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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

MAY 10 2001

File: WAC 99 102 52376 Office: California Service Center Date:

IN RE: Petitioner:
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)

Public Copy

IN BEHALF OF PETITIONER:

[redacted]

Identification 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 which 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 which 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 which 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, Acting 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 sustained and the petition will be approved.

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 that he qualifies as an alien of extraordinary ability in his field of endeavor.

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).

An alien, or any person on behalf of the alien, may file for classification under section 203(b)(1)(A) of the Act as an alien of extraordinary ability in science, the arts, education, business, or athletics. Neither an offer of employment nor a labor certification is required for this classification.

The specific requirements for supporting documents to establish that an alien has achieved sustained national or international acclaim are set forth in the Service regulations at 8 C.F.R. 204.5(h)(3). The relevant criteria will be discussed below. It should be reiterated, however, that the petitioner must show that the beneficiary has sustained national or international acclaim at the very top level.

This petition, filed on February 9, 1999, seeks to classify the petitioner as an alien with extraordinary ability as a video game designer/programmer.

The regulation at 8 C.F.R. 204.5(h)(3) presents ten criteria for establishing sustained national or international acclaim, and requires that an alien must meet at least three of those criteria unless the alien has received a major, internationally recognized award. The petitioner, through counsel, claims to have met several of these criteria.

> *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.*

Several of the articles submitted by the petitioner are reviews of games which the petitioner had designed. The majority of these reviews do not identify the petitioner at all, and therefore it is highly misleading to say that these articles are "about the alien" as the regulation requires. While the petitioner may indirectly earn a reputation by designing popular games, an article which never mentions him cannot contribute to his acclaim for the simple reason that a reader who has never heard of the petitioner will, after reading such a review, still know nothing about him.

Several articles discuss efforts by musician Pete Shelley to incorporate a computer program into his 1983 album "XL1"; a program included on the album displays the lyrics, in time with the music, if played on the 48K Spectrum computer. The petitioner, again identified only by his one-word nickname, is identified as the programmer who assisted with the project, but the central focus of the articles is Mr. [redacted] (who had already earned a measure of recognition as a former member of the punk band the Buzzcocks); one article focuses on the album's co-producer, Martin Rushent, who was already well-known as a producer of albums for several top artists. Mr. Shelley brought the petitioner into the project not because the petitioner had earned any significant reputation as a programmer, but because the two were already friends.

The above being said, two of the submitted articles are obviously about the petitioner, specifically a brief profile of the petitioner in the magazine Sinclair User and a full-page article from Your Spectrum, both of which appear from their titles to be publications for users of specific makes of computer. This evidence is diminished somewhat because the statute demands evidence of sustained acclaim; the most recent article about the petitioner (rather than about the petitioner's work with no reference to the petitioner) dates from 1985, in a magazine devoted to a now long-obsolete computer.

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

Various reviews of the petitioner's game "Cholo" offer high praise, such as the assertion that it is "a game that is possibly destined to become a classic." Jonathan Simpson-Bint, president of Imagine Media Games Division, asserts that "Cholo" "represented the height of home gaming technology in 1985," but there is no indication that the game set a new standard for home video games, or that it was more influential than most other home games of the period.

Counsel asserts that Pete Shelley's "XL1" album from 1983 is "the precursor to today's CD-R discs and the western Karaoke." Indeed, in a 1983 interview, Pete Shelley stated "[s]omeone is bound to link up a computer to a compact disc player. Compact discs are the coming thing and there are plenty of spare bytes floating around in them." At the time of the interview, compact discs were not yet the dominant format for recorded music, and the "XL1" program was incorporated not onto a CD-ROM, but rather onto the vinyl LP record, with instructions to transfer the program to tape.

While the computer program included with "XL1" may well have been an ancestor of the far more complex programs now found on many musical and multimedia releases, the press articles in the record indicate that the basic idea was Pete Shelley's and that Mr. Shelley, who had a considerable background in computer science himself, enlisted the petitioner to assist him in executing an already-formed idea.

