UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THOMAS VALDIVIA JR.,
RADU C. CHESLEREAN

Plaintiffs,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States;
U.S. CITIZENSHIP AND IMMIGRATION SERVICES;
KIRSTJEN NIELSEN, Secretary, U.S. Department of Homeland Security;
L. FRANCIS CISSNA, Director, U.S. Citizenship and Immigration Services;
JOHN FURLONG, Acting Director, District 14 - Chicago District Office, U.S. Citizenship and Immigration Services;
MARTHA MEDINA-MALTES, Field Office Director, Chicago Field Office, U.S. Citizenship and Immigration Services

in their official capacities,

Defendants.

Civil Action No. 1:18-cv-03072

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Administrative Procedure Act Case

1. Plaintiffs Thomas Valdivia Jr. ("Petitioner" or "Mr. Valdivia") and Radu C. Cheslerean ("Beneficiary" or "Mr. Cheslerean") bring this action to challenge Defendant United States Citizenship and Immigration Service's (USCIS) improper denial of Mr. Valdivia's Form I-130, Petition for Alien Relative, seeking to classify his husband, Mr. Cheslerean, as the spouse of a United States citizen pursuant to 8 U.S.C. 1151(b)(2)(A)(i).

2. This action arises under the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, the Immigration and Nationality Act (INA) of 1990, 8 U.S.C. § 1101, *et seq.*, as amended, and the regulations of the former Immigration and Naturalization Service, now the USCIS, 8 C.F.R § 1.1, *et seq.*

JURISDICTION

3. Jurisdiction in this case is proper under 5 U.S.C. §§ 551 and 701 *et seq.* (Administrative Procedure Act). This Court has original jurisdiction under 28 U.S.C. § 1331 (federal subject matter jurisdiction) and 28 U.S.C. § 1346(a)(2). The Court has supplemental jurisdiction over all other claims asserted in the action under 28 U.S.C. § 1367(a) because they are so related to the claim asserted against the Defendants that they form part of the same case or controversy under Article III of the U.S. Constitution.

VENUE

4. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because Defendants are officers or employees of the United States or agencies thereof acting in their official capacities. A substantial part of the events or omissions giving rise to the claims occurred in this district, where Plaintiffs reside and Defendants have agents.

PARTIES

5. Plaintiff Thomas Valdivia Jr. filed an I-130 petition on behalf of his husband, Mr. Cheslerean, who is a native and citizen of Romania and seeks

adjustment of status in the U.S. based on the immigrant petition filed by Mr. Valdivia.

6. Defendant Jefferson B. Sessions III is being sued in his official capacity as United States Attorney General. He is the official generally charged with supervisory authority over all operations of the Department of Justice under 28 C.F.R. §0.5.

7. Defendant Kirstjen Nielsen is being sued in her official capacity as the Secretary of the Department of Homeland Security (DHS). Defendant Nielsen is charged with the administration of the USCIS and implementing the INA. 8 C.F.R. §2.1. She is further authorized to delegate such powers and authority to subordinate employees of DHS pursuant to 8 U.S.C. §1103(a) and has specifically delegated her authority to adjudicate I-130 petitions to USCIS.

8. Defendant L. Francis Cissna is being sued in his official capacity as Director of USCIS and is the official generally charged with supervisory authority over all operations of the USCIS with certain specific exceptions not relevant under the facts asserted herein. 8 C.F.R. §103.1(g)(2)(ii)(B). Within DHS, USCIS is the agency charged with the duty to adjudicate Plaintiffs' petition, which is the subject of this Complaint.

9. Defendant John Furlong is being sued in his official capacity as Acting Director of District 14 - Chicago District Office, and is the official generally charged with supervisory authority over all operations at the two USCIS Field Offices within

District 14, which are located in Chicago, Illinois, and Milwaukee, Wisconsin, respectively.

10. Defendant Martha Medina-Maltes, is being sued in her official capacity as Director of the USCIS Chicago Field Office and is the official generally charged with supervisory authority at the Chicago Field Office. Accordingly, Director Medina-Maltes has decision-making authority over all matters alleged in this complaint.

LEGAL FRAMEWORK

Section 204(c) of the Immigration and Nationality Act ("Section 204(c)") states in relevant part:

> (c) Notwithstanding the provisions of subsection (b) 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 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.

8 U.S.C. § 1154(c). The Code of Federal Regulations provides the following:

> Documentation. The petitioner should submit documents which cover the period of the prior marriage. The types of documents which may establish that the prior marriage was not entered into for the purpose of evading the immigration laws include, but are not limited to:
>
> (1) Documentation showing joint ownership of property;
>
> (2) A lease showing joint tenancy of a common residence;
>
> (3) Documentation showing commingling of financial resources;
>
> (4) Birth certificate(s) of child(ren) born to the petitioner and prior spouse;
>
> (5) Affidavits sworn to or affirmed by third parties having personal knowledge of the bona fides of the prior marital relationship (Each affidavit must contain the full name and address, date and place of birth of the person making the affidavit; his or her relationship, if any, to the petitioner, beneficiary or prior spouse; and complete information and details explaining how the person acquired his or her knowledge of the prior marriage. The affiant may be required to testify before an immigration

> officer about the information contained in the affidavit. Affidavits should be supported, if possible, by one or more types of documentary evidence listed in this paragraph.); or
>
> (6) Any other documentation which is relevant to establish that the prior marriage was not entered into in order to evade the immigration laws of the United States.

8 C.F.R. § 204.2(a)(1)(i)(B).

> 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.

8 C.F.R. § 204.2(a)(1)(ii). The Board of Immigration Appeals has held that evidence of an attempt or conspiracy to enter a fraudulent marriage must be substantial and probative:

> Section 204(c) of the Act, 8 U.S.C. § 1154(c) (1988), 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. Accordingly, the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy. As a basis for the denial it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative. *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); 8 C.F.R. § 204.1(a)(2)(iv) (1989).
>
> Neither section 204(c) of the Act nor the regulations specify who may make the Attorney General's decision in such matters and at what point it is to be made. However, we have held that the determination is to be made on behalf of the Attorney General by the district director in the course of his adjudication of the subsequent visa petition. *Matter of Samsen,* 15 I&N Dec. 28 (BIA 1974).
>
> In making that adjudication, the district director may rely on any relevant evidence, including evidence having its origin in prior Service proceedings involving the beneficiary, or in court proceedings involving the prior marriage. Ordinarily, the district director should not give conclusive effect to determinations made in a prior proceeding, but, rather, should reach his own independent conclusion based on the

> evidence before him. *See Matter of F----,* 9 I&N Dec. 684 (BIA 1962). However, for example, in a case where the beneficiary has previously been found deportable based on a determination, supported by clear, unequivocal, and convincing evidence, that that beneficiary became a party to a fraudulent marriage for the purpose of entering the United States as an immigrant, it would be appropriate for the district director to rely on that finding of deportability in a determination that the beneficiary would be precluded by section 204(c) of the Act from obtaining an immigration benefit by virtue of a subsequent marriage. *Matter of Agdinaoay, supra.*

Matter of Tawfik, 20 I&N Dec. 166, 167-68 (BIA 1990).

FACTUAL ALLEGATIONS

Mr. Cheslerean and Ms. Garcia's marriage

11. Plaintiff Radu C. Cheslerean, a citizen of Romania, was living in Chicago, Illinois in 2005, trying to come to terms with his sexuality, which was not only in stark contrast with his strict upbringing as an Orthodox Christian, but also a dark secret which would eventually estrange him from his nuclear family. During his attempts to "cure himself" from this perceived affliction, Mr. Cheslerean met his former U.S. citizen wife, Nina R. Garcia, at a New Year's Eve party in December 2005. The couple impulsively married in Chicago very soon afterwards on February 4, 2006.

