

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B₂



FILE: [REDACTED]
LIN 07 254 57054

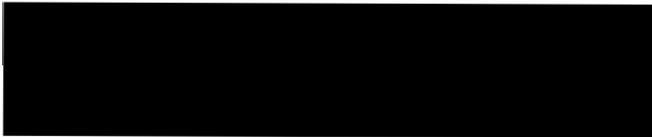
Office: NEBRASKA SERVICE CENTER

Date: NOV 09 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1153(b)(1)(A)

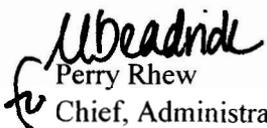
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the sciences. The director determined that the petitioner was prohibited from approval of the petition pursuant to section 204(c) of the Act, 8 U.S.C. § 1154(c) because he attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director also found that the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. More specifically, the director found that the petitioner had failed to demonstrate receipt of a major, internationally recognized award, or that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

Section 204(c) of the Act, 8 U.S.C. § 1154(c), states:

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 a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

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

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

The record reflects that [REDACTED] married the petitioner on October 17, 2001, in Chicago, Illinois. [REDACTED] filed Form I-130, Petition for Alien Relative, on February 22, 2002, seeking to classify the petitioner as a spouse of a United States citizen pursuant to section 201(b) of the Act, 8 U.S.C. § 1151(b).

As indicated in the decision by the Acting District Director, Chicago District Office, submitted the following evidence in support of the bona fides of the marriage:

1. An apartment lease, dated May 17, 2003, reflecting an address of [REDACTED]. While both [REDACTED] and the petitioner were listed as occupants of the apartment, only the petitioner's signature appeared on the apartment lease. Furthermore, a lease amendment, dated February 19, 2003, was submitted reflecting only the petitioner's signature on the document. The acting director also noted that a copy of the original apartment lease application, dated July 22, 2002, was submitted reflecting [REDACTED] request to be added to the apartment's lease based on the marriage between her and the petitioner;
2. A check, which was made out to both [REDACTED] and the petitioner, for \$7.06 for interest accrued from the security deposit on the apartment;
3. An invoice, dated April 4, 2003, from [REDACTED] indicating the name [REDACTED] was crossed out and [REDACTED] and the petitioner's name were written in its place;
4. An invoice, originally dated April 4, 2003, from [REDACTED] indicating that the original date was crossed out and May 17, 2003, was written underneath. In addition, an address of [REDACTED] was crossed out and [REDACTED] Apt. #3 written its place;
5. A billing statement from AT&T for the period of September 17 to October 16, 2003, addressed to [REDACTED] and the petitioner at the [REDACTED] address;
6. Two billing statements from from Peoples Energy, dated November 13, 2002, and August 12, 2003, addressed to [REDACTED] and the petitioner at the [REDACTED] address;
7. Two billing statements from ComEd, dated February 19, 2003, and September 15, 2003, addressed to [REDACTED] and the petitioner at the [REDACTED] address;
8. A letter, dated August 23, 2002, from SBC/Ameritech and a billing statement, dated June 7, 2003, addressed to [REDACTED] and the petitioner at the [REDACTED] address; and
9. Three photographs of [REDACTED] and the petitioner at their wedding ceremony.

[REDACTED] and the petitioner were interviewed on July 13, 2005, regarding the relative-based petition. At that time, [REDACTED] submitted Form 8453, U.S. Individual Tax Declaration for an IRS e-file Return, for 2003. The acting district director noted that [REDACTED] address was listed as [REDACTED] s. According to [REDACTED] Form G-325A, Biographic Information, she claimed to have resided at that address until March 2001. The acting director further noted that the [REDACTED] address was also listed on a 2003 Illinois Return Recap. While not mentioned by the acting district director, we note that [REDACTED] submitted Form IL-1040, Individual Income Tax Return, reflecting a "married filing jointly" return with a [REDACTED] address. The record is unclear as to why two documents for the 2003 tax year for the Illinois Department of Revenue reflect two different addresses for [REDACTED] when she claimed to have resided at the [REDACTED] address since March 2001. In

addition, the acting district director noted that [REDACTED] W-2 and Earnings Summary for 2003 reflected the [REDACTED] address, and [REDACTED] marital status as single.

