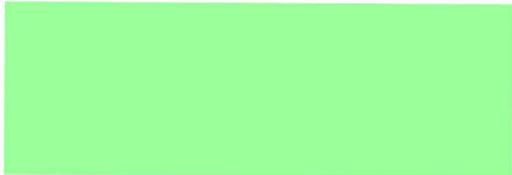


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

(b)(6)



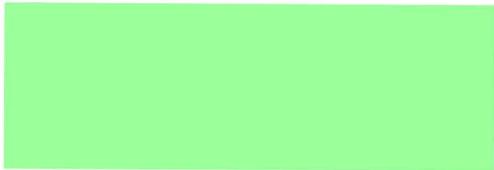
DATE: **AUG 29 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE:

IN RE: Petitioner:   
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

*Rachel Martino*  
for

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal on August 14, 2012. The AAO rejected subsequent motions to reopen and reconsider the matter pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1) on May 17, 2013. The matter is again before the AAO on a motion to reopen and a motion to reconsider. The motion to reconsider will be granted, the previous decision by the AAO to dismiss the appeal will be affirmed, and the petition will be denied.

The petitioner is an apparel design, production, and retail company. It seeks to permanently employ the beneficiary in the United States as a production planner. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the marriage fraud bar under section 204(c) of the Immigration and Nationality Act (the Act) applies to the case and denied the petition accordingly. On appeal, the AAO affirmed the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage entered into for the purpose of evading the immigration laws, and dismissed the appeal.

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. *See* 8 C.F.R. § 103.5(a)(3). A motion to reopen must state new facts. *See* 8 C.F.R. § 103.5(a)(2).

On motion, counsel asserts that the petitioner timely sent the Form G-28 to U.S. Citizenship and Immigration Services (USCIS) and that rejection of the motion was erroneous. As the record reflects that a Form G-28 was received by the AAO, the motion to reconsider the rejection will be granted, but for the reasons set forth in this decision our previous decision to dismiss the appeal is affirmed.

In the motion submitted September 13, 2012, counsel contends that the AAO erroneously concluded that the beneficiary's marriage to [REDACTED] was a sham, and that Mr. [REDACTED] married the beneficiary for the reason that she would pay his credit card debt. Counsel stated that section 21.3(a)(2)(F) of the Immigration Service Adjudicator's Field Manual (AFM) defines a sham marriage as a marriage that complies with the formal requirements of the law, but the parties entered into the marriage with no intention or good faith to live together and their marriage is designed solely to circumvent the immigration laws. Counsel contends that both the husband and wife must be questioned about the *bona fides* of their marriage, in accordance with section 21.3(a)(2)(F) of the AFM, and that the beneficiary's husband was not interviewed and given an opportunity to provide evidence. Counsel also asserts that the anonymous letter was not held to evidentiary standards. Counsel states that USCIS did not follow its adjudicative standards.

Counsel asserts that the AAO gave undue weight to a letter sent anonymously stating that the beneficiary and Mr. [REDACTED] entered into a marriage to secure a green card for the beneficiary in

exchange for her paying Mr. [REDACTED] credit card debt and providing him a monthly stipend. Counsel states that the AAO disregarded substantial and probative facts and material evidence – Mr. [REDACTED] affidavit and admissions of having credit card debt and using marijuana; that Mr. [REDACTED] was not interviewed or contacted for investigation; the author of the anonymous letter, [REDACTED] was not interviewed, and later admitted she regretted the letter; the beneficiary was unaware of Mr. [REDACTED] credit card debt prior to her marriage; and that available witnesses were not interviewed.

Counsel also contends that the AAO stated that the beneficiary made contradictory statements in an interview, but did not specify the nature of the “contradictory statements” and the basis of their materiality, and did not specify the information that the beneficiary should have known about Mr. [REDACTED]

Counsel states that the AAO was in error in concluding, on the basis that Mr. [REDACTED] did not use the bank account regularly, there is inadequate evidence of mingled assets. Counsel states that no such standard exists for refusing to accept evidence. Counsel asserts that due process is violated where speculation forms the basis of a denial. Counsel contends that the beneficiary’s payment of Mr. [REDACTED] debt establishes mingling of finances indicative of a married couple.

