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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

[Redacted]

File: [Redacted]

Office: Nebraska Service Center

Date: 18 APR 2007

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 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, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks to classify the beneficiary classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), a member of the professions holding an advanced degree. The petitioner seeks employment as a “musician, concert performer, educator, teacher, arranger.” The petitioner plays the bayan, or button accordion. 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 the classification sought 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 is not a member of the professions as that term is defined at 8 C.F.R. 204.5(k)(2), but the director did not dispute that the petitioner qualifies for classification as an alien of exceptional ability. The sole issue raised by the director is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

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.

We do not dispute the substantial intrinsic merit of the established arts such as music. With regard to national scope, the director found that the petitioner’s activities have been largely confined to the vicinity of Milwaukee, Wisconsin. Counsel, in a statement accompanying the initial filing, contends that the petitioner’s “talent and knowledge are in demand well beyond the limits of Milwaukee or even the Midwest,” and that the petitioner “has recorded two CDs, both of which have been well received by critics and academics alike throughout the U.S.”

Regarding the labor certification requirement itself, counsel notes that “this required procedure makes no sense in the case of a self-employed musician and performer,” to whom “the labor certification process [is] completely unavailable.” Counsel also contends that “the pivotal role that the performing arts play in our national cultural life demands excellence.” Counsel asserts that the petitioner will benefit the U.S. as an educator and as a performer.

In support of the petition, the petitioner has submitted over 30 witness letters; we shall consider examples of these letters below.

Mayor John O. Norquist of Milwaukee states that the petitioner has participated in the Milwaukee Symphony Orchestra’s outreach program for several years “at public grade schools in the Milwaukee area.” Mayor Norquist asserts that “this program is a model for other cultural programs in the United States.” Both of Wisconsin’s U.S. Senators, Herb Kohl and Russell Feingold, offer letters of support as well.

Current and former officials of the Milwaukee Symphony Orchestra state that the petitioner is a virtuoso of almost unparalleled skill on his instrument. Associate conductor Andres Sill states that the petitioner "has been a vital member of the Milwaukee Symphony Orchestra's award-winning Arts in Community Education ["ACE"] program, singled out by the NEA as a model of cooperation between the educational, cultural, and artistic communities in the area." The record indicates that the ACE program "takes place in 25 public, private and parochial schools," involving "[o]ver 8000 students in grades K-8, their parents and over 500 teachers."

Among the remaining witnesses, probably the most prominent was [REDACTED], the legendary television personality, composer, and author who died in October 2000 (he wrote his letter in November 1998). [REDACTED] stated:

[The petitioner] was originally brought to my attention by the Rev. William Johnson, S.J., for whom I had agreed to travel to Milwaukee . . . to do a benefit performance. . . .

Having been active in the entertainment business for half a century I have naturally previously encountered highly competent accordionists. But never before had I seen anyone able to do what [the petitioner] does. The instrument on which he performs is itself quite unusual. In fact I have never before encountered it within the context of American culture. . . .

I assure you that I am not writing this letter simply to do a personal favor, to either [the petitioner] or Father Johnson. . . . [Many] successful entertainers [such as Elvis Presley and Lenny Bruce] got either their first or most important earlier exposure on one or another of my television programs. . . . [O]f all the entertainers . . . that I have been fortunate to meet early in their careers, none of them impressed me more favorably than did [the petitioner]. . . .

I don't believe there is another musician in our country, however talented, who can do exactly what [the petitioner] does. . . .

[I]t would be tragic to expel a musician with [the petitioner's] imposing credentials.

The record contains a copy of a letter that [REDACTED] sent to fellow talk show host David Letterman in 1995, in which [REDACTED] describes the petitioner as "a freakishly gifted young musician" who "stopped the show" at the above-mentioned benefit concert. The record shows that [REDACTED] has attempted to procure several bookings for the petitioner around the country. These letters, all of which date from years before the petition's filing date, demonstrate that [REDACTED] had truly taken a deep and sincere interest in furthering the petitioner's career.

Amy Jo Sawyer, then president of the Illinois-based Accordionists and Teachers Guild, International, states:

During these past 60 years we have promoted the accordion as a serious, legitimate instrument as well as ethnic, commercial, and pop-music. . . . I represented the Western US in the World Competition held in Switzerland in 1956. I have performed with the St. Louis Symphony and have accompanied Italian Tenor, Luciano Pavarotti. . . .

[The petitioner] is definitely an asset to the US as an accordion artist and instructor . . . and we intend to have him perform and give seminars at future Festivals and Competitions. . . .

It would definitely be a loss to the Accordion Community and the US Cultural environment if [the petitioner] were not allowed to remain in the US.

Jacob B. Kons, president of the World Button Accordion Association, based in Texas, states that his organization “knows of only one other United States performer capable of performing at the same level as [the petitioner] and that is Peter Soave.” Mr. Soave (identified as a former world accordion champion) himself also offers a letter on the petitioner’s behalf, stating that he is “acutely aware that this great country needs more representation of this art form . . . and [the petitioner] . . . has significantly raised the characterization of the accordion and has introduced the unique bayan to new audiences.”

Kevin Friedrich, vice president of the Confederation Internationale des Accordeonistes and manager of Accordions Worldwide, North America, based in Kew Gardens, New York, states that the petitioner “has already established a coveted reputation in both the accordion and music worlds.”

