Draft: White Paper on Artist Mobility to the United States

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Abstract: Certain policies and procedures at U.S. Citizenship and Immigration Services ("USCIS" or the "Service") and U.S. Department of State ("DOS" or the "State Department") create undue and unnecessary burdens on the U.S. Government, unnecessarily impede U.S. commerce, and undermine the country's cultural richness and diversity. U.S interests would be served by a number of specific changes to the regulations, administrative manuals, and other legal authorities that guide policies and procedures at USCIS and DOS.

Background: Under U.S. law, if a performing artist wishes to perform in the U.S.—even unpaid or for one performance—typically he or she must first obtain an "O" or a "P" visa. O visas are available to artists who can show that they have "extraordinary ability" in their field, while P visas are available to artists who are members of "internationally recognized entertainment groups" or "culturally unique programs." To protect the labor interests of American performing artists, eligibility for these visas is strictly limited: individuals are only found to be eligible when it can be proven that they provide an irreplaceable benefit to the U.S.

There are three steps to securing an O or a P visa. First, a petition must be filed with USCIS, which must demonstrate that the artist meets the legal requirements with respect to the artist's professional caliber, and that the artist will have *bona fide* employment while in the U.S. If the petition is approved by USCIS, the second step is for the artist to apply for the physical visa and complete an interview at a U.S. consulate, in a process overseen by the DOS. If the artist is found to have no reasons for ineligibility (like a criminal record, or membership in a demographic perceived as likely to attempt illegal emigration), the artist's visa is approved and issued by the consulate. Lastly, with passport and visa in hand, the artist must appear for inspection before a U.S. Customs and Border Protection officer who makes the final determination of "admissibility."

There are hundreds of ways that this process can go wrong for a performing artist, often resulting in the cancellation of concerts, performances, or even whole tours. Sometimes what goes wrong is the fault of an artist or their management who misunderstands the process, fails to leave enough time, or encounters a legitimate barrier, like a prior criminal record. But far too often, unnecessary delays, performance cancellations, and exorbitant costs are the result of USCIS and DOS officers working under the guidance of regulatory authorities that are inefficient, unclear, contradictory, or counter to the intent of the law. These unnecessary delays, cancellations, and costs result in hardships for the artist and their supporting institutions, as well as for the businesses in the U.S. that rely upon the artists' presence. And not insignificantly, when government funds have been granted to support these artists' tours, taxpayer money is wasted.

Introduction: The United States Congress created the O and P visa classifications under the Immigration Act of 1990 and the O and P Nonimmigrant Amendments of 1991 as part of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991.[1]

[1] Tibby Blum, *O and P Visas for Nonimmigrants and the Impact of Organized Labor on Foreign Artists and Entertainers and American Audiences*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 533, 541-42 (1993).

In doing so, Congress sought to balance the U.S. performing arts industry's interest in presenting international artists with the labor interests of American performers.[2] To this end, the law gave U.S. labor unions the authority to evaluate an individual foreign artist's importance by making the "peer consultation" a required element of each petition.[3] Initially, in keeping with congressional intent, the Immigration and Naturalization Service ("INS") applied the law broadly.[4] and with the support of U.S. labor unions, the performing arts industry generally found the new process manageable and affordable: the Service's fee was $135, the unions charged no fee for their consultation, and the process could be successfully navigated without the aid—and cost—of legal counsel. Unfortunately, throughout the 1990s and even more so since 2001, policies and procedures at INS (later USCIS) and DOS have significantly increased the administrative complexity and unreliability of the process. This has placed a tremendous burden on the U.S. Government, petitioners, employers, labor unions, and beneficiaries. Consequently, the Service has steadily increased the I-129 fee to the current $460, and the unions have been compelled to charge fees as high as $500 per petition to cover their increased labor costs. Most significantly, however, the process's increased complexity and inconsistency has forced most arts organizations to hire administrative or legal assistance, with fees that range from $800 to $8000 per petition. The current cost of arranging an O-1B or P visa for a foreign artist is now typically *more than twenty times the cost of the same process in 1991.*

The current policies and procedures around the enforcement of O and P classifications have created an unconscionable lose/lose situation for the United States: they impede the activities of U.S. businesses and cultural organizations that rely on foreign performers, they unnecessarily strain chronically understaffed and overworked employees at USCIS and DOS, and they significantly impact the American people's access to international culture.

Tamizdat has spent the last two years studying thousands of O and P cases, and our findings and recommendations are in this *White Paper*. Our recommendations are motivated by the conviction that the majority of the problems encountered by the performing arts industry are the result of unnecessary bureaucratic obstacles that neither enhance U.S. security nor serve to protect U.S. labor interests. We seek to demonstrate herein that vast improvements to the system can be made by systematically addressing these specific impediments, which unduly burden the U.S. performing arts industries and create unnecessary efficiencies at USCIS and DOS.

Objective: This *White Paper* has three goals:

(1) To identify the most significant problems in the current system used by international artists to obtain the authorization needed to legally enter the United States to perform;
(2) To locate the legal or operational origins of these problems; and
(3) To propose workable solutions to these problems.

The *White Paper* also features two appendices: the first provides proposed revisions to the authorities discussed in the *White Paper*, and the second provides case examples illustrating the problems addressed by the *White Paper.* We hope that this *White Paper* will be a useful guide to policymaking at USCIS and DOS, and that it will help the international performing arts community work together with the U.S Government to improve the U.S. artist visa process.

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Finally, we wish to acknowledge that this draft incorporates numerous elements of an agenda of priority issues impacting the performing arts, sports, motion picture, and television industries, as prepared by the

[2] *Id.* at 543.
[3] *Id.*
[4] *Id.*

ACES Committee of the American Immigration Lawyers Association ("AILA"). We are grateful to AILA for generously allowing us to incorporate elements of their work.

(I) Issues regarding U.S. Citizenship and Immigration Services

Introduction: The following recommendations seek to reduce inefficiencies and errors at USCIS, minimize the burden upon and waste of petitioner and government resources in the filing and adjudication of unnecessary and redundant petitions, address issues of fraudulent documentation, and improve the ability of USCIS to produce consistent and accurate decisions, all while strengthening USCIS's power to protect U.S. labor and security interests. Below we have identified thirty pervasive problems in the adjudication of I-129 petitions for O-1B, O-2, and P applicants. We explain each issue, identify the applicable rule of law, and suggest a solution to the problem. In Appendix A, we provide our recommended revisions to the relevant manual, handbook, or other authority, as referenced in our proposed solutions. In Appendix B, we provide cases examples of each identified issue.

ISSUES REGARDING THE GENERAL PROCESSING OF ALL I-129 PETITIONS FOR O OR P STATUS:

1. Delays at U.S. Citizenship and Immigration Services unduly burden the performing arts industry.

Issue: There continue to be frequent and significant delays in the Service's processing of petitions, notwithstanding Section 214(c)(6)(D) of the Immigration and Nationality Act (the "INA" or the "Statute"), which states that the Service "shall" adjudicate a fully-submitted petition within 14 days. Neither the Vermont Service Center ("VSC") nor the California Service Center ("CSC") consistently process I-129 petitions within this statutorily mandated time-frame. The variability and unpredictability in processing times leaves the petitioner with no choice but to pay an additional $1,225 for Premium Processing Service fee, or risk financial and reputational harm to both the artist and the U.S. entities that rely upon the artist. The Service must take the steps needed to ensure timely processing.

Rule: Section 214(c)(6)(D) of the Immigration and Nationality Act states that the Service "shall" adjudicate a fully-submitted petition within 14-days. However, in 1994 when the Service issued its Regulations implementing the O and P provisions of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, it stated in its preamble, "The Service believes that there is little to be gained by imposing a required processing time. As stated in the preamble to the interim rule, when local conditions at the Service Centers adversely affect the processing time, an artificially set time limit will do little to correct the situation. The Service is aware of the legitimacy of these concerns and will make every effort to process and adjudicate petitions in a timely manner. However, such management controls are more properly within the bounds of policy guidance and operating instructions rather than regulations" (Temporary Alien Workers Seeking H-1B, O, and P Classifications Under the Immigration and Nationality Act, 59 FR 41,818-41,842 (August 15, 1994)). In other words, the Service never had any intention of guaranteeing adjudication of O and P petitions within the 14-day timeframe, notwithstanding the statutorily prescribed requirement to do so.

Proposed Solution: The Service must follow the existing statutory provision at INA §214(c)(6)(D) requiring that a fully-submitted O or P petition be adjudicated within 14 days. The Regulations at 8 CFR §214.2 should be amended accordingly. Additionally, Tamizdat supports the passage of the proposed ARTS Act of 2016, S. 2510, 114th Cong. (2016), which would require the Department of Homeland Security ("DHS") to adjudicate O and P visa petitions within 14 days after receiving such petitions and related documents. If DHS were to miss that deadline, the ARTS Act would grant Premium Processing without charge to any non-profit petitioner if DHS does not meet that deadline.

2. Support beneficiaries' petitions are frequently separated from principal beneficiaries' petitions.

Issue: At petition intake, the Service frequently separates principal petitions (O-1, P-1, P-2, or P-3) from support petitions (O-2, P-1S, P-2S or P-3S), resulting in the Service's erroneously issuing Requests for Evidence ("RFEs") regarding the alleged absence of a principal petition. These erroneous RFEs lead to unnecessary delays for the beneficiary, place an unnecessary burden on the petitioner, and create inefficiencies at the Service.

Rule: Chapter 10.1(a) of the *Adjudicator's Field Manual* (the "*AFM*") on "Receipting of Applications and Petitions at Service Centers" indicates that, "The service centers have specific detailed, written operating procedures (SOPs) which describe the functions to be performed by contractor personnel within the scope of the support services contract." Chapter 10.1(d)(1) on "Data Entry and File Management" details general steps that should take place upon receipt of an application, including that the application and supporting documents be "housed in a file jacket" and that, [r]elating files, such as family members or group members, should be bundled together."

Proposed Solution: Chapter 10.1 of the *AFM*, as well as the written operating procedures at the Service Centers, should be revised to (i) underscore that the petitions of principal beneficiaries should not be separated from those of their support personnel, (ii) require that at intake, Question 3, Part 4 of the I-129 is reviewed to determine whether there are any other petitions accompanying the principal petition, and (iii) require that, where an adjudicating officer receives a P-1S, P-2S, P-3S or O-2 petition with no apparent principal petition, every effort must be made to locate the principal petition, including but not limited to contacting the petitioner directly by telephone or email, before an RFE is issued.

Additionally, the Service should create standardized "best practice" recommendations for petitioners regarding filing and packaging I-129 petitions, with the goal of reducing common errors in Service Center mailrooms. These recommendations should be published (i) with the directions to the I-129, and (ii) on the Service's website.

3. The Service posts inaccurate processing times online.

Issue: The processing times listed on the Service's website are often extremely inaccurate, making it difficult or impossible for petitioners to effectively plan and manage their petitioning processes. The impact of this unpredictability is to make it nearly impossible for U.S. employers to contract with foreign performers with any assurance that the contract will be executable.

Rule: USCIS processing times are calculated by the Office of Performance and Quality ("OPQ"). The Service established OPQ in 2010 as part of a plan of realignment of Service headquarters with the promise of "improv[ing] mission performance and customer service delivery."[5] The Service's Mission Statement provides that, "USCIS will secure America's promise as a nation of immigrants by providing accurate and useful information to our customers…"[6]

Proposed Solution: If there are variances from the 14-day timeframe for adjudicating fully-submitted petitions, the Service should ensure that its published processing reports are updated accordingly. In fact, the Service has stated plans to take action to create an improved process for more accurately reporting processing times online (81 Fed. Reg. 26903 (May 4, 2016)). The July 2016 Performing Artist Visa Working Group (PAVWG) Comments urged the Service to take *immediate action* to do so, in compliance with its Mission Statement. Tamizdat supports the PAVWG's position on this matter.

[5] *Telecon Recap: Application Processing Times: A Conversation with USCIS Office of Performance and Quality*, U.S. Department of Homeland Security (Sept. 22, 2015), https://www.dhs.gov/telecon-recap-application-processing-times-conversation-uscis-office-performance-and-quality.

[6] *About Us*, U.S. Citizenship and Immigration Services (Dec. 30, 2016), https://www.uscis.gov/aboutus.

4. Historically, Service Centers incorrectly rejected I-129 petitions for being filed with the wrong Service Center.

Issue: Although USCIS has provided additional guidance on its website as to where beneficiaries with temporary employment in different locations should file Form I-129, this guidance is not reflected in the *AFM*. Historically the California Service Center and the Vermont Service Center have often incorrectly rejected petitions on the grounds that that they were filed with the wrong Service Center.

Rule: The USCIS website, "Direct Filing Addresses for Form I-129, Petition for a Nonimmigrant Worker," provides that, "[w]hen the temporary employment or training will be in different locations within the same U.S. state or territory, or in different U.S. states or territories, the state where your company or organization's primary office is located will still be used to determine where you should file your Form I-129 package, regardless of the beneficiary's work location(s)."[7] That is, the Form I-129 should be filed either at the Vermont Service Center or the California Service Center in accordance with the location of the petitioner's primary office.

The *AFM* does not yet incorporate this new guidance.

