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La Commission de l'immigration  
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Library Square  
300 W Georgia St Suite 1600  
Vancouver, BC V6B 6C9  
Telephone: (604) 666-5946  
Facsimile: (604) 666-3043

Immigration Appeal  
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L'immigration

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To the **appellant** at the following address:

Rinaben Kalpeshbhai PATEL BHAGA  
6560- 125 A Street  
Surrey, BC V3W 6S9

Personal Service:   
Prepaid Regular Mail:   
Courier:   
Fax:

To the **appellant's counsel** at the following address:

Khushpal Taunk  
209 - 8556 120th Street  
SURREY, BC V3W 3N5

Personal Service:   
Prepaid Regular Mail:   
Courier:   
Fax:

To the **Minister's counsel** at the following address:

CITIZENSHIP AND IMMIGRATION CANADA  
Immigration Appeals  
BC/Yukon Region  
Library Square  
Suite 700 - 300 West Georgia  
Vancouver, BC V6B 6C8

Personal Service:   
Prepaid Regular Mail:   
Courier:   
Fax:

(Signature)

(Print Name)

Karen Choi



IAD File No. / N° de dossier de la SAI : VA3-02917  
Client ID no. / N° ID client : 3965-4225

## Reasons and Decision – Motifs et décision

### *Sponsorship*

Appellant(s)

RINABEN KALPESHBHAI PATEL BHAGA

Appelant(s)

Respondent

The Minister of Citizenship and Immigration  
Le Ministre de la Citoyenneté et de l'Immigration

Intimé

Date(s) and Place  
of Hearing

May 5, 2004  
May 27, 2004  
Vancouver, BC

Date(s) et Lieu de  
l'audience

Date of Decision

September 9, 2004

Date de la Décision

Panel

Narindar S. Kang

Tribunal

Appellant's Counsel

Khushpal Taunk  
Barrister & Solicitor

Conseil de l'appelant(s)

Minister's Counsel

Judy Milne

Conseil de l'intimé

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## Reasons for Decision

[1] Rinaben Kalpeshbhai PATEL BHAGA (the “appellant”) appeals the refusal to issue a permanent residence visa to Kalpesh Kumar PATEL (the “applicant”) from India.

[2] The application was refused<sup>1</sup> because, in the opinion of the visa officer as contained in the refusal letter dated July 23, 2003, the applicant is not considered a spouse of the appellant because their marriage is as described in section 4 of the *IRP Regulations*<sup>2</sup> (the “*IRP Regulations*”) (the “Bad Faith Regulation”), in that the marriage is not genuine and was entered into primarily for the purpose of acquiring the applicant’s permanent residence in Canada. Consequently, the visa officer determined that the applicant is not a member of the family class whose application as the appellant’s spouse may be sponsored pursuant to section 117(1)(a) of the *IRP Regulations*.

[3] The Bad Faith Regulation provides as follows:

4. **Bad faith** – For the purposes of these Regulations, no foreign national shall be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine or was entered into primarily for the purpose of acquiring any status or privilege under the Act.

[4] There was no challenge by the respondent with respect to the legal validity of the marriage. At issue in this case, in a *de novo* hearing, is whether the applicant falls within the rubric of the Bad Faith Regulation. In order for a foreign national to be caught by the Bad Faith Regulation, the preponderance of reliable evidence must demonstrate that the marriage is not genuine and was entered into primarily for the purpose of acquiring a status or privilege under *Immigration Refugee Protection Act*<sup>3</sup> (the “*IRPA*”). Genuineness of the marriage is to be determined as at the time of the *de novo* hearing. In relation to the second-prong of the two-prong test, the purpose of entering into the marriage is to be determined as at the time of the wedding. In order to succeed on appeal, the appellant need only establish one of the prongs of

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<sup>1</sup> Record, pages 243-245.

<sup>2</sup> SOR/2002 – 227.

<sup>3</sup> S.C. 2001, c. 27.

the test has not been met. The onus is on an appellant to demonstrate that the applicant is not caught by the Bad Faith Regulation.

