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U.S. Department of Justice

Immigration and Naturalization Service

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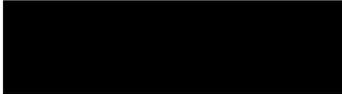
Office of Administrative Appeals  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



19 DEC 2002

FILE: WAC 01 215 50116 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(O)(i)

IN BEHALF OF PETITIONER:

**PUBLIC COPY**



**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 CFR 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 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center. An appeal from the decision was dismissed by the Associate Commissioner for Examinations, through the Administrative Appeals Office (AAO). The petitioner filed a motion to reconsider the AAO decision. The motion will be granted; the prior appellate decision will be affirmed.

The petitioner in this matter is a computer software design company. The beneficiary is a software engineer.<sup>1</sup> The petitioner seeks O-1 classification of the beneficiary under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien with extraordinary ability in the arts, in order to employ him in the United States for a period of three years as a user interface designer at an annual salary of \$100,000.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary met the regulatory standard necessary for classification as an alien with extraordinary ability in science. The director indicated that she had initially considered the petition under the regulatory criteria for an alien with extraordinary ability in the arts, but determined that a software engineer is usually considered to be engaged in computer science and the pertinent regulations for extraordinary ability in science should be applied, rather than the criteria for the arts.

On motion, counsel for the petitioner submits a brief arguing that the user interface design is an art involving design; therefore, the alien should be evaluated under the criteria for an alien with extraordinary ability in the arts. Counsel for the petitioner argues that because a user interface designer designs systems that involve visuals, colors and images, it is an art form. Arguably many occupations could be called an art form. Our lexicon is full of phrases such as the "art of medicine" and the "art of writing." The fact that these occupations involve an element of creativity does not mean they should be considered occupations in the arts for the purpose of evaluating the appropriate criteria for O-1 classification. In the instant case, the beneficiary is a software engineer specializing in user interface design. According to the *Dictionary of Occupational Titles*,<sup>2</sup> a software engineer

researches, designs, and develops computer software systems in conjunction with hardware product development, for medical, industrial, military, communications, aerospace, and scientific applications, applying principles and techniques of computer science, engineering, and mathematical analysis. Analyzes

<sup>1</sup> Counsel for the petitioner insists that the beneficiary is a user interface designer and not a software engineer, but it is clear from the job description that the job titles are interchangeable. Counsel provided the Service with a wage survey for software engineers.

<sup>2</sup> U.S. Department of Labor, *Dictionary of Occupational Titles*, Revised 4<sup>th</sup> Edition, Vol. 1, 1991, pp. 43-44.

software requirements to determine feasibility of design within time and cost constraints. Consults with hardware engineers and other engineering staff to evaluate interface between hardware and software, and operational and performance requirements of overall system. Formulates and designs software system, using scientific analysis and mathematical models to predict and measure outcome and consequences of design. Develops and directs software system testing procedures, programming, and documentation. Consults with customer concerning maintenance of software system. May coordinate installation of software system.

This job description is more aptly categorized as a scientific position rather than an artistic one.

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability.

The issue raised by the director in this proceeding is whether the petitioner has shown that the beneficiary qualifies for classification as an alien with extraordinary ability in the sciences as defined by the regulations.

8 CFR 214.2(o)(3)(ii) defines, in pertinent part:

*Extraordinary ability in the field of science, education, business, or athletics* means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

8 CFR 214.2(o)(3)(iii) states, in pertinent part, that:

*Evidentiary criteria for an O-1 alien of extraordinary ability in the fields of science, education, business, or athletics.* An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

(A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or

(B) At least three of the following forms of documentation:

(1) Documentation of the alien's receipt of nationally or internationally recognized prizes or

awards for excellence in the field of endeavor;

(2) 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;

(3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;

(4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;

(5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;

(6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;

(7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;

(8) Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

(C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

The beneficiary is a native and citizen of Germany last admitted to the United States on March 2, 2000, as a temporary visitor for business (B-1). He attended the Walther-Lehmkuhl School, a vocational school in Neumünster, Germany from February 1993 until June 1995. He has worked as a software designer in Germany and in the United States. The petitioner did not provide a comprehensive description of the beneficiary's education and employment history.

After careful review of the record, it must be concluded that the petitioner has failed to overcome the grounds for denial. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. In order to establish eligibility for extraordinary ability, the statute requires evidence of "sustained national or international acclaim" and that the alien's achievements have been recognized in the field of endeavor through "extensive documentation." The petitioner has not established that the beneficiary's abilities have been so recognized.