Proposed Solution: Chapter 3.5 of the *AFM* should be revised to reflect the new guidance now provided on the USCIS website, "Direct Filing Addresses for Form I-129, Petition for a Nonimmigrant Worker."

ISSUES REGARDING PEER CONSULTATION REQUIREMENTS:

5. With respect to O-1B Petitions for artists who are *not* screen actors, the Service often issues RFEs demanding two peer consultations (as mandated for screen actors), where only one is required by law.

Issue: The Service often issues RFEs that demand consultations not required by law. There are two varieties of O-1B petitions: (i) the "Extraordinary Ability" petition for all artists except screen actors (the "O-1B Non-screen"), and (ii) the "Extraordinary Achievement" petition for screen actors (the "O-1B Screen"). Whereas the "O-1B Screen" petition has a dual consultation requirement (mandating consultations from both labor and management organizations), the "O-1B Non-screen" petition does not. Nonetheless, the Service frequently requires that petitioning "O-1B Non-screen" artists who are performing television or similar work that is promotional or incidental to their principal employment submit consultations from the Screen Actors Guild (a labor organization) in addition to consultations from a management organization.

Rule: The O-1B classification applies either to (i) "an alien who has extraordinary ability in the sciences, arts, education, business, or athletics" (8 CFR §214.2(o)(1)(i); *see also, AFM*, Chapter 33.4(d)) ("O-1B Non-screen"), or to an (ii) an alien who "has a demonstrated record of extraordinary achievement in the motion picture or television industry" ("O-1B Screen") (8 CFR §214.2(o)(1)(ii)(A)(2); *see also, AFM,* Chapter 33.4(d)

Under Section 214(a)(6)(A)(i) of the INA, "O-1B Non-screen" beneficiaries must submit with the petition "an advisory opinion from a peer group (or other person or persons of [the petitioner's] choosing, which may include a labor organization) with expertise in the specific field involved." By contrast, for "O-1B Screen" beneficiaries seeking entry for a motion picture or television production, the Statute has a dual consultation requirement; O-1B Screen beneficiaries must submit consultations from both the appropriate union and "a management organization in the area of the alien's ability" (INA §214(c)(3)(A)).

Under the Regulations, O-1B Screen beneficiaries are identified as those persons, "who will be working on a motion picture or television production" (8 CFR §214.2(o)(5)(iii)). It is noted that the I-129 form does not demand that the petitioner state which type of O-1B is sought; the Service must make a determination based on the evidence of employment provided with the petition. Most petitions present evidence that

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7 *Filing Addresses for Form I-129*, *Petition for a Nonimmigrant Work Visa,* U.S. Citizenship and Immigration Services (October 13, 2017), https://www.uscis.gov/i-129-addresses.

clearly indicates whether the artist is a screen actor or not. However, some cases may be more nuanced, and under certain circumstances an "O-1B Non-screen" artist may engage in screen-related work and still be classified as an "O-1B Non-screen" artist. This position is supported both by the Regulations and other principles of immigration law practice:

> (1) 8 CFR §214.2(o)(1)(i) indicates that an alien who meets the qualification requirements for O-1B status may seek a visa to enter the U.S. to "perform services relating to an event or events…" The term "event" is broadly defined and "may include short vacations, promotional appearances, and stopovers which are incidental and/or related to the event" (8 CFR §214.2(o)(3)(ii)). This suggests that when an O-1B beneficiary engages in screen activities that are "promotional appearances," the beneficiary should seek O-1B Non-screen status and should not be required to meet the dual consultation requirement.
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> (2) Chapter 9, Section 402.1-3 of DOS's *Foreign Affairs Manual* states that, "an alien desiring to come to the United States for one principal, and one or more incidental purposes, must be classified in accordance with the principal purpose." This precept should apply equally at USCIS, so that that when an O-1B beneficiary engages in screen activities that are incidental to their principal purpose in the U.S. (where the principal purpose is one or more O-1B Non-screen activities), the beneficiary should seek O-1B Non-screen status and should not be required to meet the dual consultation requirement.

Proposed Solution: Chapter 33.3 of the *AFM* should be revised to clarify that a consultation from a management organization is *not* required where an O-1B Non-screen artist engages in screen-related work in the U.S., but that screen-related work is merely promotional or incidental to his or her principal purpose for coming to the United States.

ISSUES REGARDING O-1B AND P-1 PETITIONS: EVIDENCE TYPES ONE AND THREE

6. The Service incorrectly disqualifies evidence from foreign sources submitted pursuant to Evidence Types One and Three.

Issue: The Service occasionally indicates that either the 'past prong' or the 'future prong' of O-1B or P-1 Evidence Types One and Three can only be met by showing the beneficiary's relationship with a *U.S. production, event, organization, or establishment*. The requirement that the production, event, organization, or establishment be a U.S. entity has no legal authority, and creates unnecessary delays for the beneficiary, undue burden on the petitioner, and inefficiencies at the Service.

Rule: Under the O-1B Regulations, Evidence Type 1 requires, "[e]vidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation…," and Evidence Type 3 requires, "[e]vidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation…" (8 C.F.R. 214.2(o)(3)(iv)(B)(1); 8 C.F.R. 214.2(o)(3)(iv)(B)(3)). Under the P-1 Regulations, Evidence Type 1 requires, "[e]vidence that the group has performed, and will perform, as a starring or leading entertainment group in productions or events which have a distinguished reputation…" and Evidence Type 3 requires, "[e]vidence that the group has performed, and will perform, services as a leading or starring group for organizations and establishments that have a distinguished reputation..." (8 C.F.R. 214.2(p)(4)(iii)(B)(3)(i); 8 C.F.R. 214.2(p)(4)(iii)(B)(3)(iii)). There is no legal authority for the proposition that Evidence Types 1 or 3 can *only* be met if the relationship is with a *U.S. production, event, organization, or establishmen*t.

Proposed Solution: The O-1B and P-1 RFE templates, and Chapters 33.4(d) and 33.5(d) of the *AFM*, should be revised to clarify that Evidence Types One and Three may be met, irrespective of whether the beneficiary's relationship is with a U.S. entity, or a non-U.S. one.

ISSUES REGARDING O-1B AND P-1 PETITIONS: EVIDENCE TYPE TWO

7. The Service applies an unduly burdensome and incorrect standard to Evidence Type Two.

Issue: The list of published materials from which O-1B and P-1 petitions' Evidence Type Two can be taken reads as follows: "major newspapers, trade journals, magazines, or other publications" (8 C.F.R §214.2(o)(3)(iv)(B)(2); 8 C.F.R. § 214.2(p)(4)(iii)(B)(3)(ii)). The Regulations may appear ambiguous as to whether the modifier "major" is intended to modify only the noun that immediately follows, "newspapers," or whether it should apply globally to all the subsequent nouns, reading, in effect, "major newspapers, major trade journals, major magazines, or major other publications." From time to time, the Service takes the stand that the latter is the Regulations' meaning, but this is an unduly burdensome and incorrect interpretation.

Rule: The modifier "major" in Evidence Type Two ("major newspapers, trade journals, magazines, or other publications" (8 C.F.R §214.2(o)(3)(iv)(B)(2); 8 C.F.R. § 214.2(p)(4)(iii)(B)(3)(ii)) only modifies the noun "newspapers" and not "trade journals," "magazines," or "other publications." This interpretation is supported by the following arguments:

First, the adjective "major" *could have been* applied to each of the following nouns, but it was not, so the drafters' clear intent appears to have been that "major" should only apply to "newspapers."

Second, the analogous requirement for an O-1A petition (for an alien of extraordinary ability in the fields of science, education, business, business or athletics) at 8 C.F.R. §214.2(o)(3)(iii)(B)(3) calls for documentary evidence of "published material in professional or *major* trade publications or *major* media about the alien, relating to the alien's work in the field for which classification is sought..." (emphasis added). The word "major" appears both before "trade publications" and before "media about the alien," leaving no doubt that "major" is intended to modify both items. Following this logic it seems clear that the term "major" in Evidence Type 2 for O-1B and P-1 petitions is only intended to modify "newspapers," as it only appears once - before "newspapers." If the drafters intended for "major" to apply to all the items that follow (i.e., "trade journals, magazines, or other publications"), "major" would be included as an adjective before each item, as it was in the corresponding O-1A list.

Third, in 8 C.F.R. §214.2(o)(3)(iv)(B)(4) and 8 C.F.R. §214.2(p)(4)(iii)(B)(3)(iv), where Evidence Type Four is addressed, a similar list is presented, but this time the list reads "trade journals, major newspapers, or other publications." Since there is no imaginable reason that a minor trade journal could provide substantive evidence under 8 C.F.R. §214.2(o)(3)(iv)(B)(4) and 8 C.F.R.§ 214.2(p)(4)(iii)(B)(3)(iv), but not under 8 §C.F.R. 214.2(o)(3)(iv)(B)(2) and 8 §C.F.R. 214.2(p)(4)(iii)(B)(3)(ii), it seems clear that the adjective "major" in both passages is intended to apply only to "newspapers."

Fourth, in 8 §C.F.R. 214.2(o)(3)(iv)(B)(3) and 8 §C.F.R. 214.2(p)(4)(iii)(B)(3)(iii), where Evidence Type Three is explained, a similar list is provided, but this time the word "major" is deleted entirely, with the passage requesting, "[e]vidence that the [alien][group] has performed, and will perform, [services as a leading or starring group][in a lead, starring, or critical role] for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials." The complete absence of the word "major" indicates that the adjective "major" should only modify the noun next to which it appears.

As such, it seems clear that Evidence Type Two may be satisfied with evidence from *major* newspapers, *any* trade journals, *any* magazines, or *any* other publications, and that there is no legal basis for requiring that the publication be "major," unless it is a newspaper. Other than newspapers, published materials submitted as Evidence Type Two should be treated as dispositive, regardless of the "standard" or "level" of the publication.

Proposed Solution: Chapters 33.4(d) and 33.5(d) of the *AFM* should be revised to make it clear that Evidence Type Two may be satisfied by evidence from *major* newspapers, *any* trade journals, *any* magazines, or *any* other publications, so long as such evidence more likely than not proves the artist's "national or international recognition for achievements" (in the case of an O beneficiary) or the group's

"nomination or receipt of significant international awards or prizes for outstanding achievement in its field" (in the case of a P beneficiary).

ISSUES REGARDING O-1B AND P-1 PETITIONS: EVIDENCE TYPE FIVE, AND ISSUES REGARDING P-3 PETITIONS: EVIDENCE TYPE A

8. The Service routinely applies an unduly burdensome and incorrect standard to the expert testimonials provided for O-1B and P-1 petitions (Evidence Type Five) and for P-3 petitions (Evidence Type A)

Issue: The Service routinely asserts that an expert testimonial written on a beneficiary's behalf, pursuant to establishing Evidence Type Five for O-1B and P-1 petitions (8 C.F.R. §214.2(o)(3)(iv)(B)(5); 8 C.F.R. §214.2(p)(4)(iii)(B)(3)(v)) and Evidence Type A for P-3 petitions (8 C.F.R. §214.2(p)(6)(ii)(A)), must be a litany of the beneficiary's career achievements, and that an expert's subjective assertions regarding the beneficiary's extraordinary ability, sustained international renown, or cultural uniqueness are not valid evidence. We submit that the Service's approach misrepresents the fundamental purpose of Evidence Type Five and Evidence Type A, and reduces the criterion to no more than an index of other achievements that would better be submitted as evidence under other criteria. The purpose of Evidence Type Five and Evidence Type A is that the words of an expert *are evidence in and of themselves.* For example, if Mikhail Baryshnikov were to write a testimonial letter in regards to a beneficiary's O-1B eligibility, "Beneficiary is a world class ballet dancer," that statement alone, without any support, is evidence that, "the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged." Certainly, to satisfy the second requirement of the criterion—that the "testimonials must be in a form which clearly indicates the author's authority"— Mr. Baryshnikov would need to explain his credentials. And likewise, to satisfy the criterion's third requirement, Mr. Baryshnikov would need to indicate the basis of his knowledge of the alien's achievements, perhaps by stating, "I worked closely with the beneficiary at the Mariinsky Ballet from 1972 through 1974." The purpose of the testimonial letter submitted pursuant to Evidence Type Five and Evidence Type A is to allow experts familiar with the beneficiary's career to offer their subjective *opinion as evidence;* it is emphatically *not* their purpose to merely recount specific accomplishments that would better be submitted as evidence under other criteria.

Rule: Chapter 11.1(i) of the *AFM* states that, "Unlike most witnesses, an expert is permitted to give his or her opinion on a particular set of facts or circumstances involving scientific, technical, or other specialized knowledge, skill, experience, training or education. When an expert witness is offered, the person offering the testimony of the witness must prove the experience and qualifications of the witness and the facts of the case at hand." This provision underscores that the value of the "expert testimony" is in the expert's ability to give an *opinion* on a situation involving *scientific, technical, or other specialized knowledge, skill, experience, training or education.* There is no authority, in this provision or elsewhere, for the proposition that the expert is required to offer any testimony beyond the expert opinion on the beneficiary's extraordinary ability, sustained international renown, or cultural uniqueness.

