Performing Arts Visa Working Group

Date: March 5, 2014

To: U.S. Citizenship and Immigration Services

From: Performing Arts Visa Working Group

Re: USCIS Idea Community: Performing Arts and Entertainment Industry - O and P Visas

Via: public.engagement@uscis.dhs.gov

We are writing in response to the request for comments on issues in the performing arts and entertainment field, posted by U.S. Citizenship and Immigration Services (USCIS) related to the **Executives in Residence** initiative.

The Performing Arts Visa Working Group is an ad-hoc coalition of national organizations including the American Federation of Musicians, Association of Performing Arts Presenters, Dance/USA, League of American Orchestras, North American Performing Arts Managers and Agents, OPERA America, Performing Arts Alliance, The Recording Academy, and Theatre Communications Group, collectively representing more than 18,000 members. Descriptions of each of these national organizations are included in the attached document.

The working group is dedicated to improving opportunities for international cultural exchange, and to informing U.S.-based nonprofit arts petitioners about compliance with U.S. visa requirements, particularly as they pertain to the engagement of foreign guest artists through the O and P visa categories. Through interaction with arts-related visa petitioners, we frequently field inquiries from our member organizations and provide technical assistance for U.S.-based arts organizations and artist managers undergoing the visa petition process.

International cultural activity is a significant function of the U.S. arts sector, and the arts sector is a substantial economic engine for our country. Nationally, the nonprofit arts industry alone generates $135.2 billion of economic activity—$61.1 billion by the nation's nonprofit arts and culture organizations in addition to $74.1 billion in event-related expenditures by their audiences. This economic activity supports 4.13 million full-time jobs and generates $86.68 billion in resident household income.

Following the July 2010 USCIS public announcement of a commitment to reduce processing times for regular petitions to 14 days, petitioners reported greatly improved processing times at both the California (CSC) and Vermont (VSC) service centers. While the years following this announcement produced measurable improvements to the processing times and quality of adjudication for O and P arts-related visa petitions, we now—and suddenly, without warning—are experiencing a severe deterioration in the quality of processing, resulting in volumes of erroneous Requests for Evidence (RFEs) and denials from VSC and CSC that result in cancelled performances and imperil the climate for international cultural exchange.

We firmly believe that opportunities for international cultural exchange will only be improved if U.S.-based organizations and foreign artists regain confidence in the artist visa process through consistent improvements over time. Following the lengthy processing times, and unpredictable issuances of RFEs and petition denials experienced from roughly 2001 to 2010, the process of re-building trust in the U.S. visa system began with careful stewardship by USCIS national leadership and throughout the regional service centers. That trust is again unravelling as

petitioners daily experience inconsistent results and delays in the petition process. While we hope the Executives in Residence effort underway will contribute to improved reliability and affordability in the visa petition process over time, we call on USCIS immediately to stem the flow of unjustified RFEs and denials for O and P artist visa petitions.

We offer the following comments in response to the specific "Idea Community" questions:

Agents & Speculative Employment Concerns

- What type of evidence can an "agent-petitioner" submit to establish that the events or productions on the itinerary actually exist?

  The USCIS memorandum issued on July 20, 2010, titled "Clarifying Guidance on "O" Petition Validity Period Revisions to the Adjudicator's Field Manual (AFM) Chapter 33.4(e)(2) AFM Update AD10-36" calls on Service Centers to, whenever possible, "approve a petition for the length of the validity period requested where the law and regulations permit and there are no other competing national security or fraud concerns."[1] First, we note that artists and entertainers entering in the P visa classification, both as groups and individuals, would benefit from the clarity the memo provides for O petitions.

  Secondly, we call to your attention that USCIS Service Centers are seemingly randomly truncating approved work periods to cover only the contracted dates of rehearsal and performances, and otherwise disregarding the validity period requested on the Form I-129. Artists frequently require the opportunity to arrive in advance of an engagement and remain afterwards for brief periods of time. The Department of Homeland Security Customs and Protection process for requesting ten additional days of stay in advance and after an approved work period, as provided at 8 CFR 214.2(o)(10) or (p)(12), is applied extremely unevenly, leaving artists exposed to potential overstays if the approved work period is not comprehensive. Even brief, technical overstays will result in indefinite ineligibility to participate in the Visa Waiver Program, so the consequences of overstays of less than 180 days are more severe than the penalty—especially burdensome for peripatetic artists--of having forever to return to one's home country consular post.

