IMMIGRATION RELATED MARRIAGE FRAUD IN THE UNITED STATES AND THE ANALYSIS OF THE SUBSTANTIVE AND PROBATIVE EVIDENCE STANDARD UNDER SECTION 204(C) OF THE IMMIGRATION AND NATIONALITY ACT

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I. INTRODUCTION

Immigration related marriage fraud is a topic that affects foreign nationals married to, or who are eligible immediate relatives of United States ("U.S.") citizens or permanent residents that apply to register permanent residence or adjust their status in the U.S.[1] Under U.S. immigration laws, non-citizens applying to register for permanent residence or adjust their status under family-based visa petitions should be familiar with Section 204(c) of the Immigration and Nationality Act ("Act").[2] Violation of this statutory provision is a permanent bar to the approval of any subsequent immigration benefit.[3] Understandably, denials of visa petitions under Section 204(c) have created confusion among non-citizens and generated considerable debate between attorneys, non-citizens, and U.S. immigration authorities. There are valid concerns about the approach and attempts by the United States Citizenship and Immigration Services ("USCIS") to apply this provision of the law in the adjudication of visa petitions. The marriage fraud bar under Section 204(c) is one of the most serious provisions of the Act. It is a metaphorical death sentence for the non-citizen found culpable under U.S. immigration laws and policy. Unlike other immigration related penalties, the marriage fraud bar is nonwaivable and does not expire.[4]

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* PhD (Aberdeen); Attorney & Counselor at Law; formerly Law Professor at Salmon P. Chase College of Law, Northern Kentucky University, USA. Senior Lecturer, Igbinedion University College of Law, Nigeria. This article is dedicated to my elder brother, Friday Oboaguonor Okpe of blessed memory. The usual caveat applies. The author may be reached at f.o.okpe@gmail.com.

[1] *Top Story: ICE Leading Nationwide Campaign to Stop Marriage Fraud,* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Apr. 2, 2014), https://www.ice.gov/news/releases/top-story-ice-leading-nationwide-campaign-stop-marriage-fraud (applications to register permanent residence or adjust status in the U.S. are also commonly referred to as visa petitions for U.S. green cards. Green cards put non-citizen spouses and other qualified immediate relatives on a path to be eligible for U.S. citizenship. However, for ease of reference this article will focus more on marriage-based visa petitions filed by U.S. citizens).

[2] 8 U.S.C. §§ 1104–1401 (1964).

[3] 8 U.S.C. § 1182(a)(6)(C)(i).

[4] *See* 8 U.S.C. § 1182. (For example, inadmissibility based on fraud and willful misrepresentation of material facts or false claims of U.S. citizenship for unlawful voting is subject to a discretionary waiver where the non-citizen can establish extreme hardship to a qualifying relative who is a U.S. citizen or permanent resident).

Marriage-based immigration enforcement during the Trump administration was relatively very aggressive in ways that diminish the idea that the U.S. is a country of immigrants.[5] Immigration attorneys and other concerned groups often observed that several otherwise meritorious marriage-based visa petitions to adjust status or register permanent residence were being denied sweepingly under Section 204(c) of the Act.[6] One of the most common grounds for these denials has been USCIS's determination of marriage fraud based on a prior unsuccessful visa petition by the same non-citizen.[7] The debate over this issue undercut the age-long notion, that family unification and inclusion are the cornerstones of U.S. immigration law and policy. There are also legitimate questions about the due process clause and the rule of law as it applies to immigration marriage fraud under the U.S. Constitution.

At the onset of the Biden administration on January 20, 2021, President Biden signed several Executive Orders that were designed to walk back what the new administration characterized as the "bad" immigration policies of the Trump administration.[8] However, these interventions have not gone far enough to effectively address or standardize USCIS discretion in applying Section 204(c) of the Act.

In the exercise of its plenary powers over immigration law, the U.S. Congress enacted Section 204(c) of the Act to fight marriage fraud under marriage-based visa petitions by introducing a marriage fraud bar to

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[5] *See* John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations have changed under Trump*, PEW RESEARCH CENTER (Mar. 2, 2020), https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/.

[6] *See e.g.*, Elizabeth Carlson, *Five Things to Know About Fraud and Marriage-Based Petitions*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (Apr. 26, 2021), https://cliniclegal.org/resources/family-based-immigration-law/spousal-petitions/five-things-know-about-fraud-and-marriage (noting that in 2020 alone, the Board of Immigration Appeals published several decisions addressing Section 204(c) of the Act. The author was emphatic that, "…it is vitally important that practitioners and their clients understand how far reaching the marriage bar can be. Even a long ago-marriage -or a conspiracy to enter one-can gravely impact a client's ability to obtain a green card…").

[7] *Id*.

[8] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018) (where the question for determination was whether the entry suspension imposed on majority non-citizens from Muslim countries by the Trump administration, was not a violation of INA §1182(f). The section authorizes the President to, "suspend the entry of all aliens or any class of aliens whenever he finds that their entry would be detrimental to the interests of the United States". The Supreme Court held that, "§1182(f) exudes deference to the President in every clause. It entrusts to the President and the decisions whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions."); *see also* President Joe Biden, *Remarks by President Biden at Signing of Executive Orders Advancing his Priority to Modernize Our Immigration System* (Feb. 2, 2020), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/02/remarks-by-president-biden-at-signing-of-executive-orders-advancing-his-priority-to-modernize-our-immigration-system/#:~:text=Today%2C%20I'm%20going%20to,better%20manage%20of%20our%20borders.

immigration benefits.[9] Under the Act, a non-citizen determined by the USCIS to have attempted or engaged in marriage fraud during a prior marriage to a U.S. citizen is permanently barred from obtaining any immigration benefit.[10] Thus, the marriage fraud bar under Section 204(c) of the Act is very serious. On this matter, consistent with the prescriptions of the rule of law and constitutionalism, one would imagine that the serious penalty prescribed under the Act will be compelling enough to offer a constitutional presumption of innocence to non-citizens alleged to have committed marriage fraud like U.S. citizens. Unfortunately, this is not the case. Under the U.S. Constitution, Congress has no constitutional duty to provide non-citizens the full benefits and protections of the Constitution in the exercise of its plenary powers over immigration laws.[11] Despite the fact that the wording of the Act appears to be targeted at the conduct of the non-citizen regardless of the role, if any, of a U.S citizen spouse in the mix, the non-citizen has a difficult task and burden of mounting a challenge to what is a clear example of constitutional discrimination under U.S. immigration laws and policy.

Depending on the jurisdiction that is applicable to the visa petition under review, the substantive and probative evidence test is the settled standard for the judicial review of any USCIS decision denying a visa petition.[12] This article argues that the standard reflects the intention of the U.S. Congress. Often, the misapplication of the test by the USCIS is unfair. The notion that non-citizens and U.S. citizens cannot be placed in the same homogenous legal classification under Section 204(c) of the Act is a weakness that is discriminatory against non-citizens under the Act. In this article, I attempt to offer valid arguments to reinforce existing judicial precedents and challenge USCIS's deviating pattern and misapplication of the statutory provision. Thus, consistent with the rule of law, Section 204(c) of the Act requires documented affirmative and direct evidence of immigration related marriage fraud against the non-citizen before accountability may be properly demanded and applied against the non-citizen under Section 204(c) of the Act.

This article is divided into four parts. Part II examines the background and the approach of the USCIS to the probative and substantive evidence standard in the determination of immigration related marriage fraud. Part III analyzes the USCIS approach, and the standard of review applied by U.S. federal courts under the Administrative Procedure Act ("APA")[13] to

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[9] 8 U.S.C. § 1182(a)(6)(C)(i).