Proposed Solution: Chapters 33.4, 33.5, and 33.7 of the *AFM* should be revised to include language stating that the purpose of an expert testimonial letter submitted pursuant to Evidence Type Five at 8 C.F.R. §214.2(o)(3)(iv)(B)(5) or 8 C.F.R. §214.2(p)(4)(iii)(B)(3)(v), or pursuant to Evidence Type A at 8 C.F.R. §214.2(p)(6)(ii)(A), is to allow experts familiar with the beneficiary's career to offer their opinions as to the beneficiary's extraordinary ability, sustained international renown, or the cultural uniqueness of the program, as evidence. The relevant sections of Chapters 33.4, 33.5, and 33.7 of the *AFM* should be further amended to reflect that such a letter does not require an enumeration of the beneficiary's specific accomplishments.

ISSUES REGARDING RFEs and NOIRs

9. The Service incorrectly issues RFEs that appear to require evidence that is not mandatory.

Issue: In adjudicating a petition, officers who believe that the petitioner has failed to satisfy some element of one of the *optional* evidence types often articulate this failing in such a way that the *optional* evidence type appears *mandatory*. For example, in noting that a petitioner has failed to meet the future prong of Evidence Type Three (8 C.F.R. 214.2(o)(3)(iv)(B)(3)), the officer may indicate that such a failing is not a failing of Evidence Type Three—a failing that is not material if three other evidence types are satisfied—but is rather a general failing. This lack of clarity leads petitioners to believe that a mandatory requirement exists where it does not. Where the RFE is structured to address each of the eight evidence types in order, this error is usually avoided. But where an officer carelessly indicates that an optional evidentiary failing is a mandatory evidentiary failing, this carelessness leads to unnecessary delays for the beneficiary, places an undue burden on the petitioner, and creates inefficiencies at the Service.

Rule: 8 C.F.R. 214.2(o)(3)(iv)(B) states that O-1B "Extraordinary Ability" (O-1B) applicants must provide at least three of eight types of evidence (unless the criteria do not readily apply, in which case "comparable evidence" may be submitted under 8 CFR 214.2(o)(3)(iv)(C)). Similarly, 8 C.F.R. 214.2(p)(4)(iii)(B) requires that P-1 applicants provide three of the eight types of evidence outlined. Regarding the issuance of an RFE, 8 CFR 103.2(a)(iv) is explicit that an RFE must "specify the type of evidence required, and whether initial evidence or additional evidence is required, or the bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond."

Proposed Solution: The O-1B and P-1 RFE templates, and Chapters 10.5(a)(2) and -(3) of the *AFM*, should be revised to underscore that RFEs issued to O-1B or P-1 petitioners must make clear the distinction between what evidence is *required* to overcome the RFE , and what evidence is *suggested* and *could* be used to overcome the RFE.

10. The Service frequently issues vague, careless, or incomplete RFEs and NOIRs.

Issue: RFEs and Notices of Intention to Revoke ("NOIRs") frequently fail to clearly explain the evidentiary failings of the petition. Some officers do an admirable job of parsing the law. For example, an officer ideally would explain in the RFE that Evidence Types Two and Five have been satisfied, as well as the "past prong" of Evidence Type Three, leaving the petitioner only to submit additional evidence satisfying the "future prong" of Evidence Type Three. However, too often officers fail not only to critique the specific evidence presented, but also they "cut and paste" template passages such as "No evidence was submitted…", when such is not the case. This carelessness leads to confusion on the part of the petitioner, unnecessary delays or denials for the beneficiary, places an undue burden on the petitioner, and creates inefficiencies at the Service.

Rule: As provided in 8 CFR §103.2(a)(iv), an RFE must "specify the type of evidence required, and whether initial evidence or additional evidence is required, or the basis for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond." Chapter 10.5(a)(2) of the *AFM* states that, "RFEs should, if possible, be avoided," and further states, "initial case review should be thorough. Evidence or information not submitted with the application, but contained in other USCIS records or readily available from external sources should be obtained from those sources first rather than going back to the applicant for information or evidence."

Regarding NOIRs, under 8 CFR §205.2, "the director shall provide the petitioner or the self-petition with a written notification of the decision that explains *the specific reasons* for the revocation" (emphasis added).

The process by which certain changes should be made to USCIS administrative practices is addressed under Homeland Security Act § 452(b)(2)-(3), 6 U.S.C. § 272 (2002). Pursuant to this authority, the USCIS Ombudsman is tasked with identifying problem areas at USCIS and proposing changes to CIS's administrative practices to mitigate these problems. The Ombudsman must meet regularly with the Director of USCIS to present its findings and recommendations (Section 452(d)(4), Homeland Security Act).

Proposed Solution: Chapters 10.5(a)(2) and -(3), and Chapter 20.3, of the *AFM* should be revised to emphasize that, where evidence is found to be insufficient, the RFE or NOIR must contain a detailed explanation as to why the evidence is insufficient and which specific evidence is missing.

Additionally, steps should be taken to ensure that RFE and NOIR templates are up to date, and that officers are trained accordingly. Toward that end, and under the authority of Section 452 of the Homeland Security Act, RFE and NOIR templates should receive semi-annual review by the Ombudsman's Office, and that office should be charged with recording and reporting customer complaints about RFEs and NOIRs. The Ombudsman should then compile these complaints and present at its regular meetings with the Director of USCIS any recommended changes to the RFE and NOIR templates.

11. In Premium Processing cases where an RFE is issued on the principal petition, the Service often issues RFEs on support petitions for no apparent reason other than to "stop the Premium Processing clock."

Issue: In Premium Processing cases where an RFE is issued to the principal petitioner, the Service often unnecessarily issues RFEs with respect to the accompanying O-2, P-1S, P-2S, and P-3S petitions, even where these petitions are not substantively lacking any evidence. The purpose of these RFEs is ostensibly to stop the "Premium Processing clock" while the RFE on the principal petition is pending, but the practice places an undue burden on the petitioner, and creates inefficiencies at the Service.

Rule: The purpose of issuing an RFE is not to delay processing but "to request missing initial or additional evidence from applicants or petitioners who filed for immigration benefits" (*AFM*, Chapter 10.5(a)(1)). Chapter 10.5 of the *AFM* further states that, "RFEs should, if possible, be avoided."

Proposed Solution: The Regulations at 8 CFR §103.7(e)(2), which address the 15-day limitation on Premium Processing cases, should be revised to mandate that, where an RFE is issued on a principal petition, any support petitions will be held in abeyance, subject to the adjudication of the principal beneficiary's petition. No RFE should be unnecessarily issued on the support petitions.

12. In a situation where the Service is awaiting the petitioner's response to an RFE filed with regular processing, petitioners often upgrade the petition to Premium Processing and subsequently file the RFE response. In such a situation, the Service routinely re-issues the RFE, notwithstanding the fact that the RFE response has already been submitted.

Issue: When a regular processing petition is awaiting the petitioner's response to an RFE, and the petitioner upgrades the petition to Premium Processing and then subsequently files the RFE response, the Service routinely re-issues the RFE, notwithstanding the fact that the RFE response has been submitted. Often this occurs several days after the response to the "original" RFE has already been submitted, unnecessarily stopping the "Premium Processing clock," delaying Premium Processing by as long as two weeks, creating unnecessary delays for the beneficiary, undue burden on the petitioner, and inefficiencies at the Service.

Rule: Chapter 10.5(a)(2) of the *AFM* states that, "RFEs should, if possible, be avoided," and, "[e]vidence or information not submitted with the application, but contained in other USCIS records or readily available from external sources should be obtained from those sources first rather than going back to the applicant for information or evidence." This section underscores that other officers' efforts should not be duplicated, and that "[r]equesting additional evidence or returning a case for additional information may unnecessarily burden USCIS resources, *duplicate* other adjudication officers' efforts, and delay case completion" (*AFM* 10.5) (emphasis added).

Proposed Solution: Chapter 10.5 of the *AFM* should be revised to include language stating that a duplicate RFE should never be reissued when a case is upgraded to Premium Processing and a response to the regular processing RFE has already been received.

13. The Service often rejects petitions, or unnecessarily issues RFEs, in response to minor clerical or typographical errors on the part of the petitioner.

Issue: Many USCIS adjudicators reject petitions, or unnecessarily issue RFEs, when they encounter errors that are clearly clerical or typographical in nature. This leads to unnecessary rejections and delays for the beneficiary, and results in a proliferation of additional petition filings and RFEs that unnecessarily burden the Service.

Rule: Chapter 10.5 of the *AFM* states that the initial case review by a USCIS adjudicator should be thorough, and evidence "or information not submitted with the application, but contained in other USCIS records *or readily available from external sources* should be obtained from those sources..." (emphasis added). As for information to be requested by way of an RFE, 8 CFR §103.2(a)(iv) provides that an RFE must "specify the *type of evidence* required, whether initial evidence or additional evidence is required, or the bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond" (emphasis added). In contrast to these categories, clerical errors are unrelated to evidence, and should not be a basis for rejecting petitions or issuing RFEs.

Proposed Solution: Clerical or typographical errors in the initial filing of a petition could frequently be easily resolved. Where possible, errors in a petition that appear to be clerical or typographical in nature should be resolved by the Service contacting the petitioner directly by email or fax. Chapters 10.1 and 10.5 of the *AFM* should be revised to include language indicating that, (i) where possible, the Service should attempt to resolve clerical or typographical errors by directly contacting the petitioner by email or fax, (ii) clerical or typographical errors should not serve as the basis for rejecting a petition, and (iii) an RFE should only be issued when an effort to resolve the matter by contacting the petitioner directly has proven unsuccessful for no more than 24 hours.

14. The Service uses RFEs to announce new practice and policy interpretations.

Issue: O and P stakeholders often learn of new issues of concern or new USCIS regulatory interpretations through the receipt of RFEs that do not reflect established practice or interpretation. Such RFEs are confusing to petitioners, particularly when cases presenting the same issue were historically approved on a regular basis. This failure to announce practice or policy changes in advance leads to unnecessary delays for the beneficiary, places an unnecessary burden on the petitioner, and creates inefficiencies at the Service.

Rule: The purpose of issuing an RFE is "to request missing initial or additional evidence from applicants or petitioners who filed for immigration benefits" (*AFM*, Chapter 10.5(a)(1)), and not to announce new practice or policy interpretations.

Proposed Solution: USCIS should provide notice to the public, through reliable channels, well in advance of implementing a new practice or policy. For example, the Service could publish updates or FAQs, draft policy memoranda, or outreach to O and P stakeholders in the affected industries.

15. USCIS Delays in processing NOIRs received from DOS consular offices unduly burden the performing arts industry.

Issue: Often when petitions are returned and recommended for revocation by consular offices at the State Department, USCIS Service Centers fail to process the NOIRs in a timely fashion.

Rule: Chapter 20.3(b)(1) of the *AFM* provides that, "In some cases the action to revoke the petition may be initiated by the consular office due to information acquired during their review of the petition or during an interview with the beneficiary. In that case the petition should be returned by the consular office with a memo explaining the reasons they believe the petition should be revoked." Chapter 20.3(b) details next steps to taken by USCIS with respect to the petition and the NOIR.

Proposed Solution: Chapter 20.3(b) of the *AFM* should be revised to state that NOIRs received from DOS must be adjudicated in a timely fashion. In addition, Chapter 20.3(b) should include language to the effect that, (i) if the beneficiary paid for Premium Processing at the time of their application, the Premium Processing "clock" will restart upon USCIS's receipt of DOS's recommendation to revoke the petition, and (ii) if the beneficiary did *not* pay for Premium Processing, the beneficiary may upgrade their application to Premium Processing at the time that the petition is returned to USCIS and recommended for revocation.

ISSUES REGARDING O-1B and P PETITIONS REGARDING ADJUDICATION of VALIDITY PERIODS

16. The Service approves I-129 petitions, but shortens their validity periods without issuing RFEs.

Issue: The Service routinely approves O-1B and P petitions in which it truncates the validity periods requested on the petition without issuing RFEs. Consequently, petitioners must file subsequent petitions to ensure that beneficiaries may complete their planned employment. This practice promotes the needless proliferation of petitions, leading to unnecessary delays and costs for the beneficiary, placing an undue burden on the petitioner, and creates inefficiencies at the Service.

Rule: O-1B and P petitions are "benefit requests," as defined at 8 CFR §1.2 ("Benefit request" means any application, petition, motion, appeal, or other request relating to an immigration or naturalization benefit"). 8 CFR §103.2, regarding the submission and adjudication of benefit requests, provides that, other than in cases involving classified information, "[i]f the decision [regarding a benefit request] will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered."

A decision to truncate a validity period is "adverse to the applicant or petitioner" and is presumably based "on derogatory information considered by the Service and of which the applicant or petitioner is unaware" (8 CFR §103.2). In this context, "derogatory information" can be taken to mean information that would have an unfavorable effect on the outcome of the O-1B or P petition. Under 8 CFR §103.2, the applicant or petitioner must be contacted and offered the opportunity to rebut the "derogatory information" and present information in his/her favor, before the validity period is truncated.

Proposed Solution: Chapter 33.4(e)(2) must be amended to indicate that when an adjudicator finds the evidence of employment insufficient to support approval for the full requested validity period, but sufficient to support part of the requested validity period, the Service should issue an RFE, but should only do so after directly contacting the petitioner by email or fax to ascertain whether the petitioner would prefer an RFE or a truncated validity period. Similar language must be included in Chapter 33.5 of the AFM with respect to validity periods for P petitions.

