

Performing Arts Comments

Date: May 24, 2010

To: U.S. Citizenship and Immigration Services
opefeedback@uscis.dhs.gov

From: Association of Performing Arts Presenters, Dance/USA, League of American Orchestras, North American Performing Arts Managers and Agents, OPERA America, Performing Arts Alliance, Theatre Communications Group

Re: Comments on “Clarifying Guidance on ‘O’ Petition Validity Period Revisions to the Adjudicator’s Field Manual (AFM) Chapter 33.4(e)(2) AFM Update AD10-36”

The draft U.S. Citizenship and Immigration Services (USCIS) Policy Memorandum posted on May 10, 2010, regarding the validity period for O petitions holds potential significant benefit to the nonprofit performing arts community. We are grateful to USCIS for undertaking a new public process by which it will consider stakeholder comments in this and future guidance to USCIS Field Offices and Service Centers, and for its desire to address irregularities and inconsistencies experienced by arts-related petitioners, particularly through the California Service Center (CSC).

These comments are submitted by the Association of Performing Arts Presenters, Dance/USA, League of American Orchestras, North American Performing Arts Managers and Agents, OPERA America, Performing Arts Alliance, and Theatre Communications Group, collectively representing more than 18,000 members. Descriptions of each of these national organizations are included below.

Our national organizations are dedicated to improving opportunities for international cultural exchange, and to informing U.S.-based nonprofit arts petitioners about compliance with U.S. immigration requirements, particularly as they pertain to the engagement of foreign guest artists through the O and P visa categories. We frequently field inquiries from our member organizations and provide technical assistance to U.S.-based arts organizations, artists, artist managers and booking agents undertaking the visa petition process. We recognize that we have a special obligation to contribute positively to the artist visa process, both in terms of our comments to USCIS, and in our ongoing efforts to inform our members of the rules and requirements for submitting high-quality visa petitions.

Our comments specifically addressing the May 10 Memorandum follow. At the outset, we begin with a general observation. This draft Memorandum, and others to come, will require an accompanying commitment by Service Center supervisors and adjudicators to adhere to the spirit, and not just the letter, of this nation’s policy towards foreign artists, performers, entertainers, and their accompanying personnel. We likewise commit to fostering ongoing collaboration with USCIS and among artist visa stakeholders to help improve the visa process.

It is important to recognize the long history and relationship of the U.S. arts community with the agency respecting the procedures and substance of the foreign guest artist visa process. The statute governing O and P visas took effect on April 1, 1992, following lengthy and successful negotiations between organized labor, national arts service organizations, and many others, with the full cooperation of Congress and the White House. In consequence, until recently, arts-related petitioners experienced relatively consistent results between the Vermont and California service centers. Experiences reported to us by petitioners prove that this is no longer the case,

as CSC has issued and continues to issue Requests for Evidence (RFE) and denials that reinterpret, revise, and question virtually every aspect of the O and P regulations. The ensuing disruptions are reaching every corner of our nation's cultural life.

While we are encouraged that USCIS is undertaking a comprehensive review process related to adjudication procedures, we urge you to take immediate action to address the broader O and P artist visa concerns outlined in the conclusion of these comments. In the meantime, we are pleased to provide the following comments in response to the May 10 draft Memorandum.

We strongly support the Memorandum's affirmation that the statute and regulations do not place a time limit on gaps between events in a validity period. We applaud USCIS for calling on Service Centers to, whenever possible, approve the validity period requested by petitioners. The draft Memorandum should effectively reverse the recent Service Center practice of limiting validity periods. We also respectfully request a review of those petition requests that may have been adversely affected by this policy decision.

Both CSC and the Vermont Service Center (VSC) have informally adopted a practice of limiting the gaps between O and P engagements to no more than 45 days, resulting in increased costs and administrative burdens that have a direct, negative impact on engagement of foreign guest artists for performances in the United States. As it stands now, arts-related petitioners face tremendous uncertainty with respect to how long their petitions will be approved. This affects both the long-term planning of U.S. presenters, producers and foreign artists, and creates the following barriers to international cultural activity:

- Forcing U.S. petitioners and foreign artists alike to undertake more petitions and more visa applications than necessary vastly increases costs in time, money, and effort and greatly discourages all parties from participating in the process.
- Limiting itinerary gaps impedes the ability of foreign artists to acquire Social Security numbers (a time-consuming process indeed) needed to meet U.S. tax requirements.