Counsel declares that the beneficiary was not given an opportunity to respond to the new questions raised by the AAO about the timing of her employment during the early part of 2000. Counsel contends that the AAO also questions why the beneficiary could not rent an apartment for herself and Mr. [REDACTED] before he left for [REDACTED], but evidence shows the beneficiary began employment on August 28, 2000 and Mr. [REDACTED] left, as planned, for [REDACTED] three days later. Counsel asserts that the AAO observed minor issues of ambivalence that the beneficiary had about her relationship with Mr. [REDACTED] but this indicates the beneficiary and Mr. [REDACTED] “were young and perhaps somewhat impetuous when they married,” and does not establish they had no intention to build a life together or that the beneficiary married Mr. [REDACTED] to avoid immigration laws. Counsel also states that witnesses with personal knowledge did not have an opportunity to testify, and the AAO failed to acknowledge the motivation behind the anonymous letter.

Counsel asserts that the AAO ignored the substantial and probative standard articulated in *Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990). Counsel states that evidence of a fraudulent marriage “must be documented in the alien's file and must be substantial and probative.” *Id.* at 167. Counsel asserts that the evidentiary standard as articulated in *Tawfik* is based on statutory language and has been applied in *Omoruyi v. Chertoff*, 2008 WL 1912887 (S.D. Tex. 2008), *Sabhari v. Frazier*, 2007 WL 295261 (D. Minn. 2007) and *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978).

Counsel contends that the AAO cites *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), a case in which the petitioner was not given notice of and an opportunity to address a deficiency of proof so the case was remanded. Counsel declares that in the instant case the beneficiary and Mr. [REDACTED] were not provided an opportunity to address, through an interview, deficiencies regarding proof their marital relationship.

Counsel asserts that the AAO erroneously relied on conduct after the marriage – the beneficiary’s paying for Mr. [REDACTED] credit card debt, as determinative that their marriage was a sham. Counsel states that “[c]onduct of the parties after marriage is relevant only to the extent that it bears upon their subjective state of mind at the time they were married,” citing *Bark v. Immigration and Naturalization Service*, 511 F.2d 1200, 1202 (1975), (citing *Lutwak v. United States*, 344 U.S. 604 (1953)). Counsel asserts that the green card-for-money allegation is false because evidence reflects the beneficiary was not aware of the credit card debt prior to her marriage. Counsel contends that if a person had married for a green card in exchange for such a debt payment, more likely the obligation would have been fulfilled shortly after the wedding (February 2000), rather than several months later when a bill collector called (Fall 2000).

Counsel contends that the relatively short period that the beneficiary and Mr. [REDACTED] resided in the same place as husband and wife is a lifestyle issue, and cites *Bark, supra*, to state that constitutional questions arise if there is a prescribed amount of time that a husband and wife must spend together, or the manner in which either party elects to spend his or her time is designated.

Counsel also states that the AAO’s decision is in error because there is no substantial and probative evidence of marriage fraud in the record, and cites 8 C.F.R. § 103.2(b)(16)(i) to contend that denial cannot be based on undisclosed information that is unknown to the beneficiary.

Counsel declares that the denial was based on a faulty investigation by the Service and an unsupported marriage fraud determination that was never communicated to the beneficiary or her attorney.

As to reopening, the AAO finds that counsel makes no new arguments in which to establish that the marriage bar under section 204(c) of the Act does not apply to this case.

Section 204(c) states the following:

Notwithstanding the provisions of subsection (b)<sup>1</sup> 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 [director] to have been entered into for the purpose of evading the immigration laws or
- (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

Counsel states that both the beneficiary and Mr. [REDACTED] should have been interviewed regarding

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<sup>1</sup> Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

whether their marriage was *bona fide*, in accordance with section 21.3(a)(2)(F) of the AFM, and given an opportunity to provide evidence. However, the record reflects that the beneficiary was interviewed regarding the *bona fides* of her marriage on November 29, 2001, and Mr. [REDACTED] was interviewed telephonically by a special agent with USCIS regarding his marital relationship.

Counsel also states that the AAO gave undue weight to an anonymous letter and did not properly consider the marital relationship, that Mr. [REDACTED] was not interviewed or contacted for investigation, his admission in the affidavit to credit card debt and using marijuana, the beneficiary's statement in the affidavit that she was unaware of Mr. [REDACTED] credit card debt prior to their marriage, the author of the anonymous letter was not interviewed and later regretted sending the letter, the motivation behind the anonymous letter, and available witnesses were not interviewed. In its August 14, 2012 decision, the AAO described the deficiencies in the affidavits from the beneficiary, Mr. [REDACTED] and Mr. [REDACTED] concluding they failed to establish the relationship between the beneficiary and Mr. [REDACTED] was *bona fide*. The AAO also stated that the beneficiary had an opportunity to present affidavits from witnesses on appeal and it was unclear what additional evidence might have been presented through an interview beyond the information contained in an affidavit. In the instant motion counsel does not state the additional evidence that could have been presented through an interview beyond the information in the affidavits. Mr. [REDACTED] was interviewed telephonically regarding his marriage. Furthermore, while counsel states that Ms. [REDACTED] regretted sending the anonymous letter, there is no evidence in the record that Ms. [REDACTED] regretted having sent the letter. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In assessing the marital relationship, the AAO considered the anonymous letter, but it was in conjunction with the relationship of the beneficiary and Mr. [REDACTED] and all of the evidence in the record. The AAO determined that when the initial evidence – that the beneficiary and Mr. [REDACTED] knew each other for little over a month before marrying, that they lived in the same apartment for five months or less, and that Mr. [REDACTED] moved to [REDACTED] approximately six months after their marriage and did not reveal that he moved to the interviewing officer when interviewed about the Form I-130, Petition for Alien Relative (Form I-130), was viewed together with the letter submitted by Ms. [REDACTED] ample evidence existed to call into doubt the validity of the marital relationship.

