UNITED STATES IMMIGRATION COURT

(b) (6)

IN THE REMOVAL CASE OF

(b) (6)

RESPONDENT

CASE NO.: (b) (6)

ORDERS

[X] This is a memorandum of the Court's Decision and Orders entered on Dec 12, 2011. This memorandum is solely for the convenience of the parties. The oral or written Findings, Decision and Orders is the official opinion in this case. (X) Both parties waived issuance of a formal oral decision in the case.

[ ] The respondent was ordered REMOVED from the United States to _____ ( ) in absentia.

[ ] Respondent's application for VOLUNTARY DEPARTURE was DENIED and respondent was ordered removed to _____, in the alternative to _____.

[ ] Respondent's application for VOLUNTARY DEPARTURE was GRANTED until _____, upon posting a voluntary departure bond in the amount of $_____ to DHS within five business days from the date of this Order, with an alternate Order of removal to _____ or _____. Respondent shall present to DHS within ( ) thirty days ( ) sixty days from the date of this Order, all necessary travel documents for voluntary departure.

[ ] Respondent's application for ASYLUM was ( ) granted ( ) denied ( ) withdrawn with prejudice.
( ) subject to the ANNUAL CAP under the INA section 207(a)(5).
( ) Respondent knowingly filed a FRIVOLOUS asylum application.

[ ] Respondent's application for WITHHOLDING of removal under INA section 241(b)(3) was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for WITHHOLDING of removal under the Torture Convention was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for DEFERRAL of removal under the Torture Convention was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for CANCELLATION of removal under section ( ) 203(b) of NACARA, ( ) 240A(a) ( ) 240A(b)(1) ( ) 240A(b)(2) of the INA, was ( ) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered that the DHS issue all appropriate documents necessary to give effect to this Order. Respondent ( ) is ( ) is not subject to the ANNUAL CAP under INA section 240A(e).

[ ] Respondent's application for a WAIVER under the INA section _____ was ( ) granted ( ) denied ( ) withdrawn or ( ) other _____. ( ) The conditions imposed by INA section 216 on the repondent's permanent resident status were removed.

[X] Respondent's application for ADJUSTMENT of status under section 245 of the (X) INA ( ) NACARA ( ) _____ was (X) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered that DHS issue all appropriate documents necessary to give effect to this Order.

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[ ] Respondent's status was RESCINDED pursuant to the INA section 246.
[ ] Respondent's motion to WITHDRAW his application for admission was ( ) granted ( ) denied. If the respondent fails to abide by any of the conditions directed by the district director of DHS, then the alternate Order of removal shall become immediately effective without further notice or proceedings: the respondent shall be removed from the United States to _____.
[ ] Respondent was ADMITTED as a _____ until _____. As a condition of admission, the respondent was ordered to post a $ _____ bond.
[ ] Case was ( ) TERMINATED ( ) with ( ) without prejudice ( ) ADMINISTRATIVELY CLOSED.
[ ] Respondent was orally advised of the LIMITATION on discretionary relief and consequences for failure to depart as ordered.
[ ] If you fail to voluntarily depart when and as required, you shall be subject to civil money penalty of at least $1,000, but not more than $5,000, and be ineligible for a period of 10 years for any further relief under INA sections 240A, 240B, 245, and 248 (INA Section 240B(d)).
[ ] If you are under a final order of removal, and if you willfully fail or refuse to 1) depart when and as required, 2) make timely application in good faith for any documents necessary for departure, or 3) present yourself for removal at the time and place required, or, if you conspire to or take any action designed to prevent or hamper your departure, you shall be subject to civil money penalty of up to $500 for each day under such violation. (INA section 274D(a)). If you are removable pursuant to INA 237(a), then you shall further be fined and/or imprisoned for up to 10 years. (INA section 243(a)(1)).
[ ] Other:

Date: Dec 12, 2011

John R O'Malley
JOHN R. O'MALLEY, Judge

APPEAL: (X) waived ( ) reserved by ( ) Respondent ( ) DHS (X) Both

DUE BY:

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: [ ] MAIL [X] PERSONAL SERVICE
TO: [X] DHS [ ] ALIEN [X] Alien's ATT/REP [ ] ALIEN c/o Custodial Officer
DATE: 12/12/11 BY: [ ] COURT STAFF [X] JUDGE

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U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6)

Date: MAY 14 2009

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Timothy E. Wichmer, Esquire

ON BEHALF OF DHS: Glenda M. Raborn
Assistant Chief Counsel

APPLICATION: Remand for adjustment of status

This case comes before this Board pursuant to a remand order from the United States Court of Appeals for the (b) (6) Circuit. The Court remanded the record for this Board to resolve apparent inconsistent decisions. The record will be remanded to the Immigration Judge for further proceedings.

