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Mr. Corrado Pirzio-Biroli,	429-1766
Deputy Head of the Delegation of the EC Commission	

FROM: Hans Meesman, Ambassador of the Netherlands

PAGES: 11

DATE: August 8, 1991

RE: Access of artists from the EC to the USA

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August 9.

Dear colleague,

On July 5, Ambassador Van Agt and I presented to Elisabeth Tamposi, Assistant Secretary of State for Consular Affairs, a letter addressed to the Secretary of State in which the current President of the EC Council of Ministers for Cultural Affairs draws the Secretary's attention to a resolution adopted by the Council on June 7, 1991, on the temporary access of artists of European Community origin to the territory of the United States of America. For your information I am enclosing copies of that letter and the resolution.

In our conversation with Mrs. Tamposi we drew her attention to a number of issues along the lines of the enclosed talking points.
I should like to characterize Mrs. Tamposi's reaction to our demarche as understanding and sympathetic. She for her part replied on the basis of talking points which are annexed.

In the course of our conversation it became clear that no changes in the act or in its implementing resolutions are likely before October 1, the date upon which the Immigration Act of 1990 will enter into force.
You may also wish to know that members of the Subcommittee on Immigration and Refugee Affairs of the U.S. Senate in a letter of June 26, 1991 to the Commissioner Immigration and Naturalization Service (copy enclosed) have expressed concerns similar to those contained in the resolution adopted by the twelve.

In view of the fact that further steps by the twelve, in particular on Capitol Hill, may be desirable, I intend to place this question on the agenda of our forthcoming meeting on September 18.
I understand that our Counselors for Cultural Affairs will discuss this issue at their September 10 meeting.

Yours sincerely,

Hans Meesman

Hans Meesman
Ambassador

MINISTER VAN
WELZIJN, VOLKSGEZONDHEID
EN CULTUUR

SCB.MLS.U.911.942

Rijswijk/NL, July 12, 1991

The Honorable James A. Baker III
Secretary of State
Washington D.C.

Dear Mr Secretary,

The Ministers for Cultural Affairs of the Member States of the European Community met in an EC Council-meeting on June 7, 1991. During this meeting they adopted the enclosed EC-resolution regarding the measures, proposed by the Government of the United States of America, to alter the procedures for granting temporary entry visas to performing artists. In this resolution reference is made to legislation passed by the US Congress on October 27, 1990 with regard to this matter.

Writing both on behalf of the Netherlands' Government and in my capacity as the current President of the EC Council of Ministers for Cultural Affairs, I have the honour to draw your attention to the enclosed resolution. Its central message is that the deep-rooted cultural relations beween the United States and the countries of the European Community would be best served by openness and by intensive exchanges between our respective artists and cultural organisations.

I am convinced, Mr. Secretary, that you share this view. Therefore I trust that the Government of the United States will show due consideration to this EC-resolution in implementing the said legislation and that, as a result, the exchange of artists from the United States and from the EC Member States will be as intensive as ever.

Yours sincerely,

Hedy d'Ancona

Minister for Welfare, Health and Cultural Affairs of the Netherlands

RESOLUTION OF THE MINISTERS FOR CULTURE, MEETING WITHIN THE COUNCIL, ON THE TEMPORARY ACCESS OF ARTISTS OF EUROPEAN COMMUNITY ORIGIN TO THE TERRITORY OF THE UNITED STATES OF AMERICA

The Ministers for Culture, meeting within the Council,

Considering that the freedom of movement of performing artists both within and outwith the frontiers of the Community is an essential condition for the development of their careers;

Bearing in mind the reform of temporary immigration procedures adopted by the United States Congress on 27 October 1990 which deals in particular with the granting of entry visas to performing artists;

Concerned that in establishing measures for implementing this law, the American Administration should take account of the wish expressed by many artists, organisers of events and others in the entertainment industry for greater flexibility, simplification and speeding-up of the procedures for granting visas;

Recalling that the Member States of the Community have always accorded favourable treatment for access to their territory to nationals of the United States, and in particular to their artists;

Acknowledge the intention of the Government of the United States to clarify and relax the conditions for granting temporary visa to performing artists;

Request that from the outset of the preparatory stage for implementing the new law of 27 october 1990, the Government of the United States show due consideration for the proposals and wishes expressed by the sector concerned in the European Community;

Hope that by this means the Government of the United States will play its role in the development of a genuine world market for the live performing arts, distinguished by the requisite spirit of reciprocity, in particular between the United States and the European Community;

Invite the Commission to take account of this common concern and of any approaches made by Member States to the Government of the United States.