[5] Insofar that the appellant, who bears the requisite onus, is to know the case to be met, and given that the refusal letter summarizes the visa officer's concerns, that is determined from the information as set out in the Record, including the CAIPS notes. It is reasonable for the appellant to conclude that no additional grounds for refusal exist other than those set out in the CAIPS notes, or otherwise specifically stated in the Record, either by way of any statutory declaration of the visa officer or by plain statement with reference to other information in the Record. Any paucity thereto is to the benefit of the appellant.

[6] The appellant was examined at length and in detail by both counsel, and in areas regarding marital antecedents and circumstances post-refusal. Thereafter, the applicant testified by telephone from India immediately after the appellant's cross-examination and her further examination by the panel was completed, without a break in the proceedings. The applicant was also examined in some detail and in areas regarding marital antecedents and circumstances post-refusal by both counsel, and on matters that were revealed during the appellant's cross-examination. Prior to the appellant's testimony, her sister Jyoti Bhaga testified as the first witness in this appeal. The last witness was Sudhirbhai Tailor, the appellant's father. I have considered the witnesses' testimonies, along with additional material tendered at hearing, including the 'poison pen' letters received by the respondent.<sup>4</sup> Subsequent to the submissions being received, the hearing was adjourned by consent to allow the appellant to tender a video relating to the marital ceremonies and the number and identity of participants in the same. This was received and I have marked it as Exhibit A-3 in these proceedings. I have also considered the materials contained in the Record, Exhibit A-3, as well as the comprehensive and salient submissions made by both counsel at hearing.

[7] Counsel for the appellant submitted that the visa officer's concerns were put to rest in this *de novo* hearing, and the consistencies in the testimonies were in important areas and outweighed any apparent inconsistencies, including the inconsistency regarding when the applicant first learned of the fact that his wife-to-be had been married previously. He emphasized the degree of

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<sup>4</sup> Exhibit A-1, Appellant's Phone Bill and Receipts received at hearing; Exhibit A-2, 16 Tabs, 372 pages;

social enmeshment between the applicant and the appellant's family living in Gujarat, and submitted that the other witnesses' testimonies should be preferred over the appellant's father given his lack of education and sophistication. In relation to the appellant living with her former in-laws (also her sister's in-laws) after her marriage to the applicant, and her not abiding with her former in-laws' directive to sponsor her first husband's cousin to Canada, counsel for the appellant submitted that this was indicative of her credibility and further, that she was restricted from living elsewhere until her sister moved out as well. This is further commented upon below. He further emphasized that the appellant had met the applicable evidentiary threshold, a balance of probabilities.

[8] Counsel for the respondent provided brief submissions. She submitted that the respondent was not alleging the appellant's first marriage was a marriage of convenience but the main issue was the appellant's continuing relationship with her former in-laws post-marriage for some duration, and rhetorically asked what then is the relationship with her former husband. She submitted that only post-refusal did the appellant change her address from that of her former in-laws, and this undermines her credibility. Counsel for the respondent also submitted that the applicant did not know much at the interview and that she remained unconvinced that the marriage was well publicized. This is commented upon below.

### **Decision and Analysis of Evidence**

[9] Upon carefully considering all the evidence before me, including the testimony of the aforementioned witnesses, as well as the documentary evidence and the submissions of both counsel, I find, on a balance of probabilities, that the applicant is not a person described in the Bad Faith Regulation. Consequently, the decision of the visa officer is invalid in law and the appeal is allowed. Following are my reasons.

[10] In reviewing the evidence in this case, it is clear that the appellant was a credible witness, including regarding matters referred to below. It must be said that the appellant was not the best witness at times, and in her circumspect manner, testified in a manner where her testimony could appear to have lack of candour as opposed to it being, as I find, guarded and judicious. She also was extremely emotional at times, including at the end of the first hearing date when she fainted

and required the assistance of the case officer of the Appeal Division. She was also very attentive and emotional during closing submissions and during the testimony of the applicant. I find that her interest and emotional bond with the applicant during his testimony was heartfelt and her expressions of emotion at all times were sincere and not melodramatic. I find that the marriage is genuine from the appellant's perspective. This is significant because although it is the applicant's intentions that are also of pivotal importance, the intentions of the appellant are also very relevant in considering the genuineness of the marriage.

