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**U.S. Department of Justice**

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

*OFFICE OF ADMINISTRATIVE APPEALS*
*425 Eye Street N.W.*
*ULLB, 3rd Floor*
*Washington, D.C. 20536*

[redacted]

File: [redacted] Office: Nebraska Service Center Date: 8 FEB 2002

IN RE: Petitioner: [redacted]
Beneficiary:

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 did not contest that the petitioner qualifies for classification as an alien of exceptional ability or as a member of the professions holding an advanced degree, 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.

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.

In 1991 the petitioner obtained a diploma for music education from Harkiv Institute of Music of Ivan Kotlarevsky. The petitioner obtained an earlier degree in music education in 1986 from the Severodonetsk Music School. While the petitioner lists the 1991 degree as a Master's degree on her resume,[1] the record contains a certification from the Multinational Education and Information Services, Inc. stating that the 1991 degree was only equivalent to a bachelor's degree. In response to the director's July 27, 1998 request for additional documentation, prior counsel asserted that the petitioner had five years of progressive experience performing and teaching after 1991. The only teaching experience listed on the petitioner's resume is teaching bandura at the Kotlarevsky Conservatory in Karkiv and teaching a bandura chorus at the Karkiv Musical College, both between 1989 and 1994. Even if we considered this period to constitute five years after the petitioner's first degree in 1986, the petitioner has not submitted evidence to support the assertion on her resume that she taught during that period. Performing bandura is not professional experience. As such, the

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[1] The petitioner failed to submit Form ETA-750B as required for this classification pursuant to 8 C.F.R. 204.5(k)(4)(ii).

petitioner's experience as a performer cannot serve to meet the requisite five years of experience. In light of the above, the petitioner has not established that she is an advanced degree professional.

Initially, prior counsel asserted that 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." The petitioner submitted evidence which relates to 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*

The petitioner appears to have two bachelor's degrees, although only one has been evaluated. In order for a degree to demonstrate exceptional ability, it cannot be a mandatory degree for the occupation. To conclude otherwise would lead to the absurd conclusion that every individual qualified to work in the occupation has a degree of expertise significantly above that ordinarily encountered. The petitioner left blank Part 4 of the petition which requires information about the proposed employment. While an alien seeking a national interest waiver need not have a job offer, this classification is, ultimately, an employment-based classification. As such, the petitioner must indicate what type of employment she seeks. If the petitioner seeks to continue performing, then a degree is not mandatory. While a degree is normally required to teach, two degrees are not. As such, the petitioner appears to meet this criterion.

*Evidence of membership in professional associations*

Prior counsel asserted that the petitioner's memberships in musical groups and her employment as a teacher serves to meet this requirement. Neither musical groups nor educational institutions are professional associations. That the petitioner was able to obtain employment in her field is not evidence that she has a degree of expertise beyond others in her field.

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

The petitioner has received several honors and awards for her musical performances. While the record includes little evidence of the significance of these honors and awards, even if the petitioner met this criterion, she has not established that she meets at least three criteria.

As the petitioner has not demonstrated that she is an alien of exceptional ability or an advanced degree professional, 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.

As stated above, the petitioner has not indicated what employment she seeks in the United States. While cultural diversity is important to the national interest, this visa classification is, ultimately, employment based. A petitioner cannot demonstrate eligibility based on the argument that her talent is so unique that, regardless of what she does, her mere physical presence in the United States as a "cultural ambassador" is in the national interest. She must demonstrate that she will

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benefit the national interest through the employment she seeks. That said, the petitioner has previously worked as a performer and, she claims, as a teacher. Thus, we will evaluate the record as to whether this past history justifies projections of future benefits as a performer and teacher.

The director determined that the petitioner's vocation, playing and teaching ethnic music, had no intrinsic merit. We find that music and cultural performances do have intrinsic merit. We concur with the director, however, that the performances of one bandura musician at local festivals do 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 musical performers.

The petitioner submitted substantial documentation about the Ukrainian folk instrument she plays, the bandura. The petitioner received substantial training in this instrument in the Ukraine and has participated in several cultural exchanges in the United States as well as other countries. That the petitioner is a musician who is skilled with a culturally unique instrument 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 instrument she plays. In other words, while cultural diversity is important, we cannot conclude that the presence of every musician who plays a difficult, non-American instrument is in the national interest.

[redacted] Honored Artist of Ukraine, states that the bandura is an extremely difficult instrument to master due to the difficulty of the playing techniques and because it is a "synthetic" instrument which requires the performer to play and sing at the same time. Mr. Stahiv asserts that other Ukrainian musicians have adopted the petitioner's techniques.

John Borkowski, president of the Alliance of Poles of America, asserts that the petitioner has contributed to many programs of that organization, playing piano and other instruments as a member of the orchestra for the original Polish Folk and Dance Ensemble.

Valery Belinsky, a professor of music in Long Island writes that the petitioner is a talented musician who receives standing ovations from both Ukrainian and non-Ukrainian audience members when she plays.

In an unsigned letter, [redacted] a high school music teacher in Canada, states that the petitioner is "one of the few individuals that have completed the full course as a concert Bandurist and teacher." He further asserts, "she is a great asset to the Ukrainian community here in North America being able to perform and teach this beatiful [sic] musical instrument."

On appeal, the petitioner submits a petition requesting the approval of the petition signed by several parents who assert that they have been "touched" by the petitioner's music, that she has taught their children "through her music," and that she has helped to preserve their ethnic and national heritage, "whether Russian, Ukrainian, or Jewish."

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 outside the Ukrainian community has adopted the petitioner's style. The petitioner has only performed at festivals and concerts aimed at presenting Eastern European 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 Eastern European community attesting to her influence or the benefits the petitioner will bring to the United States.

Nor has the petitioner influenced the field of music education. The signed petition indicates that the petitioner has taught children "through her music." Counsel makes the same claim. From this language it is not clear that the petitioner has or seeks to work as a music teacher, as opposed to performing for children and, by doing so, "teach" them about Ukrainian music and culture. There is simply no evidence that the petitioner has influenced the field of music education to a greater degree than other music teachers.

Finally, counsel argues on appeal that Matter of New York State Dept. of Transportation, supra, is "inapplicable" because the petitioner is not seeking the waiver based on a shortage of qualified workers. That case, however, sets forth the test to be used in determining whether a waiver is warranted. While Matter of New York State Dept. of Transportation states that a waiver is not warranted simply because of a labor shortage, a determination under the jurisdiction of the Department of Labor, the case also sets forth the test for determining whether a waiver is warranted. This test is applicable to every petition seeking a waiver in the national interest.

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.