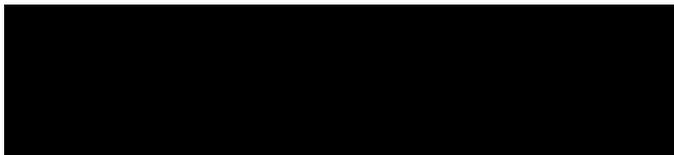




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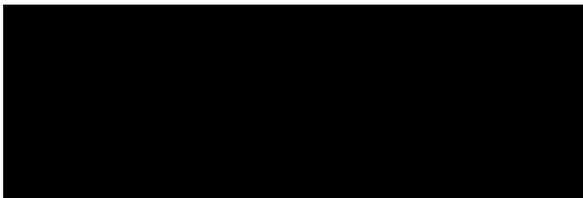
FILE: WAC 03 024 54644 Office: CALIFORNIA SERVICE CENTER Date: JAN 17 2006

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



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 California Service Center Director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an interactive entertainment software developer. The beneficiary is a software engineer. The petitioner seeks O-1 classification of the beneficiary, under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien with extraordinary ability in software engineering. The petitioner seeks to employ the beneficiary temporarily in the United States for a period of three years as a senior programmer. The petitioner has previously employed the beneficiary while the beneficiary held H-1B nonimmigrant visa classification.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary has sustained recognition as being one of a small percentage at the very top of his field of endeavor.

The record consists of a petition with supporting documentation, a request for additional documentation and the petitioner's reply, the director's decision, and an appeal with an accompanying brief.

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.

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 arisen to the very top of the field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). 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. § 214.2(o)(3)(iii). 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.

The beneficiary in this matter is a native and citizen of Norway. The record reflects that he was last admitted to the United States on August 4, 2002, in H-1B classification, as a temporary worker, and served as a programmer with the petitioner.

This petition seeks to classify the beneficiary as an alien with extraordinary ability as an information technology engineer. The regulation at 8 C.F.R. § 214.2(o)(3)(iii) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). Barring the alien's receipt of such an award, the regulation outlines eight 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 that, it claims, meets the following criteria.<sup>1</sup>

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

The petitioner states that the beneficiary meets this criterion based on his "design and develop[ment of] critical elements of award-winning and world famous multimedia software and computer games." The petitioner

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<sup>1</sup> The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

submitted a list of awards and nominations for three games that it stated the beneficiary was involved in developing. The awards for the game "Jak and Daxter: The Precursor Legacy" included a 2002 Game Developers Choice Award for original game character of the year, the 2001 *Game Revolution* Editor's Choice Award, the 2001 Best Adventure Game by PlayStation Pro 2, a top ten game of the year award from *PlayStation 2 Magazine*, the PSX Extreme Award for adventure/platform, and the 2001 PlayStation 2 award by IGN for best platformer. Awards for the game "Crash Team Racing" included awards in 1999 for Racing Game of the Year and Multi-Player Game of the Year by *Extreme Magazine*.

In response to the director's request for evidence (RFE) dated April 8, 2003, the petitioner submitted evidence that the game "Jak II" received the Best of E3 2003 award for action/adventure by *Game Revolution* and best of show from *Maxim Online*.

We note first that the petitioner submitted no evidence that any of these awards are nationally or internationally recognized awards or prizes. In fact, it is difficult to determine from the evidence whether several of the awards, such as those by *Game Revolution*, *Extreme Magazine*, IGN, or *PlayStation 2 Magazine*, are indeed awards or simple recognition by the organizations as their games of choice in certain categories.

Additionally, as noted by the director, the evidence indicates that the recipient of the award was the organization employing the beneficiary at the time. For example, in the February 2002 excerpt from *PlayStation Magazine* submitted by the petitioner, [REDACTED] that there were 36 members of the team that created the game "Jak and Daxter." While acknowledging that the beneficiary was a member of the teams responsible for creating the games and that the accolades and rewards were bestowed on the company, counsel states that it is not common in the petitioner's industry to confer awards to individual and urges Citizenship and Immigration Services (CIS) to consider the awards as comparable evidence under 8 C.F.R. § 214.2(o)(3)(iii)(C).

Counsel submits no evidence to support his statement that awards in the interactive industry are not commonly conferred upon individuals, even if the individual is the key developer. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, no evidence in the record supports counsel's statement that the beneficiary was the "key" individual in the development of these games. *Id.* Assuming, however, that counsel's statements are correct, nothing in the record suggests that individual awards are **never** conferred on deserving individuals.

The evidence does not establish that the beneficiary meets this criterion. However, we will evaluate the beneficiary's contribution as part of a team effort under 8 C.F.R. § 214.2(o)(3)(iii)(C).

*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.*

The petitioner asserts that the beneficiary meets this criterion based on his membership in the International Game Developer's Association. The petitioner submitted no evidence of the membership requirements of this organization and submits no evidence that outstanding achievement in the field is a requirement for membership. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)

(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The evidence does not establish that the beneficiary satisfies this criterion.

*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.*

As evidence that the beneficiary meets this criterion, the petitioner submitted copies of several reviews of games that it stated were created by the beneficiary. Counsel again urges CIS to consider evidence of these reviews under 8 C.F.R. § 214.2(o)(3)(iii)(C), as it is not common practice in the industry for individual game artists to be interviewed regarding his or her work.