  USCIS should reinforce with adjudicators the existing USCIS AFM guidance at 33.4 regarding validity periods, which clarifies, "Further, 8 CFR 214.2(O)(1)(i) states that the O classification is for an alien coming to the U.S. 'to perform services relating to an event or events.' Thus, there is a clear indication in the regulations that a petition may be approved to cover not only the actual event or events but also services and/or activities in connection with that event or events. 8 CFR 214.2(o)(2)(ii)(C) defines the evidentiary standard for identifying the event or activity relating to the events by requiring 'an explanation of the nature of the events or activities and a copy of any itinerary for the events or activities.' Unlike other nonimmigrant categories that have a specified time limit, a temporal period is not specified for the Os. The regulations state that the validity period shall be that which is 'necessary to accomplish the event or activity, not to exceed 3 years.'" USCIS should honor this, and accept explanations provided by petitioners in cover letters, itineraries, and other supporting petition materials.

[1] www.uscis.gov, Temporary Workers, O-1 Visa – Individuals with Extraordinary Ability or Achievement.

On the topic of evidence related to itineraries, the USCIS AFM already states that "A petitioner must establish that there are events or activities in the alien's field of extraordinary ability for the validity period requested, e.g. an itinerary for a tour, contract or summary of the terms of the oral agreement under which the beneficiary will be employed, contracts between the beneficiary and employers if an agent is being utilized in order to establish the events." USCIS adjudicators should be made more fully aware that, as articulated in USCIS public guidance, the summary of the terms of an oral agreement does not have to be signed by both parties to establish the oral agreement.[2]

Determining National/International Recognition

- How should USCIS clarify the O-1 eligibility standards within the framework of the current regulatory language?

  Petitioners and adjudicators should approach the petition process with a mutual understanding of the requirements for both petition preparation and adjudication. At present, both CSC and VSC are applying the standard of distinction for O-1 eligibility standards as it pertains to the arts under INA 101(a)(46) in a manner inconsistent with statute, regulations, and more than 20 years of practice by legacy INS and now USCIS. There is extreme inconsistency in how the comparable evidence standards for O-1 visas are applied from petition to petition during the adjudication process. Both service centers are currently demanding excessive evidence of distinction, issuing blanket RFEs that fail to indicate how a petitioner can satisfy evidentiary requirements, rejecting evidence that should satisfy requirements, and otherwise building ever-higher evidentiary barriers to petition approval.

  Comparable evidence standards should take into account the wide variety of artistic genres, many of which no longer neatly fit into more traditional forms of documentation of international recognition. Periodicals that are purely online, or with a smaller circulation, but are important documentation of record for a specific genre, should be acceptable evidence. Indeed, the international reputation of many artists increasingly can be established solely by reference to on-line materials. There is a gap between industry practice and adjudicator knowledge of what comprises a lead or starring role in various genres. Awards from niche international competitions should be acceptable evidence, but are often rejected.

  The USCIS June 3, 2013 Policy Memorandum "Requests for Evidence and Notices of Intent to Deny" includes the following as one of three key general principles for adjudicators. "Understand the standard of proof that applies to the particular application, petition, or request. In most instances, the individual has the standard of proving eligibility by a preponderance of the evidence. Under that standard, the individual must prove it is more likely than not that each of the required elements has been met."[3] In many cases adjudicators seem to simply dismiss statements of fact that support the comparable evidence standards as presented by petitioning expert arts organizations and agents, qualified labor organizations, and national arts service organizations. This pattern results in denying US audiences access to a wide array of international talent, and has serious economic and cultural consequences that harm U.S. interests.

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[2] www.uscis.gov, Temporary Workers, O-1 Visa – Individuals with Extraordinary Ability or Achievement, Application Process O-1 Visa, Contract between Petitioner and Beneficiary.
[3] www.uscis.gov, Policy Memoranda, June 3 2013.

Application of the comparable evidence standards must be consistent, USCIS should provide O and P petitioners – most of whom are not represented by U.S. counsel - with guidance at the outset that a layman can follow, and RFEs should be specific, clear, and consistent with the level of distinction required by the evidentiary criteria. We stand ready to partner with USCIS to more deeply engage on this important topic.

