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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 02 193 53169 Office: CALIFORNIA SERVICE CENTER Date: APR 26 2005

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)

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner 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 enjoyed the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel asserts that the petition was previously approved and that the director provided no explanation for reopening the petition. Clearly, an approval notice was issued on September 26, 2002. The record reveals, however, that this notice was issued in error by the computer, and not as the result of a favorable adjudication. There is no approval stamp on the petition itself. Further, Citizenship and Immigration Services (CIS) electronic records reveal that while the petition was updated as approved on September 26, 2002, that action was immediately cancelled in favor of issuing a request for additional evidence. Despite the cancellation, the computer batch-printed the approval notice. Adding to the confusion, the director's notice of March 21, 2003 purporting to "reopen" the petition did not provide a clear explanation of these events.

While unfortunate and understandably confusing to the petitioner, this series of events does not reflect that the director officially approved the petition in September 2002. Thus, while the director could have better advised counsel and the petitioner of the situation, the director did not err procedurally in issuing a request for additional evidence and ultimately denying the petition. Significantly, the petitioner was advised of the deficiencies in the record prior to denial and had an opportunity to respond to the director's concerns. Counsel's assertions regarding the beneficiary's eligibility will be addressed below.

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 seeks to classify the beneficiary as an alien with extraordinary ability as a senior designer of computer games. On page 9 of his decision, the director states:

> The [regulatory criteria discussed below] are meant to offer the petitioner guidance in the types of evidence that can be submitted. Even if an alien does fulfill at least three (or more) or like in this case two,[1] of the ten elements mentioned above, it does not necessarily establish that the alien has achieved sustained national or international acclaim and recognition, and does not mandate a finding of eligibility.

The regulation at 8 C.F.R. § 204.5(h)(3) provides:

> A petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. Such evidence shall include evidence of a one-time achievement (that is a major, international recognized award), or at least three of the following [criteria].

The ten regulatory criteria then follow. This language does not support the director's assertion that meeting three criteria is insufficient evidence of extraordinary ability. Obviously, CIS is not restricted to merely counting the evidence, but may evaluate the evidence as to whether it is indicative of or consistent with national or international acclaim. Once three criteria are met under this standard, however, the regulations do not suggest any further inquiry into acclaim is warranted. Nevertheless, as the director did not conclude that the beneficiary meets three criteria, the above statements do not appear to have prejudiced the beneficiary and do not constitute reversible error.

The petitioner has submitted evidence to meet the following criteria.[2]

> *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.*

Initially, the petitioner submitted several positive reviews of games designed by the beneficiary posted at www.gamefaqs.com and foreign language interviews with the beneficiary accompanied by partial translations. The director requested evidence of the publications' names and circulation. In response, the petitioner submitted published material about the beneficiary's newest game, all published after the date of filing. While the petitioner submitted circulation data about some of these materials, the petitioner failed to submit the

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[1] The director's decision is not clear as to which two criteria the beneficiary meets as the director rejects all of the petitioner's claims.

[2] The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

requested evidence regarding the original interviews with the beneficiary. The director reiterated that the initial submission did not establish that the materials appeared in major media and concluded that the new materials were not primarily "about the alien" as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

On appeal, counsel quotes one of the article dated after the petition was filed that does mention the beneficiary by name. Counsel then asserts that the post-filing coverage is not merely local. Counsel does not address the director's concerns about the materials initially submitted.

A petitioner must establish the beneficiary's eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Thus, we cannot consider any articles published after the date of filing. We note, however, that the director is correct that the published material must be "about the alien" and that of all the articles addressing the beneficiary's newest game, only one mentions the beneficiary by name, stating only that after a period of conceptualizing, "a prototype was knocked out in 2000, with [the beneficiary] developing the fighting systems." As counsel himself acknowledges, "it is very normal in this field for media attention to focus on the aspects of the games themselves." Thus, far more indicative of the beneficiary's acclaim would be media attention on the beneficiary's talents and accomplishments as opposed to the typical game review afforded most games issued by major companies.