[10] *Id*.

[11] Louis Henkin, *The Constitution and the United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV.. L. REV. 853, 862–63 (1987) (criticizing the plenary power doctrine, Henkin complained that the U.S. Supreme Court has removed immigration and deportation from basic constitutional protections).

[12] *In re* Tawfik, 20 I&N Dec. 166, 167 (BIA 1990); see also *In re* Singh, 27 I&N Dec. 598, 598 (BIA 2019).

[13] Administrative Procedure Act, 5 U.S.C. § 555(b) (2006).

review the decision to deny a visa petition within the framework of the substantive and probative evidence test. This Part also analyzes case law and judicial precedents to support my argument that the interventions by U.S. federal courts have not gone far enough to inhibit a pattern of automatic application of Section 204(c) where the non-citizen has been denied a marriage-based visa petition prior, contrary to the substantive and probative evidence standard. This article argues that the only standard to determine immigration related marriage fraud against a non-citizen is one that requires complete, documented, direct, and affirmative evidence of fraud against the non-citizen beyond mere retroactive inference of marriage fraud only by reason of a failed prior marriage with a U.S. citizen spouse. I conclude the article with my remarks in Part IV.

II. BACKGROUND

A. The Purpose of the Statute

This Section 204(c) of the Act[14] provides: notwithstanding the provisions of sub-section (b) no [visa] 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 spouse of an alien lawfully admitted for permanent residence, by a reason of a marriage determine 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 implementing regulation at 8 C.F.R. § 204.2(a)(1)(ii)[15] states:

> 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 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 has been convicted

[14] 8 U.S.C. §§ 1104–1401 (1964).

[15] 8 C.F.R. § 204.2 (1990) (this regulation for § 204(c) of the Act constituted a reorganization and amendment to the Act that added the substantive and probative evidence language to the Act in 1993).

> of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

Under the Act and regulation, through delegated authority, the authority of the U.S. Attorney General is exercised by the USCIS. One tool that is very common for U.S. immigration control and enforcement is the application of this provision by the USCIS to deny otherwise approvable marriage-based visa petitions. The effects of this provision in the adjudication of visa petitions and the discharge of the evidentiary burden should be a major cause of concern for non-citizens who are applying through a marriage based petition to adjust status in the U.S.[16] Thus, one can imagine the apprehension an improper application of the Act may occasion amongst prospective immigrants, their families, and communities in a country like the U.S. that prides itself with promoting family unification as one of the cornerstones of its immigration laws.[17] But, to properly understand Congress's reasoning behind the passing of the Act and its application in the adjudication of marriage-based visa petitions, it is germane to examine the amendments introduced through the Immigration Marriage Fraud Amendments Act ("IMFA") of 1986.[18]

In the 1980s, prior to the enactment of the IMFA, contractual or unilateral marriage fraud was undermining marriage-based legal immigration in the U.S.[19] There were genuine concerns that the issue has developed into a stage where congressional intervention was warranted.[20] To address the issue, the 99th U.S. Congress introduced and passed the IMFA into law to amend the Act to deter immigration related marriage fraud.[21] In the context of U.S. immigration law, contractual marriage fraud is an agreement between a non-citizen and a U.S. citizen or permanent resident spouse to enter into a marriage for the purpose of evading the immigration laws of the U.S. to register permanent residency. Unilateral marriage fraud, on the other hand,

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[16] *See* Iyawe et al. v. Garland, No. 20-3088 (8th Cir. 2021) ("The consequences of USCIS finding that a marriage was a sham are thus significant."); *see also* Osakwe v. Mukasey, 534 F.3d 977, 979 (8th Cir. 2008) ("It goes without saying that [USCIS's] determination of marriage fraud carries great consequences as an alien may be permanently ineligible to obtain an I-130 visa even if he subsequently enters into a bona fide marriage with a U.S. citizen.").

[17] *See generally* Marcel De Armas, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution,* 15 AM. U. J. OF GENDER, SOC. POL'Y & THE L. 743, 744-45 (2007).

[18] Immigration Marriage Fraud Amendments Act, 8 U.S.C. §1325(c); THE UNITED STATES DEPARTMENT OF JUSTICE ARCHIVES, *1948. MARRIAGE FRAUD -- 8 U.S.C. 1325(C) AND 18 U.S.C. 1546* (January 17, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-1948-marriage-fraud-8-usc-1325c-and-18-usc-1546 (the legislative history shows that the IMFA is a subsequent amendment to the Act).

[19] *See* James A. Jones, *The Immigration Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. STATE U. L. REV. 679, 681-82 (1997).

[20] *Id.*

[21] *See* 8 U.S.C. §1325(c)(1986).

refers to situations where the non-citizen deceives the U.S. spouse into entering a marriage for the purpose of obtaining U.S. immigration benefits.[22] Notable examples of unilateral marriage fraud include instances where the non-citizen abandons or divorces the U.S. citizen spouse almost immediately after being approved for permanent residence based on the underlying marriage.[23] The concept of contractual or unilateral immigration related marriage fraud must be distinguished from marriage fraud under U.S. criminal laws. The standard of proof under U.S. criminal laws is beyond a reasonable doubt. Prosecuting marriage fraud under U.S. criminal laws also accords the non-citizen constitutional rights including due process in ways that undermine the U.S. Congress plenary powers over immigration.[24] The plenary powers are exercised to exclude U.S. constitutional protections for non-citizens. However, immigration related marriage fraud under the Act is often established on the preponderance of the evidence to satisfy the substantive and probative evidence standard.[25] This standard of proof is lower than the prescriptions of U.S. criminal laws.

For the scope of this article, the most common motivation in immigration related marriage fraud cases under U.S immigration laws are financial gains, prevention of deportation from the U.S., sympathy for the non-citizen, and assisting a friend.[26] The primary purpose behind Section 204(c) is to strengthen, enforce, and prevent immigration related marriage fraud in the adjudication of visa petitions.[27] There is no statute of limitations for inquiry into immigration related marriage fraud whether or not, a specific and documented determination of marriage fraud was made in the adjudication of the prior visa petition filed for the benefit of the non-citizen.[28] The last sentence of the implementing regulation[29] cited above supports this interpretation. Similarly, in *Matter of Jongbum PAK*[30] the Board of Immigration Appeals ("BIA")[31] held that:

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[22] *See* De Armas, *supra* note 17, at 746, 749 (suggesting there is culpability where the U.S. citizen spouse engages in acts that indicate that they had a fraudulent intention before and during the marriage to the non-citizen).

[23] *Id.*

[24] *See generally*, David Moyce, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws,* 74 CALIF. L. REV. 1747, 1747–76 (1986).

[25] *See* Matter of Jongbum PAK, 28 I&N Dec. 113, 118 (BIA 2020).

[26] *See* De Armas, *supra* note 17, at 746.

[27] *See* Matter of Isber, 20 I&N Dec. 676, 678 (BIA 1993).

[28] *See* 8 U.S.C. § 1154(c); *see* Liliana Zaragoza, *Delimiting Limitations: Does the Immigration and Nationality Act Impose A Statute of Limitations on Noncitizen Removal Proceedings?*, 112 COLUM. L. REV. 1326, 1328-29 (2012).

[29] *See* 8 U.S.C. § 1154(c).

[30] Matter of Jongbum PAK, 28 I&N Dec. 113, 117 (BIA 2020).

[31] United States Department of Justice, *Board of Immigration Appeals* (Sept. 14, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals (describing how the BIA is an agency of the U.S. Department of Justice and the highest appellate administrative body for interpreting and applying immigration laws, the BIA has a nationwide jurisdiction to hear certain appeals from immigration Courts and USCIS including appeals on visa petitions, and most BIA decisions are subject to judicial review in U.S. Federal Courts).