17. The Service issues RFEs or truncates validity periods where it perceives gaps in employment.

Issue: It is the nature of the performing arts industry that artists frequently come to the United States repeatedly but irregularly throughout their careers, to complete brief employment engagements. Consequently, over time, artists' U.S. employers frequently file numerous petitions that are virtually identical to facilitate ongoing but irregular employment as it is contracted. This situation leads to a massive proliferation of petitions, substantial burden and expense for the petitioner, and considerable burden for the Service. For this reason, it is in the best interest of beneficiaries, petitioners, and the Service to ensure that beneficiaries obtain the longest possible validity period appropriate to their circumstances. Historically, the Service routinely and unnecessarily truncated the validity period of any petition that did not show frequent and regular activity in the U.S. This problem was somewhat alleviated by USCIS Policy Memorandum,

dated May 10, 2010, *Clarifying Guidance on "O" Petition Validity Period*. Unfortunately, however, some officers have failed to understand the meaning of "incidental or related" activities, and continue to issue RFEs to petitioners with itineraries showing gaps in employment, despite detailed explanations of the beneficiary's related or incidental activities outside the U.S. Additionally, no clarification similar to the referenced May 10, 2010 Memorandum has been issued applicable to P petition validity periods.

Rule: Under INA §214(a)(2)(A) and §214(a)(2)(B), the validity period for an O-1B, O-2, or a P petition shall be for "such period as the Attorney General may specify in order to provide for," in the case of an O-1B or O-2 beneficiary, the "event (or events) for which the nonimmigrant is admitted," or, in the case of a P petition, for the "competition, event or performance for which the nonimmigrant is admitted." 8 CFR §214.2(O)(1)(i) also states that the O-1B or O-2 is for a beneficiary coming to the U.S. "to perform services relating to an event or events," and 8 CFR §214.2(p)(ii)(B) and –(C) state that the P validity period shall be for the period of time necessary to complete the performance or event for which the group is being admitted (in the case of a P-1 petition), or to complete the "event, activity, or performance" (in the case of a P-2 or P-3 petition).

With respect to O-1B and O-2 petitions, the Service has interpreted these statutory and regulatory provisions in its Policy Memorandum, posted May 10, 2010, *Clarifying Guidance on "O" Petition Validity Period* to the effect that when there exists a significant "gap" between events, it is generally erroneous for adjudicators to conclude that "a single petition was filed for separate events rather than a continuous event." The corresponding Revisions to the *AFM* at Chapter 33.4(e)(2) state that there "is no statutory or regulatory authority for the proposition that a gap of a certain of number of days in an itinerary automatically indicates a 'new event.'" Therefore, if "a group of activities on the itinerary are related in such a way that they could be considered an event, the petition should be approved for the requested validity period. For example, 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.' In another example, if there is a break in between events in the United States and the petitioner indicates the beneficiary will be returning abroad to engage in activities which are incidental and/or related to the work performed in the United States it does not necessarily interrupt the original 'event.' The burden is on the petitioner to demonstrate that the activities listed on the itinerary are related to the event despite gaps in which the beneficiary may travel abroad and return to the United States. Those gaps may include time in which the beneficiary attends seminars, vacations, travels between engagements, etc. Those gaps would not be considered to interrupt the original 'event,' and the full period of time requested may be granted as the gaps are incidental to the original 'event.'" It is critical that when the beneficiary's activities are incidental or related to the petitioner's primary activity in the U.S.—meaning, if the activity is substantially the same kind of employment as is in evidence before the gap—the validity period will not be challenged or shortened merely because some of these activities are outside of the U.S.

It follows that this interpretation should extend to P beneficiaries as well.

Proposed Solution: The Service should issue guidance stating that its Policy Memorandum of May 10, 2010, *Clarifying Guidance on "O" Petition Validity Period*, applies to P petitions, as well. Additionally, Chapters 33.4(e)(2) and 33.5(e) of the *AFM* should be revised to include language affirming that if the beneficiary's activities are "incidental or related" to the beneficiary's primary activity in the U.S., even if they occur outside the U.S., the gap in U.S. engagements required to undertake these activities does not constitute grounds for challenging or truncating a requested validity period. The revised *AFM* provisions should include specific examples of what it means for an activity to be "incidental or related to" the beneficiary's primary activity, e.g. a dancer's rehearsals within the U.S., his or her touring engagements outside the U.S., a musician recording material outside the U.S., or a stage actor giving a series of promotional interviews on cultural news programs within the U.S.

18. Itinerary Issues Arise Where Agent Performs Function of Employer for O-1, P-1 and P-3 Performing Artist Beneficiaries.

Issue: Often O-1 and P performing artist beneficiaries do not have traditional employers as their petitioners. Instead, these beneficiaries may have U.S. agents serving as petitioners, as permitted under the Regulations. The Service often challenges such petitions by demanding that the beneficiaries submit very

detailed itineraries for potential dates in the future that are not required by statute and that, at the time of the filing of the petition, could not possibly be known or yet established due to standard practices unique to the performing arts industry.

Rule: Under the Regulations, an O-1, P-1 or P-3 petition may be filed by a "United States agent," as well as by a U.S. employer (8 CFR §214.2(o)(2)(i); 8 CFR §214.2(p)(2)(i); and 8 CFR §214.2(p)(2)(iv)(E)(1)). In certain cases, a detailed itinerary must accompany these O-1, P-1, and P-3 petitions.

For O-1 petitions, the Regulations address the itinerary requirement in three separate sections:

> (i) All O-1 petitions must include, "[a]n explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities" (8 CFR §214.2(o)(2)(ii)(C));
> (ii) "A petition which requires the alien to work in more than one location must include an itinerary with the dates and locations of work" (8 CFR §214.2(o)(2)(iv)(A)); and
> (iii) "A person or company in business as an agent may file the petition involving multiple employers as the representative of both the employers and the beneficiary if the supporting documentation includes a complete itinerary of the event or events. The itinerary must specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues, or locations where the services will be performed. A contract between the employers and the beneficiary is required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation" (8 CFR §214.2(o)(2)(iv)(E)(2)).

In a non-precedential opinion issued by USCIS' Administrative Appeals Office (the "AAO"), the AAO addressed the complexity inherent in these provisions and concluded that in the context of the beneficiary's particular industry (modeling), where she is traditionally self-employed and where the petitioner is an agent performing the function of an employer, the petition need not include a detailed itinerary (*Matter of [name not provided]*, Vermont Service Center (May 18, 2011)). First, the AAO determined that the provisions at 8 CFR §214.2(o)(2)(ii) ("Evidence required to accompany [an O-1] petition") do not mandate submission of an itinerary in all circumstances, as indicated by the use of the non-mandatory word "any" at (8 CFR §214.2(o)(2)(iv)(A) (i.e., [all O-1 petitions must include] "[a]n explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of *any itinerary* for the events or activities") (emphasis added). Second, the AAO found that, though the fashion model beneficiary would provide short-term services in various locations, such changes did not constitute "work in more than one location" such that the petition must include the detailed itinerary required by 8 CFR §214.2(o)(2)(iv)(A)); the AAO determined that a "fashion model's job is inherently peripatetic or itinerant in nature, due to the unique demands of the fashion industry" (*Matter of [name not provided]* at 12, Vermont Service Center (May 18, 2011)). Finally, The Regulations at 8 CFR §214.2(o)(2)(iv)(E)(2) (requiring a "complete itinerary of events") did not apply to the fashion model's case, because the petitioner modeling agency was not a "person or company in business as an agent" since "the record indicate[d] that the petitioner [was] not an agent representing both the employers and the beneficiary" ((*Matter of [name not provided]* at 7, Vermont Service Center (May 18, 2011)). Rather, the record indicated that the petitioner modeling agency offered the "beneficiary's professional modeling services to clients in the fashion and media industries," and as such the modeling agency constituted "an agent performing the function of an employer" under 8 CFR §214.2(o)(2)(iv)(E)(1), whereby "the contractual agreement between the agent and the beneficiary which specifies the wage offered and the other terms and conditions of employment of the beneficiary" must be provided ((*Matter of [name not provided]* at 7, Vermont Service Center (May 18, 2011)). In sum, the beneficiary did not need to include a detailed itinerary with her petition due to the unique nature of the industry in which she worked and the fact that the petitioner was an agent performing the function of an employer (and not a person or company in business as an agent, as the Director of the Vermont Service Center had posited).

Regarding P-1 and P-3 petitions, the Regulations address the itinerary requirement in four (rather than three) separate sections:

(i) All P petitions must include, "an explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities" (8 CFR §214.2(p)(2)(ii)(C));
(ii) "A petition which requires the alien to work in more than one location (e.g., a tour) must include an itinerary with the dates and locations of the performances" (8 CFR §214.2(p)(2)(iv)(A));
(iii) "[Where an agent is performing the function of an employer] … [t]he agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested" (8 CFR §214.2(p)(2)(iv)(E)(1)); and
(iv) "A person or company in business as an agent may file the P petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employer(s) and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation" (8 CFR §214.2(p)(2)(iv)(E)(2)).

The Regulations state that where "an agent is performing the function of an employer," the P Regulations at 8 CFR §214.2(p)(2)(iv)(E)(1)) require an "itinerary of definite employment and information on any other services planned for the period of time requested" (*see* (iii), above). Arguably this should not be the case, because the AAO's logic in *Matter of [name not provided]*, Vermont Service Center (May 18, 2011)) should apply equally in the context of P petitions.

Proposed Solution: Chapters 33.4(e) and 33.5(e) of the *AFM* should include language reflecting the determination of the AAO regarding itinerary requirements. Specifically, these provisions should state that a detailed itinerary is *not* required in the case of a petition where: (i) the petitioner is performing the function of the employer, and (ii) the beneficiary is traditionally self-employed in a job that is inherently peripatetic or itinerant in nature due to the unique demands of the industry (such as the fashion industry or the performing arts industry). Officers should be trained to recognize when conditions (i) and (ii), above, both apply. RFE templates should be revised to exclude challenges of "speculative employment" when conditions (i) and (ii), above, both apply. Additionally, the following sentence should be *removed* from the P Regulations at 8 CFR §214.2(p)(2)(iv)(E)(1) (regarding agent performing function of employer): "The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested."

ISSUES REGARDING THE GENERAL CRITERIA OF O-1B AND P-1 PETITIONS

19. The Service requires petitioners to re-establish a beneficiary's qualifications for O-1B and P-1 petitions when prior petitions have been approved for the same beneficiary, which leads to unnecessary delays for the beneficiary, places an undue burden on the petitioner, and creates inefficiencies at the Service.

Issue: If a particular performing artist has previously been shown to have "extraordinary ability," or an ensemble "sustained international renown," by having the O-1B or P-1 petition approved, in most circumstances the artist or ensemble would not subsequently *lose* that ability or renown. Moreover, the employment contemplated by such an artist's new petition is often substantially the same as the employment presented in the prior petition. However, despite the obvious similarities in petitions filed by a single beneficiary, the Service does not appear to give *any* deference to a beneficiary's prior approval for a classification, which leads to unnecessary delays for the beneficiary, places an undue burden on the petitioner, and creates inefficiencies at the Service.

Rule: In a Policy Memorandum dated October 23, 2017, the Service rescinded earlier guidance on the issue of prior determinations (USCIS Policy Memorandum, *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status* (October 23, 2017)). In the earlier guidance the Service stated that a prior approval for classification should

be given deference, absent evidence that: (i) there was a material error regarding that prior approval; (ii) there has been a substantial change in circumstances; or (iii) new information might lead to the denial of a subsequent petition (Interoffice Memorandum from USCIS, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* (Apr. 23, 2004)).

Proposed Solution: The Service should reinstate its 2004 Interoffice Memorandum, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* (Apr. 23, 2004). Chapters 33.4 and 33.5 of the *AFM* should be revised, consistent with the 2004 Memorandum, to provide that, in cases where a petition includes (a) evidence of prior approval, and (b) evidence of employment substantially similar to that for which the beneficiary was previously approved, the Service must give deference to the prior approval. Specifically, Chapters 33.4 and 33.5 should be revised to state that the Service must review the current petition alongside the prior approved petition to determine (i) whether there was material error in the prior petition, there has been a substantial change in circumstances, or there is new, adversely impactful information available, and (ii) whether the employment presented in the instant petition is substantially similar to that which was presented in the prior petition. In the absence of material error, a substantial change, or such new information, and where the employment is substantially similar, the Service should approve the petition. If it does not approve the petition, the Service must articulate in a Request For Evidence (i) the error, change of circumstance, or new information, and/or (ii) how the new activities differ substantially from the prior ones, as well as (iii) what new evidence is required.

