



U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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[Redacted]

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

15 NOV 2001

File: [Redacted] Office: Nebraska Service Center

Date:

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

[Redacted]

PUBLIC COPY

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


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska 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 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 qualifies for classification as an alien of exceptional ability, but 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 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." Counsel merely asserted, without discussion, that the petitioner is an alien of exceptional ability. The director did not contest this assertion. Review of the record, however, reveals that the record is absent any evidence of exceptional ability.

Counsel failed to indicate which of the six regulatory criteria the petitioner is attempting to establish. As such, we will consider all of the regulatory 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

8 C.F.R. 204.5(k)(3)(ii) states that when applying for an exemption of the job offer requirement, a petitioner must submit a completed Form ETA-750B. This form, which would include the petitioner's education, is not in the record. Thus, the petitioner has not submitted all of the documentation required by the regulations for this classification. Regardless, the record contains no evidence of any degrees, diplomas, or academic certificates. While the record contains a letter asserting that the petitioner has two degrees in unspecified fields, the letter is from Jerry Jumba, vice president of the Carpatho-Rusyn Society in the United States, and not from a degree-awarding institution. While the record does include some Slovakian documentation described by counsel only as "original documents from the Republic of Slovakia," the record contains no translations of these documents as required by 103.3(a)(3). The petitioner has not established what these documents are.

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

As stated above, the petitioner failed to submit the Form ETA-750B as required by the regulations. This form would have listed the petitioner's employment experience related to her field. Regardless, the petitioner has not submitted any employment letters reflecting any full-time employment as a singer or an explanation as to why such evidence is unavailable. Thus, the record does not support Mr. Jumba's assertion that the petitioner has radio experience, many years of amateur, semi-professional, and professional experience, and has performed in European tours. The record does contain a certificate presented to the Sarisan Slovak Folk Ensemble of Presov, Slovakia on the occasion of their 30th Anniversary in 1997. While the petitioner claims to be a former member of this group, she was only 26 years old in 1997. Thus, she could not have been a founding member of the group. The record does not reveal how long she was in the group or whether it was full-time employment.

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

The record contains no evidence that the petitioner's field of singing requires a license or certificate. Regardless, the petitioner does not appear to be licensed or certified as a singer.

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

The record contains no evidence of the petitioner's salary at any time.

Evidence of membership in professional associations

The record contains no evidence of membership in any professional singing associations.

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

The evidence which the petitioner did submit appears to address only this final criteria. Much of the evidence directly related to the petitioner herself consists of letters solicited by the petitioner to support her petition. Such letters alone cannot establish that the petitioner had already obtained recognition from her peers unrelated to the filing of the petition. The record contains no awards or other evidence of recognition from her peers, governmental entities, or professional or business organizations. The record does contain a few letters from festival organizers thanking the petitioner for participating, attesting to the favorable response to her performance and requesting that she return to perform again. These letters, however, while acknowledging the petitioner's singing skills, are not recognition of *contributions* to her field. These letters will be discussed in more detail below regarding whether an exemption of the labor certification process is in the national interest.

While the record does contain a few newspaper articles regarding festivals at which the petitioner performed which comment on the petitioner, recognition by the media is not an element of this criterion. Regardless, as a petitioner needs to meet three of the criteria; submitting evidence in support of only one criterion is insufficient.

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, we will address this issue as it was the sole basis of 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 director determined that the petitioner's vocation, singing ethnic music at local ethnic festivals, had no intrinsic merit. We find that music and cultural performances do have intrinsic merit. The director also concluded that one performer at local festivals and concerts would not have a national impact. On appeal, counsel argues that the petitioner's performances have been restricted to the Great Lakes area because of her immigration status and because that is where most people of her ethnic group reside in the United States. We do not find counsel's arguments persuasive; in fact, counsel appears to concede that the petitioner has no impact beyond those of her ethnicity. Counsel also argues that since the petitioner has made videotapes and compact discs, anyone in the nation can buy her music. The petitioner has not demonstrated, however, that she has been able to sell her videocassettes or compact discs. We concur that the performances of one singer at local festivals would not have a national impact. See Matter of New York State Dept. of Transportation, note 3. Finally, as will be discussed below, the petitioner has not established that she will benefit the national interest to a greater extent than other singers, or even ethnic singers.