> … the broad phrasing and the absence of a temporal requirement suggest that Section 204(c) may be applied based on a marriage fraud finding whenever it becomes evident that there is substantial and probative evidence of an attempt or conspiracy to enter into a marriage for the purpose of evading the immigration laws.[32]

This BIA decision established that the USCIS has the legal authority to re-examine the prior marriage of a non-citizen to a U.S. citizen for marriage fraud including instances where the prior visa petition was denied due to insufficient evidence to support the prior petition.[33] In other words, the penalty under Section 204(c) applies to non-citizens in situations where the latter never received any immigration benefit from the previous marriage and underlying visa petition.[34] The BIA specifically stated thus:

> Where there is substantial and probative evidence that a beneficiary's prior marriage was fraudulent and entered into for the purpose of evading the immigration laws, a subsequent visa petition filed on the beneficiary's behalf is properly denied pursuant to Section 204(c) of the Immigration and Nationality Act, 8 U.S.C. § 1154(c) (2018), even if the first visa petition was denied because of insufficient evidence of a bona fide marital relationship.[35]

The IMFA reinforces and establishes immigration milestones that allow the USCIS to investigate marriage fraud in the context of U.S. immigration laws.[36] Under IMFA, to curb immigration related marriage fraud, the U.S. Congress amended the Act by introducing a conditional basis for permanent residence and the removal of the conditions attached to permanent residence based on an underlying marriage to a U.S. citizen that was under two years old at the time of approval of the visa petition.[37] Pursuant to the amendments introduced under IMFA and pertinent to the utility of Section 204(c), the USCIS has the authority to terminate a conditional permanent residence where a fee or other considerations was given or offered by the non-citizen for the filing of the visa petition based on the underlying marriage other than a fee or consideration to a lawyer or other approved professional for assistance in filing the visa petition.[38]

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[32] Matter of Jongbum PAK, 28 I&N Dec. 113, 117 (BIA 2020).
[33] *Id.*
[34] United States Department of Justice, *supra* note 31.
[35] *Id.*
[36] *See* 8 U.S.C. § 1325(c) (1986) ; *see also* 18 U.S.C. § 1546.
[37] 8 U.S.C. § 1186a.
[38] 8 U.S.C. § 1186a(b)(1)(B); *see also* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 150–54 (9th ed. 2020).

The USCIS may also terminate the conditional permanent residence of the non-citizen before the second anniversary of obtaining that status, where it determines that the qualifying marriage was entered for the purpose of procuring admission as a permanent resident of the U.S.[39] The general objective of curbing immigration related marriage fraud under Section 204(c) of the Act and the amendments introduced through the IMFA are laudable. Immigration related marriage fraud, if not properly checked, could negatively impact legal immigration and the exercise of state sovereignty over immigration laws and policies.

Despite the U.S. Congress statutory interventions aimed at fighting immigration related marriage fraud, the non-citizen is not without options to challenge improper determinations of marriage fraud by the USCIS under Section 204(c) of the Act, where there are legal grounds to do so.[40] Challenges under the Act are valid where the process and the evidence relied upon by the USCIS in making a determination of immigration related marriage fraud is flawed as a matter of law.[41] A valid challenge may be made under the APA or where the action of the USCIS is inconsistent with existing precedents and jurisprudence.[42] To analyze the application of the Act as it pertains to the determination of marriage fraud in the adjudication of visa petitions, it is important to begin from the approach of the USCIS where the issues of immigration related marriage fraud are at issue in the context of Section 204(c) of the Act.[43]

B. USCIS Recent Approaches to Section 204(c) of the Act

As a matter of policy, the USCIS has broad discretion in the application of Section 204(c) in the adjudication of marriage-based visa petitions for permanent residence.[44] Based on the Act, the application of this law presupposes that the non-citizen was the beneficiary in a prior marriage-based visa petition for permanent residence that was not approved.[45] The reasons for non-approval may include insufficient evidence, documented discrepancies arising from oral interviews on the visa petition, withdrawal of the visa petition by the petitioner, or divorce in the qualifying marriage before

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[39] *Id;* 8 U.S.C. § 1186a(b)(1)(A).

[40] *See* 5 U.S.C. § 706(2)(a).

[41] *See* Bangura v. Hansen, 434 F.3d 487, 502 (6th Cir. 2006) (citing 5 U.S.C. § 706(2)(A)).

[42] The challenge is usually by motion for summary judgment. Summary judgement is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). In this regard, the court's review of the agency's action (the USCIS) is through a differential standard that interrogates the capriciousness or arbitrariness of the decision at issue. *See id*; *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[43] *See* Matter of Jongbum PAK, 28 I&N Dec. 113, 113 (BIA 2020).

[44] *Id.*

[45] *Id.*

the adjudication of the visa petition.[46] A fair analysis of Section 204(c) does not support the proposition that a prior non-approval of a visa petition not based on a specific determination of marriage fraud is equivalent to a violation of Section 204(c). In recent times, the approaches of the USCIS on this issue demonstrably indicate otherwise. Below is a list of some recent examples.

Doreen Aidoo et al. v. United States of America et al.,[47] challenges the application of Section 204(c) of the Act to deny the extant visa petition. In this case, filed against organs of the U.S. government charged with the enforcement of U.S. immigration laws, Plaintiffs Aidoo and Osei are husband and wife.[48] Plaintiff Aidoo is an American citizen, while Plaintiff Osei is a non-US citizen from Ghana.[49] The couple has children who are American citizens by birth.[50] Based on her marriage to Plaintiff Osei, Plaintiff Aidoo filed a visa petition on November 4, 2016, for the benefit of her non-citizen husband.[51] On February 21, 2017, the Plaintiffs appeared for an interview with a USCIS officer at the Cincinnati, Ohio field office of the USCIS.[52] At the end of the interview, the USCIS officer found the relationship and the *bona fides* of the Plaintiffs credible enough to approve the visa petition filed by Plaintiff Aidoo for her non-citizen spouse.[53] However, on March 31, 2017, the USCIS issued a notice of intent to deny ("NOID") Plaintiff Aidoo's visa petition because approval is barred under Section 204(c) despite the merits of the extant visa petition.[54] In the NOID, the USCIS specifically alleged that the non-citizen spouse of the petitioner's immigration record contained evidence of an attempt by the non-citizen to obtain an immigration benefit through a prior "fraudulent marriage" to another U.S. citizen.[55] The NOID was primarily based on the finding by the USCIS that the U.S. citizen in the prior marriage failed to disclose her marital status to a public benefit agency while she was married to Plaintiff Osei.[56] This decision was essentially hinging the denial of the visa petition on a prior unsuccessful visa petition filed for the benefit of Plaintiff Osei.[57] The visa petition was eventually denied by the USCIS after Plaintiff Aidoo unsuccessfully rebutted the

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[46] *See, e.g.*, Sallam v. Hansen, No. 20-1731, 2022 WL 462814, at *3–5 (N.D. Ohio Feb. 15, 2022) (The central reason given by the USCIS for the denial of the underlying visa petition was documented discrepancies that arose from initial interviews and field investigations).

[47] Aidoo v. United States, No. 19-225, 2022 WL 4537982, at *1 (S.D. Ohio Sept. 28, 2022).

[48] *Id.*

[49] Plaintiff's Motion for Summary Judgement at 1–2, Aidoo v. United States, No. 1:19-CV-00225 (S.D.Ohio June 5, 2020), ECF No. 16.

[50] *Id.*

[51] *Id.* at 2.

[52] *Id.* at 2.

[53] *Id.* at 2.

[54] *Id.* at 2.