The acting district director further indicated that [REDACTED] informed the interviewing officer that she had six children, and she had custody of three of the children. [REDACTED] stated that those children were residing with her mother at a [REDACTED] address. The acting district director questioned her continued usage of the [REDACTED] address on her 2003 income tax return documents since she was not using an address associated with her children for taxation purposes. [REDACTED] acknowledged that her two youngest children are in the custody of the state, and she never visits any of her children. The acting district director noted that the petitioner has never met any of her children.

The acting district director denied the relative petition on February 3, 2006, and concluded:

In light of the discrepancies in your tax filings, and the information that you and the Beneficiary have submitted to the Internal Revenue Service (IRS) on several occasions as opposed to the information you jointly submitted for immigration purposes, coupled with the suspicious nature surrounding the care taking of your children, it is the determination of the Service that the evidence stated above is not sufficient to establish that you and the Beneficiary have been residing together in a *bona fide* relationship since the date of your marriage, nor that you not entered into the marriage for the sole purpose of evading the immigration laws.

And while the Service did take into account your telephone and utility bills, the Service also realizes that such documents can be easily arranged to show joint ownership, while in reality only one person can manage the handling of such accounts. Therefore, in the absence of any other proof of joint accrual or ownership save for the apartment lease, which is itself questionable (lack of your signatures on the lease or its amendment; information on the rent invoices clearly crossed out and replaced by your information), it is the decision of the Service to deny your petition.

We find that the acting district director had genuine concerns regarding the bona fides of the marriage based on some of the documentation. Specifically, there were unresolved issues regarding the lease and address discrepancies on [REDACTED] income tax returns. However, we disagree with his finding that the documentation supports that the marriage was entered into fraudulently with the intent to evade the immigration laws. The acting district director based his determination on the absence of [REDACTED] signature on the lease and [REDACTED] address and marital status on the income tax documentation. In addition, the acting district director dismissed the other marital documentation (Items 2 – 9) by claiming that it could be easily arranged to show joint ownership without any evidence to support this claim. While the acting district director discovered important discrepancies and had the authority to further evaluate the marriage, he never afforded [REDACTED] the opportunity to address the concerns or explain the discrepancies. Instead, the acting district director denied the petition without issuing a notice of intent to deny or request for additional evidence.

We note that the petitioner was offered the opportunity to respond in this proceeding. Specifically, the notice of intent to deny recounted all of the evidence. Although counsel claims to have responded and purportedly submitted a copy of a letter, no actual proof was submitted such as a certified mail receipt to support its actual submission. Accordingly, we find no error on the part of the director.

A decision regarding section 204(c) of the Act is for the district director to make in prior collateral proceedings. He should reach his own independent conclusion based the evidence actually before him. *Matter of Rahmati*, 16 I&N Dec. 538 (BIA 1978); *Matter of F-*, 9 I&N Dec. 684 (BIA 1972). A finding that section 204(c) of the Act does apply to an alien must be based on evidence that is substantial and probative. *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990); *Matter of Agdianoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972). Once the Service has met this initial requirement, the burden shifts back to the petitioner, as part of his burden of proof in visa petition or revocation proceedings, to rebut the Government's evidence and establish that the prior marriage was bona fide and that section 204(c) of the Act should not apply. *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988).

In this case, we find that the record and evidence do not support the finding of the petitioner's marriage to [REDACTED] to be a fraudulent or "sham" marriage. In addition, the record does not contain evidence that is substantial and probative of a marriage that was entered into for the sole purpose of evading the immigration laws. Therefore, we withdraw the finding of the director regarding the issue of section 204(c) of the Act.

Regarding the director's finding as it relates to the petitioner's eligibility under section 203(b) of the Act, the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

At the time of the original filing of the petition on September, 7, 2007, and on appeal, counsel claimed the petitioner's eligibility based on his extraordinary ability as an inventor. Counsel never attempted to

claim the petitioner's receipt of a major, internationally recognized award, or that he meets any of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

As counsel has failed to specify which of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) the petitioner purportedly meets, we have considered the evidence submitted under the criterion we find to be most applicable. If it is counsel's contention that the petitioner meets a particular criterion not addressed in this decision, he has never provided such a statement or argument in this regard.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. A petitioner, however, cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three criteria at 8 C.F.R. § 204.5(h)(3). In determining whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

Evidence of the alien's original scientific, scholarly, artistic, or business-related contributions of a major significance in the field.

