

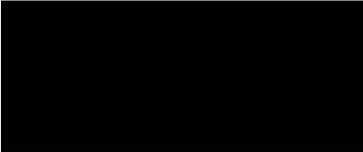


U.S. Department of Justice

Immigration and Naturalization Service

B2

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File: [Redacted] Office: California Service Center Date: 11 DEC 2001

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)

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

Various attorneys have represented the petitioner throughout the course of this proceeding, but all of them are with the same firm and thus the term "counsel" shall refer to each of them.

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 arts. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Section 203(b) of 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 to the United States will substantially benefit prospectively the United States.

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 Service 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 petitioner seeks classification as an alien with extraordinary ability as a musical composer. 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, international 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. The petitioner has submitted evidence which, counsel claims, meets the following criteria.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

Geir Johnson, former president of Ny Musikk ("the leading organization for the promotion of contemporary art music in Norway"), states that in 1988 the petitioner won "the prestigious TONO prize, the Norwegian national award equivalent to the ASCAP composition award in the United States." Mr. Johnson does not identify himself as a present or former TONO official, nor does he otherwise establish his authority to verify the petitioner's receipt of the prize. Absent such evidence, the personal assertion of Geir Johnson cannot constitute documentation of the petitioner's receipt of the TONO prize. The petitioner does not address, let alone explain, the absence of first-hand documentation. The record contains a very short letter from a TONO official, dated August 19, 1997. This letter confirms the petitioner's membership in TONO, "the performing right society in Norway," but does not mention any awards.

Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

A one-paragraph piece about the petitioner appeared in the Stanford University Campus Report, a local campus newsletter rather than a major national or international publication. Tama Yomiuri, a Japanese publication, carried a review of a performance of the petitioner's work at Japan's Computer Music Center. The record offers no information about this publication.

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

The petitioner states that he has made "contributions to music technology through graphic user interface & specifications software

engineering (1992 for Yamaha SY77 Synthesizer; 1996 for Sonic Systems JPEG Video recording)."

Geir Johnson, identified above, discusses some of the petitioner's accomplishments:

[A]t Stanford University's Center for Computer Research in Music and Acoustics (CCRMA), which is recognized as the most advanced center for computer music research in the world . . . [the petitioner] developed a feedback "Iteration" system for sound-file processing and a note-list time modulator in the C programming language; he was also responsible [for] the studio design and equipment development of an all digital sound studio at CCRMA. . . .

In 1989, Music Factory commissioned his work for computer tape and live tap-dancer which became a very successful composition; broadcast at prime time on national television in Norway at its premiere in Bergen, June 1989. In 1994 Music Factory commissioned another computer generated tape piece which was performed the next year. In 1992 [the petitioner] developed a "MapMix" application for multiple sound files . . . ; in 1993 he developed a "Z-Morph" application for sound integration for Japan. . . .

[The petitioner] is one of Norway's foremost composers in new music, and his work in the electro-acoustic field has won him international acclaim, his music having been performed at concerts and conferences all over the world. . . . In my opinion, [the petitioner] is among the elite group of internationally recognized composers in the vanguard of the field of computer music.

Patte Wood, officer and board member of the International Computer Music Association, states that the petitioner "is a unique artist in the field of Computer Music. His use of the medium and his compositions are original and his contributions in the area of technology and music are imaginative and thought producing." Other witnesses offer general praise for the petitioner's abilities as a composer of computer music.

Various documents in the record establish that the petitioner has been active in his field, participating in conferences and speaking at symposia, but there is no direct evidence to show that the petitioner's work has had a significant impact outside of the various research groups and artistic ensembles with which he has been involved.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The petitioner submits copies of his writings, which include some technical information, for instance regarding the means by which he created his composition "Downcast," written "for computer and eight strobelights." The record does not reveal where these pieces were published, and it is not entirely clear that these documents represent "scholarly articles" comparable to articles that appear in major scholarly journals and reflect the outcome of research and/or experimentation.