[11] I also find there was consistency in the applicant's testimony with that of the appellant in important areas, and such consistency outweighs the inconsistency referred to above, in relation to when the applicant learned of the appellant's marital antecedents. I find that the applicant testified in a credible but very simplistic manner, and clearly not as cogently in his expressions as the appellant. Nonetheless, the applicant provided cogent and credible evidence as to how, when, and where he and the appellant first met, and the role of the intermediary to their ultimate marital union, Mr. Bharatbhai of the City of Nosari, who is married to a woman from the appellant's home town and is known to her and her family. (During the appellant's testimony, she also referred to him as 'Bharat' and 'Bharatbhai', or Bharat brother. The interpreter indicated that 'Bhai' means brother in the appellant's native language).

[12] From his testimony, I find the applicant possessed sufficient, although not comprehensive, knowledge of the appellant's antecedents, places of work and residence, both in India and in Canada, and of her prior marital background, including the circumstances of her cohabitation with her sister in her former in-law's residence even after they married. He also corroborated very personal matters that the appellant testified to. The applicant also provided cogent and credible evidence as to the reasons why their marriage took place, their participation in other culturally specific activities, activities on a honeymoon truncated by religious Hindu-Muslim strife, and ongoing interaction by him and his family with members of the appellant's family in India. In sum, the applicant's testimony was largely corroborative of the appellant's, and is further commented on below.

[13] The marital antecedents of both the appellant and the applicant can be gleaned from the Record, including the Spousal Questionnaire, and the witnesses testified in this regard as well.

The twenty-five year old appellant was landed in Canada on May 5, 2000 as sponsored spouse of her first husband. The applicant was born January 5, 1977, and is 27 years of age. I thus find that they are compatible in age. The appellant married the applicant on February 3, 2002 in India.

[14] Both witnesses testified that the appellant had a previous marriage, with the appellant extensively testifying in this regard during cross-examination. The appellant first married Chetan Bhaga on May 9, 1999, and, as she testified, was sponsored by him to Canada. The appellant further testified she filed for divorce in that first marriage, after determining that he was involved with another non-Indian woman and after futile efforts by her and her first in-laws to mend his wayward ways, receiving the order for that divorce August 13, 2001, the divorce being in effect 31 days thereafter. The appellant testified regarding her in-laws initially maintaining their sympathy for her because of their son's philandering and also had self-interest insofar that they later pressured her to consider marrying and sponsoring to Canada their nephew.

[15] I concur with counsel for the respondent that the circumstances of the first marriage are not in issue and I find that it was both a *bona fide* marriage, and its subsequent dissolution is *bona fide* as well. In regards to the appellant's cohabitation with her former in-laws subsequent to August 13, 2001 and through to about October 2003, without explanation it does reasonably cause suspicion regarding the genuineness of this marriage. However, the appellant credibly testified that her former in-laws initially supported her and also sought her consent to sponsor Chetan's paternal cousin to Canada, despite his being about 20 years older than her. She testified that she ultimately refused to do this despite continued pressure from her former in-laws, and the relationship with her former in-laws soured, but she was able to remain in that house along with her sister, married to Chetan's brother, and her sister's children. It was during this cohabitation that she traveled to India, married the applicant, and sponsored him to Canada, and the application was refused resulting in this appeal, all facts her former father-in-law was aware of. She suspects her former father-in-law is author of the poison pen letters in Exhibit R-1, given that he was upset about her not sponsoring his nephew to Canada. Counsel for the respondent confirmed that the author was unknown and she possessed no accompanying envelopes.