[55] *Id.* at 2.

[56] *Id.* at 2.

[57] *Id.* at 2.

allegations of the USCIS when she responded to the NOID. Dissatisfied with the decision of the USCIS, the Plaintiffs filed an action before the Court to challenge the unfavorable decision.[58]

In *Matter of Jongbum PAK,*[59] the USCIS denied the visa petition at issue under Section 204(c) of the Act. In this case, the USCIS based its denial on the allegation that the discrepancies in the answers given by the non-citizen and his former U.S. citizen spouse regarding their courtship, marriage, and family members during their visa petition interview on July 12, 2012 are evidence that the non-citizen had engaged in an immigration related marriage fraud as the term is understood under Section 204(c).[60] The record, in this case, shows that the USCIS denied the visa petition because the former wife of the non-citizen provided insufficient documentary evidence in support of the visa petition.[61] In this case, the USCIS specifically alleged that the non-citizen did not reside with his former wife in the claimed address of the couple at the time material to the adjudication of the visa petition and that they had given a significantly inconsistent account of their living arrangements.[62] During the adjudication of the visa petition connected with the prior marriage, USCIS conducted a site visit to the former couple's claimed marital address. According to the USCIS, a virtual inspection of the apartment revealed that there was no evidence of any items that belonged to a female.[63] The USCIS then denied the underlying visa petition in the former marriage, concluding that the petitioner had failed to demonstrate that her marriage to the non-citizen was entered in good faith.[64]

In *Yolanda Kyeremeh v. Jefferson B. Sessions, III,* [65] Mr. Kyeremeh's visa petition filed by his U.S. citizen spouse was denied by the USCIS under Section 204(c) of the Act because the USCIS alleged that Mr. Kyeremeh engaged in marriage fraud because of the unsuccessful visa petitions filed by two prior U.S. citizen spouses.[66] In this case, the record contained evidence that Mr. Kyeremeh did not share a joint address with his former U.S. citizen spouses.[67] There were also documented inconsistencies from USCIS interviews on the prior visa petitions filed for Mr. Kyeremeh's benefit by his former U.S. citizen spouses.[68] The record also showed that Mr. Kyeremeh had divorced his former spouse while she was appealing the

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[58] *Id.* at 3.
[59] Matter of Jongbum PAK, 28 I&N Dec. 113 (BIA 2020).
[60] *Id.* at 114.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Kyeremeh v. Sessions, No. 2:17-cv-497, 2019 WL 1114905 (S.D. Ohio. Mar. 11, 2019).
[66] *Id.* at *3.
[67] *Id.* at *2-3.
[68] *Id.* at *3.

USCIS's denial of her visa petition. [69] The Plaintiff was successful at the U.S. District Court in challenging the USCIS denial of the extant visa petition under Section 204(c) of the Act.[70] The decision of the District Court, in this case, will be referred to later.

The three cases cited above demonstrate the USCIS's approach to the application and interpretation of Section 204(c) of the Act.[71] However, this approach shows an inconsistent pattern of what is now a system developing into a proactive and automatic determination of immigration related marriage fraud against the non-citizen based on a prior denial of a marriage-based visa petition. This approach is inconsistent with the substantive and probative evidence standards. The standard requires an independent review that produces documented substantive, direct, and affirmative evidence of immigration related marriage fraud.[72] Several people have argued that the USCIS approach is flawed in more ways than one as we shall see below.[73]

III. CHALLENGING A MISAPPLICATION OF SECTION 204(C) IN U.S. FEDERAL COURTS

As a matter of procedure and jurisdiction, challenging and reviewing USCIS's denial of a visa petition under Section 204(c) of the Act begins with the review of the administrative record[74] of the non-citizen to determine whether the USCIS acted in accordance with the law.

Oddly, the cases establish a pattern that targets the non-citizen including instances of clear and unilateral culpability of the U.S. citizen.[75] In these cases, USCIS has denied visa petitions on grounds that exemplify that the non-citizen is culpable by association.[76] This approach is a good example

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[69] *Id.*

[70] *Id.* at *6.

[71] *See* Matter of Jongbum PAK, 28 I&N Dec. 113 (BIA 2020); Aidoo v. United States, No. 1:19-cv-225, 2022 WL 4537982 (S.D. Ohio Sept. 28, 2022); Kyeremeh v. Sessions, No. 2:17-cv-497, 2019 WL 1114905 (S.D. Ohio. Mar. 11, 2019).

[72] *See* Adi v. United States, 498 F. App'x 478, 481 (6th Cir. 2012) (The 6th Circuit held that "A factual determination by the BIA that an alien's marriage was entered into for the purpose of gaining entry into the United States is conclusive if it is supported by reasonable, substantial, and probative evidence when the evidence is considered as a whole."); *see also* Matter of Tawfik 20 I&N Dec. 166, 168–69 (BIA 1990).

[73] *See, e.g.*, Samantha L. Chetrit, *Surviving an Immigration Marriage Fraud Investigation: All You Need is Love, Luck, and Tight Privacy Controls*, 77 BROOK. L. REV. 709, 741-42 (2012).

[74] The administrative record is a documented record of the immigration history of the non-citizen maintained by the USCIS. It may be stored in hard copies or electronic files.

[75] *See e.g.*, Aidoo v. United States, No. 1:19-cv-225, 2022 WL 4537982 (S.D. Ohio Sept. 28, 2022); Matter of Singh, 27 I&N Dec. 598 (BIA 2019); *see also* Simko v. Bd. of Immigr. Appeals, 156 F. Supp. 3d 300, 311, 316 (D. Conn. 2015).

[75] *Simko*, 156 F. Supp. 3d at 305.

[76] Bangura v. Hansen, 434 F.3d 487, 502 (6th Cir. 2006).

of the mechanical application of Section 204(c) to justify a determination of marriage fraud in ways that are not supported by the required evidentiary standard and test documented in the record. A successful challenge of the USCIS denial of a visa petition before the BIA or the U.S. federal court system is one that establishes that the USCIS had abused its discretion by acting arbitrarily in ways that violate the settled evidentiary standard required by law under Section 204(c) of the Act.[77] Under the APA, the court will set aside an agency action, if it finds that the agency's action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[78]

Generally, the petitioner may appeal a denial of the visa petition under Section 204(c) of the Act to the BIA.[79] Some of the notable precedents on the application of Section 204(c) have been established by the BIA.[80] However, because U.S. immigration law is part of administrative law,[81] the petitioner may exhaust administrative remedies before an appeal is filed in federal court.[82] But in *Bangura,*[83] where one of the issues for determination was whether the court could decline jurisdiction because the Plaintiff had not exhausted administrative remedies before filing the action challenging the denial of the extant visa petition, the court was affirmative when it held that, failure to exhaust administrative remedies does not deprive the court of subject matter jurisdiction.[84] In this case, where the primary issue is the denial of a visa petition by the USCIS, the court stated further that there is no dispute that no statute or administrative rule required Plaintiffs to exhaust their administrative remedies.[85] The court rightly noted that under the applicable regulations, the Plaintiffs have the discretion to appeal to the BIA before approaching the U.S. federal court system.[86] The precedent on exhaustion of administrative remedies established in *Bangura* is instructive because the USCIS could successfully challenge the judicial review of its action on the ground of non-exhaustion of administrative remedies by the Plaintiffs. Given

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[77] *Id.*

[78] *Id.*

[79] United States Department of Justice, *supra* note 31.

[80] *See generally* Matter of Tawfik, 20 I&N Dec. 166, 168 (BIA 1990); Matter of Singh, 27 I&N Dec. 598 (BIA 2019).

