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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: EAC-98-197-50980 Office: Vermont Service Center

Date: 6 MAR 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)

Public Copy

IN BEHALF OF PETITIONER: Self-represented

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, Vermont 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.

On appeal, the petitioner asserts that the director should not have denied the petition without granting her request for an extension to respond to the director's request for additional documentation. She submits the documentation that she had prepared in response to that request. We will consider all of this evidence on appeal.

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 director accepted this claim without any discussion. We find that the record does not support the director's conclusion. 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.” As the petitioner never claims which criteria she meets, we will discuss 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

Prior counsel asserted that the petitioner has a Master's Degree in Dance and Dance Education from New York University (NYU). The record contains letters from faculty at NYU and an award issued by NYU but does not include the petitioner's degree. While a Master's degree in dance education, a field which does not require an advanced degree, could serve to meet this criterion, the petitioner has not established that she has the claimed degree.

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 does not reflect that the petitioner has at least 10 years of full-time experience in dance and choreography. The earliest teaching experience reflected on the petitioner's resume is from 1994 and it does not appear that the teaching was full-time since the petitioner was also a student at New York University.

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

On her resume, the petitioner listed “teacher's certificate program” at Isadora Duncan International Institute. It is not clear if she had obtained this certificate at the time of filing. As with the petitioner's claimed Master's Degree, this teacher's certificate is not in the record.

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

The petitioner has not submitted any evidence regarding her salary prior to the date of filing or evidence regarding the salaries of other exceptional dancers or choreographers.

Evidence of membership in professional associations

Miriam Rosking Berger, Director of the Program in Dance Education, asserts that the petitioner was a member of the Washington Square Repertory Dance Company, and that membership is determined by audition. A dance company is not a professional association.

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

While the record also contains numerous letters attesting to the petitioner's ability, she must demonstrate recognition by her peers independent of letters solicited to support the instant petition. In other words, evidence created specifically for the petition carries significantly less weight than evidence which existed independently of the petition, such as awards. The record does include some examples of recognition of the petitioner by her peers. Specifically, New York University presented the petitioner with the Patricia Rowe Award for Outstanding Commitment to Dance Education in the Dance Education Program in 1997. The record, however, does not establish the significance of this academic award. In addition, Ellen Plotnick, a stage manager and producer of Works in Progress, a program which commissions original works of New York University Students, asserts that the petitioner is the only artist whose work was twice commissioned by the program. While impressive, this program only showcases student work and, as such, cannot be considered evidence that the petitioner's abilities are significantly above that ordinarily encountered in the field.

In light of the above, we cannot uphold the director's determination that the petitioner has established that she is an alien of exceptional ability. As such, 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.

We concur with the director that dance and choreography are areas of intrinsic merit. In addition, we acknowledge the importance of New York City to the field of dance. As such, a major choreographer in New York can conceivably have a national impact. It remains, then, to determine whether the petitioner has established that she will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications..

Jennifer Dunning, a dance critic with the *New York Times* since 1972 who has also taught dance criticism at New York University, writes:

[The petitioner] is an extraordinary artist, a dancer who is an unusual blend of lyricism and dramatic ability and a choreographer with a[n] unusually sensitive and subtle way of blending different cultures. I have, in fact, rarely come across a choreographer as skilled in drawing from several cultures, for example Western modern dance and Japanese traditional and theater dance, to make imaginative points about complicated subjects that are rarely addressed in dance today in America. In "Women in Boxes," she used three women to represent the different cultures and problems of three nations, using precepts of child psychology to give her subject a fresh new slant.

[The petitioner] has much to offer American dance artists and audiences with her unusually sophisticated use of theater design, from boxes and columns to long swatches of material. In "Tree Women," a recent solo and tour de force in which [the petitioner] ranges back and forth between the personalities of a person through time, her elegant use of fabric expresses everything from anger to glamor. In "Motherline," a touching recent story-telling quintet about families, fabric is used both to tell the story and add additional color from Japanese traditional theater dance costuming effects. . . . There are very few dancers today, anywhere around the United States, who have absorbed the mix of styles and traditions [the petitioner] has studied, including Japanese classical, ballet and jazz dance, influential American modern dance technique and choreography teachers as diverse as Mary Anthony and Erick Hawkins, the prestigious American Dance Festival and the London Contemporary Dance School, and the early 20th century dance of the great Isadora Duncan, who helped to create American modern dance.

Jeanne Bresciani, artist in residence at the Isadora Duncan International Institute and a member of the faculty at the New York University who observed the petitioner as a student there, praises the petitioner's abilities and notes that she received a scholarship to attend that institution. Ms. Bresciani continues that the petitioner has a "grasp of both Eastern and Western traditions" and has brought her modern dance knowledge back to Japan. Ms. Bresciani concludes:

In doing so, [the petitioner] insures the heritage of this vital dance form in America and creates a Japanese and international repository for its appreciation and continuance. Its repercussions are theatrical, historical and educational without bounds.

