not contain relevant and probative evidence overcoming the prior wife's statement. Accordingly, the instant petition is not approvable pursuant to section 204(c) of the Act.

B. Other Discrepancies in the Record

Even if the petitioner had overcome the director's basis for the revocation, the petition would not be approvable and the AAO would remand the petition back to the director for a new decision. The petitioner was granted classification as an employment creation alien pursuant to section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5). The record indicates that the petitioner based his petition on an investment in a new commercial enterprise (NCE), [redacted]

. As the NCE was not within a targeted employment area, the required amount of capital in this case was $1,000,000.

1. Lawful Source of Funds

The petitioner claimed that his father provided him with funds that the petitioner eventually invested in the NCE. The only evidence regarding the lawfulness of the gifted funds was in the form of a letter from the that indicated the petitioner's father "is one of the popular and old businessmen and a prominent capitalist of Iran." This letter is insufficient to demonstrate that the petitioner's father obtained the gifted funds through lawful means in accordance with 8 C.F.R. § 204.6(j)(3). The petitioner must still provide evidence that his father obtained the gifted funds lawfully.

2. Employment Creation

As evidence the petitioner met the employment creation requirements, he submitted multiple Form I-9 documents; Form 941, Employer's Quarterly Federal Tax Returns; W-2, Wage and Tax Statements; and payroll summary documents.

Regarding the individuals identified on the Forms I-9, the petitioner has not established that they worked full-time. "Forms I-9 verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. In the absence of such evidence as paystubs and payroll records showing the number of hours worked, the petitioner has not met his burden of establishing that he has created full-time employment within the United States." *Matter of Ho,* 22 I&N Dec. 206, 212 (Assoc. Comm'r 1998). Similarly, the remaining forms of evidence, including the payroll summary documents, also fail to indicate the number of hours the employees worked or their hourly wage. Although the documents entitled include "Hourly Rate," a review of the documents shows that the hourly rate is the same as the gross pay for all employees except those four employees paid on salary. Thus, the hours worked are not apparent from these payroll documents. As such, the petitioner has not demonstrated that the claimed employees were working full time as defined in the regulation at 8 C.F.R. § 204.6(e).

IV. SUMMARY

In accordance with *Matter of Tawfik*, 20 I&N Dec. at 166, USCIS has reviewed all of the evidence on record in reference to the Form I-130 filed by the petitioner's former spouse, and has come to the conclusion that there is substantial and probative evidence on record to establish he has previously sought to be accorded the status as the spouse of a U.S. citizen through a marriage whose purpose was to evade the immigration laws of the United States.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.