[16] The appellant's sister provided testimony corroborative of her affidavit as follows:

1. I am sister of the applicant, Rinaben Patel ("Rinaben") and wife of Jatin Bhaga, who is elder brother of Rinaben's ex-husband, Chetan Bhaga ("Chetan").
2. Rinaben and my family lived together with my in-laws at 12211 - 65A Avenue, Surrey, British Columbia.
3. Ten days after Rinaben arrived in Canada, she discovered that Chetan had been unfaithful to her and conceived a child with his mistress.
4. At this time Rinaben talked to her in-laws, and informed them of their son's infidelity.
5. The in-laws were very upset with their son. Rinaben and the in-laws talked to Chetan about this issue and he admitted that he had committed adultery. He further admitted to Rinaben that he had son from his mistress.
6. Upon Chetan's confession, the in-laws expelled him from their home and Rinaben remained with us. Chetan never returned home and started living with his mistress.
7. Rinaben continued to reside with her in-laws peacefully and obtained divorce order from Chetan.
8. After Rinaben obtained her divorce order, Rinaben's father-in-law made an offer to her to marry his older brother's eldest son, Jayesh Bhaga, who lives in India and to sponsor him. Rinaben declined his offer, as he was 20 years older than Rinaben.
9. Upon declined the offer, her father-in-law became upset and irritated and informed her that he would make sure that her new husband was unable to come and live in Canada.
10. After Rinaben's marriage to Kalpesh, the relationship between me and Rinaben and my in-laws became very stressed as they grew bitter and bitter.



11. My husband then began physically and sexually abusing me. He hit me three times and after which I filed a report with the police and has been starting living separate with my two children and Rinaben at 6560 – 125A Street, Surrey, British Columbia since October 2003.
12. My husband threatened me to kill me if I did not go back to the matrimonial home. Therefore, on December 03, 2—3, I have filed an action, Surrey Provincial Court Registry number, F24410 to obtain custody and maintenance for my children and restraining orders. Attach as an Exhibit “A” to this my Affidavit is a copy of the said action. (copied as per original.)

[17] I accept the appellant’s testimony in regards to her circumstances, and that of her sister Jyoti Bhaga, resultant in their ultimately moving out. These were two sisters who were married to two brothers. In the circumstances of this case, I consider it entirely understandable that the appellant’s former in-laws would continue to support the appellant for two reasons; namely, to secure their nephew’s entry to Canada through using the appellant, and to attempt to foster and maintain harmony between their other daughter-in-law and their other son Jatin. This continuing support does not mean that the appellant had any social enmeshment with her former husband Chetin, and I find that none can be inferred. As the appellant testified, she moved out in October 2003 when Jyoti and her husband’s situation deteriorated to the point where police intervention occurred followed by the custodial and maintenance legal actions described above. As such, I find that the continued co-habitation by the appellant with her former in-laws, along with her sister who was then in a marital relationship with Jatin, does not undermine the witnesses’ assertions regarding genuineness of this marriage.

[18] The applicant has not completed any college or university education, possesses a trade certificate, and has a total of 11 years of formal education. I find that the applicant is a person of limited education and limited world experiences, having never travelled outside India. Thus, I do not attach any significance to minor discrepancies in recollections of dates and events, as the witnesses were referring to matters about 2 and ½ years prior to hearing.

[19] The appellant came to India on about December 30, 2002. The appellant and applicant testified that matters proceeded rapidly and their marriage occurred on February 3, 2002. The appellant and applicant testified that they finally committed to marrying each other for the first

time on January 20, 2002, and that both families agreed as well. The appellant and applicant both testified that the applicant was aware before marriage that the appellant was previously married. Whilst the appellant testified that on January 10, 2002, during a temple visit, discussions took place with the applicant, she further testified that she thereafter went to his village of Dandhi unannounced and inquired from locals, and then decided to get married. Thus, in relation to the witnesses' testimonies regarding the final agreement of marriage, I find that it was on January 20, 2002, and that the applicant and/or his family was informed of the appellant's marital antecedents with sufficiency prior to the final decision of marriage. I find that despite the short passage of time wherein the appellant reflected upon the possible arranged match with the applicant, she and her family made background checks in his native village with locals, along with personal observations of the applicant's family, and took the advice of their family friend Bharatbhai, and these steps bolster the assertions of the witnesses regarding genuineness of this marriage. The appellant presented as a mature, reflective, and responsive witness and I find that she entered this marriage volitionally and fully cognizant of the interests of the applicant's relatives in securing this genuine match.