[81] *See generally* Jill E. Family, *Administrative Law Through the Lens of Immigration Law,* 64 ADMIN. L. REV. 565, 566–68 (2012).

[82] For further reading on the doctrine of exhaustion of administrative remedies under U.S. administrative law see Peter A. Delvin, *Jurisdiction, Exhaustion of Administrative Remedies and Constitutional Claims*, 93 N.Y.U. L. Rev. 1234, 1235–70 (2018).

[83] Bangura v. Hansen, 434 F.3d 487, 493–94 (6th Cir. 2006)

[84] *Id*. at 494.

[85] *Id*.

[86] *Id.* at 498; *see also* 8 C.F.R § 103.3 (a)(ii) (providing that, a party "may" appeal to the BIA).

the precedent established in *Bangura*, analysis of the appeal procedure of a visa petition to the BIA is outside the scope of this article.

A proper challenge of a USCIS decision denying a visa petition before the U.S. district court is examined under the following headings, to wit, jurisdiction, venue, and parties, the standard of review, and analysis of the requisite evidentiary standard for the application of Section 204(c).

A. Jurisdiction, Venue, and Parties

The U.S. district court is the trial court in the federal court system. The district court has the jurisdiction to review the decision of the USCIS denying a visa petition.[87] Where a petitioner exercises the discretion of appealing a denial to the BIA first before approaching the court, the district court has appellate jurisdiction to review the decisions of the BIA on visa petitions.[88] The USCIS as an agency of the U.S. government may also appeal an unfavorable decision of the BIA to a federal court. The jurisdiction of the district court over marriage-based visa petitions is anchored on federal question jurisdiction,[89] declaratory judgment Act,[90] and jurisdictions over actions for mandamus.[91] The APA applies to lawsuits challenging agency decisions at the federal courts.[92] The venue to challenge a USCIS visa petition decisions lies in the judicial district where the Plaintiffs reside, and where the named Defendants routinely conduct official businesses.[93] The proper parties to the action are the Plaintiffs and the U.S. government.[94] Also named as defendants in their official capacities are the Secretary of DHS and the Attorney-General of the U.S.[95] The named government officials have joint responsibilities for the administration of immigration laws through the USCIS. These officials usually transact business in every judicial district through the office of the USCIS that adjudicated the visa petition.[96] In addition, the director, and the field office director of the USCIS from whence

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[87] 28 U.S.C. § 1331.

[88] *See Bangura*, 434 F.3d at 493–94.

[89] 28 U.S.C. § 1331.

[90] 28 U.S.C. § 2201.

[91] 28 U.S.C. § 1361.

[92] 5 U.S.C. § 702.

[93] 28 U.S.C. § 1391(b)–(e).

[94] Through the Executive branch, the U.S. government is responsible for the administration of immigration petitions. *See* U.S. CONST. art. II.

[95] These are heads of the primary U.S. government agencies charged with the administration of U.S. immigration laws and policies. *See*, *Immigration Enforcement Actions*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/enforcement-actions (last visited Feb. 15, 2023); 8 C.F.R. § 103.3.

[96] The United States Attorneys are the chief federal law enforcement officer in their assigned district. They are involved in civil litigations where the United States or federal government agency is a party. They carry out their duties under the supervision of the United States Attorney-General. *See* OFFICES OF THE UNITED STATES ATTORNEYS, https://www.justice.gov/usao (last visited Jan. 29, 2023).

the decision being challenged originated, are appropriate defendants in any lawsuit before the federal court.[97]

B. Standard of Review

Generally, after the filing of the complaint before the court, either of the parties may file a motion for summary judgment.[98] Motions for summary judgments are usually entertained by the court where there is no dispute as to any material fact between the parties and the movant is entitled to judgment as a matter of law.[99] In the judicial review of visa petitions by the court, the evidence and the facts in the case are already documented in the record.[100] The central question before the court in the review of visa petition decisions is usually whether the USCIS properly reached an independent conclusion to deny the underlying visa petition based on the record or whether the denial of the visa petition is unsupported by the evidence in the record.[101]

Under this standard of judicial review, it is settled that, a material fact is one that, "affects the outcome of the suit under the governing law...[a] dispute is only genuine only if it could lead a reasonable fact finder to return a verdict for the nonmoving party."[102] It has been held that, where no genuine dispute as to material fact exists, the moving party must prevail as a matter of law, if the nonmoving party fails to make a sufficient showing on an essential element of the case.[103] However, in challenging an agency's action before the court, it is instructive to note that, summary judgment with respect to the judicial review of visa petitions, further requires the application of what has been propounded by the U.S. Supreme Court as a *differential standard*[104] by the reviewing court.

Against the foregoing analysis of the cases and Section 204(c) of the Act, the court should set aside a USCIS decision denying a visa petition, where it determines, after reviewing the record and the law that the agency's action is arbitrary, capricious, and an abuse of discretion as a matter of law. In this regard, the U.S. Supreme Court in *Motor Vehicle Mfrs. Ass'n v. State*

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[97] These officials work under the authority of the DHS and DOJ in the context of the facts and issues in this case.

[98] Fed. R. Civ. P. 56(a).

[99] *Id.*

[100] *See e.g.*, Aidoo v. United States, No. 1:19-cv-225, 2022 WL 4537982 (S.D. Ohio Sept. 28, 2022).

[101] *Id.* at *2–3

[102] Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).

[103] *Id.*

[104] See Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc. 467 U.S. 837, 842–43 (1984). Per *Chevron*, under the differential standard, the U.S. Supreme Court stated that Courts should defer to an agency's interpretation of a status unless the status itself is clear, and that if the statute is ambiguous, the agency interpretation is controlling if it is based on a permissible reading of the statute.

Farm Mut. Auto. Ins. Co., held that an arbitrary and capricious agency decision is one that:

> …relied on factors which Congress has not intended it consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or product of agency expertise.[105]

The Supreme Court decision recognized two factors that a court must consider in reviewing a USCIS decision. First, the intention of the U.S. Congress in promulgating the Act under reference. Second, whether the decision under review may be justified in applying the differential standard to the agency decision at issue. Consistent with the differential standard, a court is required to examine the rationale articulated by the agency to justify its decision.[106] Where such an explanation is made with a less than perfect clarity, a court may still be reluctant to set aside the decision, "if the agency's path may reasonably be discerned."[107] In other words, if the decision of the government agency is permissible under the differential standard, the court will sustain it. However, I contend that a court should be wary to embark on any deliberate process that attempts to discern or try to read into the underpinnings of an agency's decision. Such a duty as suggested by the differential standard will open the door for the court to enter the arena and do the work of the agency, especially in situations where the articulation of the agency's reasoning to justify a decision is weak or articulated with minimal clarity. In the judicial review of visa petitions, any court's attempt to discern the reasonable path of an agency's decision does not pass the arbitrary standard, where the agency has offered an explanation that runs counter to the record or where the process and the evaluation of the evidence do not reflect an independent review required under Section 204(c) of the Act.[108] Under Section 204(c) of the Act, a court is circumscribed to the evidence in the record.[109]

Specifically, on the standard of review, the U.S. Sixth Circuit in *Bangura* held that a determination of immigration related marriage fraud made pursuant to Section 204(c) of the Act, must be supported by substantial

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[105] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[106] *See Chevron*, 467 U.S. at 842–43.

[107] See Alaska Department of Environmental Conservation v. Environmental Protection Agency 540 U.S. 461, 497 (2004).

[108] *See* Matter of Tawfik, 20 I&N Dec. 166, 166 (BIA 1990) (Stating that to make a determination of marriage fraud within the purview of Section 204 (c) of the Act, "…the district director should not give conclusive effect to the determination made in prior proceedings, but, rather, should reach an independent conclusion based on the evidence of record…").