There are multiple practical reasons why artists must be able to combine a series of events into a single visa approval period:

- Artists frequently visit the U.S. several times in the course of a year. For example, a theatre director might be hired to direct productions in the fall and spring or may need to make multiple visits for casting, production, rehearsal, and performances for one production. If USCIS arbitrarily limits the gaps allowable between engagements, the U.S. petitioners presenting the artist will be in the unfortunate position of having to file several petitions simultaneously or sequentially, each covering a different period. This multiplies the costs and burden on the artists, U.S.-based petitioners, USCIS, and consular posts.
- Professional artists are required to enter their contract period with complete command of the work for which they have been engaged. This type of preparation can require months of individual preparation in between engagements in the U.S., especially for the presentation of a new work.
- Many culturally unique groups come to the U.S. quite regularly for certain holidays and celebrations, yet the gaps between their visits may be several months in length.

- In many performance genres there are often two periods offered in a season, two weeks in October and two weeks in March, for example. Limiting the allowable gap between performances would double the number of visa petitions and consular appointments required from each performing group and would represent a significant disincentive to performing in the U.S.

We are pleased that the Memorandum affirms that current statute and regulations do not place a time limit on the allowable gap between events in a visa validity period. The Memorandum further calls on Service Centers to, whenever possible, “approve a petition for the length of the validity period requested where the law and regulations permit.” We urge USCIS to maintain this directive in the final policy memo and to ensure that training of Service Center adjudicators will result in the immediate reversal of recent practices that have limited allowable gaps between engagements in a single validity period.

The nature of “related activities” is unclear. The Memorandum should clarify that the term “event” or “events” refers to the services proposed to be rendered, and de-emphasize any suggestion that an adjudicator must find any specific relationship between events or engagements. The Memorandum states:

...A group of related activities may also be considered to be an event.

Therefore if the activities on the itinerary, are related in such a way that they could be considered one event, the petition should be approved for the requested validity period. A series of events that involve the same performers and same or similar performance, such as a tour by a performing artist in venues around the United States, would constitute an “event” so to allow the full period requested.

In determining the validity period, adjudicators should evaluate the totality of the evidence submitted with regards to the pertinent statute and regulations to determine if the activities on the itinerary are related in such a way that they would be considered one event. Whenever possible, Service Centers should approve a petition for the length of the validity period requested where the law and regulations permit.

The Memorandum over-emphasizes the meaning of the word “event.” In so doing, it creates unnecessary confusion, and leaves too much room for interpretation. Artists can enter the U.S. under an O or P visa for a much wider range of activity than workers in other visa categories such as H-1B, L-1A, and Es. An O or P visa holder need not be entering the U.S. in connection with a specific job for an employer. Thus, the “event” can be a contract for, or an itinerary of, services being rendered. It can be one engagement, or a series of them. So long as the focus is, as the Memorandum correctly observes, on the services being rendered, no further or special relationship need exist between engagements or “events.”

In this respect, the Memorandum needs clarification. It says that adjudicators “should evaluate the totality of the evidence...to determine if the activities on the itinerary are related in such a way that they would be considered one event.” In light of recent experience, we are concerned that this opens a new avenue for adjudicators to ponder what constitutes a single event. The real issue is not how many “events” there are, but, rather, the qualifications of the beneficiary or beneficiaries for the particular classification, the nature of the proposed services, and whether the documentation of the proposed event, or events, or itinerary, is sufficient for the purpose.

We do not doubt that there may be some circumstances under which the proposed activities call for entirely different skills or services, or call for skills or services that must be evaluated according to different standards. However, if the proposed services are reasonably similar, we suggest that should be sufficient to establish that the events are connected.

