

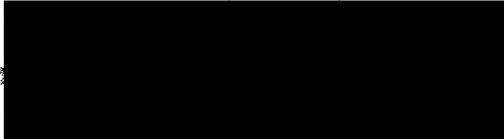


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U.S. Department of Justice  
Immigration and Naturalization Service

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



File: [Redacted] Office: California Service Center Date: 13 FEB 2002

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)

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, California 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 singer/songwriter. 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 beneficiary does not qualify for classification as an alien of exceptional ability, and that the petitioner has 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 has been a singer/songwriter since 1980. For most of the 1980s, the petitioner was a member of Loose Ends, a trio that recorded a series of hit singles and albums in the United Kingdom. Counsel states that the petitioner was "not only . . . the lead vocalist of the group . . . but also . . . the songwriter of all the Group's songs." Documentation in the record shows that Loose Ends' songs are generally co-credited to all three members, and therefore it is somewhat misleading to deem the petitioner "the songwriter" for the group.

Also, counsel's 1998 cover letter repeatedly indicates that the petitioner "is," rather than was, a member of Loose Ends. Exhibits in the record, however, identify the petitioner as a "former member" of the group. The petitioner submits a copy of the artwork and credits for the 1988 Loose Ends album The Real Chuckeeboo. A handwritten annotation on the copy indicates that the petitioner

performed "all lead vocals/backgrounds" on the album, but the credits plainly state that another member, [REDACTED] also performed "background and lead vocals." The record thus establishes several instances of false or misleading statements, preventing us from accepting counsel's assertions at face value.

The first issue to be decided is whether the petitioner is an alien of exceptional ability. The director did not address this issue in detail, stating only that the petitioner's accomplishments as a solo act (rather than as a member of Loose Ends) do not establish 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. Below, we shall address the criteria that the petitioner claims to have satisfied.

*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 record contains contracts and other documentation showing that the petitioner has been in the music business since 1980. The career of Loose Ends, in particular, is amply documented. The petitioner satisfies this criterion.

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

Counsel states that the petitioner "continues to receive royalties for the songs she has co-written and recorded from 1980 until the present." Receiving royalties is not, in itself, evidence of exceptional ability, because royalties are a common method by which songwriters earn a living. To demonstrate exceptional ability, the petitioner must demonstrate that she earns royalties in amounts significantly above those ordinarily encountered.

The petitioner submits various documents concerning her publishing agreements. These documents list advances payable to the petitioner, but these advances are against earned royalties rather than additional compensation above and beyond those royalties. Without some basis for comparison, we cannot determine that the petitioner's terms are more favorable than are normally found in her field. We also note that the petitioner has entered into contracts with a number of different publishers, which suggests that the companies are releasing the petitioner rather than picking up their options to continue the contracts.

The record includes documentation from the mid-1990s indicating that the petitioner earned performance royalties of between \$100

and £2,000 per distribution period. The length of these periods is unclear; they appear to be shorter than a year but longer than a month, but irregularly spaced and thus presumably not quarterly.

The evidence submitted is insufficient to establish that the petitioner has been compensated at a rate that demonstrates exceptional ability.

*Evidence of membership in professional associations.*

Songwriting is not a profession in the sense defined by 8 C.F.R. 204.5(k)(2), because it does not require a bachelor's degree and the occupation is not listed in section 101(a)(32) of the Act. 8 C.F.R. 204.5(k)(3)(iii), however, allows the submission of comparable evidence when the stated criteria do not readily apply to the alien's occupation. Therefore, we can consider memberships in non-professional associations that pertain to the alien's occupation. At the same time, the membership must in some way reflect exceptional ability. Membership in (for instance) a trade union, that is open to any paid worker in the field, does not inherently distinguish members as exceptional compared to non-members.

The petitioner is a full member of the Performing Rights Society ("PRS") in the United Kingdom. PRS, analogous to ASCAP in the United States, administers the performance rights to members' compositions. Full membership is contingent on meeting certain performance-based criteria; it is not automatic or open to every songwriter regardless of their level of accomplishment. Therefore, we can consider such membership to demonstrate exceptional ability.