There is no evidence that the beneficiary is the recipient of a major, internationally recognized award.

For criterion number one, the petitioner asserts that the beneficiary's receipt of two awards satisfies this criterion. The beneficiary won two design awards in 1995. He won second place in the Lubeck Chamber of Trade's national handicraft competition for youth as a typesetter. He was awarded first place in the Land Schleswig-Holstine journeyman competition. The petitioner failed to establish that these are nationally or internationally recognized awards for excellence in the beneficiary's field of endeavor. The beneficiary was the user interface designer for Kai's Power Goo. This software product was awarded the "Innovation and Software Award" in 1996 by CHIP magazine at the annual CeBit technology fair. Given that the product and not the beneficiary was the recipient of this award, the petitioner has failed to show that the beneficiary satisfies this criterion.

No evidence was submitted in relation to criterion number two.

For criterion number three, the petitioner provided the Service with published material in professional and major trade publications predominantly about Kai Krause with whom the beneficiary has worked. The petitioner provided the Service with some published material in professional and major trade publications about the work of beneficiary (Kai Gradert) in the field for which the classification is sought. For example, a product that the beneficiary co-designed, "Kai's Power Tools" is mentioned in a computer graphics magazine, *Mac Art & Design* (4:16, Summer 1996), but the beneficiary is not mentioned in the article. The beneficiary and Kai Krause are featured in a 225 word article titled "Meta Talk with Little Kai," published in *Mac Art & Design* (5:22, Spring 1998). Five photographs of the beneficiary's design work were published in *Mac Art & Design* (4:17, Autumn 1996).<sup>3</sup> The petitioner provided the Service with a videotape containing an interview of the beneficiary and Kai Krause on German national television. The petitioner failed to indicate when the television interview was aired. The beneficiary has not satisfied this criterion.

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<sup>3</sup> The petitioner indicated that the beneficiary's graphic art has been published in numerous publications, but in only one publication was the beneficiary named.

For criterion number four, no evidence was submitted.

For criterion number five, the record of proceeding contains testimonials. Henk Rogers, founder and CEO of Blue Planet Software, wrote that the beneficiary's "design contributions and interface concepts [sic] to the video game Tetris have helped Blue Plane Software to become one of the leading developers in today's video system market." Colin Wood, editor for *Design Graphics Magazine*, wrote: "[w]hile at Metacreations, Mr. Gradert was the lead designer for products such as Kai's Photo Soap, Kai's Power Show, Kai's Power Tools and Life in the Universe.... Mr. Gradert's contribution to interface aesthetics and ergonomic factors form a consistent body of work that significantly influenced the directions other teams have taken. For instance, Apple Computer's Quick Time video player user interface exudes the influence of Mr. Gradert's unique style." Dr. Klaus Schauser, a computer science professor and founder of Expertcity.com wrote that the beneficiary helped his company "bring our leading product, GoToMyPC from a technology to a full-featured product with excellent usability." Dr. Azby Brown, Associate Professor at the Kanazawa Institute of Technology wrote that the beneficiary has "greatly simplified the operation of computer graphics software making it easier for students to master and easier to teach." In review, the beneficiary has made a contribution to his employers by assisting in the design and creation of computer software. The petitioner has failed to establish that the beneficiary's contributions are of major significance in the field.

No evidence was provided in relation to criterion six.

For criterion number seven, the petitioner argues that the beneficiary has been employed in a critical and essential capacity for organizations that have a distinguished reputation. The petitioner provided the Service with many of the software products designed by the beneficiary. A review of the software credits shows that the beneficiary is one of twenty or more designers that contributed to the creation of these products. In one instance, the beneficiary is billed as the lead graphic artist for a single software product. Even if the petitioner has shown that the beneficiary played a critical role in creating these software products, he has failed to demonstrate that the beneficiary has been employed in a critical or essential capacity for organizations that have a distinguished reputation.

For criterion number eight, the petitioner has established that the beneficiary will command a high salary for services in relation to others in the field.

In sum, the petitioner has failed to demonstrate that the beneficiary satisfies at least three of the criteria listed at 8 CFR 214.2(o)(3)(iii).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

**ORDER:** The AAO decision dated July 18, 2002 is affirmed.