The Memorandum should clarify that an “event” need not be “finite.” USCIS should clarify that there is no requirement in the regulations that the activities, or the job, or the “event,” be finite. The requested classification period, or the maximum available period, will establish any necessary limitations in that regard. Of late, we have seen a variety of RFEs and denials emanating from CSC asserting that the position in question must be “temporary,” such that the event is “finite.” CSC has asserted that the definition of “event” in regulations “suggests occurrences, phenomena, or ‘events’ of definite and finite duration.” Therefore, CSC proposes, the O-1 classification is unavailable to someone seeking entry “indefinitely” to perform the “usual duties” associated with a particular position.

CSC seems to be suggesting that unless an “event” has a specific start date and a specific end date, it cannot be an “event.” Where does this leave artistic directors, for instance? CSC seems to suggest that because a conductor or director – such as one under contract for three seasons – would be entering to perform the “usual duties” of a conductor or director, the O-1 classification cannot apply. CSC should recognize that the requested classification period itself supplies the beginning and the end dates for the duration of the activities, during which time the O-1 can render the qualifying services. If the event consists of an itinerary, it, too, has a beginning and an end, and its duration will be circumscribed by the maximum available classification period.

The Memorandum should include the P classification. The impact of the Memorandum can be increased exponentially by applying it to the P classification. The problem of inconsistent service center responses to itinerary gaps is common to both the O and P classifications. There is no difference in principle between them with respect to the definition of “event” or the gaps between engagements. There is thus no reason to distinguish between the two classifications in the memo. Based on experiences reported to us by petitioners, both the Vermont and California USCIS Service Centers have arbitrarily limited the gaps between related engagements in P petitions. Maintaining a distinction between these classifications in the memo imposes an unfair and inappropriate burden on a wide range of artists and entertainers entering the United States to perform in groups and in a culturally unique capacity.

Just as it is common for individual artists to be engaged by a particular U.S. venue for several weeks a year, or over a period of years, so it is common for many foreign groups and culturally unique performers to tour the U.S. once or twice each year. They may enter the U.S. for specific holiday performances, or for the summer festival circuit, travel internationally, then return to the U.S. en route back to their point of origin. There is no statutory or regulatory authority for the proposition that gaps in itineraries somehow automatically create a “new event” for P petitions, just as there is no such authority in the O classification. The draft Memorandum observes that, “unlike other nonimmigrant categories that have a specific time limit, a temporal period is not specified for the Os.” The same observation applies to the P classification.

Conclusion. We look forward to the issuance of the final Memorandum and are committed to communicating the resulting guidance to the U.S.-based petitioners within our collective memberships. We are grateful for this opportunity comment and we look forward to a continued dialogue with USCIS on the full range of adjudication challenges in the O and P classifications not addressed in this particular Memorandum, including these:

- The timeframe for O and P adjudications is unpredictable, made all the more so by the sheer volume of unwarranted RFEs and denials.
- In implementing premium processing, Legacy INS made it clear that it intended the service to be voluntary, not mandatory. The unpredictability of regular processing forces more O and P petitioners to premium process their petitions, at a cost the non-profit performing arts sector in particular cannot afford.
- CSC is applying the standard of distinction as it pertains to the arts under INA §101(a)(46) in a manner inconsistent with statute, regulations, and nearly twenty years of practice by Legacy INS and now USCIS. CSC demands excessive evidence of distinction and otherwise builds ever-higher evidentiary barriers to petition approval.
- CSC imposes requirements on P-3 “culturally unique” petitions that are contrary to the regulations, including an incorrect definition of what constitutes a “culturally unique event,” and it imposes an impermissibly restrictive interpretation of what constitutes a culturally unique program, performance, or presentation.
- Clarifying guidance is needed reaffirming policies of the Immigrant Services Division of legacy INS that an O-1 petition by the same petitioner for the same alien may be approved for a full three-year term of validity, and an O-1 alien may be granted an extension of stay for a full three years, where the petitioner identifies a new event or activity.