12. On August 23, 2006, six months after the marriage, the couple decided to formalize Mr. Cheslerean's residence in the United States. Ms. Garcia therefore filed a Form I-130, Petition for Alien Relative, *pro se*, on behalf of Mr. Cheslerean, seeking to classify him as the spouse of a U.S. citizen pursuant to 8 U.S.C. 1151(b)(2)(A)(i) ("Ms. Garcia's I-130 petition").

13. According to the biographic information forms submitted with Ms. Garcia's I-130 petition, Mr. Cheslerean moved in with Ms. Garcia for about a month

before the couple moved together to an apartment located at 30 E Division St. Apt. 11C, Chicago, IL 60610, in March 2006.

14. On November 14, 2006, Ms. Garcia and Mr. Cheslerean were interviewed by Officer Staziak at the USCIS Chicago Field Office located at 101 W. Congress Pwky., Chicago, IL 60605. They testified consistently with the information contained on the Forms G-325, as well as the other application forms submitted with the I-130 petition. Attorney Nancy M. Vizer represented Ms. Garcia and Mr. Cheslerean at this interview.

15. On June 19, 2008, nineteen months after the interview, Attorney Vizer sent a letter to Officer Staziak, with copy sent to the Adjudications Branch Chief at the time, Ms. Yolanda Vera, inquiring about the case's status and noting that, "[t]o date, we have not received any word from you; no request for evidence, no decision, no indication that the case is being investigated. We are quite concerned that the file has gotten misplaced." Exhibit A, p.1.

16. On August 1, 2008, then-District Director Ruth A. Dorochoff sent a boilerplate letter addressed to Mr. Cheslerean, with copy sent to Attorney Vizer, acknowledging receipt of the June 19, 2008 status inquiry, and stating that Mr. Cheslerean's permanent residence application was "under further review by the adjudicating officer." *Id.* at 2.

17. Over two and a half years after the interview, on July 31, 2009, USCIS issued a Notice of Intent to Deny [Ms. Garcia's I-130] Petition for Alien Relative (hereinafter "2009 NOID"), attached as Exhibit B.

18. The 2009 NOID focused on Ms. Garcia and Mr. Cheslerean's financial and living arrangements, concluding as follows:

> You have failed to meet your burden of proof of establishing that you and your husband have established a life together as a married couple. It is therefore the intent of the Service to deny your I-130 petition *on this basis*.

Exhibit B, 2009 NOID, p. 2. (emphasis added).

19. Ms. Garcia, through counsel, timely responded to the 2009 NOID, rebutting Officer Staziak's adverse findings, and submitting additional evidence of the bona fide nature of the couple's marriage, including, but not limited to, affidavits from Mr. Cheslerean; Ms. Garcia; Mr. Valdivia, Mr. Cheslerean's friend since 2005; and Ms. M-P-A-, Ms. Garcia's friend since approximately 2004 or 2005. Attorney Vizer's brief, as well as the Forms G-325 and affidavits, submitted in response to the 2009 NOID, are attached as Exhibit C.

20. In her affidavit, Ms. Garcia explained how differences in personality and lifestyle between her and Mr. Cheslerean led to the eventual breakdown in their relationship:

> . . . I love to go out and party, while Radu is a lot more of a quiet person. However, when I met him, he seemed to enjoy going out and meeting people, while I enjoyed the calmness he displayed. It helped me to "de-stress" a little bit.
>
> 4. I enjoyed going out with Radu in the beginning, and introducing him to all my friends, since he really didn't have any friends in Chicago.
>
> 5. Unfortunately, after awhile [*sic*], I started being annoyed by the very things that had attracted me to Radu. I like to go out and have fun most of the time. I don't have any children yet, and want to be able to enjoy every minute, so that I will be ready when it is time to take on that responsibility. Radu is much more ready to settle down..
>
> 6. Even though Radu stayed home, I continued going out. It really annoyed me that he would not come out with me. He began to be jealous, and we started having fights about that, and about many other things.

> 7. Radu was also the more organized one in our house. I am very relaxed about what the house looks like, while Radu likes things to be way too well organized. This was another cause of friction between us.
>
> 8. Radu and I still lived together, and were still trying to work things out, when we went to his adjustment interview in November 2006. But shortly after that, it all got to be too much, and he moved out.
>
> 9. I have lived at a couple of different addresses since then, but have sometimes used the same address as Radu, as we have tried to reconcile a couple of times.
>
> 10. For a short time after we separated, Radu and I did not speak to each other, or if we did it was only to fight. But after six months, we saw that we really did not dislike each other; we were just too different to ever be able to have a good marriage (although we only learned this through trying to reconcile). So now that we have set that aside, we have been able to become friends.

Exhibit C, Ms. Garcia's 2009 affidavit, pp. 12 - 14.

21. In his affidavit, Mr. Cheslerean also described the circumstances of his marriage to Ms. Garcia:

> . . . I am very conservative, while Nina is more of a "partyer." When I met her, she seemed very exciting and exotic to me, and I enjoyed her ability to bring out my more adventurous side. She brought me out to clubs and other fun places, where we would spend time with her friends, who quickly became my friends. At the time, I had just moved to Chicago, and was very lonely, since I really didn't know anyone in town.
>
> 4. Nina continued being exciting to me during the early part of our marriage, and I really enjoyed the "new me," who spent more time out socially, instead of just staying home watching TV
>
> 5. Unfortunately, after awhile [*sic*], I started being annoyed by the very things that had attracted me to Nina. While I had enjoyed going out with her, I began to be tired of it. I found that I missed watching tv and relaxing.
>
> 6. Even though I wanted to stay home, Nina would not stop going out. She went out several times a week, sometimes with me, sometimes without me. I began to be jealous, and we started having fights about that, and about many other things.
>
> 7. I was also the more organized one in our house. Nina did not like to put things away, so I always had to do it for her. I like to live in a clean, well-organized home, so I was the one who had to do all the work. This was another cause of friction between us.

Id., Mr. Cheslerean's 2009 affidavit, pp. 15 - 17.

22. In his affidavit, Mr. Valdivia, who hosted the New Year's party at which Mr. Cheslerean and Ms. Garcia first met, writes:

> 3. I have been friends with Radu since the end of 2005. We were introduced through a mutual friend, [I-], who had lived in Chicago for some time, and then had worked with Radu in Texas.
>
> 4. [I-] was visiting Chicago for the 2005 holiday season. Radu was new in town and did not know a lot of people. [I-] therefore brought Radu out with her to meet some of [I-]'s friends.
>
> 5. I do not remember exactly where I met Radu. It was at one of the clubs in Chicago.
>
> 6. A few days after I met Radu was New Year's Eve. [I-] was planning to come to a party at my apartment, and asked if she could bring Radu along. I agreed, and am very glad that Radu was there, because we ended up becoming very close friends.
>
> 7. One of my other good friends, [M-P-A-], was also at the 2005-2006 New Year's Eve party. She brought her friend Nina Garcia with her.
>
> 8. Everyone at the party noticed Nina and Radu. It was very clearly "love at first sight," and I remember that Radu took Nina home after the party. When I heard that they were getting married a few weeks later, I was only surprised by how fast it was, but not by their relationship. I was honored to serve as best man at their wedding, since Radu had no family in Chicago, and had not lived in town long enough to make many friends.
>
> 9. Nina and Radu's wedding was at City Hall. It was not elaborate, but we had a great celebration going out to dinner at Ronny's Steakhouse that night.
>
> 10. After the wedding, I became even better friends with the couple. My mother "adopted" them, inviting them to our home for several holidays, including Thanksgiving and Christmas dinner in 2006. The family group had about 15 people, including some extended family members. Nina and Radu also came to my mother's home for my birthday party that year.
>
> 11. I also invited Nina and Radu into my poker group. This is a casual group of friends that gets together almost weekly at each other's houses for cards and snacks. They were fun to be around, and everyone liked them.
>
> 12. Nina and Radu's marriage started out great, but towards the end of 2006 they were fighting a lot. I don't really know what started the fights, but I can certainly state that it was uncomfortable to be around them at times. More than once I had to take one of them aside to calm them down. They would always make up, but then would fight again.