20. The Service applies an incorrect and unduly burdensome standard with its emphasis on "secondary evidence."

Issue: Prior to August 2013, the Service rarely required that evidence of extraordinary ability, sustained renown, or cultural uniqueness be accompanied by additional "secondary evidence" showing the reliability or relevance of the primary evidence. To illustrate: an O-1B petitioner might seek to satisfy the "past prong" of Evidence Type One (i.e., "that the alien has performed...services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications contracts, or endorsements" (8 CFR §214.2(o)(3)(iv)(B)(1)) by presenting a program showing that the beneficiary had headlined at a performance at Carnegie Hall. Prior to 2013, this exhibit was generally viewed by the Service as dispositive. Starting around August 2013, many officers at the Service began requiring "secondary evidence," whereby evidence, for example, of having performed at Carnegie Hall was not seen as sufficient unless Carnegie Hall's "distinguished reputation" were established by a "secondary" exhibit. While the Service's reason for this policy shift was clearly to better understand the veracity and context of the primary evidence, the new approach has virtually doubled the burden placed on petitioners and frequently violates the preponderance standard which presumes a *reasonable* "trier of fact"—one who knows, ought to know, or can infer the relevant information (in the above example, the distinguished reputation of Carnegie Hall).

Furthermore, petitioners are now presented with the challenge of determining, without any USCIS guidance, what constitutes a reliable method to prove abstract attributes like a "distinguished reputation." Certainly, the renown of Carnegie Hall is indisputable, but what document can *prove* its renown? The Service has been critical of "self-serving" secondary evidence, so the venue's own website cannot be trusted. Though one could infer from *Encyclopedia Britannica*'s entry on Carnegie Hall that it is a venue of international renown (e.g. Tchaikovsky served as a guest conductor), that entry does not specifically state that Carnegie Hall is a "venue of international renown" (as the Service now seems to require):

> "Carnegie Hall, historic concert hall at Seventh Avenue and 57th Street in New York City. Designed in a Neo-Italian Renaissance style by William B. Tuthill, the building opened in May 1891 and was eventually named for the industrialist Andrew Carnegie, its builder and original owner. Pyotr Ilyich Tchaikovsky served as guest conductor during the hall's opening week, and since then virtually every important American and visiting musician has performed there. The hall was the longtime home of the New York Philharmonic until that orchestra moved to Lincoln Center in the 1960s. In 1959 Carnegie Hall came close to being demolished, because the New York Philharmonic's planned move to Lincoln Center left the hall only marginally profitable. At this point the violinist Isaac Stern

> and the music patrons Jacob and Alice Kaplan mounted a successful campaign to save the old building, and in 1960 New York City bought the building, the money to be repaid to the city by the new nonprofit Carnegie Hall Corporation. Carnegie Hall thus continued to host concerts and other musical events, and in 1986 it underwent a major restoration." (*Encyclopedia Britannica*, 2014)

It is possible that an article in a major publication like *The New York Times* might suggest the venue's renown, or there might even be an article about the venue, but finding such an article may be more a matter of luck than diligence. And, even then, is it incumbent on the petitioner to prove the reliability of *The New York Times*? And if so, what publication could be found to reliably demonstrate another publication's reliability? This line of thinking raises the disturbing possibility that secondary evidence might be discounted for lack of tertiary evidence, which of course, begs the issue of quaternary, quinary, senary, septenary, and octonary evidence. We are reluctant to go with the Service down this path because with each step we massively increase the burden placed on petitioners and the Service, significantly raise the practical standards for O-1B, P-1, and P-3 eligibility, narrow the field of eligible O-1B, P-1, and P-3 artists, and, most importantly, drift farther and farther afield from the applicable *preponderance* standard of evidence.

Rule: Regarding "primary evidence" versus "secondary evidence," Chapter 11.1(f) of the *AFM* provides that, "[p]rimary evidence is evidence which on its face proves a fact. For example, the divorce certificate is primary evidence of a divorce. Secondary evidence is evidence which makes it *more likely* that the fact sought to be proven by the primary evidence is true, but cannot do so on its own face, without any external reference"(emphasis added). The *additional* evidence (showing the reliability or relevance of the original "primary" evidence) routinely required by the Service since August 2013, is evidence that "makes it more likely that the fact sought to be proven by the primary evidence is true, but cannot do so on its own face, without any external reference." Accordingly, this evidence, when sought, constitutes secondary evidence.

Chapter 11.1(c) of the *AFM* states "[t]he standard of proof applied in most administrative immigration proceedings is the 'preponderance of the evidence' standard. Thus, even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is 'probably true' or 'more likely than not,' the applicant or petitioner has satisfied the standard of proof." Requesting that "secondary evidence" be submitted to establish the reliability or relevance of the primary evidence where the veracity of the primary evidence is not *reasonably* in question raises the standard of review above the governing "preponderance" standard and creates undue burden on the petitioner, and inefficiencies at the Service.

Proposed Solution: Chapters 33.4(d) and 33.5(d) of the *AFM* must be revised to emphasize that where submitted documentary evidence *more likely than not* proves the truth of the primary fact, secondary evidence (e.g. to show the "distinguished reputation" of a venue) must not be sought. Chapters 33.4(d) and 33.5(d) must also be revised to provide that when secondary evidence is sought, the standard applied must be, per Chapter 11.1(f) of the *AFM*, that it "[be] it more likely that the fact sought by the primary evidence is true."

21. Regulations regarding agents as sponsors and petitioners are confusing.

Issue: The Regulations provide that O and P petitions may be filed by a "United States agent" representing both the employer and the beneficiary. The Service appears to interpret "employer" to mean "performance venue," while in reality a performing artist's employer is frequently not the venue at which the artist performs; rather, artists are often contracted to perform at venues through booking agents, production companies, or other producers, presenters or promoters. As such, the contractual relationship that the Service assumes dominates the industry does not in fact reflect standard practices within the industry. No relationship normally exists between the petitioning agent and the "employer," and when it does exist, it is typically created solely for the purpose of conforming to visa requirements. The result of this confusing guidance unnecessarily burdens the relationships between venues and petitioners.

Rule: The Regulations at 8 CFR §214.2(o)(2)(iv)(E) and 8 CFR §214.2(p)(2)(iv)(E) state that, "A United States agent may be: The actual employer of the beneficiary, the representative of the both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent …."

Proposed Solution: Chapters 33.4(c) and 33.5(d) of the *AFM* should be revised to clarify that the list of possible agency relationships at 8 CFR §214.2(o)(2)(iv)(E) and 8 CFR §214.2(p)(2)(iv)(E) is nonexclusive. Chapters 33.4(c) and 33.5(d) should also state that USCIS officers must not request documentation to the effect that the petitioner is authorized to "act in the place of" the employer. Finally, Chapters 33.4(c) and 33.5(d) of the *AFM* should underscore that the standard evidentiary requirements for O and P petitions (set forth in 8 CFR §214.2(o)(2)(ii) and 8 CFR §214.2(p)(2)(ii)) apply to agency situations that do not fall into any of the three possibilities listed at 8 CFR §214.2(o)(2)(iv)(E) and 8 CFR §214.2(p)(2)(iv)(E).

22. Narrow definitions of an artist's field create undue burdens.

Issue: The boundaries that divide the artistic disciplines are extremely porous, and contemporary performing artists' work frequently roams across genres. Where an artist's career crosses genre boundaries, they may be inappropriately disqualified from a visa status when an inappropriately strict interpretation of the regulations disqualifies their achievements in related professions. For example, an artist who has a long and illustrious career as a musician may evolve their stage show to the point where it comes to fall within the practices and institutions of modern dance. When this happens, the law must be flexible enough to recognize that evidence of a beneficiary's renown or extraordinary ability in one field should qualify as evidence toward establishing their eligibility for O or P status in a reasonably related field.

Rule: The evidentiary criteria for O and P visas are laid out at 8 CFR §214.2(o)(2) and 8 CFR §214.2(p)(2) and in Chapters 33.4 and 33.5 of the *AFM*. These sections do not refer to the relevance of experience in fields that are natural predecessors to or related to the new field.

Proposed Solution: Chapters 33.4(d) and 33.5(d) of the *AFM* should be revised to state that for purposes of O-1B and P-1 petitions, allowable evidence of the beneficiary's renown or extraordinary ability in one field should include evidence of the beneficiary's experience in a reasonably related field, toward establishing their eligibility for O or P status.

23. The Service frequently rejects evidence based on new media and technology.

Issue: The Service often rejects evidence types, submitted to satisfy the regulatory criteria, that reflect the evolution of new media and technology. Due to the emergence of new media platforms and technological advances, the manner in which the performing arts businesses are conducted has shifted dramatically. In the world of international cultural media, the relevance and impact of new media platforms and social networking have greatly reduced the relevance and quantity of traditional media, and these contemporary modes of communication have become leading indicators of commercial and critical success. For example, media platforms such as YouTube are now the preferred platform for content and advertising. These platforms did not exist when the O and P regulations were promulgated. Despite these fundamental changes in the media arena, the Service frequently issues RFEs and denials based on a rejection of evidence drawn from new media platforms. This outmoded practice places an undue burden on petitioners and creates inefficiencies at the Service. Examples of contemporary forms of relevant evidence include (without limitation):

- Statistics indicating the number of internet downloads and viewing, online commentary, and online ratings for productions and performances (e.g., Netflix, YouTube, Vimeo, Vine, etc.)
- Blog or website traffic popularity and commentary (e.g.. number of daily views, unique visitors, press impressions, and recognition by *other* social media websites).
- Social media popularity and presence (e.g. Facebook "likes" or "fans," YouTube "views" or "subscribers," Twitter "followers" or number of re-tweets, Instagram followers, etc.)

Rule: The evidentiary requirements for O-1B, P-1, and P-3 beneficiaries can be found at 8 CFR §214.2(o)(3)(iv), 8 CFR §214.2(p)(4)(iii)(B), and 8 CFR §214.2(p)(6)(ii). Chapter 11.1(c) of the *AFM* states, "[t]he standard of proof applied in most administrative immigration proceedings is the

'preponderance of the evidence' standard. Thus, even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is 'probably true' or 'more likely than not,' the applicant or petitioner has satisfied the standard of proof."

Proposed Solution: Chapters 33.4(c) and 33.5(c) of the *AFM* should be revised to clarify that, (i) adjudicators must consider contemporary forms of evidence, including new media platforms, when making a determination as to whether the beneficiary satisfies the regulatory criteria, and, (ii) as with all immigration filings, the standard of proof applied to such contemporary forms of evidence stipulates that where submitted documentary evidence *more likely than not* or *probably* proves the claim, the petitioner has met their burden of proof. It should be emphasized that as with all metrics employed to evaluate an artist's career, metrics should be evaluated relative to the artist's field of work: for example, an avant-garde composer may be able to demonstrate leadership in her field with YouTube viewership numbers that would not indicate any significant success for a mainstream pop act. While the burden of showing the relevance of new media evidence remains on the petitioner, the *AFM* should be further revised to emphasize that where new media evidence is submitted, adjudicators should be particularly mindful of the preponderance of evidence standard.

ISSUES REGARDING O-1B RULES AND STANDARDS

24. The Service's interpretation of the Standard of Comparable Evidence for O-1B "Extraordinary Ability" ("O-1B Non-Screen") petitions has rendered this alternative meaningless.

Issue: The eight categories of evidence admissible to establish eligibility for "O-1B Non-Screen" status are narrow and inapplicable to the careers of some otherwise deserving performing artists. 8 CFR §214.2(o)(3)(iv)(C) allows for the possibility of providing "comparable evidence," but to date the Service's interpretation of this "comparable evidence" provision is so lacking in clarity that it fails to offer a viable alternative to the eight enumerated evidence types, thwarting the intent of the "comparable evidence" clause. Although the Service issued Draft Policy Memorandum 602-0123, "Comparable Evidence Provision for O Nonimmigrant Visa Classifications," seeking to provide guidance on this matter, the Memorandum still does not succeed in making the "comparable evidence" alternative a viable one.

Rule: 8 CFR §214.2(o)(3)(iv)(C) states that, "If the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility."

Proposed Solution: The meaning of "comparable evidence" must be interpreted so as to provide artists with a meaningful alternative to establishing their eligibility. The Performing Artist Visa Working Group (PAVWG) has submitted Comments in response to Draft Policy Memorandum 602-0123 in which it urges the Service to engage further with the arts community before adopting the Draft Policy Memorandum as final and to publish the corresponding proposed revisions to the *Adjudicator's Field Manual* (the "*AFM"*) for public notice and comment *before* issuing them in final form. We support the PAVWG's position.

Additionally, a petitioner's inability to present evidence that falls into any of the eight enumerated types would seem to show that the criteria in paragraph (o)(3)(iv) do not readily apply to the beneficiary's occupation; petitioners should not be required to additionally indicate why the criteria do not apply to the occupation and/or why the evidence submitted is "comparable."

The only question before an adjudicating officer ought to be what criteria *should* be used to evaluate evidence presented as "comparable," and we propose that Chapter 33.4 of the *AFM* be amended to allow petitioners to submit any non-overlapping EB-1 or O-1A evidence type in lieu of one of the eight O-1B evidence types, and that this evidence should be considered "comparable" under 8 CFR §214.2(o)(3)(iv)(C).

ISSUES REGARDING P-1 RULES AND STANDARDS

25. The Service's application of the "international" aspect of being "internationally recognized" is highly inconsistent, and frequently unduly burdensome.