Counsel errs in asserting that the AAO did not specify the nature and materiality of the contradictory statements made by the beneficiary at interview on November 29, 2001. The AAO stated that at the interview the beneficiary made contradictory statements about her relationship with Mr. [REDACTED] that she regretted marrying Mr. [REDACTED] then did not regret marrying him; that Mr. [REDACTED] had a marijuana addiction, then had a “temptation” instead of an addiction; that Mr. [REDACTED] moved to [REDACTED] to remove himself from drug temptations and to paint his brother's house, then that he was going to attend college, then that he did not enroll in school. Counsel asserts that these are minor issues that the beneficiary had about her relationship with Mr. [REDACTED] showing candor and credibility and are an indication they “were young and perhaps somewhat impetuous when they married.” This is inconsistent with the record as it reflects that the beneficiary was approximately 29 years old when she married Mr. [REDACTED], and had held a position as an international business manager. She therefore should have known basic information about her husband.

Counsel states that the AAO was wrong in concluding that because Mr. [REDACTED] did not use the bank account regularly the bank statements are inadequate evidence of merged assets. Counsel contends that “[n]o such standard exists for refusing to accept evidence.” The AAO considered the bank statements as relevant evidence, but determined their probative value was diminished because they did not demonstrate that Mr. [REDACTED] actually used the bank account and therefore did not establish the merged finances of a *bona fide* marital relationship. Counsel contends that the beneficiary’s payment of Mr. [REDACTED] credit card debt establishes merged finances indicative of a married couple, but fails to explain how payment of a debt constitutes a merger of finances.

Counsel declares that the beneficiary was not given an opportunity to respond to new questions raised by the AAO regarding the timing of her employment during the early part of 2000. The AAO did not raise new questions about the beneficiary’s employment, but stated it was unclear from the affidavits how the beneficiary and Mr. [REDACTED] could not afford to live together in their own apartment after their marriage. In addition, the beneficiary had an opportunity on motion to clarify matters raised by the AAO.

Counsel states that the relatively short period that the beneficiary and Mr. [REDACTED] resided in the same place as husband and wife is a lifestyle issue, and cites *Bark, supra*, for the proposition that there is no standard about the kind of life that partners may choose to lead. *Bark* states that evidence of separation after a wedding, standing alone, cannot support a finding that a marriage was not *bona fide* when it was entered, but that the time and extent of separation, combined with other factors may support the conclusion that a marriage was not *bona fide*. The key issue of the *bona fides* of the relationship is whether the parties intend to establish a life together at the time of their marriage. *Id.* In the instant case, the AAO found that when the anonymous letter, the relationship of the beneficiary and Mr. [REDACTED] and the evidence in the record were considered together, there was substantial and probative evidence that the parties did not intend to establish a life together at the time of their marriage.

The AAO finds that counsel errs in stating that the AAO ignored the substantial and probative standard articulated in *Tawfik, supra*. The AAO did not base the denial on undisclosed information unknown to the beneficiary, but found that upon examination of the record, there was ample substantial and probative evidence of a documented, fraudulent marriage. Counsel also asserts that the anonymous letter was not held to evidentiary standards. The beneficiary was aware of the anonymous letter and had an opportunity at her interview to refute the information contained in the letter.

In sum, counsel has not established that the AAO’s decision dated August 14, 2012 was erroneous and based on an incorrect application of law or Service policy.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that “[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other

documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>2</sup>

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. The evidence referred to on motion, affidavits, and an anonymous letter, was previously presented. Thus, the evidence referred to on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The motion to reconsider is granted and the decision of the AAO dated May 17, 2013 is affirmed. The petition is denied.

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<sup>2</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).