The petitioner has written various pieces published in the Computer Music Journal, such as book reviews and a report on the events at a conference. These writings appear to represent opinion and reportage rather than scholarly writings which set forth new findings in a given field of research.

Perhaps the most persuasive example of a scholarly article by the petitioner is a 1990 article in the Norwegian publication Data Tid in which the petitioner discusses technical aspects of digital sound processing. Even here, however, the record tells us nothing about Data Tid except that it is a Norwegian-language publication relating to computers.

The petitioner asserts that screenplays, storyboards, and "CD recording of musical composition" also constitute "publication" of his work. These, however, are not scholarly articles. Recorded works by the petitioner are covered by another criterion, further below.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The petitioner states that his concert performances satisfy this criterion. Counsel asserts that various concert performances by the petitioner satisfy this criterion. The criterion, however, is more appropriate for the visual arts. Almost every musician, actor, and other performing artist "displays" his or her work in the sense of performing in front of an audience. In the performing arts, acclaim is generally not established by the mere act of appearing in public, but rather by attracting a substantial audience. For this reason, the regulations establish a separate criterion especially for the performing arts:

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

The petitioner states that he has "displayed" his work through concert performances, and "published" his work through CD recordings, but he makes no claim of commercial success on either front. The fact that the petitioner's work has been performed in public and issued on CDs is not *prima facie* evidence of

extraordinary ability, because one need not be a top figure in the field in order to perform in public or release a CD.

The petitioner submits copies of programs from several performances which included his work, but there is no evidence to establish that these performances drew greater audiences than other computer music performances that did not feature his compositions.

The director informed the petitioner that the documentation submitted with the petition was not sufficient to establish the beneficiary as an alien of extraordinary ability. The director clearly set forth the criteria outlined in section 203(b)(1)(A) of the Act, and specified that the Service has defined "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." The director requested "advisory opinion(s) . . . from recognized government organizations and/or recognized major academic or business organizations or institutions" to establish that the petitioner is nationally or internationally acclaimed as one of the top figures in his field.

In response, the petitioner has submitted three letters which, according to counsel, "attests to the Petitioner's national acclaim within the industry as one of a few experts in his field (digital signal processing and its applications) and the importance of DSP in harnessing information technology." These letters were originally written for submission with the appeal for an earlier, denied petition filed by the petitioner.

Jay Kadis of CCRMA states that the petitioner "is an expert in digital signal processing (DSP) techniques. This type of computer programming is fundamental to the fields of communications, audio and video, radar, and medical imaging. . . . There is a shortage of qualified DSP programmers." A claimed worker shortage is irrelevant to whether or not the petitioner has sustained national or international acclaim.

James Garrison of Hewlett-Packard discusses "the major influence Digital Signal Processing (DSP) and its research (which is [the petitioner's] specialty) has on the high technology industry today." Mr. Garrison states that the petitioner's "field of research is extremely important to the continued technological developments in the Telecommunications Industry (and the many other industries which rely on DSP technologies)."

The initial filing of the petition had contained no mention at all of DSP or its general applications outside of creating electronic music. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), and

Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Mr. Garrison asserts "[i]t would be a mistake to confuse [the petitioner's] emphasis on music composition in this field since his work (i.e. DSP computer programming, etc.) is far-reaching and is a core for much of the computer industry today and in the future." Nevertheless, the petitioner himself has stated that his intention is to work as a self-employed composer. General assertions regarding the applications of DSP technology do not establish that this petitioner has made significant advances regarding those applications. Absent specific examples of significant contributions that the petitioner has made outside of musical composition, there is no evidence that the petitioner's work is directly relevant outside of musical composition.

Robin Goldstein, Program Manager of Microsoft's Audio Group, states:

Researchers at CCRMA over the years have developed and patented many of the technologies in use in the Computer Music industry today. Moreover, patents on Computer Music and DSP research done at CCRMA have yielded quite a profit for Stanford and its commercial partners here in the US and abroad. Some of these technologies have even been refined for use on personal computer systems and are part of applications used by my team here at Microsoft.