Id., Mr. Valdivia's 2009 affidavit, pp. 18 - 19.

23. In her affidavit, Ms. M-P-A- also described some of her interactions with both Ms. Garcia and Mr. Cheslerean:

> 5. I met Radu on December 31, 2005, at a New Year's Eve party at the home of Thomas Valdivia. I was at the party with Nina, who also met Radu that night.

> 6. I could see right away that Radu and Nina were very attracted to each other. Once they met, they spent the rest of the evening together, and he ended up taking her home.
>
> 7. I was not surprised after that to hear that Nina and Radu were dating very seriously. Nina is a very impetuous person, and it only surprised me a little to learn that she and Radu planned to be married just a month after they had met.
>
> 8. I was a little concerned that Nina and Radu were getting married too soon, but I agreed to serve as maid of honor at their wedding. The wedding was a fairly simple event at City Hall, but we all went out to dinner at Ronny's Steakhouse afterwards to celebrate.
>
> 9. Nina and Radu were a great couple, and fun to be around. I was involved in several organizations in Chicago, and often invited them to attend events.
>
> 10. Nina and Radu especially enjoyed coming to the AFTRA senior radio shows that I worked with. These are plays that are broadcast on the radio. Senior citizens read the scripts in front of a live audience, but do not wear costumes. Usually there are sound effects, such as hitting wood with something so it will sound like a door is being opened.
>
> 11. I also went to several "artsy" cultural events with Nina and Radu, such as "Lucy Parson," a play about the life of Lucy Parson.
>
> 12. Besides going out with the couple, I often visited Nina and Radu's one bedroom apartment at 30 E Division in Chicago. Sometimes we would have dinner together, sometimes watch movies, and sometimes just "hang out." Whenever I visited, it was clear to me that they both lived there. They would both bring dishes and food to and from the table. One or the other would work the remote to show a movie. The apartment had one bathroom, and I remember seeing men's and women's toiletries on the shelves.
>
> 13. I particularly remember being at the apartment for Nina's birthday party in September of 2006. Radu gave her a beautiful necklace with a small butterfly on it.
>
> 14. Sometimes when I visited Nina and Radu, my fiancé (now husband) [W-A-] would come along. He was very busy working and going to school, so he did not always join me.

Id., Ms. M-P-A-'s 2009 affidavit, pp. 20 - 22.

24. On September 10, 2009, nearly three years after Ms. Garcia and Mr. Cheslerean were interviewed, then-Field Office Director Donald P. Ferguson ("Field Office Director") issued a Notice of Decision to Deny [Ms. Garcia's I-130] Petition for Alien Relative (hereinafter "2009 denial"), attached as Exhibit D. It is quite instructive to note that in the 2009 denial, the Field Office Director, with no apparent

understanding of U.S. tax laws or well-established U.S. Supreme Court precedent[1], demonstrated USCIS's bias by incorrectly accusing the couple of possibly felonious tax fraud, and then using this erroneous finding to justify USCIS's decision to disregard Ms. Garcia's testimony as not credible:

> Furthermore, you provided a copy of your 2008 taxes which indicates that you and the beneficiary filed married filing jointly. Your 2008 taxes were filed with the address of 5950 N Kenmore Avenue, Chicago, IL. It is unclear why you are claiming this address as your residential address as you have admitted to the Service that you do not live with the beneficiary. It appears you filed these taxes jointly for the sole purposes of obtaining a larger refund from the government. Your attorney even states that in the past you and the beneficiary filed taxes either separately or together to obtain the maximum tax refund, and not because you were living together as a married couple in marital union. It appears you willfully and knowingly misrepresented material facts to the Federal government for your financial gain. *Therefore, the Service finds your testimony in regards to your marriage not credible*.

Exhibit D, 2009 denial, p. 2 (emphasis added).

25. Ms. Garcia, through counsel, timely appealed the 2009 denial to the Board of Immigration Appeals (BIA). Attorney Vizer's brief on appeal is attached as Exhibit E.

26. Ms. Debra G. Gordon, Associate Counsel for USCIS, submitted a brief in support of the decision of the "District Director," concluding the following:

> . . . The Field Office Director was correct in denying Petitioner's visa petition on the grounds that Petitioner *failed to establish by a preponderance of the evidence* that her marriage to the Beneficiary was entered into in good faith and not for the purpose of evading immigration laws and procuring immigration benefits.

Exhibit F, DHS brief, p. 5 (emphasis added).

[1] *See Gregory v. Helvering*, 293 U.S. 465, 469 (1935) ("The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.") (citing cases)

27. On February 10, 2011, the BIA dismissed the appeal of the 2009 denial. In its decision (hereinafter "2011 BIA decision"), the BIA noted:

> . . . The [2009] NOID was issued after the parties provided *limited documentation* in support of the petition. . . .
>
> . . . We find the Director's denial of the visa petition in the September 2009 decision to be correct, *as the petitioner did not meet her burden of proof*. . . .
>
> The evidence presented by the petitioner is not persuasive of a shared life together and *does not establish a bona fide marriage by a preponderance of the evidence*. The affidavits submitted by the petitioner and the beneficiary indicate that they separated in November 2006, shortly after their interview. The petitioner *did not furnish sufficient proof* that she and the beneficiary had commingled assets. The financial records submitted were minimal and do not demonstrate sharing of assets, and the petitioner has not provided evidence of motor vehicle ownership, insurance policies, utility bills, photographs, or other documentation which would meet her burden of showing that she and the petitioner intended to establish a life together.

Exhibit G, 2011 BIA decision, p. 2 (emphasis added) (footnote omitted).

28. Ms. Garcia and Mr. Cheslerean divorced in Cook County, Illinois, on August 29, 2011. The divorce decree indicates that the couple had lived separate and apart as of March 15, 2007.

Mr. Cheslerean and Mr. Valdivia's marriage

29. In May 2007, Mr. Cheslerean and Plaintiff Thomas Valdivia Jr. initiated a romantic relationship. With Mr. Valdivia's support, Mr. Cheslerean overcame his strict religious upbringing and began to live authentically as a gay man. Mr. Cheslerean did not come out to his father until he was 33 years old.

30. When same-sex marriage was legalized in Illinois in 2014, Mr. Cheslerean and Mr. Valdivia were finally able to get married. They did so soon after the law changed, on May 17, 2015, in Las Vegas, Nevada.

31. On September 6, 2016, Mr. Valdivia filed a Petition for Alien Relative, Form I-130, on behalf of Mr. Cheslerean, seeking to classify him as the spouse of a U.S. citizen pursuant to 8 U.S.C. 1151(b)(2)(A)(i) (hereinafter "Mr. Valdivia's I-130 petition").

32. On January 12, 2017, Mr. Valdivia and Mr. Cheslerean were interviewed by Officer Fortini at the USCIS Chicago Field Office located at 101 W Congress Pwky, Chicago, IL 60605. Attorney Lisa Nosek represented Mr. Valdivia and Mr. Cheslerean at this interview.

33. On Valentine's Day, February 14, 2017, USCIS issued a Notice of Intent to Deny [Mr. Valdivia's I-130 petition on behalf of his husband] (hereinafter "2017 NOID"), attached as Exhibit H.

34. The 2017 NOID stated USCIS's intention to deny Mr. Valdivia's I-130 petition based on Section 204(c) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1154(c).

35. Mr. Valdivia, through counsel, timely responded to the 2017 NOID, submitting new affidavits from himself, Mr. Cheslerean, and Ms. Garcia. Attorney Nosek's brief and the affidavits submitted in response to the 2017 NOID are attached as Exhibit I.

36. In his affidavit, Mr. Valdivia writes:

> 3. I met Radu through a friend while he was starting his relationship with Nina, who he eventually married. To say it was a quick engagement would be accurate, but they seemed very much in love.
>
> 4. I got to spend time with them and became a close friend of the couple. Through Radu, I found out they were having problems, arguing all the time and having

shouting matches. I was feeling sad for Radu and realized at this time that I had a crush on him. The crush only grew.