Nonetheless, the petitioner submitted no evidence that the beneficiary was primarily responsible for the creation and production of these games, and the beneficiary is not mentioned in the various reviews and comments. The documentation submitted by the petitioner does not establish that the beneficiary satisfies this criterion.

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

As evidence that the beneficiary meets this criterion, the petitioner submitted a letter of recommendation from Mark Cerny, owner of Cerny Games, a consulting company. In a letter dated June 2, 2003, Mr. Cerny stated that he has known the beneficiary in a professional capacity since 1999 and had worked with him closely at the petitioning organization. Mr. Cerny stated that the beneficiary had made the following “significant original contributions to the game industry:” the TFRAG engine, a unique software system for portraying or rendering a game’s background visual environment on the PlayStation 2 platform, which was also used by the Insomniac Games development studio in the development of one of its games; a graphics engine for use in the “Jak & Daxter: The Precursor Legacy” game; the ETIE engine, designed and implemented with Mr. Cerny, and for which the petitioner submitted a patent application; “unique effects;” and improvements to the “Jak & Daxter: The Precursor Legacy” engine. The petitioner also submitted a May 22, 2003 letter from the vice-president of technology for Insomniac Games, Inc., Alex Hastings, who confirmed his organization’s use of the TFRAG and TIE engines, indicating that these engines “played an essential role in the success’ of the game “Ratchet & Clank.”

While it is apparent that work performed by the beneficiary was instrumental in the success of games developed by the petitioning organization and Insomniac Games, Inc., the record contains no evidence that the beneficiary’s innovations were used or relied upon by others in the field, or that they constituted a contribution of major significance to software engineering or entertainment technology. The petitioner submitted no evidence that a patent for the beneficiary’s work was awarded or that the technology that is the subject of the patent application constitutes a contribution of major significance to the field. While letters of recommendation are important in providing details about the beneficiary’s role in various projects, they cannot by themselves establish the beneficiary’s influence over the field as a whole.

The evidence does not establish that the beneficiary meets this criterion.

*Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation.*

The petitioner states that the beneficiary meets this criterion through his employment with the petitioner as a senior programmer, as a senior software engineer with Square USA, Inc. and Looking Glass Studios, as a lead programmer with Averstar, Inc., and as a lead programmer on the game "Speed Freaks" for Funcom.

The documentation submitted by the petitioner as evidence that these organizations have distinguished reputations consists primarily of statements by the organizations' themselves, such as pages from their websites. The petitioner submitted no independent corroborative evidence that these organizations enjoy a distinguished reputation in the field of entertainment technology.

The record contains evidence that the petitioner is a wholly owed subsidiary of Sony Computer Entertainment, the developer and marketer of the Sony PlayStation. However, the petitioner submitted no evidence that the beneficiary has been employed in a critical or essential capacity either for Sony Computer Entertainment or the petitioning organization. The evidence suggests that the beneficiary has had, and will have, a role in the development of products for these organizations; however, the petitioner submitted no evidence that the position of a senior programmer, software engineer or lead programmer, positions held by the beneficiary at the various organizations, were in a critical or essential capacity. *See Matter of Soffici*, 22 I&N Dec. at 165.

The evidence does not establish that the beneficiary satisfies this criterion.

*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.*

In a statement submitted with the petition, the petitioner stated that it will pay the beneficiary an annual salary of \$125,280. In his letter accompanying the RFE, counsel stated that the beneficiary's current salary was \$142,154. A copy of a paycheck stub for May 2003 indicated that the beneficiary was paid approximately \$68.34 per hour.

To establish that the beneficiary meets this criterion, the petitioner submitted a copy of a 2002 Employers Group national survey on information technology professionals. The survey reflected a top salary of \$96,009 for those information technology professionals who worked in health and education. While the beneficiary's salary is certainly far above those professionals, we note that the survey includes no comparable data for the category IT, E-Businesses and Software, which appears to be more analogous to the petitioner's field. The petitioner submitted no evidence that the beneficiary's salary is high relative to others in the entertainment technology field.

The evidence does not establish that the beneficiary meets this criterion.

The regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C) provides, "If the criteria in paragraph (o)(3)(iv) 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 evidence indicates that the beneficiary was a member of a team that developed software and technology programs for his employers. Therefore, evidence concerning awards by the beneficiary's employing organizations will be considered under this regulatory provision.

The petitioner submitted evidence that the games "Jak & Daxter: The Precursor Legacy," "Crash Team Racing," and "Jak II" received awards as discussed under criterion one above. The evidence does not establish that the awards received by the beneficiary's employing organizations for these programs are nationally or internationally recognized awards for excellence, and therefore, the petitioner has not established that the beneficiary was a member of a team that received a national or international award for excellence.

The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). In order to establish eligibility for extraordinary ability, the statute requires evidence of "sustained national or international acclaim" and evidence 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. In order to establish eligibility for O-1 classification, the petitioner must establish that the beneficiary is "at the very top" of his field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). The beneficiary's achievements have not yet risen to this level.

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 appeal is dismissed.