[109] *Id.*

and probative evidence documented in the record.[110] Thus, the court has the legal authority to overturn any finding of marriage fraud not supported by substantive and probative against the non-citizen in the adjudication of visa petitions.[111] It is argued that, the evidence required by the Act to justify the application of Section 204(c) to bar the approval of visa petitions, is one that is in accordance with established precedents and upheld by the courts.

Conversely, based on the forgoing analysis, the USCIS may want to argue in a judicial review that the Plaintiffs are asking the Court to reweigh the evidence in the record by challenging the decision of the agency. This argument is not persuasive because it can be distinguished and contextualized. In contrast, I submit that in arguing that the USCIS decision to deny a visa petition is inconsistent with the law, the Plaintiffs are calling on the court to review the rationale articulated by the USCIS to deny the visa petition of the Plaintiffs. In this way, the Plaintiffs are contending that the USCIS rationale for the denial is inconsistent with the record and evidence as a matter of law. Thus, the Plaintiffs' argument in this instance distinguishes, if at all, the U.S. Supreme Court's reasoning under the differential standard that a reviewing court should not upset an agency's decision on an account of reasonable discernment of the agency's path to justify the decision at issue.

For the USCIS to successfully oppose a motion for summary judgment that is seeking to overturn the denial of a visa petition as a matter of law, the USCIS "must point to concrete evidence in the record. A mere scintilla of evidence in favor of the nonmoving party, without more, will not give rise to a genuine dispute at trial."[112] I submit that summary judgment challenging the propriety of the USCIS denial of a visa petition based on alleged marriage fraud should be granted by the court, except there is evidence in the record that goes beyond mere allegations, conclusions, conjecture, and speculation. The nonmoving party, the USCIS in this case, has the burden of presenting definite and competent evidence in rebuttal, otherwise, summary judgment to challenge the agency decision succeeds. Overall, the standard of review based on the record rests on the plank of the substantive and probative evidence standard and whether the USCIS decision under review satisfies the elements of the test as established by administrative and judicial precedents.

C. The Elements of the Substantive and Probative Evidence Standard

Having established that it is on the basis of the substantive and probative evidence standard that a USCIS decision under Section 204(c) may be reviewed by the court, it is necessary to understand the elements of the

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[110] Bangura v. Hansen, 434 F.3d 487, 502 (6th Cir. 2006).
[111] See *Tawfik,* 20 I&N Dec. at 167.
[112] Anderson v. Liberty Lobby, 477 U.S. 242, 242 (1986).

tests as they should be applied under Section 204(c) of the Act. The substantive and probative evidence test to support a proper finding of marriage fraud in the context of Section 204(c) was laid down by the BIA in the case of *Matter of Tawfik*.[113] This precedent, amongst other procedural factors, is the most concrete foundation for the review of USCIS decisions on denials of marriage-based visa petitions under Section 204(c) of the Act.[114]

In *Tawfik*, a U.S. citizen, filed a visa petition for her spouse, an Egyptian citizen.[115] The visa petition was approved by the predecessor agency of the USCIS on 14 September 1987.[116] However, in a letter dated July 25, 1989, the USCIS district director revoked the visa petition on the ground that the beneficiary had previously attempted to be accorded an immediate relative status[117] as the spouse of a U.S. citizen in a prior marriage determined by the Attorney General of the U.S. to have been entered into for the purpose of evading the immigration laws. In this case, the record reflects that this was the beneficiary's third marriage, and his second to a U.S. citizen.[118]

In the *Tawfik* case, the BIA established *inter alia* that, to make the right decision under Section 204(c) of the Act, "the District Director should not give conclusive effect to determinations made in prior proceedings, but, rather, should reach his own independent conclusion based on the evidence before him."[119] The BIA allowed the appeal of the petitioner in this case and overturned the decision of the USCIS.[120] The BIA explained its reasoning for allowing the appeal of the Plaintiff this way:

> …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 noted that the record contained evidence which had been rebutted, 'from which it [could] be reasonably 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 substantive and probative evidence requisite to the

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[113] Matter of Tawfik, 20 I&N Dec. 166, 170 (BIA 1990).
[114] The test was first applied in Matter of Agdinaoay, 16 I&N Dec. 545, 546 (BIA 1978).
[115] *Tawfik*, 20 I&N Dec. at 167.
[116] *Id.* at 166.
[117] *Id*.
[118] *Id.* at 167.
[119] *Id*. at 166.
[120] *Id.* at 170.

preclusion of approval of a visa petition in accordance with Section 204(c) of the Act.[121]

For the USCIS to properly apply Section 204(c) of the Act to bar the approval of marriage-based visa petitions under U.S. law, *Tawfik* established that the evidence relied upon to make an independent review of the record of the non-citizen to determine the liability of the non-citizen must demonstrably show two fundamental elements-documented and affirmative evidence of marriage fraud.[122] The reasoning and intention of the U.S. Congress are inherent in the precedent established in *Tawfik*. It supports the proposition that any independent review of the record of the non-citizen that is based on mere inference of marriage fraud from the record makes an unfavorable determination by the USCIS arbitrary, and a violation of Section 204(c) of the Act.[123] The mere evidence of a prior marriage to a U.S. citizen by the non-citizen upon which a visa petition was not approved by the USCIS, is not, by itself, automatic evidence of immigration related marriage fraud under Section 204(c) of the Act and the precedent established in *Tawfik.*

D. Substantive and Probative Evidence of Marriage Fraud Under Section 204(c)

To analyze a documented and affirmative evidence of immigration related marriage fraud, it is instructive to refer to the approach of the USCIS explained earlier in this Article. In *Aidoo*,[124] the USCIS contended before the Court that, the omission of the former U.S. spouse of the non-citizen to disclose her marital status to a government agency unbeknownst to the non-citizen is evidence of immigration related marriage fraud against the latter. In *Matter of Jongbum,*[125] the BIA accepted the USCIS argument that documented discrepancies and insufficient evidence that prevented the approval of the prior visa petition filed for the benefit of the non-citizen in a prior marriage justifies the application of Section 204(c) to statutorily bar a subsequent visa petition for the non-citizen.[126] In *Kyeremeh*, which has similar facts and issues for determination with *Aidoo* and *Jongbum*, the court rejected the USCIS approach that documented inconsistencies and the evidence that the non-citizen did not share a joint address with his former

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[121] *Id.* at 168.
[122] *Id.* at 170.
[123] *Id*.
[124] Aidoo v. United States, No. 1:19-cv-225, 2022 WL 4537982 at *13–14 (S.D. Ohio Sept. 28, 2022) (The Court rejected this argument of the USCIS which was hitherto adopted by the BIA in this case. The Court rightly noted that, the former wife's deception or omission to correctly disclose her marital status when she applied for public housing without the knowledge of the Plaintiff, "shed no light on Mr. Osei's [Plaintiff] intentions in entering the marriage." According to the Court, only the non-citizen's, "intentions are the proper focus of the INA §204(c) inquiry").
[125] Matter of Jongbum PAK, 28 I&N Dec. 113 (BIA 2020).
[126] *Id.*

U.S. spouse is enough to apply Section 204(c) against the non-citizen in a subsequent visa petition adjudicated by the USCIS.[127]

Under *Tawfik*, the USCIS must show that there is documented direct and affirmative evidence against the non-citizen in the record to satisfy the substantive and probative evidence standard, otherwise, any denial of a visa petition violates Section 204(c) of the Act.[128] The evidence against the non-citizen on the record must be affirmative beyond mere inference of fraud. Any determination of immigration related marriage fraud must be reached through an independent review of the record *ab initio* consistent with the precedent established in *Tawfik.*[129] In this context, direct and affirmative evidence is one that is direct and unilateral on the part of the non-citizen. It should establish that the non-citizen engaged directly in an act beyond the mere fact of a prior marriage, which demonstrates an intention to evade immigration laws. In *Lutwak v. United States*, the Supreme Court held that a valid determination of marriage fraud requires a higher proof independent of the ordinary inference that a marriage was entered solely for the purpose of evading the immigration laws.[130]