[20] Both witnesses testified that numerous persons attended the marriage ceremonies, including relatives from both sides. Whilst counsel for the respondent was unconvinced of the publicity of this marriage, I have reviewed the video in Exhibit A-3 tendered by the appellant and I find that it does evidence publicity resultant from this well attended marriage and is thus indicative of genuineness of this marriage.

[21] Subsequent to marriage, as both the appellant and applicant testified, the appellant remained in India and cohabited with the applicant and his extended family members until her departure near the end of March 2002. Both the appellant and applicant credibly testified as to their intimacy and as to specific events, such as the curtailing of their honeymoon due to logistical problems resultant from religious riots in Gujarat at the time. Both of these witnesses testified at length regarding their social enmeshment, both with each other and by the applicant with the appellant's extended family. I find this type of social enmeshment by the applicant and his in-laws to be significant indicia of a genuine arranged marriage.

[22] The appellant testified that after she returned to Canada, she and the applicant maintain extensive phone contact, and also communicate via letters. Extensive documentary material

corroborates this testimony.<sup>5</sup> The applicant corroborated this testimony as well. Both witnesses testified regarding future marital plans, including having children. Documentary evidence, namely photographs, proffered by the appellant corroborates their testimonies regarding social enmeshments by the appellant with the applicant's family whilst in India.<sup>6</sup> I find that the degree of social enmeshment by the appellant in her spouse's family, and visa versa, to be indicative of genuineness of this marriage.

[23] As stated above, the appellant and applicant are compatible in age. Both also have compatible levels of social background. I also find that both have similar educational backgrounds, with the appellant possessing 12 years of education and her husband 11 years. Both have similar religious backgrounds, being of the Hindu faith. Both also have similar linguistic capabilities, having Gujrati as their mother tongue. Whilst the appellant is previously married, and hence they do not have identical marital antecedents, both share the commonality of having no children. In regards to the marital incompatibility, I find that this is mitigated insofar that the applicant, as he testified, has a maternal aunt who is divorced and thus there is precedence in his family of divorce. Furthermore, both come from a similar socio-economic background.

[24] I find that these commonalities, coupled with the trust reposed in Bharatbhai by the appellant and the applicant's family, form a sufficient impetus to consider an arranged marriage in all the appellant and applicant's circumstances. I find that the hallmarks of a genuine arranged marriage, as borne out by the credible testimony of the appellant and applicant, are present in this case.

[25] The appellant and applicant's credible testimonies, coupled with materials submitted,<sup>7</sup> constitute sufficient evidence of numerous phone calls of lengthy duration between the appellant and the applicant since marriage. I find there is sufficient trustworthy evidence of numerous telephone calls and personal contact between the appellant and the applicant. Photographs provided by the appellant establish a degree of tenderness between the appellant and the applicant in various venues, and corroborate the appellant's and the applicant's testimony regarding the appellant's enmeshment with extended family members.<sup>8</sup> I find that there is

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<sup>5</sup> Exhibit A-1 and A-2.

<sup>6</sup> Record (for example, page 353); Exhibit A-2.

<sup>7</sup> See Exhibit A-1 and A-2.

<sup>8</sup> Record and Exhibit A-2.

sufficient documentary and photographic evidence of an on-going marital relationship, much of it corroborative of the *viva voce* evidence of the appellant and the applicant.<sup>9</sup> I find this couple's commonality has been built upon by diligence between the parties in pursuing their relationship to its marital fruition, and subsequently has been strengthened over time with frequent communication.

[26] In regards to any apparent inconsistency between the testimony of the applicant and his purported responses at interview, I attach lower weight to the version of events as outlined in the CAIPS notes in any event, given that it is not a verbatim transcript of the interview of the applicant. There was a Gujrati interpreter utilized at interview. The CAIPS notes are in English and there is no indication in the Record of any proficiency of the interpreter in transcription of such an interview conducted in Gujrati into the CAIPS notes summary. There is no interpreter's jurat in relation to the CAIPS notes, nor any separate statutory declaration, nor a clear indication as to whether the visa officer actually transcribed the CAIPS notes. As a result, I attach these notes even lesser weight, and I prefer the credible explanations of the applicant in this regard.