It is not clear why the petitioner needs to remain in the United States to bring U.S. modern dance to Japan.

In a subsequent letter, Ms. Bresciani asserts:

[The petitioner] is amply gifted in the modern dance and singularly qualified to represent the work of Duncan on both a national and international scale. Of all participants in the high level training program that I direct, [the petitioner] is the artist to whom I feel most confident in entrusting the treasured works and new commissions.

Martha Myers, Dean of the American Dance Festival, provides general praise for the petitioner's choreography and dance abilities, asserting, "I am strongly convinced that she will contribute to the cultural fabric of the United States." Ms. Myers does not provide examples of how the petitioner might have already influenced the field of dance as a whole.

Carman Moore, a composer and conductor who serves as Artistic Director at Skymusic, Inc., discusses the petitioner's choreography of his compositions. He asserts that Skymusic desires to hire the petitioner as a dance captain and administrator. In a subsequent letter, Mr. Moore elaborates that as a composer, he has collaborated with such choreographers as Alvin Ailey, Anna Sokolow, Jacques D'Amboise, Donald Byrd, and Garth Fagan. He further indicates that he has judged choreographers seeking grants at the National Endowment for the Arts, the Rockefeller Foundation, the Pew Foundation, and the New York State Council on the Arts. Regarding the petitioner, he states:

[The petitioner] is one of the finest new choreographers on the modern dance scene, both in the U.S. and the world. She combines a profound knowledge of many kinds of dance from the lineage of Isadora Duncan – the American founder of modern dance – to Japanese traditional dance, all of which she mixes ingeniously into an eloquent style all her own.

Mr. Moore also notes the impressive credentials of the petitioner's references. Dr. Elizabeth Robinson, the producer of Carman Moore's *Mass for the 21st Century*, a three-hour production

choreographed by the petitioner, praises her talent as a choreographer. Dr. Robinson further asserts that she attends all of the petitioner's performances.

Sako Ueno, a dance critic in Japan, praises the petitioner's abilities as a dancer with superb musical knowledge and a keen view upon contemporary society who is also a resourceful teacher. Jon Brokering, an associate professor at Chuo University in Tokyo, discusses the petitioner's choreography for him in Japan.

Mary Anthony, director and founder of the Mary Anthony Dance Theater with 50 years of training and choreography experience, writes:

[The petitioner] is one of the most important contemporary young choreographers of our time. Her choreography, "Motherline," is a truly brilliant work. I was so impressed with this piece that I chose this piece for one of my concert presentations. It is a successful dance drama with fusion of the Japanese traditional theater and the contemporary American dance. We artists have a mission to create a new story by reflecting our societies. [The petitioner's] choreography has a quality of modern dance similar to that which I pursued in my dance career. . . . [The petitioner] is one of the most important contemporary choreographers whose work advances the standards of modern dance cross-fertilization.

Sachiyo Ito, a NYU professor and artistic director of Sachiyo Ito and Company of which the petitioner is an officer, asserts that the petitioner performed with that company at the Bruno Walter Auditorium at Lincoln Center and the Brooklyn Botanic Garden.

Miriam Roskin Berger, Director of the Program in Dance Education at NYU, praises the petitioner's abilities as a choreographer, asserting that she was a member of the Washington Square Repertory Dance Company, that she served as an assistant choreographer for the Lincoln Center Out-of-doors Program, and that she continued to teach at various institutions while a student at NYU.

John Meade, an adjunct professor at NYU, merely reports that the petitioner was an exemplary student and that he observed her "growth" as a dancer and teacher.

The record includes several other letters from individuals who praise the petitioner's abilities as a dancer but profess no expertise in the field of dance.

The director stated that the petitioner had not established that she was among the most talented choreographers or dancers in the United States or that her individual performances "engendered substantial acclaim." These statements reflect too strict a standard. Being at the top of one's field and sustaining national acclaim are requirements for a higher classification than that sought by the petitioner, specifically, aliens of extraordinary ability. The director, however, also

concluded that the petitioner had not demonstrated that she is an influential instructor or choreographer.

On appeal, the petitioner submits several reviews of her performances. Many of the reviews are for performances which took place after the date of filing. As such, they do not establish that the petitioner had contributed to the dance industry as a whole at the time of filing. In addition, some of the articles are in Japanese-language publications, which cannot demonstrate an influence outside the Japanese community.

We do not discount the opinions of renowned choreography experts, even those who collaborated with the petitioner. Moreover, the letter from Ms. Dunning, a dance critic for the *New York Times* for over 20 years, carries considerable weight. Nevertheless, the opinions of such experts are more persuasive when supported by independent reviews published in respected media or equivalent evidence. The record, however, contains only one review of the petitioner's work that predates the petition. Thus, the claim that the petitioner has already influenced the field of dance is not adequately supported by objective evidence.

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.