The Sixth Circuit appeared to follow the reasoning of the Supreme Court in *United States v. Chowdhury.*[131] In *Chowdhury*, the court held that in criminal marriage fraud cases, conviction is proper where it can be established that a defendant acted willfully by acting intentionally and purposely with the intent to do something that is forbidden by law or acting with the knowledge that his conduct was unlawful.[132] Applying this rationale to U.S. immigration law, the court stated, thus, "we believe that the language knowingly enters a marriage for the purpose of evading any provision of the immigration laws is best understood as another way of saying that in knowingly entering a marriage, the defendant knowingly violated the immigration laws." [133] The non-citizen should not be held liable for immigration related marriage fraud by the association on account of a prior marriage to a U.S. spouse without more, except by the fact of marriage or an unsuccessful prior visa petition. In a ruling that appears to throw more light on the nature of evidentiary standard necessary to validate immigration related marriage fraud, the court in *Bangura* echoed the U.S. Supreme Court decision in *Bryan v. United States.*[134] The court stated *inter alia* that, to prove that a defendant [the non-citizen] has acted intentionally and willfully to

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[127] Kyeremeh v. Sessions, No. 2:17-cv-497, 2019 WL 1114905, at *15 (S.D. Ohio. Mar. 11, 2019).

[128] Matter of Tawfik, 20 I&N Dec. 166, 170 (BIA 1990).

[129] *Id*. at 166.

[130] Lutwak v. United States, 344 U.S. 604, 611(1953).

[131] United States v. Chowdhury, 169 F.3d 402, 406-407 (6th Cir. 1999).

[132] *Id.*

[133] *Id.*

[134] Bangura v. Hansen, 434 F.3d 487, 502-03 (6th Cir. 2006); Bryan v. United States 524 U.S. 184 (1998).

sustain a conviction for marriage fraud, the government must prove more than the defendant knowing of the facts constituting the crime. According to the court, the government must prove (1) the alien knowingly entered the marriage (2) the purpose of the marriage was to evade the immigration laws, and (3) the alien knew or had reasons to know of the immigration laws.[135]

Therefore, specific to the *Aidoo* case,[136] any inference about the Plaintiff's former U.S. spouse's dealings with the government agency wherein she failed to disclose her marital status, is insufficient to sustain the allegation of marriage fraud. Indeed, prior marriage to a U.S. citizen, without any affirmation of fraud on the record, does not warrant the application of Section 204(c) in the adjudication of visa petition. The failure of the former U.S. spouse to disclose her marital status is not direct and affirmative evidence of immigration related marriage fraud against the non-citizen. Section 204(c) is not a blank check given by the U.S. Congress to the USCIS to automatically deny visa petitions. This statement is true for non-citizens who had been unsuccessful in prior visa petitions because their former U.S. spouse was suspected or alleged by the USCIS to have acted improperly or unilaterally on an application for public benefit with another government agency. On the contrary, Congress will not intentionally pass a law that will violate the rights of U.S. citizens without qualification in the public interest. In *Griswold v. Connecticut*, the Supreme Court opined unequivocally that the constitutional protection of the right to privacy extends to marriage as a "right so basic and fundamental and so deeply rooted in our society…"[137]

Based on this constitutional pronouncement, the USCIS may only infringe on the rights of U.S. citizens to deny them the opportunity to enjoy a family life based on their marriage to non-citizens, where the legitimate purpose is narrowly tailored. Any regulatory infringement that is founded on speculation and unfair suspicion does not satisfy this standard. Based on the authority of *Griswold*, the rights of U.S. citizens married to non-citizens may be implicated in situations of improper denial of visa petitions filed for their foreign spouses. Reviewing the import of Section 275(c) which is in *pari materia* with Section 204(c), the Ninth Circuit was very persuasive when it held that, "if one spouse intended the marriage to be a sham when the ceremony took place, but the other intended the marriage to be genuine, then the one committed the fraud, but not the other."[138]

Based on established precedents and the reasoning of the U.S. Supreme Court in the cases cited above, substantive, and probative evidence of fraud is one that is direct and affirmative evidence of immigration related

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[135] *Bangura*, 434 F.3d at 502-03.

[136] Aidoo v. United States, No. 1:19-cv-225, 2022 WL 4537982 (S.D. Ohio Sept. 28, 2022).

[137] Griswold v. Connecticut, 381 U.S. 479, 491–92 (1955).

[138] *See* U.S. v. Orellana-Blanco, 294 F. 3d 1143, 1151 (9th Cir. 2002).

marriage fraud against the non-citizen. The requisite evidence must be documented against the non-citizen on the record. The U.S. courts have attempted to give concrete examples of affirmative evidence that satisfy this standard. In *United States v. Islam*, applying this standard, the Tenth Circuit, held that the payment to U.S. citizens under a marriage fraud ring to marry Pakistani men to help them obtain permanent residence in the U.S. was sufficient motivation to support a conviction of marriage fraud against the aliens.[139] In this case, the court found that the couples got married to evade the immigration laws of the U.S. The Seventh Circuit also properly found immigration related marriage fraud in *United States v. Darif*, where a Moroccan paid a U.S citizen $3,000 to fly to Morocco to marry him and assist to obtain immigration papers to work and live in the U.S.[140] In both cases, the courts made it clear that to sustain a conviction and by extension make a valid determination of immigration related marriage fraud, the government must show that the goal of evading the immigration laws of the U.S. motivated the defendants.[141] The reasoning of the courts in *Islam* and *Darif* above was re-established in the latter case of *Nazar Simko et al. v. BIA*[142] on the quality of evidence that satisfies the substantive and probative evidence standard.

The subject of the case in *Nazar Simko et al.* was a Ukrainian national. The USCIS obtained evidence that the former U.S. spouse of the Ukrainian national was involved in a fraudulent marriage ring while they were married.[143] On whether that was sufficient evidence to apply Section 204(c) to bar the approval of a subsequent visa petition filed for his benefit, the U.S. District Court for the District of Connecticut found that the USCIS acted arbitrarily and capriciously when it denied the subsequent visa petition filed for the Ukrainian by his extant U.S. spouse.[144] According to this federal court, the USCIS relied on evidence in the record that was not "substantive and probative" or affirmative to support the conclusion that the Ukrainian national had directly engaged in immigration related marriage fraud to evade the immigration laws of the U.S.[145] It is instructive to note that, the evidence relied on in this case by the USCIS to deny the underlying visa petition, was that the non-citizen's former U.S. spouse was alleged to have been part of a fraudulent marriage ring. The court found that "substantive and probative evidence requires more than facts that could create a reasonable inference of fraud."[146] The decision of the U.S. District Court in *Simko et al.*, that declared the denial of the underlying visa petition arbitrary and capricious was based on the reasoning of the court that, the evidence of fraud cited by the USCIS was against the former U.S. spouse of the beneficiary. The *Simko* court

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[139] United States v. Islam, 418 F.3d 1125, 1127, 1130 (2005).
[140] United States v. Darif, 446 F.3d 701, 703–04 (2006).
[141] *Id*. at 710.
[142] Simko v. Bd. of Immigr. Appeals, 156 F. Supp. 3d 300, 309 (D. Conn. 2015).
[143] *Id*. at 304–05.
[144] *Id.* at 314.
[145] *Id*. at 310.
[146] *Id*. (quoting Matter of Tawfik, 20 I&N Dec. 166, 168 (BIA 1990)).

