



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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Washington, D.C. 20536



NOV 14 2001

File: WAC-98-075-55579 Office: California Service Center Date:

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)

Identifying data added to prevent identity disclosure and invasion of personal privacy

IN BEHALF OF PETITIONER:  
[Redacted]

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 C.F.R. 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 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, California Service Center. The Associate Commissioner, Examinations, dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

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 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 did not contest that the petitioner qualifies for classification as an alien of exceptional ability, but concluded 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.

On appeal, counsel argued that the exemption from the job offer requirement would be in the national interest. On November 1, 1999, the Administrative Appeals Office (AAO), on behalf of the Associate Commissioner, dismissed the appeal, finding not only that a waiver of the job offer requirement was not in the national interest, but that the petitioner had not demonstrated that she was an alien of exceptional ability.

On motion, counsel asserts that the AAO ignored the director's "conclusion" regarding the petitioner's exceptional ability. The AAO, however, did not "ignore" the director's statement that the petitioner, "would likely qualify as an 'alien of exceptional ability.'" In fact, the AAO quoted it. Rather the AAO held otherwise. If favorable determinations were not reviewable by the AAO, there would be no point in authorizing the AAO to review certified approvals as provided in 8 C.F.R. 103.4. Counsel has provided no authority for the argument that the AAO, in reviewing the director's decision as requested on appeal, erred in reconsidering whether the petitioner had established exceptional ability. Moreover, the director's statement is ambiguous, and is hardly an indication that the issue was even considered at her level.

Counsel also argues that the petitioner did establish exceptional ability and that a waiver of the job offer requirement would be in the national interest. These arguments will be discussed below.

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 petitioner seeks classification 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.

The regulation at 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered."

In its decision, the AAO discussed the following criteria.

*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*

In its initial decision, the AAO noted that the petitioner claimed no postsecondary degrees. On motion, the petitioner submits a transcript reflecting that the petitioner took two jazz piano courses at Chabot – Las Positas, Community College District; a transcript for Peralta Community College District reflecting that the petitioner studied there for six semesters; a certificate verifying that the petitioner passed grade two Children's Examinations on March 25, 1977 at the Royal Academy of Dancing; a certificate that the petitioner completed an audio production and performance in music and radio programming course at the Local Radio Workshop in October 1993; and a certificate verifying that the petitioner was examined with distinction in Grade 7 (advanced) in the Spring of 1984 by the Royal Schools of Music.

In support of the petition, the petitioner submitted the required Form ETA-750B which the petitioner signed on January 12, 1998 under penalty of perjury. On that form, question 11 requests "Names and Addresses of *Schools, Colleges and Universities attended (include trade or vocational training facilities).*" (Emphasis added.) The petitioner responded, "None." Thus, we cannot conclude that the AAO erred in concluding that the petitioner had no postsecondary academic experience.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. The academic record submitted on motion, which does not reveal that the petitioner has ever completed a degree, hardly demonstrates that the petitioner is significantly more educated than the ordinary music educator.

*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 AAO concluded that the petitioner did not have 10 years of experience as a music educator. The AAO questioned whether the petitioner had even worked in music education prior to her arrival in the United States in 1996. On motion, counsel refers to several letters in the record which refer to the petitioner's involvement with children's workshops in 1995 and assistant teaching at St. Helens Primary School. Counsel then asserts that the petitioner's work in arranging harmonics for various songwriters and for her own group as well as her work with audio production and music direction for an advertising agency and other music groups are sufficiently related to be considered experience in music education.

We agree with the initial finding that audio production and music direction is not sufficiently related to music education to be considered experience in that occupation. It is clear that the petitioner also felt this experience was unrelated. On Form ETA-750B question 15 requests that a petitioner "list all jobs held during the last three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9." (Emphasis added.) The petitioner listed her music educator experience which she claimed started in February 1995. She did not list her audio production and music direction experience.