5. Though they tried to make it work as any married couple does, I admit that when they broke it off, I was relieved. I hung out with Radu and he entrusted me with how he was feeling with his failed marriage. Over a few weeks in May 2007, I gained the courage to kiss him one night, knowing this might end our friendship. He kissed me back.

6. From here, no label was used to describe what we had or how he identified. We just spent time together because we enjoyed each other's company. Over time, we realized that what we found with each other was love.

7. After so many years together, our relationship only grew stronger. We told our friends, they accepted, supported and loved us back. Two years ago, when same sex marriage became legal, we made the decision to solidify our bond, our love with marriage.

8. We have worked hard, supported each other and have made future plans and goals, which are now less of a certainty. This notice of intent to deny has caused major heartache and depression in our home.

Exhibit I, Mr. Valdivia's 2017 affidavit, pp. 7 - 8.

37. In his affidavit, Mr. Cheslerean explains:

2. Being in a relationship with a man did not come by easy for me. Words like "I am gay" never came out of my mouth before, when I was younger.

3. I grew up in Romania in a conservative Christian orthodox family. Both my parents would take my older brothers and me to church almost every Sunday.

4. My parents tried to instill strict orthodox Christian values in me and my brothers in regards to growing up as man in this culture. Homosexuality is seen as a sin and an affront to god.

5. I grew up believing that homosexuality was a sin and an unacceptable way of living. This is something I never discussed with my parents or my brothers.

6. I did not come out to my father until I was 33 years old. His reaction was not positive and he told me he did not want to know anything about my husband or our relationship.

7. The expectations my parents had of me were to be just like my brothers and settle down one day with a good girl, start a family and have a few kids.

8. Growing up and more so after my mother passed away in 2005, I felt a great deal of pressure to make my family happy. It was my responsibility to respect their wishes and to make them proud.

9. I met Nina Garcia in December of 2005. When I met Nina, more than 11 years ago, I was immediately hooked. She was my opposite, an extrovert, always fun who showed me around Chicago when I was still new to the city. I was in love and impulsive. We were married in February of 2006, two short months later.

10. My mother never got a chance to see me being married to Nina, although I am sure she would have been very proud. My mother passed away in 2005.

11. My father and brothers were very excited about the marriage and they were looking forward to the possibility of meeting Nina in person.

12. The reaction of my father and brothers to this marriage helped me feel like I was fulfilling my familial duty. With my mother's memory heavy on my heart, I felt like I was making her proud and living up to her expectations.

13. Nina and I had a tumultuous relationship with lots of partying, going out while spending everything we had. I was so much younger and with my head in the clouds.

14. Nina and I had a genuine relationship and marriage and we lived everyday as immaturely as we both were. We had no care and definitely no plans, like you would expect adults to have.

15. In my relationship with Nina, we did not plan ahead, or have insurance or much other evidence of a commingled life because we had very little money, and any savings we had we would just spend. We were young and immature and didn't think about the future or plan ahead.

16. Nina and I lived together at 30 E Division, Apt. 11 C in Chicago, Illinois. Any other addresses in the public records were Nina's or my separate residences before we got married, or her parents' address. For example, I ceased living in Texas as of 2005, although public records, cited by USCIS indicate that I had a Texas address in 2009.

17. Nina and I were two very different people. I am serious, introverted, and shy. Nina, on the other hand, was outgoing, careless, wild, and totally extroverted. At first I found it exciting and fun to be around her but later it became exhausting to keep up with her.

18. Our marriage quickly turned sour and the romance fizzled out when we realized the differences between us. We separated at the end of 2006.

19. We tried to work things out during the holidays but all attempts failed. We split up for good at the beginning of 2007. The short duration of the marriage does not mean it was fraudulent, it just means we jumped into a relationship without giving it much thought. That does not make my previous relationship ingenuine. It does not mean we frauded the government.

20. We filed my residency application in August 2006, but by the time of our interview in November 2006, our relationship was crumbling. Still, at the time of the interview with USCIS, I did not know what was going to happen with our relationship.

21. My previous marriage was genuine, and both Nina and I really believed we could make it work. We were so young and unprepared for a life together. We ended up being upset with each other more days than being happy.

22. Failing in my relationship with Nina and the separation from her were very difficult. It felt like a disappointment toward my parents. I felt lost and started focusing on myself more and less on pleasing my family. Living up to their expectations became less important to me.

23. Coming to terms with who I am and living my life authentically as a gay man was a painful journey and it took me a lot longer than it takes other gay men these days.

24. I met Thomas around the time I met Nina. Thomas and I were good friends throughout my relationship with Nina and he was aware of the problems we were having. He was a supportive friend throughout the separation process.

25. With Thomas, I got over my orthodox religious beliefs and stopped trying to make my family happy, and focused on myself.

26. Thomas has been my constant support and I can't imagine life without him. He taught me about being comfortable with who I am, even if that means disappointing my parents or my brothers. I am a gay man and I have never been happier.

Id., Mr. Cheslerean's 2017 affidavit, pp. 9 - 11.

38. Ms. Garcia also submitted a new affidavit, writing as follows:

2. I have known Radu for many years now, since December, 2005. After a brief engagement, we married in February of 2006. We had a passionate relationship that I would best describe as young love.

3. He was different than other guys I had dated before and I felt attracted to his looks and his quirky ways. Radu was always very polite and respectful towards me. It was the first time I felt such a strong connection to a man and I was determined not to let him go.

4. We had many great moments throughout our relationship and I believe we both learned a lot from one another. I remember him telling me about his growing up in Romania and I knew we shared the same views and desires for a better life.

5. We were living in Gold Coast at the time, at 30 E Division, and we used to out to the bars and restaurants in the area. We would explore the city together and check out new places like the Museum of Contemporary Art and the Chicago symphony.

6. We had many arguments also in which neither of us were willing to back down.

7. Radu was too conservative for me and we fought a lot about how we spent our time and money.

8. Our relationship did not work out as well as we thought it would and we separated after one year of being married.

9. We tried getting back together and work things out, but I realized I was too young to settle down and our marriage was suffocating. I was just not happy anymore. It was devastating that we just could not see past the many arguments we kept having.

10. After our separation in 2007, it took me a while to regain my confidence. Radu and I used to be very passionately in love with each other at the beginning of our relationship and coming down from that was not easy on me.

11. We decided to stay connected and our friendship eventually helped me be okay with the thought that we were not going to change each other, that we were better off separated.

> 12. It was later, after our separation, that Radu confided in me that he started seeing someone, a man.
>
> 13. I was surprised to hear that he was in a gay relationship, but I was happy to see him happy. I know both Radu and his husband, Thomas Valdivia, and they are great together.

Id., Ms. Garcia's 2017 affidavit, at 13 - 14.

39. On March 29, 2017, Field Office Director Martha Medina issued a Decision denying Mr. Valdivia's I-130 petition (hereinafter "2017 denial"), attached as Exhibit J. Without addressing the content of any of the affidavits contained within the administrative record, the 2017 denial concluded as follows:

> Although USCIS carefully considered the statements made in regards to the current Notice of Intent to Deny (NOID), they are insufficient to warrant a favorable decision. They mainly reitierate [*sic*] what was stated in statements previously submitted in regards to the marriage of Ms. Garcia and Mr. Cheslerean.
>
> Based on a review of the record, USCIS finds that the approval of your Form 1-130 is prohibited under INA 204(c) . . .

Exhibit J, 2017 denial, p. 3.

40. Mr. Cheslerean, through counsel, timely appealed the 2017 denial to the BIA. Attorney Nosek's brief on appeal is attached as Exhibit K.

41. On August 14, 2017, DHS filed a one-page checklist as its response to the appeal, requesting that the BIA summarily dismiss the appeal because the attorney of record failed to file her appearance before the Board on Form EOIR-27, and stating that USCIS would rely upon the decision of the Field Office Director without further briefing, as "[t]he record as a whole indicates that the Board should not disturb the decision in this case." Exhibit L.

