

O and P Visa Concerns
Submitted by the Performing Arts Visa Working Group
May 13, 2010

Following are a minute sampling of cases in which the USCIS California Service Center has issued improper RFEs and denials in response to O and P petitions, or has taken so long to process that it has impeded the ability of U.S.-based arts organizations to present international guest artists. It is important to note the following:

1. There are myriad more examples such as those below.
2. In each RFE or denial below, CSC misconstrued, misapplied or ignored the applicable regulatory provisions and nearly 20 years of agency practice to reach a result that damaged petitioner and artist alike.
3. CSC's continued conduct affects not just the immediate cases at hand, but also the confidence of petitioners nationwide, and artists internationally, in the artist visa process.
4. For the most part, the experience of the Performing Arts with the Vermont Service Center is completely different. There are of course occasions in which VSC errs or misconstrues, but they are rare and form no patterns.

We appreciate the opportunity to register these concerns with SCOPSRFE and look forward to a continued dialogue in which we can, together, craft solutions that will strengthen the artist visa process and improve opportunities for international cultural exchange.

Complete contact information for the Performing Arts Visa Working Group is attached.

Performing Arts Examples of Requests for Evidence and Denials

RFE Questions Gap between Related Events

WAC-10-133-52863

RFE Date: April 22, 2010

Petitioner: Lyric Opera of Chicago

Beneficiary: Alain Altinoglu, Conductor

RFE was issued on April 22, 2010, claiming that the gap between performances and the two separate contacts for the events required submission of two separate petitions. The petition was for Alain Altinoglu to conduct the opera *Carmen* at two different time periods during the 2010-2011 performance season. Though the performances take place at different times, they remain performances of *Carmen*, by the same opera company/petitioner, conducted by the same individual.

Based on the May 10, 2010 Draft Policy Memorandum, it is even more unclear why these two performances would not be considered a single event.

RFE Demands Proof of “Temporary” or “Finite” Nature of Activities

WAC-10-092-51430

Denial Date: [NOT printed on decision!]

Petitioner: Fort Wayne Philharmonic, Inc.’

Beneficiary: Bradley Thachuk, Associate Conductor

As one ground for denial, CSC asserts that beneficiary must be shown to be coming to render services for a “finite event,” and that “merely coming to the U.S. to perform the usual day-to-day duties...without a specific intended purpose does not qualify as an event.” (**NB:** two other grounds for this denial itemized below)

WAC-10-800-03345

Denial Date: April 16, 2010

Petitioner: Ballet Metropolitan, Inc.

Beneficiary: Susan Smith, Ballet/Dance Instructor

Sole basis of denial is that beneficiary “will be performing the day to day duties of a Ballet instructor” rather than performing services related to an event or events for an employer.

RFE Challenges Reputation of Ballet Company and Dancer

WAC-10-800-04702

RFE Date: April 15, 2010

Petitioner: Cincinnati Ballet

Beneficiary: Liang Fu, Corps de Ballet Member

Cincinnati Ballet is seeking to renew the O-1 visa issued to Mr. Liang Fu as a corps de ballet member who often performs solo roles and is even featured on the front page of the Company’s website. The RFE questions the distinguished reputation of Cincinnati Ballet’s version of *The Nutcracker* by stating, “while a ballet such as *The Nutcracker* may have a distinguished reputation, not every production of it does.” The RFE also questions the extraordinary ability of Mr. Liang Fu, an award winning dancer who has performed lead and solo roles on an international level. The RFE states, “it does not necessarily follow that every ballet dancer who has performed on stage, appeared on television, been featured in a newspaper or magazine article, or who has received praise or endorsements from well known or well respected experts in the field, possesses a demonstrated, sustained record of a high level of achievement within the field of endeavor.”

CSC often strikes this theme, saying, in effect, that just because the evidence supports a finding of extraordinary ability does not mean CSC is obliged to approve the petition.

RFE Requests Evidence Submitted in Original Petition

WAC 10-108050432

RFE Date: April 6, 2010

Petitioner: San Francisco Opera

Beneficiary: Frank Schlossmann, Opera Production Designer

The RFE Notice requests a copy of a valid contract between the petitioner and the beneficiary. The regulations provide that if there is no written contract, the petitioner may submit a written summary of the employment terms. The initial petition included a

copy of the unsigned contract outlining the employment terms between San Francisco Opera and Mr. Frank Schlossman.

WAC 10-107-51306
RFE Date: April 6, 2010
Petitioner: San Francisco Opera
Beneficiary: Johanne Davies, Opera Director

Same.

WAC 10-107-51283
RFE Date: April 6, 2010
Petitioner: San Francisco Opera
Beneficiary: Petre Ionescu, Opera Director

Same.