Issue: Regarding the criterion that P-1 applicants must be "internationally recognized in the discipline for a sustained and substantial period of time," (8 C.F.R. 214.2(p)(4)(iii)(B)(3)) it is unclear whether proving international recognition requires *any* showing of qualifying evidence from outside the beneficiary's home country, or if the criterion is more strict. The Service's adjudicators have been highly inconsistent in how they apply the concept of international renown, and this inconsistency creates unnecessary delays for the beneficiary, undue burden on the petitioner, and inefficiencies at the Service.

Rule: 8 CFR §214.2(p)(3) defines "internationally recognized" to mean "having a high level of achievement in a field evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that such achievement is renowned, leading, or well-known *in more than one country*" (emphasis added). Under this definition and 8 C.F.R. 214.2(p)(4)(iii)(B)(3), the petitioner must provide qualifying evidence from at least two countries, but there is no authority for the proposition that the Service may require more than one piece of qualifying evidence from outside the beneficiary's home country in applying the "internationally recognized" criterion.

Proposed Solution: Chapter 33.5(d) of the *AFM* should be revised to clarify that the requirement of being "internationally recognized" is satisfied if one or more exhibits of qualifying evidence originate from outside of the beneficiary's home country, and that there is no requirement that *all* evidence of renown be from outside the beneficiary's home country.

26. Ambiguity regarding whether supporting performing artists may be listed on a P-1S petition creates a situation where, in view of the "75% Rule," it becomes impossible for some ensembles to perform in the U.S.

Issue: There is ambiguity around whether supporting performing artists joining an ensemble, orchestra, or other entertainment group may be listed on a P-1S petition. Such confusion causes problems because these artists also often cannot be included on the principal P-1 petition due to the so-called "75% Rule" (requiring that 75% of the members of an entertainment group must have been performing entertainment services for the group for a minimum of 1 year (INA §214(c)(4)(B)(i)(II); INA §214(c)(4)(B)(iii)(I); 8 CFR §214.2(p)(4)(i)(B)).

The issue arises because ensembles frequently enlist additional members to allow for the live performance of arrangements that the core group cannot perform without assistance. For example, if Pink Floyd were touring the world with a 65 piece orchestra (for less than a year) and wished to bring the tour to the U.S., the members of the orchestra might not be permitted on the P-1S petition due to the ambiguity around the P-1S rules; they also would not be allowed on the principal P-1 because 75% of the members of the orchestra would not have been with Pink Floyd for at least a year. As such, there would be no visa accessible to the members of the supporting orchestra, aside from requesting a waiver of the 75% Rule, and if that waiver were denied, the tour would have to be cancelled.

Rule: An essential support alien may be granted a P-1S classification "based on a support relationship with … a P-1 entertainment group" (8 CFR §214.2(p)(4)(iv)(A)). The *AFM* states that the term "group" (for purposes of the P-1 entertainment group classification) "relates only to *performing* P-1 aliens." As such, it is clear that the P-1 petition may not include individuals who assist in the presentation who are not on the stage (e.g., lighting or sound technicians), as these individuals more properly belong on a P-1S. However, this does not conversely mean that all performers *must* be included on the P-1 rather on the P-1S, and there is no authority in the INA or the Code of Federal Regulations that prohibits including *supporting performing artists* on a P-1S. Yet many officers take the position that *supporting performers* may not be included on the P-1S petition. The issues that arise out of this incorrect application of the P-1S classification are compounded by the 75% Rule. Under the 75% Rule, for a member of a group to qualify for P-1 classification, 75% of the members of the group must have been performing entertainment services for the group for a minimum of 1 year (INA §214(c)(4)(B)(i)(II); INA §214(c)(4)(B)(iii)(I); 8 CFR §214.2(p)(4)(i)(B)). Though this rule is waivable (INA §214(c)(4)(B)(iii)(II); 8 CFR §214.2(p)(4)((iii)(C)(3)), the Service frequently declines to do so.

Proposed Solution: Chapters 33.2 and 33.5 of the *AFM* should be amended to affirm that supporting performers who are not members of the core ensemble can be listed on P-1S applications.

ISSUES REGARDING P-3 RULES AND STANDARDS

27. The Service issues RFEs that demand an unreasonably high standard of evidence in regards to the P-3 requirement (C) (*see* 8 CFR §214.2(p)(ii)(C), i.e. that a petition include "evidence that all of the performances or presentations will be culturally unique events."

Issue: The Service's enforcement of the P-3 requirement that a petition include "evidence that all of the performances or presentations will be culturally unique events" is frequently unduly burdensome because documentation regarding every event may not be available, and because the fact that all events will be culturally unique more likely than not can be inferred from the evidence supplied to satisfy requirements (A) and (B). For example, if an ensemble of Tuvan throat singers is seeking P-3 status to tour in the U.S., and the evidence submitted to satisfy requirements (A) and (B) sufficiently establishes that the individuals are, in fact, singers who specialize in the unique vocal traditional of Tuvan, it is more likely than not that Tuvan throat singing is the activity that the beneficiaries will undertake while performing under contract at U.S. venues. Therefore, it is unduly burdensome of the Service to demand evidence from each venue to establish that the beneficiaries have been engaged to present this particular art, where it is their life's work to present such art.

Rule: In relevant part, INA 101(a)(15)(P)(iii) defines the P-3 classification as being that where an alien, "(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and (II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique." The Regulations at 8 CFR §214.2(p)(ii) require, more specifically:

> (A) Affidavits, testimonials, or letters from recognized experts attesting to the authenticity of the alien's or the group's skills in performing, presenting, coaching, or teaching the unique or traditional art form and giving the credentials of the expert, including the basis of his or her knowledge of the alien's or group's skill, or
>
> (B) Documentation that the performance of the alien or group is culturally unique, as evidenced by reviews in newspapers, journals, or other published materials; and
>
> (C) Evidence that all of the performances or presentations will be culturally unique events.

Under the Statute, a P-3 beneficiary must be part of "a commercial or noncommercial program that is culturally unique," but it should be noted that there is no statutory mandate that petitioners provide evidence that *all* of their performances be culturally unique events; this apparent requirement is only outlined at 8 CFR §214.2(p)(ii).

Proposed Solution: Chapter 33.7 of the *AFM* should be amended to provide that requirement (C) has been met when a preponderance of the evidence (supplied to satisfy requirements (A) and (B)) creates the reasonable inference that all of the performances or presentations will be culturally unique events.

ISSUES REGARDING PETITIONS FOR SUPPORT PERSONNEL AND SPOUSES

28. The Service frequently applies an unduly high standard in evaluating an O-2, P-1S, P-2S, or P-3S beneficiary's "experience" with the principal beneficiary.

Issue: In creating the O-2, P-1S, P-2S and P-3S classifications, Congress recognized that internationally touring performers frequently rely on the assistance of specific individuals to perform tasks necessary for the completion of the O-1B, P-1, P-2, or P-3 principal beneficiaries' activities. Unfortunately, the Service frequently construes the requirement that the O and P support personnel have "experience" too narrowly, at odds with the Statute, and without an understanding of industry practices. It is entirely possible that a performer might engage one or more foreign performers or technical personnel very shortly before a U.S.

engagement, and those supporting individuals' "experience" might be no more than a single rehearsal. Moreover, that rehearsal might not occur until after the petition is filed. Nevertheless, upon arrival in the U.S. that individual would possess "experience" with the principal O or P holder that no U.S. musicians or technician could replace.

Rule: Under INA §101(a)(15)(O)(ii)(III)(a), an O-2 beneficiary must have "critical skills and experience" with an O-1 beneficiary. There is no other statutory standard with respect to O-2 beneficiaries beyond this provision, and so it seems apparent that special emphasis was placed by the statute on the "critical" nature of the "skills," but not on the nature of the experience. The corresponding statutory provisions for the P-1S, P-2S, and P-3S beneficiaries require that the beneficiary be an "integral part of the group" (INA §101(a)(15)(P)(ii)(I)), which is comparable to the O-2 statutory criteria. The Statute also reiterates at INA §214(c)(4)(B)(i)(I)-(II) that the P support personnel beneficiaries must be an "integral and essential" part of the group, though *only* the performers must have had a prior relationship to the group. There is no authority whatsoever, either in the Statute or the Regulations, for the proposition that the essential personnel must have had prior experience providing that very support to the group. In fact, the Statute makes it clear that this type of prior experience is *not* a requirement for O-2, P-1S, P-2S, and P-3S beneficiaries.

Proposed Solution: Chapters 33.4 and 33.5 of the *AFM* should be revised to state that "critical skills and experience" (in the case of O-2 beneficiaries) and "experience in providing such support" (in the case of the P-1S, P-2S, and P-3S beneficiaries) can be met if the individual has or will by the time of the U.S. engagement have "any skills and/or experience not readily offered by or available from a U.S worker."

29. The foreign essential support personnel of an artist who is a U.S. citizen or lawful permanent resident are unapprovable for O-2 status, which creates an unacceptable barrier to culture and commerce.

Issue: The Service issued a Policy Memo, dated December 31, 2011, clarifying that the P-1B classification should not be limited to artists coming to the U.S. to join only *foreign*-based entertainment groups, but rather should also include applicants coming to join U.S.-based internationally recognized entertainment groups (PM-602-0053: *Clarifying Guidance on Definition of Internationally Recognized for the P-1*). However, there is no corresponding policy at the Service with respect to the foreign essential support personnel of U.S. solo artists. As a result, an unnecessarily impossible situation that serves no policy purpose arises when a U.S. solo artist—even one in residence abroad—wishes to tour in the U.S. with his or her foreign supporting performers or crew. Because an O-2 petition cannot be filed without an O-1B principal petition, and O-1B petitions cannot be filed for non-aliens, there are no visa classifications available to those supporting artists or crew members. For example, if the world renowned cellist Yo Yo Ma creates a collaborative work with a remarkably skilled foreign violinist who is not yet eligible for O-1B status, and whose performances are not "culturally unique," Mr. Ma would not be able to perform that work in the U.S.

Rule: Under INA §101(a)(15)(O), beneficiaries are defined as *aliens* who meet certain criteria. Under INA §101(a)(3), the term "alien" means "any person not a citizen or national of the United States." Because O-2 beneficiaries depend on O-1B beneficiaries for their classifications, a U.S. citizen cannot tour in the U.S. with his or her foreign supporting musicians or crew, because they would be unable to get visas.

Proposed Solution: The Service should issue a policy memo, following the logic of its 2011 Policy Memo on the P-1B classification, to affirm that a U.S. individual *may* file an I-129 establishing his or her qualifications for O-1B status, with an accompanying affidavit stating that no visa is sought for such individual and that the sole purpose of the I-129 filing is to establish O-2 eligibility for his or her foreign support personnel. If the O-1B petition is approved, O-2 petitions may also be approved.

30. U.S. law does not offer work authorization to the spouses of O and P artists.

Issue: The United States is in a fierce global competition for the world's best artists, entertainers, and athletes. Unfortunately, sponsoring organizations are finding it more difficult to recruit top talent due to the fact that spouses of O and P nonimmigrants are prohibited from working in the United States. A study of eleven major countries with which the United States competes for talent found that *all eleven grant work authorization to spouses of foreign athletes, entertainers, and artists.*[8] U.S. petitioners report that if they cannot assure work authorization for spouses of foreign athletes, entertainers, and artists, top talent who are married will be less likely to come to the U.S.

Rule: 8 CFR §274a.12(a) lists the "Classes of aliens authorized to accept employment" under the INA, including O-1 and accompanying O-2 beneficiaries at 8 CFR §274a.12(a)(13)), and P-1, P-2, and P-3 beneficiaries (8 CFR §274a.12(a)(14)). O-3 and P-4 beneficiaries -- the spouses of the O and P nonimmigrants -- are not included at 8 CFR §274a.12(a), and as such are prohibited from accepting employment.

Proposed Solution: USCIS should amend 8 CFR §274a.12(a) by adding paragraph (21) for the spouse of an O nonimmigrant, and paragraph (22) for the spouse of a P nonimmigrant. This would provide such spouses the same opportunity to work that is currently afforded to spouses of E and L workers.

[8] The eleven countries are Canada, Mexico, United Kingdom, France, Germany, Spain, Netherlands, Italy, Australia, Brazil, and Argentina.

(II) Issues regarding U.S. Department of State

Introduction: The following recommendations seek to reduce inefficiencies and errors at U.S. Department of State ("DOS" or the "State Department"), minimize the burden upon and waste of both beneficiary and government resources, and improve the ability of the State Department to produce consistent and accurate decisions, all while strengthening DOS's power to protect U.S. labor and security interests. Below, we have identified seventeen pervasive issues in the adjudication of O-1B and P applications. We explain each issue, identify the applicable rule of law, and suggest a solution to the problem. Then, in Appendix A, we provide our recommended revisions to the relevant manual, handbook, or other authority, as referenced in our proposed solutions. In Appendix B, we provide cases examples of each identified issue.

1. There is no way for an artist to determine in advance of travel that the activities scheduled in the U.S. may appropriately be undertaken without an employment-based visa, and rely on that determination upon arrival.