Some witnesses, including Thomas Dolby Robertson,[1] CEO of Headspace Inc., indicate that "XL1" was the first attempt to link computer software with recorded music. The record, however, does not support this assertion. While "XL1" was the first full-length musical album to include a computer program, contemporary news articles indicate that EMI recording artist Chris Sievey had previously issued a 45 r.p.m. single record including both music and software which would display graphics and the record's lyrics (which, from the description, is very similar to the function of the "XL1" software). The various witnesses may well be unaware of this single, but nevertheless the record shows that "XL1" was not the first commercial release of a record that included both music and software.

With regard to the significance of the petitioner's work on "XL1," we note comments by the petitioner himself from a 1985 interview:

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[1]Mr. Robertson appears to be the individual who, under the name Thomas Dolby, recorded the hit song "She Blinded Me With Science."

> I was very excited about the release of *XL1* - I thought there'd be all sorts of people after me to write programs for their albums. . . . Of course, nothing happened at all - it was very disappointing. . . .
>
> I saw that there was absolutely no recognition coming my way as a result of *XL1*.

Given the petitioner's own assertion that "XL1" brought him no significant recognition, it is difficult to conclude that "XL1" represents a contribution of major significance. The evidence showing that "XL1" was not, in fact, the first hybrid of recorded music and software, calls into question the originality of the contribution.

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

Counsel states that the petitioner's "work . . . has been and will be showcased throughout America." Counsel cites "exhibit E" of the initial submission, which consists of advance publicity for the then-forthcoming "Pac-Man 3D." Publicity of this sort is more akin to publications than to artistic exhibition. Furthermore, unlike an artistic exhibition such as a museum show, in which the artist's name is prominently featured, the petitioner's name does not appear in these materials. Likewise, photographs of a "Pac-Man 3D" display at a trade convention do not show the petitioner's name at all, let alone feature it prominently.

The evidence discussed above has been less than persuasive. The petitioner has, however, more persuasively satisfied the remaining three criteria.

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

Counsel asserts that the petitioner has performed in such roles for a number of employers, but the record contains evidence from only two of them. Bert Schroeder, director of Content Development for Psygnosis, states that the petitioner was the lead programmer for "Joe Montana's NFL Football" which "was the number 3 best selling game of all time on the Sega CD having sold over 100,000 units worldwide."

Jesse Taylor, director of Research and Development for Namco, states that the petitioner is lead programmer for the development team working on "Pac-Man 3D," an updated version of Namco's classic game from two decades earlier. Mr. Taylor asserts that the petitioner "is indispensable to this team," and that "the Pac-Man

project is critical to the continuing business success of Namco Hometek."

Upon consideration, we conclude that a lead programmer plays a critical role for a producer of video games. While these companies may employ substantial numbers of programmers, the duties of a lead programmer differ significantly from those of a "rank-and-file" programmer; the latter essentially follow the directions and execute the designs of the former.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

T.J. Summers of Interact, "an employment consulting firm specializing in recruitment of programmers and artists within the software entertainment industry," states that the petitioner's starting salary at Namco Hometek is $90,000, which "places him in the top five (5) percentile [sic] programmers within the software entertainment industry."

Joan Stark, director of Human Resources at Namco Hometek, states that the petitioner's "current salary is $91,500.00 and he is eligible for a bonus of up to 30%. . . . [T]he salary granted to [the petitioner] places him among the highest paid programmers within the software entertainment industry."

While the Department of Labor's Occupational Outlook Handbook, 1998-1999 edition, offers no direct corroboration of the above assertions, it does indicate on page 109 that the median earnings of computer programmers in 1996 "were about $40,100 per year," and that "[m]edian earnings for programmers at the supervisory or team leader level were about $55,000." The petitioner's earnings are well above this amount.