Paul Robert Magocsi, the founding president of the Carpatho-Rusyn Research Center, Inc., writes that he came to know the petitioner during his visits to Slovakia in the early 1990s. He indicates that the petitioner played a unique role in the post-communist renaissance of Rusyn culture because she was active in Slovakia and the United States. Finally, he writes:

In essence, [the petitioner] through her recordings and well-attended concerts in the United States, functions as a cultural ambassador linking Slovakia (specifically the Rusyns of eastern Slovakia) and America. As such, she is contributing to the fulfillment of one of the basic goals of American foreign policy on the eve of the 21st century: to assure a firm basis for western-oriented democratic reform and stability in the former Communist counties of east-central Europe. In that regard, [the petitioner] is the latest in a long line of newcomers to

the United States who have enriched their new homeland by sharing with all Americans the positive aspects of her European place of birth.

Mr. Magocsi's personal assertions are utterly insufficient to establish that the petitioner is advancing the cause of democracy abroad by singing at local festivals. Jerry John Jumba, founding committee member and vice president of the Carpatho-Rusyn Society indicates that he plays the petitioner's recordings on his weekly Rusyn radio program with an unspecified number of "multicultural" listeners in the "tri-state" area and is collaborating with the petitioner on a new concert of Carpatho-Rusyn art songs and a song book of Carpatho-Rusyn songs with English translations. Mr. Jumba concludes:

[The petitioner's] presence in the United States is a fortunate serendipity of cultural progress for us because of her willingness to work and collaborate in the field of Rusyn music, language, and ethnography of which she is so uniquely qualified. This work has already begun to have a meaningful sphere of influence among American Rusyns, and we hope we can fulfill the immediate cultural goals which we strive to accomplish. We, at the Carpatho-Rusyn Society, know of no other person in the United States who can bring this blend of song performance, expertise, and collaborative work into the foreground of American Rusyn cultural progress, and help to enrich the meaning of the American Carpatho-Rusyn presence in American's multicultural society.

The record contains little evidence that Mr. Jumba's radio show is exposing significant numbers of non-Slovaks to Carpatho-Rusyn music or that the petitioner's music is the basis of the radio show's success. The record also fails to demonstrate the success of the art song book.

John J. Righetti, President of the Carpatho-Rusyn Society, echoes Mr. Jumba's sentiments, asserting that the petitioner is one of the first European Rusyn artists to be performing exclusively Rusyn material in the United States since World War II. The fact that the petitioner is one of an unspecified number of musicians now performing Rusyn music in the United States is not evidence that she is influential.

Maryann Sivak, secretary for the Carpatho-Rusyn Society, states:

She is a major league singer, direct, insightful, and extremely visual. She has performed traditional and contemporary Carpatho-Rusyn songs on stage, in churches, at private gatherings, and at various Cartho-Rusyn Folk Festivals.

Ms. Sivak also asserts, however, that the petitioner was not even aware of her cultural identity until she met members of the Society in the United States. Ms. Sivak asserts that at that time the petitioner "became interested in her ethnicity and wants to learn more." While Ms. Sivak states that the goal of the Society is to provide an opportunity for Americans to experience Carpatho-Rusyn culture, she concludes only that "the symbiotic relationship that we have established [with the petitioner] will enrich our organization and also [the petitioner]." This letter appears to

indicate that the petitioner is still learning about her heritage and does not suggest that she is making a national impact.

Thomas Ivanec, Director of the amateur Slovak Folk Ensemble indicates that the petitioner and her accordion accompanist assisted the Slovak Folk Ensemble on several occasions which "added authenticity and professionalism." Mr. Ivanec continues, "this has greatly helped us in promoting our Slovak heritage." Mr. Ivanec also asserts that the petitioner has arranged songs for the group, which allowed the Slovak Folk Ensemble to add singing to their program. Writing songs for an amateur Slovak music group is not evidence of influence on the music industry as a whole.

