



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



File: [Redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 21 2000

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

Public Policy

IN BEHALF OF PETITIONER:



identifying
prevent clear 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

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as a self-employed professional musician. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The first issue to be decided is whether the petitioner is eligible under the classification sought; i.e., whether the petitioner is a member of the professions with an advanced degree, and/or an alien of exceptional ability. The regulation at 8 C.F.R. 204.5(k)(2) states, in pertinent part:

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as an occupation for which a United States Baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The petitioner holds a Master of Science degree in Geography and Ecology from Leningrad State University, Leningrad, Russia. This degree has no bearing on the listed occupation of self-employed professional musician. It cannot suffice for the petitioner simply

to demonstrate that he holds an advanced degree. It is noted here that section 203(b)(2)(A) of the Act has created the visa classification for members of the professions holding an advanced degree, whereas section 203(b)(3)(A)(ii) pertains to a lesser classification (without the added benefit of the national interest waiver) for members of the professions. Because the only eligibility factor separating these two classifications is the alien's advanced degree, and because these visa classifications are both employment-based, it is only reasonable to require that the alien's advanced degree be pertinent to the alien's occupation in order to qualify the alien for the higher classification. The distinction between classifications exists not to reward aliens simply for having achieved advanced degrees, but to recognize the greater degree of expertise in a given field which derives from continued study in that field. Therefore, the petitioner must show a clear nexus between the alien's advanced degree and the profession in which the alien seeks employment. To hold otherwise would allow aliens into a higher visa classification, with eligibility for additional benefits, based on irrelevant degrees.

The petitioner has not demonstrated persuasively that the occupation of self-employed professional musician constitutes a profession, or that his advanced degree in geography and ecology is closely related to his occupation.

The burden is on the petitioner to establish that his occupation represents a profession, and that his advanced degree is relevant to that profession. The petitioner has not met this burden.

Because the petitioner has not established eligibility for classification as an advanced degree professional, the petitioner cannot receive a visa under the classification sought unless he qualifies as an alien of exceptional ability.

The regulation at 8 C.F.R. 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

As stated above, the petitioner holds a master's degree in geography and ecology. The petitioner has no postsecondary training in music, nor has he otherwise documented an educational history which would indicate unusual expertise in his field.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of

full-time experience in the occupation for which he or she is being sought.

The petitioner has established that he has at least ten years of full-time experience as a musician.

A license to practice the profession or certification for a particular profession or occupation.

Evidence of membership in professional associations.

The petitioner does not claim to have satisfied these two criteria.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.

The petitioner does not claim to have satisfied this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The record does not establish any institutional recognition of the petitioner's ability in music. Instead, the petitioner has submitted a number of letters from witnesses.

The regulations pertaining to exceptional ability call for objective, independently verifiable categories of evidence. The absence of acceptable evidence cannot be overcome simply by locating individuals who offer the opinion that the petitioner is exceptional in his field.

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. This issue is moot, because the petitioner is ineligible under the classification sought, but the issue will be discussed briefly because this issue figured in the director's decision.

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The record contains a number of witness letters. [REDACTED]

[REDACTED] states that the petitioner's skill on the balalaika "was a wonder to behold." [REDACTED]

[REDACTED], Department of Foreign Languages, Department of the Air Force, states that the petitioner's performance "was truly remarkable." [REDACTED], Professor of Music and Concert Artist, University of Denver, indicates that the petitioner "has a reputation as being one of the best in the world on his instrument." [REDACTED]

[REDACTED] states that the petitioner "is regarded as one of the best balalaika players in the world among our subscribers, sponsors and professional musicians connected with the festival." [REDACTED]

[REDACTED] testifies that the petitioner is "a

leading performer of Russian music and a virtuoso balalaika player."

states that he believes the petitioner's "presence in the United States would be in the national interest of the United States."

refers to the petitioner as "a cultural mediator between two nations."

The director denied the petition, stating that "there appears to be no basis for granting a waiver of the job offer requirement to the alien petitioner, as it has not been proven that a waiver would be in the national interest."

On appeal, counsel asserts that the letters from the two officials of the armed forces detailed how the petitioner's performances helped to raise the cultural awareness of the members of the armed forces who will be serving all over the world. Counsel submits three additional letters of recommendation.

[The petitioner] is a tremendous asset to the United States of America. He has demonstrated his exceptional ability in the art of communication of the cultural background of the Russian people that will substantially improve the cultural awareness and diversity of the American people and Military personnel through his artistic endeavors and thus benefit prospectively the national cultural, and educational interests and national security interests, in the welfare of the United States of America; and whose services in this arena are sought by many other local and national interests.

writes to invite the petitioner to perform a cultural program at 4 or 5 schools in the Denver area. writes again to state:

I have previously written two letters in support of [the petitioner's] national interest waiver petition. It is my understanding that you have denied his petition on the basis of the limited nationwide impact of [the petitioner's] skills. Granted, I have no knowledge of INS policies and procedures, but your justification suggests that I have not done a very good job of explaining the contribution that [the petitioner] makes to our mission here.

It has been precisely my point that [the petitioner's] cultural presentations have had a significant positive impact on the training of the next generation of U.S. Air Force officers. These officers will serve not only all over the United States,

but all over the world. It is highly likely that most of the young people who have attended [the petitioner's] presentations will eventually serve our country in positions requiring the cultural and linguistic skills that these presentations have enhanced. His presentations here at the US Air Force Academy may be delivered in one location, but they will certainly have national impact.

The petitioner in this case does not simply seek classification as an advanced degree professional; he argues that his contribution is of such national importance that he merits an exemption from the job offer requirement which normally attaches to that classification. With the additional benefit there must come an additional threshold of evidence. It cannot suffice simply to establish that the petitioner's balalaika concerts have been appreciated.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

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

This denial is without prejudice to the filing of a new petition, in a classification for which the alien is clearly eligible, by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.