Brussels, 7 June 1991

TALKING POINTS

With respect to the desire for flexibility, simplification and expedition expressed in the resolution adopted by the Member States of the Community, the following technical amendments are suggested:

1. The 25,000 cap seems to be arbitrary. A transitional period e.g. of 2 years, should be allowed in order to monitor the actual flow, and provide a basis for the establishment of the cap.

2. Petitions on behalf of a group rather than individual members of that group should be counted towards a cap in the "P" category.

3. Confirmation that the regulatory language for "O" visas reiterates the current professional standard of "aliens prominent in their field", rather than establishing new restrictive definitions.

4. Expanding the "P" provisions to include groups that are established professionally, for example in the country of origin.

5. Removing the new restriction that to qualify for a "P" visa every member of a group must have a "sustained and substantial relationship with that group over a period of one year".

6. Eliminating the provision preventing applications being filed more than 90 days in advance to enable U.S. organizers to arrange performances with sufficient lead time.

7. The verification of criteria for O- and P-visas should be primarily the responsibility of the authorities charged with delivering the visas, i.e. US consular services, after appropriate consultation also within the country where they are based.

Talking Points

o -- I am sympathetic with the concerns you are expressing over the new requirements for entertainers, performing artists, and athletes, which take effect on October 1.

o -- No one wishes to impose unfair or excessive restrictions on the entry into the U.S. of foreign entertainers, performing artists, or athletes.

o -- I hope you understand that it is not actually the proposed regulations of the Immigration and Naturalization Service (INS) which impose those new requirements; it is the law itself.

o -- Under our system of government, INS does not have the power to issue regulations which would eliminate the requirements of the law. All it can do is apply the law as reasonably as possible.

o -- There are domestic interest groups which are also concerned about the potential effect of the new requirements and one bill has already been introduced which would modify some of the new requirements and eliminate others.

o -- The Congress is about to recess until after Labor Day and no action will be taken on this matter before then.

o -- The Administration will likely have to take a position on this bill or, perhaps, on another bill similar to it. The concerns you and others in Europe and elsewhere are expressing will be given careful consideration in determining what the Administration's position should be.

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 26, 1991

The Honorable Gene McNary
Commissioner
Immigration and Naturalization Service
425 I Street, N.W.
Washington, D.C. 20536

Dear Commissioner McNary:

One of the most controversial provisions of The Immigration Act of 1990 has turned out to be the creation of the new O and P nonimmigrant visa categories. As you may be aware, during conference on the bill last year, we accepted the House of Representatives' nonimmigrant package without Senate hearings with the clear understanding that the new categories were noncontroversial. The conference report fails to reflect our understanding that the new categories were largely going to codify existing procedures and practices. Contrary to our expectations, the end result appears to be a radical departure from existing H-1B regulations.

Over the past several months representatives from the fields of the arts, culture, entertainment, athletics and other performers have expressed alarm over the potential impact of the statutory provisions for O's and P's which they perceive not only as a departure from current practice, but a serious threat to their programs. After discussions with these groups and with organized labor, we believe the following proposals are acceptable to all parties.

Listed below are some areas of concern which have been raised, and our proposed remedies. Some will require statutory change, which we hope to accomplish in our forthcoming "technical corrections" bill. Others, perhaps the majority, can be resolved through regulations, which we would encourage the Administration to do before draft regulations are proposed, and certainly in any final regulations. As the principal Senate conferees on this bill, we believe the following proposals reflect our intent in signing the Conference Report last year:

REGULATORY CHANGE:

1. CONSULTATION PROCEDURES: In our view, the consultation requirement can be met through a written notice to the appropriate labor organization. This would both expedite processing and eliminate unnecessary paperwork. The unions would have the option to respond within a fifteen-day period, but a written advisory opinion would only be necessary when their input is desired by the INS. The notice would list the supporting documents, indicating that they are on file for review by interested parties.

Should a labor organization supply a negative advisory opinion in the context of an O-1 petition, the petitioner shall have the option to submit a further advisory opinion from a peer group prior to adjudication by INS. We urge INS to define an appropriate peer group as "a group or an organization comprised of practitioners of the alien's occupation who are of equal standing with the alien in terms of employment status and which is governed by such practitioners. In certain fields, a union organization would be an appropriate peer group".

In instances where there is no appropriate labor organization, meaning there is no collective bargaining agreement or just that no labor organization has expertise in the field, or where no appropriate peer group exists, we believe that a simple posting of the notice would satisfy the statutory requirements for consultation.

2. DEFINITION OF "ALIEN WHO HAS EXTRAORDINARY ABILITY": The standard for extraordinary ability and achievement should be the same as the general standards for prominent individuals and groups found in the new H regulations published in January 1990 (effective February 26, 1990). The intent of Congress was to attract prominent performers and artists through the establishment of a high standard, not to exclude aliens who have yet to achieve preeminence from performing in the United States. If this change is not possible by regulations, we are willing to change the statute accordingly.