The amateur game reviews submitted initially may be available internationally on the Internet, but not every Internet posting can be considered major media. Independent journalistic coverage is far more persuasive evidence of national or international acclaim than reviews by ordinary gamers posted on a gaming website. Moreover, reviews that do not mention the beneficiary by name are not indicative of his personal acclaim.

The interviews purportedly appear in MarvelX Magazine, X-Men vs. Street Fighter Strategy Guide and Sega Saturn Magazine. The record contains no evidence regarding the circulation of these publications. Thus, the petitioner has not established that these interviews appeared in major media. Finally, without complete translations, we cannot determine whether these interviews are promotional press releases. Such press releases, including ones that feature interviews with the designer of the game being promoted, are not journalistic reportage that can serve to meet this criterion.

In light of the discussion above, we cannot conclude that the beneficiary meets this criterion.

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

It is inherent to the field of game design to design games. Thus, while designing a successful game may be evidence of competence in one's field, it is not necessarily evidence of a contribution of major significance to the field. Rather, we would expect evidence of an impact on the field beyond the steady improvement in technology typical in this field.

Initially, counsel asserted that the beneficiary's personal assertions regarding the sales of games he designed are evidence of his contributions which "have a direct and critical effect on the design, development, and eventual success of his game projects at" the petitioning company. The director requested "evidence to establish how the alien's work is considered original and how it has made a major contribution of significance to the field of

Senior Designer relating to the Video Game industry compared to all others in the field." In response, counsel discusses only the beneficiary's work on a game that had been previewed in the press but had yet to debut.

The director acknowledged the materials regarding the beneficiary's most recent project but concluded that the beneficiary's impact "is yet to be seen." On appeal, counsel once again references the beneficiary's curriculum vitae and the "data sheets" prepared by the beneficiary. Counsel further notes that while not yet released, the beneficiary's newest project was already receiving reviews at the time of the response to the request for additional evidence.

As stated above, the petitioner must establish the beneficiary's eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49. While the beneficiary may have been working on his latest project at the time of filing, it had not yet been reviewed or released at that time. We concur with a director that the record lacks evidence that this project had already impacted the field of game design as of the date of filing.

The record lacks evidence verifying the beneficiary's self-serving attestations of the sales and coin drop data for his games. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft*, 14 I&N Dec. 190, 193-194 (Reg. Comm. 1972), broadened in *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) and *Matter of Ho*, 22 I&N Dec. 206, 211 (Comm. 1998). Moreover, commercial success is a separate criterion to be discussed below. At issue is whether these games can be considered contributions of major significance to the field of computer gaming. We acknowledge the positive reviews of gamers on www.gamefaqs.com. The record lacks, however, evidence that these games revolutionized the world of computer gaming. For example, there is no evidence that the style or technique used in these games was unique and has proven influential in the design of other games by other companies. In light of the above, the petitioner has not established that the beneficiary met this criterion as of the date of filing.

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

Initially, counsel referenced several letters from employees of the petitioning company and a letter from the beneficiary's prior employer as evidence to meet this criterion. The director requested other evidence of the beneficiary's role with the petitioner. In response, counsel references the letters already submitted and a new letter from another employee of the petitioning company. The director asserted that the letters were from "colleagues, co-workers, other professionals and other distinguished experts in the field." The director then concluded that the letters were "more akin to 'reference letters' than to testimonials of the [beneficiary's] individual contribution to the field." Finally, the director concluded that while the beneficiary may have "benefited" his field expertise, the record did not demonstrate that he will "substantially benefit prospectively the United States."

On appeal, counsel notes that this discussion has nothing to do with the leading or critical role criterion and asserts that the petitioner is in the best position to verify the beneficiary's role for the petitioner. We concur with counsel that the director's discussion is not only confusing but also unrelated to the criterion purportedly being analyzed. Specifically, the director does not explain the difference between a "reference letter" and a "testimonial" or why the former are less reliable than the latter. As such, the director's assertion that the letters fall under the former category is meaningless. Moreover, contributions to the field fall under a separate criterion

already discussed above. The director does not explain why the beneficiary's contributions are relevant to this criterion. Finally, the statutory requirement that the petitioner establish that the alien will "substantially benefit prospectively the United States" is a secondary requirement typically presumed of most aliens of extraordinary ability.