The petitioner submitted evidence of his U.S. Patent 7,292,153 B1, IVONKA, which is a drunk-driving detection system to assist police officers in the testing of suspected drivers for the presence of drugs and alcohol. The petitioner failed to submit any documentary evidence establishing that IVONKA has ever been utilized. Instead, the petitioner submitted marketing material from InventHelp in order to show that IVONKA is available for licensing or sale to manufacturers or marketers.

Nonetheless, this office has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York*

State Dep't. of Transp., 22 I. & N. Dec. 215, 221 n. 7, (Commr. 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* The petitioner has not only failed to establish that IVONKA has been used by the targeted audience of police departments, but the petitioner has failed to establish that IVONKA has even been manufactured or created. The petitioner has failed to establish that his patent is a contribution of major significance in the field through his development of this idea.

According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. Without extensive documentation showing that the petitioner's work has been unusually influential, highly acclaimed, or widely accepted throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

Accordingly, the petitioner has not established that he meets this criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

The petitioner submitted a job verification letter, dated February 10, 2009, indicating that the petitioner worked for Weber-Stephen Products Company from February 10, 2000, to May 26, 2008, as a team leader. The petitioner also submitted his performance appraisal from [REDACTED] dated June 21, 2007, which the petitioner received a rating of "meets requirements."

The submitted documentation does not establish that his position was leading or critical to this company as a whole. For example, the record does not include detailed job responsibilities discussing the nature of the petitioner's duties and significant accomplishments and the importance of his role to the company's operations. The petitioner failed to establish that his leadership or critical roles directly led to the success and accomplishments at this company. Further, the petitioner has not submitted an organizational chart or other similar evidence showing his position in relation to that of the other employees in similar positions at this company. There is no evidence demonstrating how the petitioner's roles differentiated him from the other team leaders. In this case, the documentation submitted by the petitioner does not establish that he was responsible for the success or standing to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim.

Accordingly, the petitioner has not established that he meets this criterion.

The petitioner has failed to demonstrate, nor has he ever claimed, the receipt of a major, internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the sustained national or international acclaim necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 204.5(h)(3).

Finally, beyond the decision of the director, we make two additional findings. First, the statute and regulations require that the petitioner seeks to continue work in his area of expertise in the United States. *See* section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the petitioner detailing plans on how he intends to continue her work in the United States. On the Form I-140, the petitioner failed to provide any information in Part 6, "Basic information about the proposed employment." Further, with his initial submission, the petitioner submitted no personal statement, no letters from prospective employers, contracts, or other information detailing his plans in the United States. As referenced previously, the petitioner submitted a job verification letter from Weber-Stephen Products Company indicating employment from February 10, 2000, to May 26, 2008, as a team leader. The record does not demonstrate that the petitioner's previous employment was in his area of expertise. More importantly, however, the petitioner failed to establish that he will continue work in his claimed area of expertise as an inventor in the United States.

Second, the petitioner has failed to establish that his entry into the United States will substantially benefit prospectively the United States. As discussed above, the petitioner has failed to establish his extraordinary ability as demonstrated by the required sustained acclaim and has also failed to establish through extensive documentation that his achievements have been recognized in his field. In addition, the petitioner has failed to establish that he seeks to enter the United States to continue work in his area of extraordinary ability. Given his failure to satisfy any of these statutory requirements, the petitioner's substantial benefit cannot be automatically assumed. As previously discussed, the petitioner has failed to provide any description of his future plans in the United States. As he has failed to provide any probative details about his future prospects, opportunities, plans or intent, it is unclear how he will substantially benefit prospectively the United States.

An immigrant visa will be granted to an alien under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), only if the alien can establish extraordinary ability through extensive documentation of sustained national or international acclaim demonstrating that the alien has risen to the very top of his field. However, in this instance the record does not establish that the petitioner achieved sustained national or international acclaim so as to place him at the very top of his field nor did he establish that he plans to continue work in his area of expertise while in the United States or that his entry will substantially benefit the United States. He is thus ineligible for classification as an alien with extraordinary ability pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), and his petition may not be approved.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.