[27] As stated above, various members of the both families attended this marriage ceremony in India. The photographic evidence in the Record displays a marriage with much pomp and circumstance, and with numerous relatives in attendance. The video in Exhibit A-3 further exemplifies the ceremonies, and attendees at these events. I do not accept counsel for the respondent's contention that this marriage is solely for the purpose of the applicant acquiring landed status in Canada insofar that it's genuineness is bolstered by the participation in elaborate marital processes and ceremonies by so many members of both families, amongst other invitees.

[28] In regards to the apparent inconsistency between the appellant and applicant regarding whether an 'engagement' occurred, I find that various cultural events described, some akin to an engagement or engagement-like ceremony, occurred and were described in detail by the appellant and applicant. For example, the appellant testified "we considered the exchange of *sagan*, which is the gifts, as an engagement." In further questioning of what a *sagan* of 101 rupees would be referred to in her community, the appellant described it as a *Chandala*, which the interpreter culturally interpreted as a 'confirmation'. The appellant further testified that this

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<sup>9</sup> *Ibid.*

*Chandala* was a confirmation of an engagement. I find that the applicant's testimony that there was no engagement does not impugn his credibility insofar that this a term subject to cultural interpretation, and the testimony of the appellant regarding ceremonies such as a *sagan* and *Chandala* suggests that a Gujrati equivalent of 'engagement' is not necessarily unequivocal.

[29] I find the appellant's father's testimony, received by teleconference, to be without reflection and unhelpful, and I attach it limited weight. His testimony touched upon many occurrences in the early stages of the marital arrangements, yet his testimony was not in accordance with that of the appellant and of the applicant. Given that the appellant and applicant were consistent in important areas (for example, in regards to the appellant's unannounced visit on January 17, 2002 along with her mother to the applicant's ancestral village of Dandhi), inconsistencies between their testimonies with that of the appellant's father are not as significant, in my view. In addition, the testimony of the appellant's father regarding occurrences where he was not personally in attendance is at a minimum hearsay, and thus of more diminished weight in any event.

[30] In the context of this arranged marriage, where there is no return visitation by the appellant, it is to be reasonably expected that there will be some paucities in knowledge between the parties. I find, given the credible testimony of the appellant that the applicant has likely been forgetful or even cavalier in retaining knowledge of the circumstances of their original meeting. In the context of this arranged marriage, with elders playing pivotal roles (in particular, the appellant's mother and the applicant's parents, as well as Bharatbhai), I find that the applicant's and appellant's credible testimonies regarding forward-looking aspects of their lives is more significant than forgetfulness regarding past and sometimes painful events. I find from the witnesses' otherwise credible testimony that the appellant's full marital antecedents were made available to the applicant's family as the intermediary Bharatbhai was told of these matters separately, and this is indicative of genuineness at this *de novo* hearing regarding the arranged marriage and on-going relationship supportive of the genuineness of their marriage.

[31] Given that this was a hearing *de novo*, the key concerns of the visa officer were alleviated at the appeal to my satisfaction.

**Conclusion**

[32] There was sufficient reliable evidence of the nature of a genuine marriage, including but not limited to that enumerated above, that I am of the view that the appellant has shown, on a balance of probabilities, that the applicant is not a person described in the Bad Faith Regulation. In reviewing the evidence in this case on the whole, I conclude, on a balance of probabilities, that the appellant has established that his marriage to the applicant is genuine, and that it was not entered into for a primary purpose of gaining any status or privilege for anyone under *IRPA*. Consequently, the decision of the visa officer is invalid in law.

[33] The appeal is allowed in law.

**NOTICE OF DECISION**

The appeal is allowed. The officer's decision to refuse a permanent resident visa to Kalpesh Kumar PATEL is set aside, and the officer must reconsider the application in accordance with the reasons of the Immigration Appeal Division.

**"Narindar S. Kang"**

\_\_\_\_\_  
Narindar S. Kang

**2 September 2004**

\_\_\_\_\_  
Date (day/month/year)

**Judicial review** – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.