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

Counsel asserts that Loose Ends "was awarded the Best Rhythm and Blues Group Award from 'Jack the Rapper' . . . in 1994." As noted above, there is no evidence that the petitioner was a member of Loose Ends in 1994. Counsel further claims that Loose Ends "has sold over 5 million albums around the world. Two of their albums, 'A Little Spice' and 'Zagora,' have both gone platinum, meaning that each album has sold over 1 million pieces." Counsel also claims that the mayor of Atlanta, Georgia, presented the petitioner with the key to the city in a 1987 ceremony.

Although any one of the above claims would seem to be readily verifiable, the record contains no documentary evidence to support any of these claims. These unsubstantiated claims have no weight. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). This finding is further reinforced by other

claims, discussed elsewhere in this decision, which the record shows to be false or at least misleading.

To demonstrate the lasting influence of the petitioner's past work, counsel discusses the use of the petitioner's songs by other artists. Counsel states:

[REDACTED] has admired all of [the petitioner's] songs, among them "I Give My All" and "Stay Awhile." [REDACTED] recorded these songs in a remixed version as "My All/Stay Awhile" in her latest music album titled "Butterfly." When [REDACTED] later released the song as a single, it went to number 1 in the Billboard Chart, and has sold millions worldwide.

Counsel states that the credits of the CD single show the petitioner "as the songwriter." The record contains a copy of the artwork and credits of the "My All/Stay Awhile (JD Remix)" single. The credits do not indicate that the petitioner is "the songwriter," or even a principal songwriter; the credits state "'My All/Stay Awhile' contains a replay of 'Stay A Little While Child'" which is jointly credited to the three members of Loose Ends.

The credits also list another track, simply called "My All." This song is credited to [REDACTED]. There is no evidence that [REDACTED] composition "My All" derives in any way from the petitioner's "I Give My All." This assertion, like the claim that [REDACTED] has admired all of [the petitioner's] songs, has no evidentiary support in the record. The record indicates that the single features several different mixes of "My All," some of which include extracts from "Stay A Little While Child" and some of which do not. The record contains no chart documentation whatsoever, to verify that the version of the song that reached number one was, in fact, "My All/Stay Awhile" rather than "My All" which does not credit the petitioner at all.

Counsel also states [REDACTED] [sic] recorded [the petitioner's] song 'Slow Down' in his latest music album, [REDACTED]. The liner notes to [REDACTED] state that the song "Slow Down" was "Written and Performed by [REDACTED] and [REDACTED] and that the recording "Contains an interpolation of 'Slow Down' by Loose Ends." Clearly, [REDACTED] and [REDACTED] did not record straight "cover" versions of Loose Ends songs; rather, they incorporated elements of those songs into their own new compositions. The record indicates that other artists have used what appear to be samples of original Loose Ends recordings in their own songs.

Notwithstanding the above serious flaws and omissions in the record, the totality of the evidence indicates that the petitioner was an integral part of a highly successful musical group that continues to influence newer rap and R&B musicians. We find, therefore, that the petitioner has been recognized for significant contributions.

We hereby withdraw the director's finding that the petitioner does not qualify as an alien of exceptional ability. 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.

The petitioner's exceptional ability as a songwriter is not *prima facie* evidence of eligibility for the waiver; the plain language of the statute states that aliens of exceptional ability are generally required to present a job offer with a labor certification at the time the petition is filed, and only for due cause is the job offer requirement to be waived. Clearly, exceptional ability in one's field of endeavor does not, by itself, compel the Service to grant a national interest waiver of the job offer requirement.

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.

Counsel asserts that the petitioner will serve the national interest through "improvement of the music recording industry" and "improvement of the U.S. economy and providing employment to U.S. workers." Counsel's arguments in this regard are not persuasive. For instance, counsel asserts that without songwriters there would be no songs, and thus no recording industry. While obviously true, this assertion applies to all songwriters and does not single the petitioner out for the special benefit of a national interest waiver. Similarly, the assertion that the petitioner, as a singer as well as a songwriter, is "self-contained" and therefore attractive to record companies, is not persuasive because singer/songwriters are not rare in the industry.