concluded that more evidence was required to satisfy the substantive and probative evidence test.[147]

As the *Nazar Simko et al.* court rightly noted, "[i]n the decades since *Matter of Tawfik* was decided, the BIA has maintained this policy of requiring evidence of fraud in the non—citizen's file to warrant the application of the marriage fraud bar."[148] Similar to the approach of the USCIS in the recent case of *Aidoo et al*, and in *Kyeremeh,* it is significant that the USCIS deployed resources to conduct conclusive field investigations on the joint addresses Mr. Kyeremeh and his former U.S. spouse submitted in support of his prior visa petition[149] The USCIS also interviewed witnesses, including neighbors, family, the property managers.[150] Still, on the question of whether Mr. Kyeremeh's subsequent meritorious visa petition approval could be barred under Section 204(c) of the Act based on the denial of the prior visa petition and the circumstances of his prior marriages, the Court held that USCIS denial of the visa petition under Section 204(c) violated the APA.[151] The *Kyeremeh* Court hinged its decision on the premise that the USCIS erred in improperly discounting the evidence of *bona fides* on the record by providing a conclusory explanation that rendered the USCIS decision, in this case, arbitrary and capricious under the APA.[152]

Recently, the opposing view presented by the BIA in *Matter of Singh*[153] is a futile attempt to distinguish *Tawfik* in favor of circumstantial evidence, without more, to justify the application of Section 204(c) of the Act to the adjudication of marriage-based visa petitions. Circumstantial evidence is grounded in the inference of fraud contrary to the ratio in *Tawfik*.[154] The BIA's opinion in this case to the extent that circumstantial evidence alone is sufficient to constitute substantive and probative evidence contradicts most federal courts' decisions on the characteristics of the evidentiary standard that should amount to substantial and probative evidence of fraud under Section 204(c).[155] Federal court's jurisprudence on this matter is superior to the opinions of the BIA in the U.S. judicial hierarchy. In *Singh*, there was an admission by the former spouse of the non-citizen during a field investigation

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[147] *Simko,* 156 F. Supp. 3d at n. 9, n. 15.

[148] *Id.*

[149] Kyeremeh v. Sessions, No. 2:17-cv-497, 2019 WL 1114905, at *5 (S.D. Ohio Mar. 11, 2019).

[150] *Id.* at *4.

[151] *Id.* at *5.

[152] *See also* Daneshvar v. Ashcroft, 355 F.3d 615, 625–26 (6th Cir. 2004).

[153] Matter of Singh, 27 I.&N. Dec. 598 (BIA 2019).

[154] Matter of Tawfik, 20 I&N Dec. 166, 166 (BIA 1990).

[155] *See e.g.*, Kyeremeh v. Sessions, No. 2:17-cv-497, 2019 WL 1114905, at *4 (S.D. Ohio Mar. 11, 2019); Simko v. B.I.A., 156 F.Supp.3d 300, 310–11 (D. Conn. 2015); Boansi v. Johnson, 118 F.Supp.3d 875, 880-81 (E.D.N.C. 2015) (where the U.S. district Court for the E.D.N.C. criticized the USCIS for inappropriate application of Section 204(c) of the Act to deny a visa petition despite pointing to no direct evidence of marriage fraud in the record); Zemeka v. Holder, 989 F.Supp.2d 122, 132 (D.D.C. 2013).

by the USCIS that her former marriage with the beneficiary of the extant visa petition was a sham marriage.[156] The unchallenged admission is substantive, probative, direct, and affirmative to justify the application of Section 204(c) in this case. Instead of hinging its entire decision on the plank of the admission to make it more consistent with existing precedents and federal court decisions, the BIA in this case went on a needless legal journey to attempt to make the case that, "circumstantial evidence alone may be sufficient to constitute substantial and probative evidence."[157] Though the BIA in *Singh* agreed with its ruling in *Tawfik* that, "a reasonable inference of fraud is not sufficient to meet the substantive and probative evidence standard",[158] its attempt to differentiate between a "reasonable inference" of fraud and substantial and probative evidence is not valid under Section 204(c) to elevate circumstantial evidence to the level of substantive and probative evidence standard without any qualification.[159] On the contrary, the BIA's concession that a reasonable inference of fraud is insufficient, supports my contention that the substantive and probative evidence standard requires direct and affirmative evidence of fraud that is documented in the record.

However, as seen in *Jongbum, Singh,* and the agency's argument in *Aidoo*, recent trends in the application of Section 204(c) of the Act by the USCIS and BIA demonstrate a disturbing trajectory in favor of a mechanical application and over-reliance on circumstantial evidence without corroboration and standard qualification.[160] This trend violates the precedent established in *Tawfik* and is a fundamental deviation from the substantive and probative evidence standards. In *Jongbum*, the BIA upheld the decision of the USCIS denying the extant visa petition by relying on documented inconsistencies during the interviews conducted on a prior visa petition as the basis to apply Section 204(c) to a subsequent visa petition.[161] In this case, the record only contains documented interview inconsistencies and the fact that the prior visa petition was denied for insufficient evidence.[162] There was no direct and affirmative evidence of immigration related marriage fraud against the non-citizen.[163] The BIA decision in *Jongbum* also raises the question of whether the USCIS conducted an independent review of the record of the non-citizen to apply Section 204(c) as stipulated in *Tawfik.* The USCIS is making the same argument it made in *Jongbum* in the *Aidoo* case. The BIA decision in *Jongbum* and the argument of the USCIS in *Aidoo* violate the

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[156] Matter of Laureano, 19 I.&N. Dec. 1, 2–3 (BIA 1983) (per the BIA, a sham marriage is one, "entered into for the primary purpose of circumventing the immigration laws…[t]he central question in determining whether sham marriage exists, is whether the parties intended to establish a life together at the time they were married").

[157] Matter of Singh, 27 I. & N. Dec. 598, 598 (BIA 2019).

[158] *Id*. at 602.

[159] *Id.*

[160] *See id.*

[161] Matter of Jongbum PAK, 28 I&N Dec. 113, 114 (BIA 2020).

[162] *Id.*

[163] *Id*. at 114–19.

established precedent and policy laid down in *Tawfik* which stipulated documented substantive and probative evidence of immigration related marriage fraud against the non-citizen before the application of Section 204(c) can be justified as a matter of law.

IV. CONCLUSION

Based on the intention of Congress and the consideration of family unification in U.S immigration law and policy, the substantive and probative evidence standard established in *Tawfik* is a condition precedent before the USCIS may validly apply Section 204(c) of the Act to deny an otherwise approvable visa petition filed for the benefit of the non-citizen. Substantive and probative evidence as understood under the Act, judicial precedents, and U.S. immigration policy, is evidence that is documented, substantive, probative, direct, and affirmative against the non-citizen. A proper inquiry under Section 204(c) of the Act must begin and end with the analysis of the intentions and culpability of the non-citizen in the context of the substantive and probative evidence standard. Section 204(c) of the Act does not give the USCIS an unfettered discretion to abuse the agency deferential standard under the APA to automatically deny a subsequent visa petition on the ground of prior documented insufficient evidence or interview inconsistencies without more. A mechanical reference to Section 204(c) and the utility of the unilateral culpability of the U.S. citizen spouse for marriage fraud is not sufficient to deny a visa petition. USCIS's adoption of this approach and any attempt to deviate from the substantive and probative standard established in *Tawfik* is arbitrary and capricious. Federal courts should always, as a matter of law, reject this trajectory and reverse the trend whenever it is called upon to do so.