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

The petitioner submits documentation pertaining to Namco Hometek. The petitioner, however, had only recently begun working for Namco when the petition was filed; there is no indication that any Namco game designed by the petitioner had even been completed, let alone released long enough for sales figures to be available. "Pac-Man 3D," the petitioner's principal project for Namco, had not even been released as of the petition's February 1999 filing date. NAMCO intended to release the product for the 1998 holiday season, but subsequent publicity materials show an expected release date of February 1999, May 1999, and (in documents submitted on appeal) October 1999.

The petitioner shows that "Joe Montana Football" was the third highest selling game for Sega Genesis CD between 1994 and February 1998, selling 117,145 copies or 6.29% of total game sales for the system. While these sales do not represent commercial success in the performing arts, they certainly represent commercial success and thus we can consider this evidence to be "comparable evidence" under 8 C.F.R. 204.5(h)(4).

We can conclude from the available evidence that the petitioner has met with commercial success in terms of sales of games he has designed.

The director denied the petition, stating that the petitioner has not shown "that he is internationally renowned and recognized as being at the top of his field of endeavor as a video game designer/programmer." The director observed that the petitioner was a member of a design team rather than the sole designer of his games. The director also noted that the petitioner's media coverage has been "intermittent," and that the display of upcoming games at trade shows is the norm rather than a mark of special distinction.

On appeal, counsel notes that the statute allows national or international acclaim, despite the director's implication that such acclaim must be international. Nevertheless, counsel asserts that the petitioner has in fact established international acclaim in the U.S., the U.K., and Japan. The new evidence submitted to establish such acclaim dates from after the petition's filing date.

Counsel asserts that the petitioner's membership on a design team should not be an adverse factor, because the petitioner was the leader of that team. We concur with counsel insofar as working with a team does not necessarily diminish the petitioner's contributions, and, as counsel mentions, supervision of a team frees the petitioner from "routine" programming tasks so that he can devote his efforts to design work.

Counsel asserts that "Cholo" and the "XL1" program "were [the petitioner's] exclusive work. No one else has been accredited [sic] with these two designs." This assertion is plainly false, as the record amply documents that Pete Shelley collaborated with the XL1 program, and the "Cholo" instruction booklet indicates that the game "was conceived, designed, and programed by . . . [the petitioner] and Glyn Williams." The falsity of counsel's statement, whether intentional or inadvertent, illustrates the importance of the Service's insistence on primary evidence, rather than mere claims by counsel. 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).

In response to the director's finding that a trade show is not an artistic showcase, counsel simply repeats the assertion that the petitioner's work has appeared at trade shows. Repetition, however, is not rebuttal.

The petitioner submits documentation regarding the release of the newly-titled "Pac-Man World" in 1999. Mike Fischer, marketing director for Namco Hometek, states that "[s]ales of the game are approaching one million units worldwide." We consider the evidence regarding "Pac-Man World" only because the game was already in advanced development at the time the petition was filed. The petitioner cannot retroactively establish eligibility through the outcome of a project which had not begun before the petition's filing. See 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.

In review, while not all of the petitioner's evidence carries the weight imputed to it by counsel, the petitioner has established that he has been recognized as an alien of extraordinary ability who has achieved sustained national acclaim and whose achievements have been recognized in his field of expertise. When weighing the evidence, we must give consideration to the nature of the petitioner's field of endeavor; and in this context, we cannot ignore the petitioner's leading role in the design of two top-selling video games. While the petitioner has not attracted an overwhelming degree of media coverage, it is not evident that the petitioner's field of endeavor readily lends itself to such coverage; we cannot expect that the petitioner would routinely appear on the cover of major gaming magazines, or that the petitioner would be as well-known to the world at large as, say, a famous actor or athlete. Upon careful consideration, we conclude that the petitioner has established eligibility for the benefits sought under section 203 of the Act.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.