42. On December 14, 2017, the BIA dismissed the appeal of the 2017 denial. In a two-page decision (hereinafter "2017 BIA decision") littered with contradictory

statements, the BIA, like the USCIS, failed to provide a detailed, reasoned analysis in support of its conclusion that "the evidence and findings in the record constitute substantial and probative evidence of the beneficiary's prior marriage fraud." Exhibit M, p. 2. The 2017 BIA decision constitutes final agency action.

43. Plaintiffs have exhausted their administrative remedies.

FIRST CLAIM FOR RELIEF
Violation of APA for Agency Action that is Arbitrary and Capricious, an Abuse of Discretion, and Not in Accordance with Law
5 U.S.C. §§ 702, 706(2)(A)

44. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

45. The purpose of the APA is to prevent abuse of discretion by federal agencies by granting the federal judiciary authority to review the actions of such agencies.

46. One mechanism the APA uses to prevent abuse of discretion is to place time constraints upon agencies so that agencies do not use prolonged delays for the sole purposes of harassment and intimidation, or as a method to disguise a refusal to act. For this reason, the APA requires administrative agencies to conclude matters presented to them "within a reasonable time." APA § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it").

47. This Court also may hold unlawful and set aside agency action that, inter alia, is found to be: "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(C); or "without observance of procedure required by law," 5 U.S.C. § 706(2)(D). "Agency action" includes, in relevant part, "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

USCIS'S UNREASONABLE DELAY IN ADJUDICATING MS. GARCIA'S I-130 PETITION CONSTITUTES AN ABUSE OF DISCRETION.

48. As noted above, USCIS took over two and a half years to issue a NOID, and nearly three years to issue a final decision, from the time that Officer Staziak interviewed Ms. Garcia and Mr. Cheslerean on November 14, 2006. Despite this ample opportunity, neither the 2009 NOID nor the 2009 denial listed any substantial or probative evidence demonstrating that the couple's marriage had been entered into for the purpose of circumventing immigration laws.

49. USCIS's unreasonable delay in adjudicating Ms. Garcia's I-130 petition was such, that it eliminated the possibility of granting Mr. Cheslerean conditional permanent residence status, which would have allowed USCIS to investigate the couple's marriage for two additional years, as contemplated by the Immigration and Marriage Fraud Amendments of 1986 (IMFA). *See* 8 U.S.C. § 1186a(h)(1)(C) (establishing conditional permanent resident status for aliens deriving their immigrant status based on a marriage of less than *two* years); *see also* Adjudicator's

Field Manual (AFM)[2], Chapter 21.1(d)(6) ("Properly used, IMFA is a powerful anti-fraud tool, since it enables USCIS to fully adjudicate a case both before the alien obtains LPR status and once again when he or she seeks removal of the conditions.") Had USCIS approved Ms. Garcia's I-130 petition on or after the couple's second wedding anniversary (February 4, 2008), Mr. Cheslerean would have been granted legal permanent residence, and his green card would not have expired for 10 years.

USCIS AND BIA'S FAILURE TO PROPERLY CONSIDER MATERIAL EVIDENCE CONTAINED IN THE RECORD OF PROCEEDING CONSTITUTES AN ABUSE OF DISCRETION.

50. While the 2011 BIA decision listed the evidence presented in response to the 2009 NOID, it failed to provide an analysis of such, or address any of the rebuttal explanations offered by Ms. Garcia and Mr. Cheslerean in their respective affidavits. It also failed to mention the evidence that was initially submitted in support of Ms. Garcia's I-130 petition or consider the content of Ms. Garcia's or Mr. Cheslerean's sworn testimony at the November 2006 interview with Officer Staziak.

51. The BIA has repeatedly held that testimony should not be disregarded simply because it is "self-serving." *See Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) ("We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available.") (citing cases).

[2] **The AFM is one of several types of USCIS policy materials**. *See* AFM Chapter 3.4(a) (listing "Field and Administrative Manuals" as examples of policy materials). "**Policy material is binding on all USCIS officers** and must be adhered to unless and until revised, rescinded or superseded by law, regulation or subsequent policy, either specifically or by application of more recent policy material." *Id.*

USCIS'S ADVERSE CREDIBILITY FINDING WITH RESPECT TO MS. GARCIA'S TESTIMONY, AS WELL AS ITS DISMISSIVE TREATMENT OF TESTIMONIAL EVIDENCE SUBMITTED BY THIRD PARTIES, CONSTITUTES AN ABUSE OF DISCRETION.

52. The adverse credibility determinations contained in the record of proceedings not only undermine federal regulations but are also contrary to binding agency policy, which instructs adjudicators to provide specific reasons in support of adverse credibility findings:

> If you decide that the statement or testimony of a petitioner or applicant, or of any other witness, is not credible, your written decision should indicate this conclusion. *It generally is not enough simply to say that the witness is not credible*. Instead, your decision should give the specific reason or reasons for your conclusion, and refer to the elements of the record that support the conclusion.

AFM, Chapter 11.1(l) (emphasis added).

> In any situation where the testimony of a witness is questionable, *you should supplement the record with the testimony of another witness or with other evidence relating to the same matter*. In doing so you will be ensuring that your decision will stand up to review in further administrative proceedings.

AFM, Chapter 11.1(g) (emphasis added).

53. In the 2009 denial, the Field Office Director falsely accused Ms. Garcia and Mr. Cheslerean of lying to the Internal Revenue Service so that they could obtain a larger tax refund. *See* Exhibit D, 2009 denial, p. 2 ("It appears you filed these taxes jointly for the sole purposes [*sic*] of obtaining a larger refund from the government . . . and not because you were living together as a married couple in a marital union. It appears you willfully and knowingly misrepresented material facts to the Federal government for your financial gain."); the Field Office Director then relied on this false accusation to support his adverse credibility finding with respect to Ms. Garcia.

See ibid. ("Therefore, the Service finds your testimony in regards to your marriage not credible.")

54. The Field Office Director also indicated that the affidavits submitted by third parties having personal knowledge of the bona fides of the prior marital relationship could be given "little evidentiary weight . . . in light of the other discrepancies in the record." Exhibit D, 2009 denial, p. 2. It remains unclear why USCIS believes that "discrepancies" between Ms. Garcia and Mr. Cheslerean's evidence of their residential history, and the government's information from unidentified public records, are sufficient justification for disregarding the testimony of credible third parties.

USCIS AND BIA'S RELIANCE ON INCORRECT FINDINGS OF FACT CONSTITUTES AN ABUSE OF DISCRETION.

Ms. Garcia and Mr. Cheslerean's separation

55. The 2011 BIA decision replicated a misstatement of fact originally made in the 2009 denial: that Ms. Garcia and Mr. Cheslerean separated in November 2006. In the 2009 denial addressed to Ms. Garcia, the Field Office Director states: "You claim the beneficiary moved out shortly after the interview occurred. It appears that the information in regards to your residential address and the beneficiary's residential address is correct as you admit that you and the beneficiary separated in 2006." (Exhibit D, 2009 denial, p. 2); while the 2011 BIA decision reads: "The affidavits submitted by the petitioner and the beneficiary indicate that they separated in November 2006, shortly after the interview." Exhibit G, 2011 BIA

decision, p. 3. Had USCIS or the BIA carefully reviewed the affidavits submitted by Ms. Garcia and Mr. Cheslerean in response to the 2009 NOID, they would have realized that the couple never attested to separating in November 2006 but instead declared that "[they] still lived together, and were still trying to work things out, when [they] went to [Radu's] adjustment interview in November 2006. But shortly after that, *it all got to be too much, **and** [Radu] moved out*." Exhibit C, pp. 13, 16 (emphasis added). However, as reflected in their divorce decree, Ms. Garcia and Mr. Cheslerean separated on March 15, 2007. Therefore, they resided together as a married couple for over one year.