Issue: An individual may seek to enter the U.S. on a B-1 or B-2 visa, under the limited circumstances described in the *Foreign Affairs Manual* (the "FAM") at 9 FAM 402.2-4(A)(7) (the "amateur exception"), 9 FAM 402.2-5(B) (the "showcase exception"), 9 FAM 402.2-5(F)(2) (the "academic exception"), 9 FAM 402.2-5(G)(1) (the "cultural exception"), 9 FAM 402.2-5(G)(2) (the "international competition exception"), or 9 FAM 402.2-5(G)(4) (the "recording exception"). All of these provisions outline exceptions to the general requirement that an entertainer or artist enter the U.S. with an employment-based visa as described in 9 FAM 402.2-5(G). However, no procedure exists whereby the individual can (a) seek the government's review of the planned activities, (b) obtain a determination regarding the applicability of such exception prior to travel, and (c) rely on that determination upon arrival to the U.S. For example, if a musician seeks B-1 status to enter the U.S. to perform at an event sponsored by her government, as per 9 FAM 402.2-5(G)(1) ("Participants in Cultural Programs"), and the consulate determines that B-1 status is in fact appropriate, DOS does not have a reliable system for communicating its determination to Customs and Border Protection ("CBP"). In such a case, when the artist arrives in the U.S., she is subject to a second determination, without receiving the benefit of the prior favorable DOS determination.

Rule: Pursuant to the statutory and regulatory authority at INA §101(a)(15)(B), INA §212(q), and 22 CFR §41.31, the provisions at 9 FAM 402.2-4(A)(7), 9 FAM 402.2-5(B), 9 FAM 402.2-5(F)(2), 9 FAM 402.2-5(G)(1), 9 FAM 402.2-5(G)(2), and 9 FAM 402.2-5(G)(4) outline six exceptions whereby an entertainer or artist may enter the U.S. to undertake professional-like activities without an O or P visa, but instead with a B-1 or B-2 visa.

DOS may communicate any decisions it makes to CBP by way of annotating visas through the Consolidated Consular Database (the "CCD") (*see* 9 FAM 403.9-5(A)(a)). (DOS officers often provide visa annotations by writing on the foil sections of the issued visas. However, it is our understanding that DOS is transitioning from requiring officers to annotate visa foils to requiring officers to input annotations directly into the CCD.)

9 FAM 403.9-5(A) gives additional guidance on the use of annotations:

> … Annotations also provide CA and others (through the Consular Consolidated Database (CCD)) with information, both current and historical, and may be the only manner in which certain information is collected in an electronic format. Understanding when to annotate and when not to annotate a visa, and what information should or must be included, is important in making annotations effective.
>
> b. A visa annotation is a simple and useful method to convey information about a visa applicant and the circumstances under which a visa was issued, explain the circumstances or assumptions

on which the visa decision was based, or clarify key factors which were considered at the time of adjudication. The information contained in a visa annotation should help facilitate an immigration inspector's decision on whether or not to admit the visa holder to the United States, and, if to admit, for how long.

One of four principal instances in which annotations *must* be provided, under 9 FAM 403.9-5(A)(d)(2), is with respect to "B-1 visas issued for certain employee-like purposes." The six "professional-like" exceptions whereby an entertainer or artist may enter the U.S. with a B-1 or B-2 visa (instead of with an O or a P visa) are arguably "certain employee-like purposes."

Proposed Solution: 9 FAM 403.9-5(A)(d)(2) should be revised to include B-2 visas. 9 FAM 403.9-5 should be further amended to require that if an entertainer or performing artists seeks and successfully receives B-1 or B-2 status in order to engage in activities that fall within one or more of the exceptions to the rule at 9 FAM 402.2-5(G), as described in 9 FAM 402.2-4(A)(7), 9 FAM 402.2-5(B), 9 FAM 404.2-5(F)(2), 9 FAM 402.2-5(G)(1), 9 FAM 402.2-5(G)(2), or 9 FAM 402.2-5(G)(4), the consular office must enter into CCD an annotation indicating, (a) the exception under which the visa is issued, with reference to the relevant FAM section, and (b) the U.S. event or organizations to which the excepted activities apply. For example:

9 FAM 402.2-4(A)(7) for NYC St. Patrick's Parade only
9 FAM 402.2-5(B) for SXSW only
9 FAM 404.2-5(F)(2) for Yale University only
9 FAM 402.2-5(G)(1) for NL consulate event only
9 FAM 402.2-5(G)(2) for Academy Awards only
9 FAM 402.2-5(G)(4) Fort Apache Studios only

(The term "only" in the above examples does not imply that, e.g., *only* a SXSW event would qualify for the showcase exception, but rather that the specific artist or group entering the U.S. is doing so in this instance *only* to perform at SXSW.)

CPB shall treat individuals seeking admission to the U.S. and holding B-1 or B-2 visas that are annotated in the CCD in this manner with a degree of deference, shall not readjudicate whether the U.S. event or or organization falls within the exception, and shall base their determination of admissibility on whether it is more likely than not that the beneficiary's activities in the U.S. on the whole fall within the limits of B-1 or B-2 status.

2. Consulates' staffs require that O-1B, O-2, and P applicants produce a copy of their full I-129 petition at interviews.

Issue: Numerous consulates routinely demand that O-1B, O-2, and P applicants produce a copy of their complete petition at interviews, which is contrary to the stated FAM rules and unnecessarily burdensome to the applicant.

Rule: Pursuant to the authority of INA §214(c), 22 CFR §41.55, 8 CFR §214.2, and 22 CFR §41.56, 9 FAM 402.13-5(B) and 9 FAM 402.14-6(E) state that, "You should not require an applicant seeking [an O or P] visa to present an approved Form I-129, Petition for a Nonimmigrant Worker, or evidence that the [O or P] petition has been approved (a Form I-797, Notice of Action). All petition approvals must be verified either through the PIMS [Petition Information Management Service] or through the Person Centric Query Service (PCQS), in the CCD under the Cross Applications tab. Once you have verified approval through PIMS or PCQS, consider this as prima facie evidence that the requirements for [O or P] classification, which are examined in the petition process, have been met."

There is, however, a State Department Policy Memo, dated July 19, 2005 (Subject: *Visa Applications from Artists and Entertainers*), that seemingly contradicts the FAM provisions, stating that each member of a performing group must "have a copy of the approved I-129 petition in order to apply, or evidence (such as an I-797) of notification from DHS or the Department that such a petition has been approved (see 9 FAM 41.56 N10.2)."

Proposed Solution: Consular staff should have access to the complete I-129 and supporting documents through the Petitioner Information Management Service (PIMS) or through the Person Centric Query Service (PCQS), and applicants should not be required to produce these documents at their interviews. The statement to the contrary in the July 19, 2005 Policy Memo (cited under "Rule") has been superseded by the FAM update, following the introduction of PIMS and PCQS. Consular staff should be trained regarding 9 FAM 402.13-5(B) and 9 FAM 402.14-6(E). Additionally, the July 19, 2005 Policy Memo should be re-issued without the contradicting statement, or 9 FAM 402.13-5(B) and 9 FAM 402.14-6(E) should be amended to explicitly note that this section of the Policy Memo has been superseded. Finally, DOS and the Service should work to ensure that PIMS and PCQS are stable so that petitions can be verified without delays caused by technological problems.

3. Consulates' staffs and websites require that O-1B, O-2, and P applicants produce a copy of their I-797.

Issue: Numerous consulates routinely demand that O-1B, O-2, and P applicants produce a copy of their I-797 approval notice at interviews, which is contrary to the stated FAM rules and unnecessarily burdensome to the applicant.

Rule: Pursuant to the authority of INA §214(c), 22 CFR §41.55, 8 CFR §214.2, and 22 CFR §41.56, 9 FAM 402.13-5(B) and 9 FAM 402.14-6(E) state that, "You should not require an applicant seeking [an O or P] visa to present an approved Form I-129, Petition for a Nonimmigrant Worker, or evidence that the [O or P] petition has been approved (a Form I-797, Notice of Action). All petition approvals must be verified either through the PIMS [Petition Information Management Service] or through the Person Centric Query Service (PCQS), in the CCD under the Cross Applications tab. Once you have verified approval through PIMS or PCQS, consider this as prima facie evidence that the requirements for [O or P] classification, which are examined in the petition process, have been met."

There is, however, a State Department Policy Memo, dated July 19, 2005 (Subject: *Visa Applications from Artists and Entertainers*), that seemingly contradicts the FAM provisions, stating that each member of a performing group must "have a copy of the approved I-129 petition in order to apply, or evidence (such as an I-797) of notification from DHS or the Department that such a petition has been approved (see 9 FAM 41.56 N10.2)."

Proposed Solution: Consular staff should have access to the I-797 (as well as to the complete I-129 and supporting documents) through Petitioner Information Management Service (PIMS) or through the Person Centric Query Service (PCQS), and applicants should not be required to produce these documents at their interviews. The statement to the contrary in the July 19, 2005 Policy Memo has been superseded by the FAM update following the introduction of PIMS and PCQS. Consular staff should be trained regarding 9 FAM 402.13-5(B) and 9 FAM 402.14-6(E).

Additionally, the July 19, 2005 Policy Memo should be re-issued without the contradicting statement, or 9 FAM 402.13-5(B) and 9 FAM 402.14-6(E) should be amended to explicitly note that this section of the Policy Memo has been superseded. Finally, DOS and the Service should work to ensure that PIMS and PCQS are stable so that petitions can be verified without delays caused by technological problems.

4. Some consulates' staffs inappropriately re-adjudicate O-1B, O-2, and P applicants' petitions.

Issue: There has been a pattern of consular staff appearing to re-adjudicate petitions and, in some cases, unnecessarily recommending revocation.

Rule: Pursuant to the authority of INA §214(c), 22 CFR §41.55, 8 CFR §214.2, and 22 CFR §41.56, 9 FAM 402.13-5(B) and 9 FAM 402.14-6(E) provide that:

> a. Other than instances involving obvious errors, consular officers do not have the authority to question the approval of [O or P] petitions without specific evidence, unavailable to DHS at the time of petition approval, that the beneficiary may not be entitled to status. The large majority of

approved [O and P] petitions are valid, and involve bona fide establishments, relationships, and individual qualifications that conform to the DHS regulations in effect at the time the [O or P] petition was filed.
b. On the other hand, the approval of a petition by DHS does not relieve the alien of the burden of establishing visa eligibility in the course of which questions may arise as to his or her eligibility to [O or P] classification. If you develop information during the visa interview (e.g., evidence which was not available to DHS) that gives you reason to believe that the beneficiary may not be entitled to status, you may request any additional evidence that bears a reasonable relationship to this issue. *Disagreement with DHS interpretation of the law or the facts, however, is not sufficient reason to ask DHS to reconsider its approval of the petition"* [italics added].

Additionally, the provisions of 9 FAM 402.13-5(G) and 9 FAM 402.14-6(F) instruct consular officers that they must, "[...] refer cases to USCIS for reconsideration sparingly, to avoid inconveniencing bona fide petitioners and beneficiaries and causing duplication of effort by USCIS. You must have specific evidence of a requirement for automatic revocation, material misrepresentation in the petition process, lack of qualification on the part of the beneficiary, or of previously unknown material facts, which might alter USCIS's finding before requesting review of a Form I-129, Petition for a Nonimmigrant Worker, approval."

Proposed Solution: 9 FAM 402.13-5(G) and 9 FAM 402.14-6(F) should be revised to emphasize and clarify the limits on consular officers' authority, by stating that:
• a non-binding consultory opinion by an officer of the consulate's Educational and Cultural Affairs must be obtained before the recommendation for revocation is reviewed by the Chief of the Consular Section;
• the authorization of the Chief of the Consular Section is required before an O-1B, O-2, or P visa petition can be recommended for revocation; and
• a notification of the notice of intent to revoke must be forwarded not only to the applicable USCIS Service Center, but also to the DOS Visa Office and the Office of the CIS Ombudsman. The DOS Visa Office and the CIS Ombudsman's Office should be charged with monitoring consular revocation requests and positioned to respond if trends indicate abnormalities in adjudication.

5. Consular procedures for receiving payments of fees are not sufficiently flexible.

Issue: Many consulates demand that fees be paid by credit card or bank wire from a local bank, which creates undue hardship for touring artists (who often apply for visas as third country nationals) or managers abroad. The Foreign Affairs Handbook ("FAH") does have specific procedures for collecting fees via credit card, but this section of the FAH is not accessible to the public.

Rule: It is our understanding from 9 FAM 504.2-6(B) that the Foreign Affairs Handbook ("FAH") at 7 FAH-1 H-700 has specific procedures for collecting fees, but this section of the FAH is not accessible to the public.

Proposed Solution: 7 FAH-1 H-700 should include a provision requiring that all consular posts establish procedures, or ensure that their contracted third-party service providers establish procedures, to accept consular fees paid through:

- international credit cards,
- international bank wires, or
- cash.

6. Consulates have created unduly burdensome procedures for resolving cases that have been 221(g)'ed.

Issue: Some consulates have implemented a system to track documents submitted to resolve 221(g)'ed cases, under which the consulate must "unlock" the beneficiary's case, allowing the beneficiary to then

download a "courier in certificate." In practice, the "unlocking" process frequently fails to occur in a timely fashion, creating unnecessary delays in resolving a case that has been refused under 221(g).