Accordionist Kenny Kotwitz, who has played on several film scores (such as Who Framed Roger Rabbit? and The Natural) and television programs (such as The Simpsons and The Lawrence Welk Show), deems the petitioner to be “a world class concert accordionist” and “a wonderful teacher,” and “a young man who has done extraordinary things in a relatively short amount of time. . . . How rare it is to have an artist at his level on this, or any other instrument.”

A number of witnesses are based in Milwaukee or the surrounding area. The petitioner, however, has submitted letters from many individuals in New Jersey, California, Missouri, and other states, indicating that the petitioner’s reputation and impact are not limited to Milwaukee.

The director denied the petition on February 23, 2000, acknowledging the petitioner’s exceptional ability and the intrinsic merit of his occupation, but finding that the petitioner’s work lacks national scope and that the witness letters “do not establish that the alien’s work is at a level above all those others who are in the field.” The director noted the lack of evidence that the petitioner has

performed at prestigious concert venues, won major competitions, or secured a recording contract with a major record company.

The petitioner's appeal of this decision was untimely filed, and the director treated it as a motion to reopen pursuant to 8 C.F.R. 103.3(a)(2)(v)(B)(2). The director reopened and again denied the petition on May 10, 2000, and the petitioner has again appealed the decision. We will consider the two appeals together.

Counsel argues that the petitioner "has proven that he is more than an 'extremely talented accordionist' . . . he is breaking barriers in introducing the bayan accordion to the symphony orchestra" and educating non-musicians about the instrument. Counsel contends that the director's references to top performance venues and major recording labels are "highly unrealistic and inappropriate," and asserts that the petitioner's "substantially greater value to the U.S. should be measured by the opinions of the experts in his field."

Certainly the petitioner should not be required to demonstrate that he is nationally acclaimed as one of the very top figures in his field. Such a standard is appropriate to a higher visa classification, alien of extraordinary ability, established by section 203(b)(1)(A) of the Act. The petitioner need not establish extraordinary ability to meet the lower threshold of the national interest waiver.

Furthermore, as counsel observes, accordion experts not only in Milwaukee but also throughout the United States have attested to the petitioner's rare talent. The late Steve Allen considered the petitioner to be "freakishly talented" and among the most impressive acts he had ever seen. Considering Mr. Allen's close contact with several generations of top stars, we cannot lightly dismiss his comments. Obviously, an alien cannot secure a national interest waiver simply by obtaining a letter from a celebrity, but we must weigh carefully any statements made by such individuals. Frequently, the very reason such people are famous in the first place is because they are among the best at what they do, and as such they have earned some degree of deference when offering detailed statements that pertain directly to their area of expertise.

On appeal, the petitioner submits letters from additional witnesses. Professor Joan Cochran Sommers, assistant dean of the Conservatory of Music at the University of Missouri-Kansas City and Amy Jo Sawyer's successor as president of the Accordionists and Teachers Guild, International, states the petitioner is a "world-class" musician who is building a national reputation. Prof. Sommers indicates that she has adjudicated national and international competitions, as well as trained top-level players in international competitions, thus establishing that she is "more than competent in judging [the petitioner's] abilities."

Professor Friedrich R. Lips, who trained the petitioner at the Russian Academy of Music, states that the petitioner "is considered to be in the international accordion community, at the top of the world of the bayan instrument." Richard Kessler, Executive Director of the American Music Center in New York, New York, states that he and his organization "consider [the petitioner] to be a unique artistic resource in the mid-West and on a national level. Without question, [the petitioner] is the finest bayan accordionist in the United States." Mr. Kessler notes that the American Music Center

rarely supports immigrant petitions because “our mandate is to promote American music and arts,” but the petitioner represents “an exceptional case.”

It is certainly true that most of the petitioner’s activities in the U.S. have taken place in the Milwaukee area, and that the bayan is a relatively obscure instrument in this country. At the same time, however, we must consider that the statute, as worded, plainly makes provision for aliens of exceptional ability in the arts to obtain the national interest waiver when circumstances warrant. Also, the petitioner in this instance has marshaled what seems to be an unprecedented level of support for his petition from musicians, music educators, and others, whose competence and judgment in this matter are beyond serious dispute.

Documentation submitted on appeal supports the petitioner’s earlier contention that the Milwaukee Symphony Orchestra’s ACE program, described above, is a nationally acclaimed program. The petitioner’s vital contribution to a nationally-recognized educational program is heavily documented in the record. The petitioner, in this instance, has not merely demonstrated that he hopes to teach children about his instrument, or that he personally believes that his efforts are important. The petitioner, on appeal, has backed up his claims with credible documentation at the highest national levels. In this way, the petitioner stands apart from many other artists who claim to serve the national interest, but who are able to offer little support for such claims apart from their own assertions that children benefit from exposure to other cultures.

It does not appear to have been the intent of Congress to grant national interest waivers to every alien who shows artistic talent, or who hopes to expose children and other Americans to other cultures. That being said, artists certainly qualify for consideration for the waiver, and in the present proceeding, the petitioner has shown overwhelming support for his petition from throughout the artistic community, indicating that his impact is not limited to the Milwaukee area or to a handful of local classrooms. Prominent witnesses have attested that to retain this alien’s services as a performer and as an educator serves the national interest. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.