The petitioner has submitted a number of witness letters in support of her claim. Tim Lester, executive director of the Greater Los Angeles African-American Chamber of Commerce, states that the petitioner is "an asset to this Country" owing to "her unique abilities and financial contribution via album sales generated through her year long standing relationship with [the] MCA Record Label."

[REDACTED] president and CEO of MCA Records Black Music Division, states that the petitioner "established herself as one of the most prolific artists in our camp, and through our efforts made MCA quite literally, a great deal of money." Another MCA official, Madeline Randolph, senior director of Artists and Repertoire, R&B Music, states that the petitioner is "one of the most sought after writers at this time" and that "Loose Ends past recordings are top ten in remixing and sampling endeavors."

[REDACTED] president and CEO of Silas Records, calls the petitioner "a very talented songwriter, thought to be one of the most prolific in the R&B adult contemporary music market to date."

[REDACTED] president and CEO of Fully Loaded Records, states that the petitioner is "well sought after independently as a songwriter," and that "[t]hroughout America in the R&B music community, [the petitioner] is held in the highest regards as one of Europe's most significant vocal performer [sic]." [REDACTED] further contends that the petitioner "has had the opportunity to become ingrained in American culture, customs, and politics." Former Shalamar vocalist [REDACTED] states that the petitioner "has continued to perfect her writing skills and is considered one of the most prolific songwriters in the industry today."

[REDACTED] of Boom Entertainment, manager of record producer [REDACTED] states "[a]ccording to Pete, [the petitioner] is one of the best vocalists the industry has to offer." [REDACTED] states that [REDACTED] wants to "collaborat[e] with Loose Ends for a possible forth-coming album." The record contains no statement from [REDACTED] himself; the second-hand assertion that he personally considers the petitioner to be a talented singer is not persuasive evidence in support of the waiver request.

Arguably the best-known of the witnesses is [REDACTED] among the most famous NBA basketball players of recent years. Mr. [REDACTED] however, offers little detail in his brief letter. He states only that the petitioner is "a former member of the music group 'Loose Ends,'" and that the petitioner's "musical talent . . . would be an asset to the industry and the R&B culture."

A number of these witnesses state or imply that the petitioner is, rather than was, a member of Loose Ends, but others identify her as a "former member" thus acknowledging her departure from the group. Given the disagreement over such basic facts as whether the petitioner is or is not still a member of Loose Ends, we cannot place great credence in much vaguer claims such as the assertion that the petitioner is "one of Europe's most significant vocal performers." We note that a number of record company executives praise the petitioner in very general terms but none of them indicate that the petitioner is currently under contract with them as a writer or as a performer. The record offers no evidence to show that the petitioner has experienced any success as an artist in her own right (rather than as a guest artist) since her departure from Loose Ends.

The assertion that the petitioner is "prolific" carries little weight without direct evidence that demand exists for the petitioner's new compositions. The recent recordings including the petitioner's work feature the petitioner's older songs with Loose Ends, rather than new compositions.

The director denied the petition, stating that the petitioner has not established that she meets the guidelines set forth in Matter of New York State Dept. of Transportation. The appeal contains no new evidence. Counsel, on appeal, essentially repeats earlier arguments rather than adding anything of substance to the record. Numerous claims remain unsubstantiated.

As we have noted above, documents in the record (such as printed credits) contradict a number of key assertions. Because of these contradictions, other unsubstantiated claims or vague assertions cannot carry significant weight. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent

competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

The petitioner has clearly enjoyed some success as a member of the very popular group Loose Ends. The continued influence of the petitioner's early work, however, is not contingent on her presence in the United States. The petitioner has not demonstrated that her work since the 1980s has continued to influence her genre of music at a perceptible level, and therefore the extent to which she will prospectively benefit the United States is in doubt.

Serious discrepancies between the petitioner's claims, and the evidence purporting to support those claims, raise further questions as to whether the approval of this petition would be in the national interest. Section 204(b) of the Act states, in pertinent part, "the Attorney General shall, if he determines that the facts stated in the petition are true . . . , approve the petition." As noted above, some of the factual assertions advanced in the petition are, or strongly appear to be, not true.

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 job offer requirement 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.