Ms. Garcia and Mr. Cheslerean's friendship

56. As noted above, in affidavits submitted in response to the 2009 NOID, Ms. Garcia and Mr. Cheslerean revealed that, after they separated in 2007, they were eventually able to become good friends:

> For a short time after we separated, Radu and I still did not speak to each other, or if we did it was only to fight. . But after about six months, we saw that we really did not dislike each other; we were just too different to ever be able to have a good marriage (*although we only learned this through trying to reconcile*). So *now* that we have set that aside, we have been able to become friends . . . Radu is *now* a good friend, and as such, I hope that he is able to become a permanent resident and remain in the United States.

Exhibit C, Ms. Garcia's 2009 affidavit, pp. 13-14. (emphasis added).

> For a short time after we separated, Nina and I did not speak to each other, or if we did it was only to fight. . But after about six months, we saw that we really did not dislike each other; we were just too different to ever be able to have a good marriage. So *now* that we have set that aside, we have been able to become friends. Nina is *now* a good friend, and as such, she has agreed to continue to support me for the permanent residence process."

Id., Mr. Cheslerean's 2009 affidavit, pp. 16-17. (emphasis added).

57. However, as demonstrated in the record of proceeding, USCIS and the BIA instead construed Ms. Garcia's testimony as an admission that she and Mr. Cheslerean were friends who decided to enter a sham marriage for immigration purposes:

> The Service indicated in the [2009 NOID] that you and the beneficiary appear to know each other and appear to be friends. The [2009 NOID] also states that you and the beneficiary may be nothing more than friends and that this marriage was arranged to assist the beneficiary's admission into the United States. In your affidavit, *you claim that your relationship to the beneficiary is just friends and that you hope he will become a permanent resident and remain in the United State*s.

Exhibit D, 2009 denial, p. 2.

> While Petitioner and Beneficiary have conceded that they are friends and that Petitioner would like to see Beneficiary become a permanent resident, there is very little evidence indicating the parties have a bona fide marriage.

Exhibit F, DHS brief, p. 5.

> The [2009 NOID] also contended that Ms. Garcia and Mr. Cheslerean were friends and that Ms. Garcia had married him in order to assist his admission to the United States.
>
> Ms. Garcia and Mr. Cheslerean made a timely response to the [2009 NOID]. Again, after carefully reviewing the response, USCIS determined that the response was insufficient to establish the eligibility for the benefit sought. *USCIS based its decision in pertinent part on the petitioner's admission that she and the beneficiary did not reside together and that they were simply friends*.

Exhibit H, 2017 NOID, p. 2 (emphasis added).

Basis of 2009 denial

58. In denying Mr. Valdivia's I-130 petition, the USCIS and the BIA misconstrued the basis of the 2009 denial, claiming for the first time that Ms. Garcia's I-130 petition had been denied under Section 204(c), which is perplexing, as Section 204(c) was intended to serve as the basis to deny *subsequent* visa petitions on behalf

of a beneficiary who was found to have entered, or attempted or conspired to enter, a sham marriage for immigration purposes. *See* Exhibit H, 2017 NOID, p. 3 ("As such, on September 10, 2009, USCIS sent you a [NOID], citing [Section 204(c).]"; *see also* Exhibit J, 2017 denial, p. 3 ("The [2009] denial stated that Ms. Garcia and Mr. Cheslerean did not demonstrate by preponderance of evidence that their marriage was entered into in good faith. The Form I-130 Petition was denied under Section 204[c] of the Act, prohibiting the approval of visas filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws."); *see also* Exhibit M, 2017 BIA decision, p. 2 ("In September 2009, the visa petition was denied under section 204(c) because Ms. Garcia had not presented evidence of a shared life together (including lack of commingled financial assets), which suggested that Ms. Garcia had married the beneficiary for the purpose of providing him with immigration benefits . . . The instant petitioner married the beneficiary in May 2015, and he filed a visa petition on his behalf in September 2016. The Director again denied the petition in March 2017 under section 204(c).").

59. However, the administrative record clearly shows that the stated basis of the 2009 denial was a failure to meet the burden of proof to establish eligibility for the benefit sought. Assuming *arguendo* that, in 2017, the USCIS and the BIA were instead claiming that the basis of the 2009 denial was a finding of marriage fraud, they still failed to advance any substantial or probative evidence in support of such a finding, as required by the applicable laws, regulations, and binding agency policy. Such a failure to follow procedure required by law is yet another instance of agency

abuse of discretion in this case. The following allegations detail other examples of the USCIS and the BIA's abuse of discretion through their failure to observe procedure required by law.

SECOND CLAIM FOR RELIEF
Violation of APA for Agency Action that is Without Observance of Procedure Required by Law 5 U.S.C. §§ 702, 706(2)(D)

60. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

THE USCIS AND THE BIA'S FAILURE TO CONSIDER SUBMITTED, MATERIAL EVIDENCE ESTABLISHING THAT MS. GARCIA AND MR. CHESLEREAN'S MARRIAGE WAS BONA FIDE, WAS WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW.

61. The 2011 BIA decision mischaracterizes the language at 8 C.F.R. § 204.2(a)(1)(i)(B), implying that evidence to establish the bona fides of a marriage is limited to "proof of commingling of financial resources, proof of joint ownership of property, proof of joint tenancy of a common residence, birth certificates of children born to the petitioner and the beneficiary, and affidavits of others having knowledge of the bona fides of the marital relationship." However, the plain language of 8 C.F.R. § 204.2(a)(1)(i)(B), reproduced above, makes it clear that the enumerated examples are neither required nor exhaustive ("The types of documents which *may* establish that the prior marriage was not entered into for the purpose of evading the immigration laws include, *but are not limited to* . . .") (emphasis added).

62. Moreover, in its footnote citing "8 C.F.R. § 204.2(a)(1)(B) [*sic*]" as the legal basis for finding that "[Ms. Garcia] did not furnish proof that she and the beneficiary

had commingled assets" the BIA neglects to mention the catchall provision listed at the end of 8 C.F.R. § 204.2(a)(1)(i)(B) ("*Any other documentation which is relevant* to establish that the prior marriage was not entered into in order to evade the immigration laws of the United States") (emphasis added).

63. After misconstruing the applicable regulations, the BIA notes that "[t]he financial records submitted were minimal and do not demonstrate sharing of assets, and the petitioner has not provided evidence of motor vehicle ownership, insurance policies, utility bills, photographs, or other documentation which would meet her burden of showing that she and the petitioner intended to establish a life together" in support of its conclusion that "[t]he evidence presented by the petitioner is not persuasive of a shared life together and does not establish a bona fide marriage by a preponderance of the evidence." Exhibit G, 2011 BIA decision, p. 3.

USCIS'S UNSUPPORTED FINDING OF MARRIAGE FRAUD, MADE OVER A DECADE AFTER MS. GARCIA AND MR. CHESLEREAN'S MARRIAGE, WAS WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW.

64. It is in the 2017 NOID that USCIS first announces its conclusion that the marriage between Ms. Garcia and Mr. Cheslerean was entered into for the sole purpose of evading immigration laws: "Based on the evidence contained in the Service file, there is no evidence to suggest that Ms. Nina Garcia and Mr. Radu Catalin Cheslerean established a marital relationship. *USCIS further concludes that the marriage between Ms. Nina Garcia and the beneficiary was entered into for the sole purpose of evading immigration laws and procuring an immigration benefit*. As such,

USCIS is prohibited from approving the instant Form I-130 pursuant to Section 204(c) of the Act." (emphasis added).

