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U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 179 51240 Office: TEXAS SERVICE CENTER Date: JUN 4 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner, a video game development company, seeks to classify the beneficiary 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. The director determined the petitioner had not established that the beneficiary has earned 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 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 the beneficiary has sustained national or international acclaim at the very top level.

This petition, filed on May 28, 2002, seeks to classify the beneficiary as an alien with extraordinary ability in the field of video game computer design and programming. At the time of filing, the beneficiary was working for the petitioning entity as a Senior Video Game Programmer. The statute and regulations require the beneficiary's acclaim to be sustained. Documentation in the record reflects that the beneficiary has been working in the United States since 1997. Given the length of time between the beneficiary's arrival in the United States and the petition's filing date, it is reasonable to expect the beneficiary to have earned national acclaim in the United States during that time. The beneficiary has had ample time to establish a reputation in this country.

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 sustained acclaim necessary to qualify as an alien of extraordinary ability. The petitioner has submitted evidence that, counsel claims, meets the following criteria.

> *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.*

In order to demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, a fixed minimum of education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion because participation, employment, education, experience, test scores and recommendations do not constitute outstanding achievements. In addition, a membership in an association that evaluates its membership applications at the local chapter level would not qualify. It is clear from the regulatory language that members must be selected at the national or international, rather than the local, level. Finally, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

Documentation accompanying the petition included evidence of the beneficiary's membership in the International Game Developers Association (IGDA). According to its website at *www.igda.org*, "[m]embership in the IGDA is open to everyone - being a professional game developer is not required. Rather, a love for games and the willingness to support the IGDA's mission are what really count."

Also submitted was evidence of the beneficiary's membership in the Academy of Interactive Arts and Sciences (AIAS). According to information submitted by the petitioner on appeal, "[m]embership in the Academy of Interactive Arts and Sciences is open to qualified individuals working in the worldwide entertainment software community.... Qualified applicants are admitted in one of four classes of membership..." A letter from Mija Coit, Director of Administration and Operations, AIAS, states that the beneficiary is a member under the "Active Creative/Technical category." Documentation provided by the petitioner indicates that this membership category is open to "[i]ndividuals who have been active for at least two years in the creation or development of interactive product, and have been credited in published works." We find that being credited in a published work and possessing two years of work experience do not rise to the level of outstanding achievement in the field.

In this case, it has not been established that the beneficiary's membership in either organization required outstanding achievement or that his admission to membership was evaluated by experts at the national or international level.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

In an occupation where "judging" the work of others is an inherent duty of the occupation, such as a coach, instructor, teacher, professor or editor, simply performing one's job related duties demonstrates competency, and is not evidence of national or international acclaim. Instead, the petitioner must demonstrate that the beneficiary's sustained national or international acclaim resulted in his selection to serve as a judge of the work of others. Similarly, the evaluation of others must take place at the national or international level and involve accomplished professionals in the beneficiary's field.

Randy Dersham, General Manager, Acclaim Studios, states:

> [The beneficiary's] experience and technical ability give him excellent skills to review potential new hires. His input and judgment of the work of potential new hires is valued and appreciated. He interviews almost all the programmers who apply for a job with Acclaim because he has some of the best technical knowledge in our organization.

It is reasonable to conclude that participation in the hiring process is a routine duty expected of senior programmers such as the beneficiary. Performing job interviews for one's employer (a local or institutional function) is not adequate to distinguish the beneficiary from almost all others in his field, nor is it adequate to demonstrate his national or international acclaim.

On appeal, counsel states: "The Academy of Interactive Arts and Sciences has a review board, which is responsible for the Annual Interactive Achievement awards. As a member of this association, [the beneficiary] has had the option of joining this several times." The plain wording of the regulation, however, requires evidence of the beneficiary's "participation." The record contains no evidence showing that the beneficiary has ever served on the review board for AIAS.

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

The director found that the petitioner's evidence satisfies this criterion. Even if we were to conclude that this single criterion has been met, it represents only one of the requisite three that must be fulfilled pursuant to 8 C.F.R. § 204.5(h)(3).

With regard to the witness letters presented in this case, it is noted that the majority of them originate from individuals who have worked directly with the beneficiary. Letters from those close to the beneficiary certainly have value, for it is those individuals who have the most direct knowledge of his specific contributions to a given project. It remains, however, that very often, the beneficiary's projects are also the projects of the witnesses, and no individual is likely to view his or her own work as unimportant. The observation that the majority of the witnesses have close ties to the beneficiary is not intended to cast aspersions on the integrity of the witnesses; we acknowledge that these individuals are respected in their field. Still, these individuals became aware of the beneficiary's work because of their close contact with him; their

statements do not show, first-hand, that the beneficiary is widely acclaimed throughout the greater field. An individual with sustained national or international acclaim should be able to produce ample unsolicited materials reflecting his individual reputation. For example, the record contains no articles or formal recognition devoted exclusively to the beneficiary's individual accomplishments. Of greater relevance than articles that profile Acclaim's video games (which were the result of a large collaborative effort among a number of individuals) would be articles about the beneficiary himself. It is noted that none of the reviews or video game coverage presented in this case specifically mention the beneficiary. If the beneficiary is not widely praised outside of a small group of current and former coworkers, then it cannot be concluded that he enjoys sustained national or international acclaim as one who has reached the very top of the field.