RFE Claims Assistant Conductor Not a Lead Role; Challenges Reputation of Musician

WAC-10-107-51135
RFE Date: March 9, 2010
Petitioner: Chicago Opera Theater
Beneficiary: Andrew Griffiths, Assistant Conductor/Harpsichordist

RFE received March 23 in response to premium processed O-1 for Mr. Griffiths, being hired to serve as Assistant Conductor/Harpsichordist for COT. He had significant evidence of his work as both Conductor and Assistant Conductor and as a Tenor with a Grammy Award nominated ensemble, for which he also served as Conductor. RFE claimed the positions of Assistant Conductor and Harpsichordist require separate skill sets and there was insufficient evidence that he was extraordinary in both. RFE asserted that his work with the vocal ensemble was irrelevant, and that Assistant Conductor position is not a lead role. Petition ultimately approved only after petitioner retained immigration counsel, and Opera America intervened, to educate CSC on the details of baroque opera, including the fact that the Assistant Conductor has *the* lead role, playing the harpsichord, while conducting the singers, occasionally accompanied by the orchestra.

RFE Maintains Role of Associate Conductor Ineligible for O-1 Classification

WAC-10-092-51430
Denial Date: [NOT printed on decision!]
Petitioner: Fort Wayne Philharmonic, Inc.
Beneficiary: Bradley Thachuk, Associate Conductor

Its RFE suggests that CSC categorically takes the position that the role of Associate Conductor cannot, by definition, qualify for O-1 status as a lead or starring role. Other RFEs suggest that CSC has adopted this position with respect to any associate, assistant, back-up or cover role.

RFE Asserts Matinees are not Prestigious Events and that Cover Singers do not Qualify for O-1 Status

WAC-10-800-02388

Denial Date: February 10, 2010

RFE Date: February 19, 2010 (CSC reopened the petition and issued a second RFE)

Petitioner: Musical Arts Association (Cleveland Orchestra)

Beneficiary: Martin Mitterutzner, opera singer

Among many assertions, CSC stated that because the beneficiary would only be on stage half the time, he could not be performing a lead or starring role, although the other half of the concert involved a violin piece. CSC stated that beneficiary was only going to be performing in the day time, and matinees are less distinguished, in contrast to distinguished productions, which occur at night.

Denial Claims Corps de Ballet Dancer and Role Ineligible for O-1 Status

WAC-10-100-51051

Denial Date: April 15, 2010

Petitioner: San Francisco Ballet

Beneficiary: Harrison James Wynn, Corps de Ballet Member

Beneficiary, then enrolled at SFB's Ballet School, was offered a position as a member of the Corps de Ballet. The RFE repeatedly demanded evidence to show that Mr. Wynn had danced at the highest level of the Ballet and sought a complete itinerary of events. In its response, SFB submitted additional programs for roles Mr. Wynn danced with the Ballet (not the School), additional letters confirming that Mr. Wynn often filled in for injured company members and that the roles he danced with the Ballet were lead/starring, and a salary survey showing Mr. Wynn's proffered salary as a Corps member was above Department of Labor's prevailing wage. CSC's denial made clear its opinion that a Corps member is, by definition, not at the highest level, and, if he was extraordinary, SFB would hire him as a Principal.

Unwarranted RFE Costs Petitioner \$1,000

WAC-10-079-51245

RFE Date: March 9, 2010

Petitioner: Musica Extraordinaria LLC

Beneficiary: Andre R Mehmani, Pianist

Beneficiary is an award-winning jazz pianist and composer. The RFE claimed the initial filing did not include enough evidence of extraordinary ability and also asked for explanation of the events, itinerary and contracts. Initial filing included ample evidence of Beneficiary's numerous CDs and awards, a significant amount of press and a number of support letters. Petitioner resubmitted all the articles from the initial filing, more letters to confirm his awards and other achievements, excerpts from books about Brazil's leading musicians, including Beneficiary, more background and evidence on his awards and background information on the publications in which articles/reviews appeared. CSC ultimately approved, but Petitioner was forced to upgrade to premium processing to allow time for beneficiary to obtain his visa.

RFE Unwarranted in Light of Multiple Prior Approvals

WAC-10-092-51430

Denial Date: [NOT printed on decision!]

Petitioner: Fort Wayne Philharmonic, Inc.

Beneficiary: Bradley Thachuk, Associate Conductor

CSC dismissed every item of evidence concerning the extraordinary ability of petitioner's associate conductor, now in his ninth season with petitioner, although the evidence, which included a list of beneficiary's public performances, was virtually identical to that submitted with the initial O-1 petition, approved by the Nebraska Service Center, the extension approved by NSC, and at least four subsequent extensions approved by CSC.

RFE Requests Irrelevant Information

WAC 10-800-00284

RFE Date: November 2, 2009

Petitioner: New York City Opera

Beneficiary: Ioan Iestyn Davies, Singer

The petition was for a single engagement with New York City Opera, only. The RFE requested an itinerary of engagements/employers even though NYCO made no mention of the beneficiary working for any other employers, nor were there any plans for him to do so. While NYCO did not state that the petition was not an itinerary-based petition, it seems unreasonable to have to state what something is not.