Respectfully submitted by,

Association of Performing Arts Presenters
Dance/USA
League of American Orchestras
North American Performing Arts Managers and Agents
OPERA America
Performing Arts Alliance
Theatre Communications Group

Performing Arts Service Organizations

Association of Performing Arts Presenters

Founded in 1957, the Association of Performing Arts Presenters (Arts Presenters) is the largest service and advocacy organization for the presenting and touring field in the United States. With more than 1,700 members worldwide, Arts Presenters represents colleges and universities; performing arts centers; regional, state, and local arts agencies; festivals; historic theaters; community centers, artists and artists managements. Arts Presenters is committed to increasing community participation, promoting global cultural exchange and fostering an environment for the performing arts to thrive. A leader in the field, Arts Presenters works to effect change through professional development, resource sharing and civic engagement.

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Dance/USA

Dance/USA, the national service organization for not-for-profit professional dance, seeks to advance the art form by addressing the needs, concerns and interests of professional dance. To fulfill its mission, Dance/USA offers a variety of programs for the membership and arts community, including data research and regional professional development, as well as works with organizations within and outside the arts field with whom common goals are shared. Dance/USA's membership currently consists of over 400 ballet, modern, ethnic, jazz, culturally specific, traditional and tap companies, dance service and presenting organizations, artist managers, individuals, and other organizations nationally and internationally. Dance/USA's member companies range in size from operating budgets of under \$50,000 to over \$30 million.

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League of American Orchestras

The League of American Orchestras provides leadership and service to American orchestras while communicating to the public the value and importance of orchestras and the music they perform. Founded in 1942 and chartered by Congress in 1962, the League serves more than 850 member symphony, chamber, youth, and collegiate orchestras of all sizes. The League links a national network of thousands of musicians, conductors, managers, board members, volunteers, staff members, and business partners, providing a wealth of services, information, and educational opportunities to its members.

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North American Performing Arts Managers and Agents

The North American Performing Arts Managers and Agents (NAPAMA) is a not-for-profit service organization, founded in 1979 and dedicated to promoting the professionalism of its members and the vitality of the performing arts. NAPAMA promotes the mutual interests of its members, their work with presenting organizations, government agencies, unions and other organizations serving the performing arts locally, nationally and internationally.

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OPERA America

OPERA America leads and serves the entire opera community, supporting the creation, presentation, and enjoyment of opera. Artistic services help opera companies and creative and performing artists to improve the quality of productions and increase the creation and presentation of North American works. Information, technical, and administrative services to opera companies reflect the need for strengthened leadership among staff, trustees, and volunteers. Education, audience development, and community services are designed to enhance all forms of opera appreciation. Founded in 1970, OPERA America's worldwide membership network includes nearly 200 Company Members, 300 Affiliate and Business Members, 2,000 Individual Members, and 11,000 subscribers to the association's electronic news service.

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Performing Arts Alliance

The Performing Arts Alliance is a national network of more than 4,100 members comprising the professional, nonprofit performing arts and presenting fields. For more than 30 years, the Performing Arts Alliance has been the premiere advocate for America's professional nonprofit arts organizations, artists and their publics before the US Congress and key policy makers. Through legislative and grassroots action, the Performing Arts Alliance advocates for national policies that recognize, enhance and foster the contributions the performing arts make to America. The Performing Arts Alliance member organizations include: American Music Center, the Association of Performing Arts Presenters, Chorus America, Dance/USA, Fractured Atlas, the League of American Orchestras, the National Alliance for Musical Theatre, the National Performance Network, OPERA America and Theatre Communications Group.

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Theatre Communications Group

Theatre Communications Group (TCG), the national organization for the American theatre, offers a wide array of services in line with our mission: to strengthen, nurture and promote the professional not-for-profit American theatre. As the U.S. Center of the International Theatre Institute, a worldwide network, TCG supports cross-cultural exchange through travel grants and other assistance to traveling theatre professionals. TCG seeks to increase the organizational efficiency of our member theatres, cultivate and celebrate the artistic talent and achievements of the field, and promote a larger public understanding of and appreciation for the theatre field. TCG serves over 420 member theatres nationwide.

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