Standard and burden of proof, generally

65. The administrative record shows that, in denying Ms. Garcia's I-130 petition, the USCIS and the BIA first failed to properly consider the submitted testimonial and documentary evidence under the applicable preponderance of the evidence standard. The Adjudicator's Field Manual (AFM) states in relevant part:

> The standard of proof applied in most administrative immigration proceedings is the "preponderance of the evidence" standard. Thus, **even if the director has some doubt as to the truth, if the petitioner submits *relevant, probative, and credible* evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof**. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). **If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence** or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.
>
> The preponderance of the evidence standard of proof, however, does not apply to those applications and petitions where a higher standard is specified by law. The statute provides for a higher standard in some cases, such as the **"clear and convincing evidence" standard required to *rebut* the presumption of a prior fraudulent marriage** pursuant to section 245(e)(3) of the Act and to determine citizenship of children born out of wedlock pursuant to section 309(a)(1) of the Act.

AFM, Chapter 11.1(c) (emphasis added).

66. The administrative record further shows that the 2009 denial was based on USCIS's finding that Mr. Cheslerean was not eligible for the benefit sought because Ms. Garcia had failed to meet her burden of proof as petitioner. USCIS neglected, however, to explain how Ms. Garcia failed to sustain her burden of proof under the preponderance of the evidence standard. Specifically, it failed to provide a detailed analysis, under the correct standard, of the contents of the submitted

documentary and testimonial evidence, or explain the reasons why it found the evidence of record to be insufficient in order to overcome the adjudicator's doubts and speculations, as expressed in the 2009 NOID.

67. While the "clear and convincing evidence" standard is required in order to *rebut* the presumption of a prior fraudulent marriage, merely claiming that the record of proceeding contains substantial and probative evidence of marriage fraud is insufficient to create such a presumption. Accordingly, USCIS's unsupported finding of marriage fraud, made over a decade after Ms. Garcia and Mr. Cheslerean's marriage, not only deprived Ms. Garcia of the opportunity to directly challenge such a serious allegation, but also constituted an impermissible attempt to shift and heighten Mr. Valdivia's burden of proof. *See Bouras* at 679 (Posner, J. dissenting) ("And how odd it is to place the burden of proof on the person accused of fraud, rather than on the accuser. It's as if I could sue a person for fraud, present no evidence of fraud, yet it would be his burden to persuade judge or jury that he was not guilty of fraud.").

Insufficient evidence

68. The AFM establishes that an adjudicator has a variety of options if, after all required initial evidence has been received, he or she cannot decide the case based on the information submitted. One of these options is issuing a Request for Evidence, which gives the petitioner a response time of up to 12 weeks, three times the amount of time afforded by a NOID. *See* AFM Chapter 10.5(a)(2) ("If an RFE is needed, the adjudicator must: (1) determine what evidence is lacking and (2) request that

evidence."). The adjudicator also has the option to interview other witnesses or execute an investigation. *See* AFM Chapter 10.5(a)(3).

69. The administrative record in this matter indicates that the adjudicator instead opted to proceed with a NOID two and a half years after interviewing Ms. Garcia and Mr. Cheslerean, purportedly on the basis of "derogatory information," much of which was shown to be either baseless or internally inconsistent in counsel's NOID response. There is no indication that such information was unavailable to the adjudicator at the time of, or within a reasonable period after, the interview. There is also no indication that the adjudicator employed any of the other investigative tools that were available to him, such as reaching out to third parties who submitted affidavits in support of Ms. Garcia's I-130 petition to better assess their credibility; calling Mr. Cheslerean's employer to confirm the contents of his employment verification letter, which challenged the accuracy of one of the two pieces of "derogatory information" referenced in the 2009 NOID; or sending investigators to visit the marital home. Now, over a decade later, Mr. Cheslerean is still suffering the consequences of the adjudicator's mishandling of his and Ms. Garcia's case to the point that USCIS and the BIA now claim that he is permanently precluded from legally residing in the United States.

Requirements for making a finding of marriage fraud

70. "Derogatory information, like supporting documentation, need not comply with the strict rules of evidence. However, the adjudicating officer must keep in mind that the applicant or petitioner must be afforded an opportunity to inspect and rebut

adverse information, except certain classified materials, which should be discussed in general terms without jeopardizing the security of the information or the source." AFM, Chapter 11.1(k) (citing 8 C.F.R § 103.2(b)(16) and *Matter of Tahsir*, 16 I&N Dec. 56 (BIA 1976)).

71. Evidence of an attempt or conspiracy to enter a marriage for the purpose of evading immigration laws "must be documented in the alien's file and must be substantial and probative" in order to support a Section 204(c) finding. *Matter of Tawfik* at 68. *See also* AFM, Chapter 21.3, (a)2.D. ("the evidence of the attempt or conspiracy must be contained in the alien's file.") (citing 8 C.F.R § 204.2(a)(1)(ii)).

Non-viable vs. sham marriages

72. A finding that a previous marriage was non-viable does not necessarily indicate it was contracted solely for immigration purposes; therefore, such a finding does not conclusively place an alien within Section 204(c). *See Matter of Rahmati*, 16 I&N Dec. 538 (BIA 1978).

73. For at least forty years, the BIA has confirmed that "a fraudulent or sham marriage is intrinsically different from a nonviable or nonsubsisting one[.]" *Matter of McKee,* 17 I&N Dec. 332, 333 (BIA 1980) (citing *Matter of Rahmati*). In *McKee,* the BIA found "that it was error for the District Director to deny the instant visa petition based solely on the separation of the parties." *Id.* at 334.

74. Somewhat more recently, in *Tawfik,* the BIA reiterated that:

> [T]he mere fact that, at the time of the visa petition denial, the petitioner was living separate from the beneficiary is not evidence of an attempt or conspiracy on the beneficiary's part to enter into a marriage for the purpose of evading the immigration laws. *Quite the contrary, his divorce, prior to a decision on the petition which may*

> *have been in his favor, tends to reflect the bona fide nature of the marriage that he chose to terminate.*

Tawfik at 169 (emphasis added).

75. However, the language of both the 2009 and 2017 denials not only ignores the realities faced by modern, low-income couples, but also reflects the erroneous belief that all marriages are destined to last "until death do us part." In doing so, as Judge Posner laments in *Bouras v. Holder,* 779 F.3d 666, 673 (7th Cir. 2015), the USCIS and the BIA "confused a failed marriage with a fraudulent one." *Bouras* at 673 (Posner, J. dissenting). *See Bark v. Immig. and Naturalization Serv.*, 511 F.2d 1200, 1201–02 (9th Cir. 1975) ("Aliens cannot be required to have more conventional or more successful marriages than citizens.") (citing *Lutwak v. United States* (1953) 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593).

76. Although the 2017 denial repeatedly cites to *Matter of Tawfik* for the proposition that "substantial and probative evidence" of an attempt or conspiracy to enter a marriage for the purpose of evading immigration laws is necessary in order to support a Section 204(c) finding, USCIS failed to list any substantial and probative evidence in support of its newly announced conclusion that Ms. Garcia and Mr. Cheslerean had a sham marriage; and made contradictory statements implying that a failure to meet the burden of proof for establishing eligibility for a marriage-based immigration benefit, is tantamount to substantial and probative evidence of an attempt or conspiracy to enter a marriage for the purpose of obtaining said benefit. *See* Exhibit J, 2017 denial, p. 3 ("The [2009] denial stated that Ms. Garcia and Mr. Cheslerean did not demonstrate by a preponderance of evidence that their marriage

was entered into in good faith. The Form I-130 was denied under Section 204[c] of the Act, prohibiting the approval of visas filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.")

77. In this connection, it is important to note that USCIS had ample opportunity to list the required substantial and probative evidence in the 2009 denial, if such evidence existed, as the 2009 denial was issued almost three years after the couple's interview, and more than a year after the Field Office Director's August 1, 2008 letter to counsel indicating that the matter "is under further review by the adjudicating officer." Exhibit A. However, USCIS has not offered one shred of substantial or probative evidence of marriage fraud or even purported to do so.