David Siller, Director of Research and Development at CAPCOM Digital Studios, praises the beneficiary's skills as unique and asserts that the studio would not have been able to develop "Final Fight Revenge" without the beneficiary. Mr. Siller does not discuss the beneficiary's position with CAPCOM or explain the organization of the studio. The petitioner also failed to provide evidence of CAPCOM's reputation. In response to the director's request for additional evidence, the petitioner provided evidence that the beneficiary was the producer of X-Men vs. Street Fighter, manufactured by CAPCOM. The record lacks evidence, however, that X-Men vs. Street Fighter was or is one of CAPCOM's best selling games.

Shuhei Yoshida, Vice President of Product Development for the petitioner, states that the petitioner selected the beneficiary "to serve as the lead designer for a major top-secret development project." Mr. Yoshida continues that the beneficiary is critical to the success of the project and that Mr. Yoshida is "staking a large part of our company's commercial and artistic success on the continued presence of [the beneficiary] on our team." Other representatives of the petitioner, Connie Booth, Director of Product Development, and Kelly Flock, President, provide general praise of the beneficiary and their expectations for his success at the petitioning company.

At issue are the nature of the role the beneficiary was hired to fill and the reputation of the employer. We are satisfied the petitioner enjoys a distinguished reputation nationally. At the time of filing, the petitioner had already hired the beneficiary as lead designer for a major project. The record reveals that the petitioner organized a press conference, attended by 200 members of the press, to present the beneficiary's game. In light of the above, we find that the beneficiary meets this criterion.

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

Initially, the petitioner submitted an April 15, 2002 letter offering the beneficiary a salary of $116,000. The director requested evidence comparing the beneficiary's salary to others in the field. In response, the petitioner submitted evidence that the 90th percentile annual wage for multi-media artists and animators is $76,360. The director concluded that the record lacked "corroborative evidence that the beneficiary has been compensated a high salary in the past."

On appeal, counsel asserts that the regulation at 8 C.F.R. § 204.5(h)(3)(ix) does not require evidence of high remuneration in the past. The regulation uses the word "has." The regulation does not suggest that evidence that the alien "will command" a high salary is sufficient. Regardless, as stated above, the regulation at 8 C.F.R. § 103.2(b)(12) and *Matter of Katigbak,* 14 I&N Dec. at 49, require that the petitioner establish the beneficiary's eligibility as of the date of filing. Thus, the director did not err by requiring evidence of high remuneration prior to the date of filing.

Counsel further asserts that the beneficiary "has been earning at least $100,000 per year since obtaining O-1 status on April 17, 2000 and at least $116,000 prior to the filing of the I-140 on May 24, 2002." The assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). The record lacks the beneficiary's Forms W-2 or other

objective evidence of his income from the petitioner or any other employer. In light of the above, the petitioner has not established that the beneficiary meets this criterion.

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

The director acknowledged that the beneficiary was the producer of X-Men vs. Street Fighter but concluded that the record lacked evidence that the beneficiary enjoyed any commercial success from this project. The director further concluded that the presumed commercial success of the beneficiary's latest project was not evidence of his eligibility as of the date of filing. On appeal, counsel asserts that the petitioner "provided documentation showing that the Beneficiary's prior videogame development efforts resulted in sales of more than $171,768,500, a notable and significant commercial success." Counsel then asserts that the projected success of the beneficiary's latest project should be considered as evidence of "sustained commercial success."

First, the $171,768,500 amount is derived from several games. The record lacks comparative evidence allowing us to analyze whether any one game enjoyed notable commercial success. Regardless, as stated above, all of the sales data and coin drop data are provided by the beneficiary. We need not accept the beneficiary's unsupported assertions on this matter. *Matter of Treasure Craft*, 14 I&N Dec. at 193-194; *Matter of Soffici*, 22 I&N Dec. at 165; *Matter of Ho*, 22 I&N Dec. at 211.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Review of the record, however, does not establish that the beneficiary has distinguished himself as a senior designer 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 beneficiary shows talent as a senior designer, but is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field. 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.