WAC 10-108-51231

RFE Date: April 8, 2010

Petitioner: Lyric Opera of Chicago

Beneficiary: Mark O. Thompson, Set/Costume Designer

Beneficiary is one of the world's leading set/costume designers who has a currently valid O-1 visa and has held them before. RFE requests W-2s for past 2 years, individual income tax returns with all schedules for same period or an explanation why he was not required to file them, with proof of that non-requirement, and copies of his pay stubs for the last 4 pay periods. Beneficiary is an independent contractor who, as a nonresident, should receive 1042-S statements. He is not subject to withholding, and receives most of his income from the US in the form of royalties that are tax-exempt under the U.S.-U.K. Tax Treaty. To the extent he receives U.S.-source income, it, too, is exempt from tax under that treaty. It appears CSC wanted to know whether beneficiary was engaging in the already-approved O-1 activities while in the U.S., but it never asked that question. Also, beneficiary should not be forced to share with petitioner his financial arrangements with other employers.

Congressional Intervention Required for P-1 Approval

WAC 10-116-50114

RFE Date: April 2, 2010

Petitioner: San Francisco Symphony

Beneficiary: Exaudi Vocal Ensemble

Petitioner premium processed a P-1 petition on March 17, 2010, only to receive an RFE two week later requesting further information about the employment dates for two members of the group who had not performed with the six-member group for at least

one year. With the assistance of an attorney, petitioner submitted further evidence on April 29, explaining that one artist was replacing a vocalist who had fallen ill, and that the other was required to fulfill the unique musical selection to be performed. Both are grounds to waive the usual “75%” rule. Nonetheless, on May 11, after being told through congressional liaison that CSC intended to deny the petition, petitioner cancelled the group’s appearances, scheduled for May 19-23,. After further Congressional intervention, CSC issued an approval on the evening of May 11, too late for the group’s visas to issue. Petitioner must re-program the planned concert, at considerable financial and reputational damage.

Petition Denial Based on the 75% Rule Incorrect

WAC-10-022-50987

WAC10-022-50923

WAC 10-022-50989

WAC 10-022-50953

WAC 10-022-41045

Petitions Submitted: November 2, 2009

Petitioner: The Children’s Theatre Company of Minneapolis

Beneficiary: Patch Theatre Company (from South Australia)

Petitioner sought to present the beneficiary company, which performs extraordinary work for young people, between January 12 and February 21, 2010. Petitioner premium processed two P-1 petitions. CSC erroneously denied the petitions based on the 75% rule, stating in its denial that only 65% of the members met that rule, when, in fact, 4 of 5 did. CSC failed to update the online Case Status Service, and refused to provide case status information by phone or fax. A CSC employee finally informed petitioner by phone that an RFE and a notice of intent to deny had been issued, but would not provide detailed information on the RFE, which arrived by U.S. Post 7 days later – on a petition that had been premium processed. CSC ultimately told petitioner to file individual O-1 petitions for each group member. Petitioner had met the required threshold, incurred great expense, invested vast staff time, secured intervention by its U.S. Senators and Representatives with the final result that young audiences in the Twin Cities were denied performances by this extraordinary company.

Well Known Chinese Classical Guitarist Almost Misses Performance Date

WAC 09-154-52683

Date: Fall 2009

Petitioner: Seldy Cramer Artists

Beneficiary: Xuefei Yang

Petitioner filed O-1 petition for a classical guitarist who had been approved for O-1 status in prior years. The petition was submitted in April 2009, but the RFE did not issue until July 2009. Petitioner responded promptly in July, yet, by October, weeks before the scheduled performance, CSC had not issued a decision. After several conversations with CIS, the Association of Performing Arts Presenters learned that the petition had been approved on July 30 but CSC *forgot* to send the approval notice. Only after the case was flagged by a senior service operations staffer at CIS was this information conveyed. CSC continues to take 2 months to process O and P visa petitions.

International Guitar Competition Winner Denied O-1 Classification

WAC 09-169-51821

Denial Date: September 21, 2009

Petitioner: Seldy Cramer Artists

Beneficiary: Gabriel Bianco

Petitioner submitted reviews, publicity materials and other support material, a dozen letters of recommendation including one from the President of the Naxos record label. Petitioner forced to upgrade to premium processing, for an additional \$1000, after CSC failed to respond within the 2 month timeframe claimed on the CIS website. CSC immediately denied, asserting lack of proof of extraordinary ability. The presenters involved lost money by having to cancel his performances with such short notice and, in some cases, having to find replacement performers.

RFE Asserts that Culturally Unique Performances Must be AT Culturally Unique Events

WAC 10-114-51631

RFE Date: April 1, 2010

Petitioner: Eye For Talent

Beneficiary: Dry Yai (musical group from Sierra Leone)

In a common theme in response to P-3 petitions for culturally unique performers, CSC demands evidence that all the performances will “take place at” culturally unique events. The regulations require only that the performances *be* culturally unique events. By adding the preposition, CSC completely changes the meaning of the regulation and imposes a non-existent requirement on P-3 petitioners.