Unions and the Consultation Requirement

- What factors should be considered by USCIS in determining whether the consultation requirement has been fulfilled?

  It is important to recognize the long history and relationship of the U.S. arts community with the USCIS 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. We strongly caution against USCIS making substantive changes in the policy or practice related to consultation process without conducting a thorough and transparent regulatory process consistent with the Administrative Procedures Act.

  That said, adjudicators should be fully aware that, under current regulations, USCIS provides for two circumstances under which a written advisory opinion is not required. Petitioners may provide alternative documentation if either of the following circumstances apply: If the petitioner can demonstrate that an appropriate peer group, including a labor organization, does not exist, the decision will be based on the evidence of record. A consultation may be waived for an alien with extraordinary ability in the field of arts if the alien seeks readmission to perform similar services within 2 years of the date of a previous consultation. Petitioners may submit a waiver request and a copy of the previous consultation.[4] These policies are unevenly applied, causing petitions to be delayed by unnecessary RFEs.

- How can USCIS determine the existence of a labor union for the specific industry?

  We suggest that the universe of related labor organizations is relatively clear, and that the process for determining whether a labor organization exists should not significantly impair the petition process. USCIS has compiled an index of O and P consultation organizations, posted in its online public guidance, most recently updated March 11, 2013.[5] This list should be updated on a continuous basis, in consultation with national arts service organizations and labor organizations.

Contracts and Agreements between Petitioner and Beneficiary

- Based on industry standards, what type of evidence should be accepted to establish a bona fide work agreement? What terms are standard in a bona fide work agreement?

  In the arts industry, the petitioner is not always the actual employer of the beneficiary and, as such, there is no "contract" between the two parties. Instead, the petitioner may

[4] www.uscis.gov, Temporary Workers, O-1 Visa – Individuals with Extraordinary Ability or Achievement, Application Process O-1 Visa, Exceptions to the Consultation Requirement.
[5] www.uscis.gov, Temporary Workers, O-1 Visa – Individuals with Extraordinary Ability or Achievement.

simply be the beneficiary's appointed agent for immigration purposes. The November 20, 2009 memorandum "Requirements for Agents and Sponsors Filing as Petitioners for the O and P Visa Classifications" states that "The petitioner/employer, seeking to serve as an agent for the beneficiary and/or for other employers, must establish that the petitioner is duly authorized to act as their agent."[6] Such evidence needn't be a signed contract. Adjudicators should be aware that the petitioner/agent may present a document signed by the beneficiary's employers which states that the petitioner is authorized to act in that employer's place as an agent for the limited purpose of filing the O petition with USCIS.

We appreciate this opportunity to comment as part of the ongoing efforts of USCIS to engage the public in open feedback and dialogue regarding stakeholder concerns. To that end, we hope that the Ideas Community comment opportunity is just one part of an ongoing dialogue regarding the Executive in Residence program. And, while we appreciate the democratic ideals of a social media-inspired platform for public dialogue such as the Ideas Community, we urge USCIS to refrain from instituting significant policy changes without undertaking a more formal public review and comment process. We are particularly concerned, because elevating the documentary requirements may significantly hamper international cultural exchange.

Meanwhile, immediate action is needed within the current USCIS statute, regulations, and policies. While we are encouraged that USCIS is undertaking an Executives in Residence program that might lead to substantive improvement in adjudication procedures for the arts and entertainment industries over time, we urge you to take immediate steps to address the full array of O and P artist visa concerns articulated in these comments, as well as in the following areas not included in Ideas Community forum slate of questions:

- Implementing consistent timeframes for regular O and P visa processing
- Updating USCIS online reports of average O and P processing times
- Instituting reliable procedures for accessing the Traditional Expedite process

Until recently, arts-related petitioners experienced relatively consistent results in O and P visa processing at the Vermont and California service centers. Experiences reported to us by petitioners prove that this is no longer the case, as they encounter RFEs 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. We look forward to further communication with USCIS on the full array of policies impacting international cultural activity.

Sincerely,

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

[6] www.uscis.gov, Temporary Workers, O-1 Visa – Individuals with Extraordinary Ability or Achievement.