Tatiana Jarosova, a professor of Eastern European Languages and Cultures at John Carroll University, praises the petitioner's artistic skill and character, but fails to explain how the petitioner will benefit the national interest.

The record includes evidence that the petitioner has performed at various Carpatho-Rusyn festivals and local festivals celebrating world cultures representing the Carpatho-Rusyn culture. Specifically, the petitioner has performed at the Slovak Music Festival at the University of Pittsburgh, Cleveland's One World Day, the Slovak Catholic Summerfest in 1998, the Carpatho-Rusyn Easter Egg Extravaganza at the Andy Warhol Museum, Otkoberfest celebrations in Painsville, Ohio, concerts entitled the second and third "Song Tour of Carpatho-Rus," and at ethnic concerts presented by the Carpatho-Rusyn Society, the Rusin Association of Minneapolis, and the Lucina Slovak Folk Ensemble of Cleveland. The record contains a compact disc with music by Sarisan from 1994. As stated above, the record does not establish in which years the petitioner was a member of Sarisan. The record is also absent any evidence regarding the sales of the compact disc.

Finally, the record includes articles and fliers regarding Eastern European religion, culture, and festivals which appear to have no relation to the petitioner herself. That the petitioner is a singer who belongs to an ethnic group which has been divested of its heritage abroad is not, in and of itself, sufficient to warrant a waiver of the labor certification requirement. Eligibility for the waiver must rest with the alien's own qualifications rather than with the origin of the music she sings.

A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at note 6. The record simply contains no evidence that the petitioner has influenced music as a whole. There is no evidence that any other artist has adopted the petitioner's style. The petitioner has only performed at festivals and concerts aimed at presenting Carpatho-Rusyn or Slovak culture. While ethnic music in the multi-cultural United States can often be influential, the record does not reflect that the petitioner's music has garnered any attention outside her own community. There are no letters from anyone outside the Carpatho-Rusyn or Slovak community attesting to her influence or the benefits the petitioner will bring to the United States.

The petitioner has not established that the newspaper articles are from major newspapers or that they constitute more than press releases or coverage of local festivals by local papers. The articles do not reflect that the petitioner is influential in the music industry. The most favorable article was written by Mr. Jumba, the petitioner's collaborator, and published in The New Rusin Times, hardly evidence of the petitioner's influence on her field as a whole.

Counsel also repeatedly asserts that the petitioner has a political influence, comparing her to Marlena Deitrich during World War II, Miriam Makeba and the anti-apartheid movement, and Radio Free Europe during the Cold War. First, the record does not support these assertions. Moreover, counsel has not explained how the petitioner will best aid the Carpatho-Rusyns, previously but no longer repressed under communism, by residing in the United States.

The letters submitted on appeal are not persuasive. All but one of the letters are from local professors, including a professor who is also the honorary consul of the Slovak Republic. These letters fail to establish that the petitioner has made a national impact. The remaining letter is from August Pust, Director of the Ohio Governor's Office of Multicultural Affairs and International Relations. Mr. Pust asserts:

[The State of Ohio] supports organizations that enlist trained professionals to provide the needed educational, technical and highly specialized expertise, in [the petitioner's] case, her extraordinary musical and performing talents, and at the same time energizing our overall multicultural life in the State of Ohio.

Mr. Pust, however, acknowledges that he was contacted by the leadership of the American Slovak community in Ohio regarding this case. Mr. Pust does not assert his own familiarity with the petitioner or indicate that she would benefit the United States on a national scale.

On appeal, counsel asserts that since the petitioner performs for many organizations, none of which have the means to employ her full-time the labor certification process is not applicable to her. The availability of the labor certification process, however, does not automatically warrant a waiver of the process, rather it is simply one factor to be considered. Id.

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 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.