Regardless, the record does not demonstrate that the petitioner had 10 years of full-time experience even if we did include her audio production and music direction experience. The regulations require letters *from her employers* verifying 10 years of full-time experience. Rob Morris indicates only that the petitioner was his "right-hand woman" at Euro RSCG, an advertising agency. He fails to indicate how many years she worked there.

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

The AAO concluded that the petitioner did not hold a certificate to teach in public schools or any other relevant license or certification. Counsel does not challenge this conclusion on motion.

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

Counsel does not challenge the AAO's conclusion that the petitioner does not meet this criterion.

*Evidence of membership in professional associations*

The AAO concluded that the petitioner's work with the Oakland Jazz Choir and Rhythmic Concepts, Inc. could not qualify for this criterion because musical ensembles are not professional associations. The AAO then quoted counsel's evaluation of the Jazzschool in Berkeley, but reached no conclusion of its own. On motion, counsel asserts that the AAO acknowledged that Jazzschool is a professional association. The AAO did not reach this conclusion. Counsel

further argues that the Oakland Jazz Choir is part of Rhythmic Concepts, Inc., which is a professional organization. Stacey Hoffman, Executive Director for Rhythmic Concepts, Inc., writes:

Rhythmic Concepts, Inc. [is] a nonprofit corporation dedicated to preserving American Jazz music through education and performance. We embrace artists from all different levels and backgrounds. We are supported, amongst others, by the Oakland Cultural Affairs Commission, the City of Oakland, the Oakland Redevelopment Agency and the Alameda County Art Commission. RCI is proud to be the recipient of the prestigious '1997 Oakland Business Association Award for the Most Outstanding Arts Organization' at the Oakland Metropolitan Chamber of Commerce Oakland Business and Arts Awards. We have produced Jazz Camp West since 1984, created the Oakland Interfaith Gospel Choir in 1986, the Oakland Jazz Choir in 1992 and Rhythm Voice, now entitled Jazz Camp Weekend, in 1995.

This description simply does not indicate that Rhythmic Concepts, Inc. serves the same function as a professional organization such as a bar association or the American Academy for the Advancement of Science. Even if we were to consider Rhythmic Concepts, Inc. a professional association or equivalent, the petitioner would still only establish that she meets one criterion.

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

The AAO concluded that the petitioner did not meet this criterion due to her membership in the Oakland Jazz Choir, asserting that while a music group requires a certain skill level, admission to such a group is not recognition for achievements or contributions to the industry. The AAO also noted that the Oakland Jazz Choir appears to enjoy only a local reputation and has 50 to 60 members. Counsel asserts that "this does not seem a strong point," and refers to evidence that the petitioner is a "leader" in the choir. Once again, acceptance into a choir is at most recognition of vocal skill, not recognition of achievements or significant contributions to the field of music education. Counsel further argues that the Oakland Jazz Choir includes acclaimed artists such as Gwendolyn Mitchell and Dale Minkoff and performs at internationally recognized venues such as Kimballs East, Yoshi's and Great American Music Hall. Regardless, the AAO further found that the reputation of Jazz Camp, the Oakland Jazz Choir, and Rhythmic Concepts, Inc. did not necessarily reflect the petitioner's personal reputation. Especially as some of the evidence predated the petitioner's entry into the United States. Counsel does not address this point on motion.

The AAO also rejected counsel's contention that the petitioner's alleged membership in the award-winning group Ivan Ego and the Media-Stars qualifies the petitioner for this criterion. The AAO noted that the evidence failed to reveal that the petitioner was a central member of the group. On motion, counsel asserts that the petitioner's photograph appears in group photographs printed in the paper and letters from the advertising agency represented by the band and the

manager of the band. The AAO did not assert that the petitioner was not in the band at all. The AAO noted that the only mention of female band members were as back-up singers. The letters do not assert that the petitioner did any more than provide back-up vocals for the band. The petitioner has not overcome these points on motion. Significantly, the record lacks a letter from the lead singer confirming the exact nature of the petitioner's role in the band.