If I could ever tear [the petitioner] away from Stanford, I am sure the Microsoft Research Group, one of the software industry's largest think tanks, would benefit from his abilities and knowledge. In addition, if [the petitioner] would like to return to software development for personal computers, I would encourage him to apply for an open position for a Development Lead reporting to me in the Microsoft Audio Group.

As with the statement of James Garrison, Robin Goldstein's letter indicates that the petitioner could make valuable contributions to computer software development, but there is no indication that the petitioner has already done so. General assertions that the CCRMA research group has made valuable contributions do not establish that the petitioner is personally responsible for such contributions, or that he was a member of the group at the time it made the contributions. It remains that the petitioner seeks employment not as a computer programmer or as a developer of electronic technology, but as a musical composer who utilizes computer technology.

These letters do not address the issue of sustained acclaim, because they were originally solicited in the context of a separate petition, seeking a different immigrant visa classification.

The director denied the petition, stating that the petitioner has won some recognition in his field, but that the evidence submitted does not place him at the very top of that field. On appeal, counsel submits a short statement and indicates that a brief is forthcoming within 30 days. To date, nearly two and a half years after the filing of the appeal, the record contains no further submission and a decision shall be made based on the record as it now stands.

Counsel states that the director failed to acknowledge that the petitioner's TONO award is an internationally recognized award. Counsel asserts "TONO is the Norwegian branch of ASCAP and ASCAP/BMI is the largest international music organization in the world that distributes composers' royalties from airplay, concerts and other venues." As noted above, the record contains no documentation from TONO to establish the petitioner's receipt of the award or its significance. Also, while TONO serves the same purpose in Norway as ASCAP does in the U.S., i.e. securing composers' royalties, there is no evidence that "TONO is the Norwegian branch of ASCAP." Rather, the record indicates that TONO has "reciprocal contracts with ASCAP, BMI and Sesac in the USA."

Counsel states that the director "erroneously disregarded the evidence that Rolf Wallin, one of Europe's top composers, was selected by the President of Ny Musikk to be on the jury that awarded the first of two TONO awards the petitioner received." We can find in the record no prior mention of Rolf Wallin, nor of a second TONO award. Geir Johnson, in his letter, does not discuss Rolf Wallin, nor does he assert that his organization, Ny Musikk, played any role in the selection of the TONO award winners. Counsel cites no source for the claims made on appeal regarding the TONO award. Even without taking into account the credibility issues arising from counsel's demonstrably incorrect assertion that TONO is a part of ASCAP, the assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel asserts that the director "failed to give proper weight to the evidence submitted that the Petitioner has distinguished himself as an alien of extraordinary ability," and that the director "misrepresent[ed] the evidence." These are general claims, and we have shown that counsel's own representation of the record on appeal is not entirely reliable.

Counsel contends that "the INS is unfamiliar with the Petitioner's field of endeavor and does not have sufficient expertise to

evaluate the specific evidence submitted." The burden of proof is on the petitioner to establish eligibility. If the evidence is insufficient to establish eligibility, the petitioner cannot overcome this shortcoming simply by challenging the Service's competence to evaluate the evidence of record. Counsel follows this argument with the assertion that "a request for additional evidence should have been made." The record proves that the director did in fact make such a request, to which the petitioner responded through counsel.

The petitioner has shown that he has earned the respect of some leading figures in his field, both in the U.S. and in his native Norway. The record, however, simply does not contain sufficient evidence to meet the regulatory criteria and establish that the petitioner has earned sustained national or international acclaim as one of the very top figures in his field.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim, is one of the small percentage who has risen to the very top of the field of endeavor, and that the alien's entry into the United States will substantially benefit prospectively the United States.

Review of the record, however, does not establish that the petitioner has distinguished himself as a composer to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the petitioner has enjoyed success in his field, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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.