With regard to the letters from Liz Wakefield and Meighan Shoesmith, who state that they were not previously aware of the beneficiary, and were simply reviewing his resume or list of accomplishments after he first contacted them, we note that such letters are not adequate to establish sustained national or international acclaim. Such letters may, in fact, simply reinforce the conclusion that the beneficiary is not well-known in the field, by demonstrating that his individual reputation did not precede the specific request for their recommendations. We acknowledge that the beneficiary participated in several profitable game development projects for Acclaim (for example, he is listed with other game creators in the game credits); however, the record lacks evidence that singles him out as the primary force behind the company or the success of the games on which he has worked.

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

In order to establish that the alien performed a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of the beneficiary's role within the entire organization or establishment and the reputation of the organization or establishment.

The record does not adequately show that Acclaim Studios – Texas, Inc. is an organization with a distinguished reputation. Nigel Cook, Vice President and General Manager, Acclaim Studios, states:

> Acclaim Studios – Texas is a wholly owned subsidiary of Acclaim Entertainment, Inc., as sales content and media provider to the entertainment industry. We are involved in the design, development and production of hi-tech video and computer games for our parent. At Acclaim, we have developed a comprehensive library of proprietary development tools, which enable us to set the standard in the video game industry. In addition to the state-of-the-art proprietary software, we also use "off-the-shelf" technologies. In the industry, we are considered "cutting edge" in the industry because of our advanced technology found in our games. Our clients include Sega, Nintendo and Sony, to name a few.

Other than statements from Acclaim's Vice President and General Manager, the record lacks supporting documentation (such as published materials) to show that Acclaim Studios – Texas, Inc. has earned a distinguished reputation when compared to other video and computer game developers (such as Exile Interactive and Jester Interactive).

"Exhibit 4" contains a review posted at *www.checkout.com* in which Scott Alan Marriott discusses Acclaim's "Frank Thomas Big Hurt Baseball." He states: "All in all, this is a good first-time effort from Acclaim and it appears they're on their way to becoming a major player in the baseball market. If they can add real teams, stadiums, an announcer and tighten up the interface, they'll have something worth swinging for."

"Exhibit 17" contains a review, dated January 15, 2002, entitled "Hands-on Turok: Evolution." It states:

> Acclaim studios Austin, formerly Iguana Entertainment, has been underway with the fourth iteration of the Turok series for roughly two years. The design has yielded what the developer says is "The best Turok there ever was." Acclaim demonstrated an early version to members of the press today, and while it has a long way to go, it was enough to prove that Turok: Evolution is on track to provide a solid first-person shooter experience.

Such statements (suggesting future results rather than a proven history of distinction) are not adequate to demonstrate that Acclaim Studios – Texas has established a distinguished reputation when compared to other profitable companies in the video game industry.

On appeal, counsel asserts that the beneficiary has fulfilled a leading or critical role "through his position as a Lead Programmer and Programmer for Acclaim Studios, Iguana Entertainment, Mastertronic and in his freelance work." Aside from failing to demonstrate that the preceding companies enjoy distinguished reputations in their industry, the petitioner has not submitted adequate evidence to establish the importance of the beneficiary's role in relation to other programmers/senior programmers employed by the beneficiary's companies. Nor has it been adequately documented that the beneficiary has consistently exercised substantial control over crucial creative, personnel, or business decisions executed on behalf of those organizations (rather than decisions limited only to his immediate video game projects). The record contains no evidence showing that the importance of the beneficiary's role is comparable to that of Randy Dersham or Nigel Cook, for example. In conclusion, we find that the capacity in which the beneficiary has served at various companies is not tantamount to a leading or critical role.

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

The petitioner submitted the beneficiary's Form W-2 for 2001 indicating that he earned $86,910. On appeal, counsel states:

> [The beneficiary's] wage surpasses the prevailing wage for the position in Central Texas by almost $33,000. That is demonstrated by the information gleaned from the U.S. Department of Labor-Employment and Training Administration web site. That site indicates that the prevailing wage for the highest level of programmer [Level IV] is only $57,450.

The petitioner, however, must demonstrate that the beneficiary's salary is high when compared with the most experienced and well-known video game programmers from around the country. Local prevailing wage figures from Texas do not meet this standard.

An e-mail from Jean Orrison submitted on appeal indicates that Lead/Senior Programmers at Acclaim earn from $86,320 to $98,800 per year. It is noted that the beneficiary's salary for 2001 places him among the lower end of the pay scale for Acclaim's "Lead/Senior" programmers. Regardless, the petitioner must demonstrate that the beneficiary's salary is high when compared with the most experienced and well-known computer programmers from throughout the United States, not just among his immediate coworkers. The petitioner offers no basis for comparison to show that the beneficiary's salary amount was significantly high in relation to others in the field at the national level.

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

On appeal, counsel states: "In his capacity as a programmer for Acclaim Studios, [the beneficiary] has contributed his considerable talent to some of Acclaim's most commercially successful games." The plain wording of this criterion, however, requires commercial successes in the "performing arts." This criterion was clearly intended for actors and musical performers rather than for computer programmers. The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation.

We acknowledge that the beneficiary has played a part in contributing to the development of some successful video games; however, the level of success that can be specifically ascribed to the beneficiary's individual programming skills or innovations has not been demonstrated. The evidence contained in the record, most notably the video game reviews and promotional pieces, do not specifically identify the beneficiary as the primary reason or innovator responsible for Acclaim's video game sales volume.

In conclusion, we find that the evidence presented by the petitioner does not establish the beneficiary has earned international acclaim, or national acclaim in the United States or England. The petitioner in this case has failed to demonstrate that the beneficiary meets at least three of the criteria necessary to qualify as an alien of extraordinary ability.

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 does not establish that the beneficiary has distinguished himself as a video game programmer 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 is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established the beneficiary's 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.