In addition, the AAO noted that much of the petitioner's experience was in performing, not music education. While counsel asserts that the AAO ignored the importance of music ability in music education, that does not appear to be the case. The AAO acknowledged that music ability is an important element of music education, but concluded that music ability alone cannot serve as evidence of exceptional ability as a music educator. We find no reason to disturb that conclusion.

Finally, the AAO acknowledged that the record contained several letters attesting in general to the petitioner's exceptional ability. The AAO stated that the above objective criteria were designed to avoid the determination of ability based on the subjective opinions of others. Counsel's motion reflects that she misunderstands the AAO's point on this issue.

Counsel argues on motion that the witnesses are experts in their field. The AAO did not assert otherwise. The AAO's point was that a petitioner cannot avoid meeting three of the above criteria simply by submitting letters from experts attesting to the petitioner's exceptional ability in general terms.

Counsel also faults the AAO for failing to consider the following objective evidence: lyrics written by Little Composer students, a cassette of the children singing their compositions, and the petitioner's picture and name in various performance schedules and articles. Once again, the AAO's discussion of objective evidence was simply to make the point that it is not enough to argue an individual meets someone's subjective definition of "exceptional," a petitioner must meet three of the objective criteria set forth in the regulations. We do not find that the AAO failed to consider any evidence relevant to the above criteria.

As the petitioner has not demonstrated that she is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, the AAO addressed this issue in its initial decision as it was the sole basis of the director's decision. As such, we will again consider this issue on motion.

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 director concluded that the petitioner's work would have merely a regional impact on her own students. On appeal, the petitioner submitted information regarding the petitioner's work with the Little Composers program. The AAO concurred with the director, noting that the record contained no first-hand evidence to show that a significant number of educators nationwide have expressed interest in the Little Composers program. The AAO also questioned whether the petitioner was involved with the Little Composers Program at the time of filing. With regard to the petitioner's involvement with Jazz Camp, the AAO noted that attendance by children from different states and nations did not demonstrate a national or international impact. The AAO concluded that the petitioner had not demonstrated a sustained impact beyond what could be expected from any qualified music educator in the same capacity.

On motion, counsel asserts that songwriting instruction in the pop style is unprecedented in elementary education, therefore there are no music educators in this capacity with whom to compare the petitioner. Counsel refers to the plan to make Little Composers a national program with special emphasis on inner city youth. Counsel asserts that the petitioner has demonstrated prior achievements at the Jazzschool and Jazz Camp West. Counsel references previously submitted letters from Stacey Hoffman and Susan Muscarella, as well as letters from Susan Muscarella and Congresswoman Barbara Lee submitted on motion, all regarding the petitioner's work at Jazzschool.

Congresswoman Lee asserts that the petitioner has contributed to American social and musical culture and music education and played an instrumental role in the development of a world-class teaching environment at the Jazzschool. Congresswoman Lee fails to provide the source of this information, nor does the petitioner provide supporting letters from disinterested music educators confirming the Congresswoman's assertions.

In her most recent letter, Susan Muscarella asserts that the petitioner is essential to the success of Jazzschool, that she is playing an important role in relocating the school and obtaining accreditation from the University of California, Berkeley, which will lead to a national role for the school. Ms. Muscarella also asserts that the petitioner introduced the "Songwriting for Kids" to the Jazzschool.

In her initial letter, however, Ms. Muscarella indicated that the "Songwriting for Kids" class would not premiere until the next semester. As such, at the time of filing, the petitioner cannot demonstrate that she had impacted the field of music education through this course by the time the petition was filed.

It remains, regardless of plans to expand Jazzschool or the petitioner's hope to help implement the Little Composers program nation-wide, the petitioner must demonstrate that she has already impacted her field as a whole. The new evidence submitted on motion does not demonstrate that the petitioner had influenced the music education of children nation-wide at the time of filing.

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, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.

**ORDER:** The Associate Commissioner's decision of November 1, 1999 is affirmed. The petition is denied.