3. ONE-YEAR ASSOCIATION REQUIREMENT: The INS draft regulations require that O-2 applicants demonstrate a "significant prior experience of at least one year with the O-1 alien". This requirement is not compelled by either the statutory requirement nor the legislative history. We believe that there must not be a specific requirement with respect to prior experience with the O-1 principal alien.

4. NINETY-DAY FILING PERIOD: We understand the INS is contemplating a requirement that a petition may not be filed more than 90 days prior to date of entry. This is not required by the legislation. In fact, it may make impossible advance planning for those in the entertainment field who of necessity must book their tours months or even years in advance. We strongly recommend that it be omitted.

5. DELETE TERM "NON-COMMERCIAL" FOR P-3's: While well-intentioned, this requirement has the unanticipated consequence of prohibiting culturally unique groups from performing in commercial locations such as night clubs. This would, for example, prohibit Irish harpists from performing at The Dubliner or prevent Khmer dancers from performing in ethnic clubs. Our intent was not to limit performances by such groups. We therefore urge deletion of any reference to "non-commercial" to enable culturally unique performers to entertain in commercial locales.

STATUTORY CHANGE:

1. THE 25,000 CEILING UNDER THE NEW SECTION 214(g): No one has any accurate statistics on the numbers of artists and entertainers who enter the U.S. on an annual basis. Consequently, we propose that each visa be counted individually, as provided in the Act, but we have proposed that the 25,000 limit apply to petitions only. At the end of 18 months, the GAO will be required to conduct a study to determine actual usage, and assess the impact, of the new O and P visa categories on the American labor force and on employers in affected industries, while providing information on barriers to the employment of U.S. citizens in these same occupations abroad. Statutory changes to this effect will be made in the "technical corrections" bill.

2. NINETY DAYS BEFORE REENTRY REQUIREMENT: We propose to eliminate this requirement in the technical corrections bill. Alternatively, brief departures from the United States should not trigger the ninety-day reentry requirement.

3. REMOVE REQUIREMENT FOR ONE YEAR'S ASSOCIATION FOR P-1's: We have determined that this requirement is unrealistic given the realities of the entertainment industry. On the one hand, large entertainment groups such as symphony orchestras, ballet companies, and opera companies necessarily have fluid memberships. On the other hand, smaller groups such as string quartets or even rock groups would be prohibited from touring the United States if they had a member with less than one year's association. We propose to address this technical problem in the technical corrections bill.

4. RETURN TRANSPORTATION FOR DISMISSED EMPLOYEES: Section 207(b)(2) of the new Act imposes an obligation on the employers of aliens who are provided H-1B or H-2B status, and who are dismissed from employment before the end of the period of authorized admission to pay the reasonable costs of return transportation abroad. We propose to extend this requirement in the "technical amendments" bill to include employers of O, P and Q aliens.

5. LABOR ATTESTATION FOR H-1B WORKERS: Another technical correction under consideration is to clarify that the required labor condition application need only be filed and accepted -- not approved -- by the Department of Labor prior to filing the H-1B petition. This labor attestation procedure would be similar to that made by health care delivery organizations for H-1A registered nurses.

6. INCLUSION OF INDIVIDUAL ENTERTAINERS UNDER P-1: We are proposing to amend the P-1 category by inserting a provision to include, in addition to groups, those individuals who have been recognized internationally as outstanding in the discipline for a sustained and substantial period of time.

Another issue of concern is the perceived failure of INS to provide a mechanism for expedited processing of emergency H-2B, O and P visa petitions. The draft regulations state only that the four Service Centers will handle all O and P petitions, even in emergent situations. We would appreciate learning what emergency procedures INS contemplates for last-minute replacements.

Finally, there is a perception that the delay in release of regulations will lead to confusion among petitioners as well as Service Center personnel. Consequently it has been suggested that those aliens whose H-1B petitions were approved during FY 91 be entitled to apply for H-1B visas through December 31, 1992, under the same terms and conditions as before. Petitions for such aliens would provide INS with a copy of their prior H-1B approval notice and verification of a consultation with the relevant labor union. Such H-1B visa applications would not count against the cap on P visas, but INS would keep track of their numbers to provide reliable statistics on entries. We would appreciate your comments on this as a proposed statutory change.

Given the controversial nature of these provisions, we would welcome the opportunity to meet with you to discuss the suggested solutions prior to the release of the draft regulations.

Sincerely,

Alan K. Simpson
Ranking Member
Subcommittee on Immigration
and Refugee Affairs

Edward M. Kennedy
Chairman
Subcommittee on Immigration
and Refugee Affairs

Paul Simon
Member
Subcommittee on Immigration
and Refugee Affairs