78. Case law provides numerous examples of evidence that have been found to meet this burden. For example, in *Zyapkov v. Lynch,* 817 F.3d 556 (7th Cir. 2016), the Court agreed that a site investigation that found the beneficiary living with his non-US citizen ex-wife, instead of the U.S. citizen wife, constituted substantial and probative evidence of marriage fraud. *See, generally, id.*

79. In *Cassell v. Napolitano* 12-CV-9786, 2014 WL 1303497 (N.D. Ill. Mar. 31, 2014), the Court makes the important point that "[i]f USCIS and/or the BIA conclude that there is 'substantial and probative' evidence that a marriage was entered into for the purpose of evading the immigration laws, the agency must deny the petition on that basis. And a denial on that basis will have severe and lasting consequences going forward if one of the parties to the marriage marries again and files a

subsequent petition." *Cassell*, at *10. The Court goes on to clarify that "8 C.F.R. § 204.2(a)(1)(ii) only requires an agency to support a fraudulent marriage determination with substantial and probative evidence if the agency denies the I–130 petition on that basis. *That determination is separate and distinct from the agencies' determination regarding whether the petitioner has sustained his/her burden or establishing a bona fide marriage*." *Ibid*. (emphasis added).

80. Other Circuits have also provided examples of substantial and probative evidence that can lead to a conclusion of marriage fraud. In a recent decision, the U.S. District Court for the District of Nevada found that a site visit and phone call to the beneficiary that yielded inconsistent evidence about who lived at the marital home, together with a sworn statement by the beneficiary that the marriage was "for the sole purpose of getting [his] green card" constituted the required substantial and probative evidence." *Tkacz v. Duke*, 214CV00092RFBCWH, 2018 WL 1621140, at *3 (D. Nev. Mar. 31, 2018).

81. The BIA, in supporting the 2017 denial, inexplicably cites *Matter of Phillis,* 15 I&N Dec. 385 (BIA 1975). The *Phillis* couple, interviewed separately from each other, provided significantly inconsistent testimony about whether they had ever lived together; at what point the petitioner learned about the beneficiary's immigration status; and whether or not the petitioner had been paid for the marriage. The petitioner also admitted that his family did not know about the marriage. *Matter of Phillis* at 386. Although decided before Section 204(c) was enacted, *Phillis* lists arguably substantial and probative evidence of marriage fraud.

82. The BIA has also cited *Matter of Tawfik,* for the proposition that "[a] visa petition will be denied or revoked if there is substantial and probative evidence of such an attempt or conspiracy [to enter into a marriage for the purpose of evading the immigration laws] in the alien's file." Exhibit M, 2017 BIA decision, p. 2 (citing *Matter of Tawfik*). Certainly, this standard is necessary for the orderly enforcement of immigration laws. Yet the BIA sustained the *Tawfik* appeal and reinstated approval of the visa petition (*Matter of Tawfik* at 170) because no such evidence was in the record. In this matter, there is not one scintilla of substantial and probative evidence of marriage fraud anywhere in the extensive record, nor has USCIS indicated that in its three years of investigating this matter, it uncovered such evidence.

83. *Tawfik* also stands for the proposition that "[o]rdinarily, the district director should not give conclusive effect to determinations made in a prior proceeding, but, rather, should reach his own independent conclusion based on the evidence before him." *Id.* at 168. In *Tawfik*, the BIA concluded that the district director's reasonable inference that "the record contained evidence, which had not been rebutted, 'from which it [could] be reasonably inferred' that the beneficiary entered into a marriage for the primary purpose of obtaining immigration benefits . . . [did] not rise to the level of substantial and probative evidence requisite to the preclusion of approval of a via petition in accordance with section 204(c) of the Act." *Ibid.*

84. In this matter, contrary to *Tawfik*, the USCIS and the BIA gave conclusive effect to the Field Office Director's speculations about the testimonial and documentary evidence of Ms. Garcia and Mr. Cheslerean's marriage. In fact, neither the 2009 NOID nor the 2009 Denial expressly conclude that the couple had entered a sham marriage in order to obtain immigration benefits. *See* Exhibit B, 2009 NOID, p. 2 ("You have kept your money and assets separate from your spouse, and it *appears* at best that you and your spouse *may* be nothing more than friends and this marriage was arranged to assist the beneficiary's admission to the United States.") (emphasis added); *see also* Exhibit D, 2009 denial, p. 2 ("The Service indicated in the [2009 NOID] that you and the beneficiary *appear* to know each other and *appear* to be friends. The [2009 NOID] also states that you and the beneficiary *may* be nothing more than friends and this marriage was arranged to assist the beneficiary's admission into the United States.") (emphasis added).

THIRD CLAIM FOR RELIEF
Violation of the Due Process Clause of the Fifth Amendment of the U.S. Constitution

85. Due process protects a noncitizen's liberty interest in the adjudication of applications for relief and benefits made available under the immigration laws. *See Arevalo v. Ashcroft*, 344 F.3d 1, 15 (1st Cir. 2003) (recognizing protected interests in the "right to seek relief" even when there is no "right to the relief itself").

THE DENIAL OF MR. VALDIVIA'S I-130 PETITION ON BEHALF OF HIS IMMEDIATE RELATIVE SPOUSE IMPLICATES HIS LIBERTY INTEREST IN MARRIAGE AND FAMILY LIFE.

86. The Constitution's protection of marriage and family life encompasses a U.S. citizen's choice to build his marital home in the United States. *See Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *see also Griswold v. Connecticut*, 381 U.S. 479, 502 (1965) (White, J., concurring) (describing the right to marry and "establish a home" as one of the "basic civil rights of man").

87. A U.S. citizen's liberty interest in marriage and family life is no less fundamental when it involves immigrant families. *See Fiallo v. Bell*, 430 U.S. 787, 794 (1977); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Congress has made family unity a central goal of our immigration laws: A U.S. citizen may petition the government for a visa for her non-citizen spouse, and Congress has accorded such petitions a "most favored" position under our immigration laws. *See Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197 (2014) (noting that "immediate relatives" of U.S. citizens are "most favored" under U.S. immigration laws).

88. USCIS's denial of Mr. Valdivia's I-130 petition significantly burdens his fundamental liberty interest in marriage and family life by making it virtually impossible for his spouse to legally remain in the United States with him.

89. Any foreign national who attempts or conspires to enter into a marriage for the purpose of evading U.S. immigration laws is ineligible for an immigrant visa (8 U.S.C. § 1154(c)(2)); thus, he can never become a citizen of, or even reside permanently in, the United States. *See Ghaly v. I.N.S.*, 48 F.3d 1426, 1436 (7th Cir.

1995) (Posner, J., concurring) ("This [Section 204(c)] is a harsh law, and one would expect the government in enforcing it to make at least modest efforts to guard against mistakes.").

90. The USCIS, by delegation of the Attorney General and the DHS Secretary, has exclusive authority over the adjudication of I-130 petitions. This means that, even in the context of removal proceedings, an immigration judge would be unable to adjudicate, or review the denial of, an I-130 petition. The only recourse for overturning an unlawful Section 204(c) finding, other than through the BIA, lies in the federal courts.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court issue judgment in its favor and against Defendants and issue the following relief:

A. Vacate the decision of the BIA dismissing Mr. Valdivia's appeal;

B. Declare that the basis of the 2009 denial was a finding that Ms. Garcia failed to meet her burden of proof to establish eligibility for the benefit sought, not a finding of marriage fraud;

C. Declare that the defendants must support a suspicion of a sham marriage by substantial and probative evidence;

D. Declare that the administrative record does not contain any substantial or probative evidence that Ms. Garcia and Mr. Cheslerean entered into a sham marriage;

E. Order the BIA to sustain Mr. Valdivia's appeal and remand the case to USCIS with instructions to reopen and adjudicate Mr. Valdivia's I-130 petition, in accordance with this Court's opinion;

F. Award costs and reasonable attorneys' fees incurred in this action; and

G. Grant such other relief as the Court may deem just and proper.

Date: April 30, 2018

Respectfully submitted,

Thomas Valdivia Jr.

Radu C. Cheslerean

BY COUNSEL:

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