As the Court observed, this case has a "tortured procedural history." *See* (b) (6) (b) (6) The facts of the case are as follows. The respondent, a native and citizen of Nigeria, applied for, and was granted, a student (F-1) visa to enter the United States in 1995. Thereafter, he married a United States citizen named (b) (6) who filed a visa petition on his behalf in 1998. That petition was denied by the Immigration and Naturalization Service (now the United States Citizenship and Immigration Services ("USCIS"), a component of the Department of Homeland Security). The respondent's application for adjustment of status based upon the marriage was denied on May 24, 2001, upon a finding that the respondent (the beneficiary of the visa petition) had entered into the marriage solely for the purpose of obtaining an immigration benefit.[1] The respondent was served a Notice to Appear and placed in removal proceedings.

[1] We note that while an Immigration Judge may deny a continuance (as in this case) based upon the denial of a visa petition based on the statutory bar contained in section 204(c) of the Act or deny an application for adjustment of status based upon a prior fraudulent marriage, the denial of a visa petition pursuant to section 204(c) is statutory.

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During this period, the respondent and his first wife divorced and the respondent remarried. His second wife, (b) (6) a United States citizen, filed a visa petition on his behalf. The visa petition filed on behalf of the respondent by his second wife was denied on April 8, 2002. (b) (6) filed a second visa petition on the respondent's behalf in 2005. That petition was approved on March 8, 2006. Based upon the approval of the visa petition, the respondent filed a motion to remand proceedings so he could pursue an application for adjustment of status. Upon discovery that the second visa petition filed by (b) (6) had been approved, the DHS filed a Notice of Intent to Revoke approval of the visa petition on August 22, 2006. Although the record contains the Notice of Intent to Revoke the petition, the record does not reveal that the petition was actually revoked.

At removal proceedings that were commenced following the denial of the respondent's application for adjustment of status before the INS in 2001, the Immigration Judge concluded in a decision dated June 25, 2002, that the INS had failed to prove by clear and convincing evidence that the respondent's 1995 admission (on a student visa) was based upon visa fraud. I.J. at 2. However, the Immigration Judge did conclude that the respondent's application for adjustment of status could not be granted because the visa petition filed on his behalf by his second wife was subject to the statutory bar against the approval of a visa petition after a previous visa petition has been denied based upon a finding that the previous marriage was fraudulent. *See* section 204(c) of the Immigration and Nationality Act; 8 U.S.C. § 1182(c). I.J. at 3.

Although the record contains a Notice of Intent to Revoke the second visa petition filed by (b) (6) (b) (6) and approved on March 8, 2006, the record does not contain evidence that the approval of that petition was actually revoked. If the petition was actually revoked, such evidence may be submitted on remand to the Immigration Judge. Assuming *arguendo* that such a revocation was effected, the respondent's application for adjustment of status must be denied for lack of an immediately available visa petition. *See, e.g., Matter Velarde* 23 I&N Dec.253 (2002) (application for relief must establish statutory eligibility). However, if the approval of the visa petition was not revoked, the Immigration Judge may consider continuing the case to see if USCIS ultimately revokes the petition or hold a hearing to see if DHS presents sufficient evidence of prior marriage fraud to warrant a denial of the application for adjustment of status as a matter of discretion.[2]

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[2] The record indicates that the Immigration Judge denied the respondent's request for a continuance in 2002, because a previously filed visa petition was denied by the INS on 204(c) grounds. Subsequent to that decision, that visa petition was denied. Therefore, the Immigration Judge never made a finding that 204(c) statutorily barred the respondent from seeking adjustment of status as he denied the continuance pursuant to this Board's decision in *Matter Velarde*, 23 I&N Dec. 253 (2002). Because the record does not contain clear evidence that the second visa petition filed by (b) (6) on behalf of the respondent was actually revoked, we are unwilling to conclude that the 204(c) bar would prevent the respondent from seeking adjustment of status if the USCIS had in fact approved a subsequent visa petition on his behalf.

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Accordingly, we will remand the record for further proceedings.

ORDER: The record is remanded to the Immigration Judge for further proceedings.

FOR THE BOARD