Rule: Pursuant to the authority of INA §221(g) and 22 CFR §41.121, 9 FAM 403.10-4(A) addresses reapplication procedures for visa applications following a refusal, and the reactivation of a case refused under INA §221(g). The provisions at 9 FAM 403.10-4(A)(b)(1) (outlining suggestions for posts to manage workload) specifically state that, "Using 221(g) to avoid decisions or hold open reapplication invites abuse." 9 FAM 403.10-4(B)(1)(a) (on overcoming post refusals) states that, "When the applicant returns with the document, you should overcome the previous refusal, allowing the case to be adjudicated." Finally, 9 FAM 402.2-2(F) states that, "The policy of the U.S. Government is to facilitate and promote international travel and free movement of people of all nationalities to the United States for the cultural and social value to the world and for economic purposes." All three of these FAM provisions make it clear that consulates should follow a policy of prompt reactivation and adjudication of a case refused under INA §221(g).

Proposed Solution: 9 FAM 403.10-4(A)(b) (U) should be revised to require that all consular posts establish simplified procedures, or ensure that their contracted third-party service providers establish simplified procedures, to allow for the prompt reactivation and adjudication of a case refused under INA §221(g).

7. Consulates' staffs regularly refuse to review documentation (including waiver applications) submitted by O-1B, O-2, and P applicants before issuing a 214(b) refusal.

Issue: O-1B, O-2, and P applicants, particularly those in Africa, Asia, and South America, frequently take great pains to prepare documentation to prove sufficient ties to their home country. Far too often, consular staffs fail to make full use of this information (including waiver applications) before issuing a 214(b) refusal.

Rule: Pursuant to the authority of INA §214(b) and 22 CFR §41.121, the provisions of 9 FAM 403.10-4 (U) on overcoming or waiving refusals state that, "INA §291 places the burden of proof upon the applicant to establish eligibility to receive a visa. However, the applicant is entitled to have full consideration given to any evidence presented to overcome a presumption or finding of ineligibility. It is the policy of the U.S. Government to give the applicant every reasonable opportunity to establish eligibility to receive a visa. This policy is the basis for the review of refusals at consular offices and by DOS. It is in keeping with the spirit of American justice and fairness. With regard to cases involving classified information, the cooperation accorded the applicant must, of course, be consistent with security considerations, within the reasonable, non-arbitrary, exercise of discretion in the subjective judgments required under INA §214(b) and §221(g)." Moreover, DOS's Bureau of Educational and Cultural Affairs (the "ECA") can play a role in assisting the reviewing consular officers, as ECA officers may have more interaction with the local arts community than the consular officers do. As mandated by the Mutual Educational and Cultural Exchange Act of 1961, the ECA was created to "increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange" and "to promote international cooperation for educational and cultural advancement."

Proposed Solution: 9 FAM 403.10-4 (U) should be revised to require that documentation submitted by an O-1B or P applicant pursuant to overcoming the 214(b) presumption be reviewed by a consular supervisor prior to issuing a denial, and the denial must be authorized by that consular supervisor. 9 FAM 402.13-10(B) and 9 FAM 402.14-10(D) should be revised to indicate that a recommendation from an Educational and Cultural Affairs officer at the consulate is strong evidence that the 214(b) presumption has been overcome.

8. Consulates' staffs inappropriately disregard some types of evidence submitted by O-1B, O-2 and P applicants to overcome the 214(b) presumption.

Issue: Under INA §214(b) there is a presumption that O-1B, O-2 and P applicants have "immigrant intent" -- i.e. that they intend to remain permanently in the U.S. The burden is on these applicants to overcome this

presumption, generally by showing strong ties to their home country (including a residence). Because O-1B, O-2 and P applicants frequently travel extensively, spending considerable amounts of time traveling outside their country of residence, they may have difficulty proving these strong home country ties. As such they may be disproportionately vulnerable to a 214(b) refusal. Even so, consulates often inappropriately disregard evidence submitted by these O-1B, O-2 and P applicants to overcome the 214(b) presumption, where that evidence does not show that the applicant will return to his or her home country but *does* clearly indicate that the O-1B, O-2 or P applicant will depart the U.S.

Rule: The statutory presumption that all O-1B, O-2 and P applicants intend to remain permanently in the U.S. (unless they show otherwise) arises from INA §214(b), which states in relevant part that, "Every alien (other than a nonimmigrant described in subparagraph (H)(i) or (L) of Section 101(a)(15)) shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 101(a)(15)."

That O-1B, O-2 and P applicants must provide evidence of a *temporary* intent to remain in the U.S. is also implicit in 8 CFR §214.2(o)(13) and 8 CFR §214.2(p)(15), where it is stated that the applicant may "come to the United States for a temporary period as a[n] [O][P] nonimmigrant and depart voluntarily at the end of his or her authorized stay …"

Evidence of the requisite "temporary" intent, rebutting the "immigrant presumption," should logically include evidence that a beneficiary is obligated to depart the U.S. pursuant to contracts for subsequent employment outside the U.S., even when the applicant is not immediately returning to his or her home country. Documentation submitted by O-1B, O-2 and P applicants to this effect should be considered as evidence that rebutts a 214(b) presumption.

Proposed Solution: 9 FAM 402.13-10(B), 9 FAM 402.14-10(C), 9 FAM 403.10-3(D)(1)(U), and 9 FAM 401.10-4(A)(U) should be revised to indicate that where an application for an O-1B, O-2, or P visa is accompanied by evidence of contracted work outside the U.S. subsequent to the visa's validity period, any 214(b) refusal of the application must be authorized by the Chief of the Consular Section..

9. Some consulates refuse to schedule emergency interviews except in "life or death" situations.

Issue: Most consulates will allow touring artists who can demonstrate the need to schedule emergency interviews prior to the soonest appointment available through normal procedure. Unfortunately, several posts enforce a policy that limits emergency interviews to "life or death" situations.

Rule: Pursuant to authority under INA§222(e), INA §222(h), 22 CFR §41.102, and 22 CFR §41.103, 9 FAM 403.3-2 (U) on scheduling appointments states that, "Per 7 FAH-1 H-263.5, CA encourages all posts to use an NIV appointment system. An effective appointment system must be flexible and must accommodate the largest number of applicants consistent with effective interviewing and security processing. An appointment system must also provide for expedited handling for legitimate business travelers and students, possibly by setting aside dedicated blocks of time for those categories." Moreover, a State Department Policy Memo, dated July 19, 2005 (Subject: *Visa Applications from Artists and Entertainers*) provides that, "Consular officers should also be sensitive to the needs of performers whose schedules may be disrupted by unforeseen events, and whenever possible, accommodate these groups through posts normal procedures for expediting visa applications. Consular officers should be especially alert to changes in a program or a group compelled by illness, injury or other emergencies."

Proposed Solution: Contracted public performances should be considered grounds for approving a request for an expedited consular interview. 9 FAM 403.3-2 (U) should be revised to make it clear that O-1B, O-2, and P applicants traveling to complete contracted public performances qualify as "legitimate business travelers" who should be granted expedited emergency consular interviews as necessary. Additionally, 9 FAM 403 should be amended to incorporate the language of the July 19, 2005 Memo regarding the need for consular officers to be sensitive and accommodating to performers whose schedules are disrupted by unforeseen events and alert to changes in a program or a group compelled by an emergency. Finally, the term "emergency" should be defined in 9 FAM 403 to include contracted public performances.

10. 221(g) refusals caused by delays at Service Centers and KCC can negatively impact applicants.

Issue: Applicants frequently schedule consular interviews upon word from USCIS indicating that their I-129 petitions have been approved. In some cases, these interviews occur before the Petitioner Information Management Service (PIMS) or the Person Centric Query Service (PCQS) has been updated to reflect the approval, so the interview results in a 221(g) refusal until the administrative processing is complete. This 221(g) refusal, caused by circumstances beyond the applicant's control and through no fault on their part, can lead to unfair permanent negative implications on their record when the refusal is not subsequently overcome by an approval.

Rule: 9 FAM 403.10-3(A)(2) (U) (2)(d) states that a 221(g) refusal letter must include the following language: "Please be advised that for U.S. visa purposes, including ESTA (the ESTA website), this decision constitutes a denial of a visa." These provisions were written under the authority of INA §221(g) and 22 CFR §41.121.

Under 22 CFR §41.121(a), "Nonimmigrant visa refusals must be based on legal grounds, such as one or more provisions of INA §212(a), INA §212(e), INA §214(b), (f) or (l), INA §221(g), or other applicable law…When a visa application has been properly completed and executed in accordance with the provisions of INA and the implementing regulations, the consular officer must either issue or refuse the visa."

However, the Government sometimes issues visa refusals under 221(g) that it clearly does not intend to be final (see, e.g., *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States, 168 F. Supp. 3d. 268*, 285 *(D.D.C. 2016),* wherein, "Plaintiffs who applied through the Baghdad Embassy received a notice stating "[w]e have refused your visa under section 221(g) of the Immigration and National [sic.] Act [8 U.S.C. § 1201(g)] until]: We complete administrative processing. We will contact you when it is finished.")

In *Nine Iraqi Allies*, the court rejected the Government's position that a 221(g) notice constitutes a final refusal for purposes of the doctrine of consular nonreviewability, where the application is still in administrative processing. *Id.* The court stated, "The applications have either been finally denied or they are still working their way through the [Special Immigrant Visa 14 step-process] the Government requires to be completed. The Government cannot have it both ways." *Id.* at 289. This ruling should apply to O-1B, O-2, and P applications: A 221(g) notice that is clearly not a final refusal (especially where such 221(g) notice is due to error or delay on the part of the Government) should not constitute a refusal for purposes of ESTA or future visa applications.

Nonetheless, it is not clear that this is the case in current practice. Especially in a situation where a beneficiary's application is delayed under 221(g), but the delay also leads to the cancellation of travel, the 221(g) may remain on the beneficiary's record and disrupt future visa or ESTA applications.

Proposed Solution: A 221(g) refusal could occur because of a failing on the part of USCIS or The Department of State. 9 FAM 403.10-3(A)(2) (U) should be revised (i) to remove the provision that a 221(g) refusal constitutes a denial for U.S. visa purposes (including ESTA), and (ii) to affirm that a 221(g) refusal will not have a lasting negative impact on the rights of the beneficiary. Alternatively, 22 CFR §41.121 should be revised to acknowledge the existence of a "soft" 221(g) refusal, which would suspend processing of the visa in a manner that would have no lasting negative impact on the rights of the beneficiary.

11. Consulates refuse to schedule interviews for third-country nationals.

Issue: Some consulates periodically refuse to schedule consular interviews for third-country nationals, or construct their websites so that while a third-country national may attempt to schedule an interview, no interview time is made available. This practice may create extreme hardship for touring performing artists

whose complex tour schedules may necessitate completing an interview in a country where U.S. consulates refuse third-country nationals.

Rule: Pursuant to authority under INA §222(c), INA §222(e), 22 CFR §41.101, 22 CFR §41.103, and 22 CFR §41.106, 9 FAM 403.3-2 states, with respect to scheduling appointments, that "[a]n effective appointment system must be flexible and must accommodate the largest number of applicants consistent with effective interviewing and security processing." Additionally, 9 FAM 402.2-2(F) states that, "The policy of the U.S. Government is to facilitate and promote international travel and free movement of people of all nationalities to the United States for the cultural and social value to the world and for economic purposes."

Proposed Solution: Posts should not be allowed to refuse to schedule interviews for third-country national O-1B, O-2 and P applicants that request interviews, nor create administrative obstructions to inhibit third-country nationals from scheduling interviews. 9 FAM 403.3-2 (U) should be revised to make it clear that consulates may neither refuse nor create obstacles intended to deter third-country nationals from scheduling O-1B, O-2, and P interviews.

12. Consulates incorrectly issue O-1 visas for five-year validity periods.

Issue: Certain consulates are issuing O-1 visas for five-year validity periods, which is longer than the maximum allowable three-year period. This is happening notwithstanding the fact that the underlying petitions for these visas reflect the correct three-year duration. As a result, O-1 beneficiaries who have incorrectly received five-year O-1 visas encounter problems they did not anticipate when the three-year limit is subsequently imposed on them.

Rule: Under 22 CFR 41.55(c) the "period of a validity of [an O visa] … must not exceed the period indicated in the petition, notification or confirmation…" For an O visa, the Statute prescribes that the petition validity period must be "for a period of time determined by the Director to be necessary to accomplish the event or activity, *not to exceed 3 years*" (INA §214.2(o)(6)(iii)(A)) (emphasis added) (*See also* 9 FAM 402.13-8 and 9 FAM 402.13-10(D)). Accordingly, an O-1 visa has a maximum allowable validity period of three years.

Proposed Solution: 9 FAM 402.13-10(D) should be revised to underscore that the validity period of an O visa must not exceed three years.

13. Consulates frequently fail to complete refusal documentation.

Issue: When denying a visa application, many consulates provide denial documentation that lacks critical information about the refusal, contrary to the requirements of 9 FAM 403.10-3.

Rule: 9 FAM 403.10-3(A)(1) states that, "Explanations of why a visa could not be issued need not be lengthy. You should explain the law and the refusal politely and in clear terms, providing a citation of the legal section relied upon. Use of jargon or obscure terms can create confusion, frustration and, often, additional work in the form of congressional and public inquiries. An example: In a case involving a refusal under INA §214(b), it is essential that you tell the applicant that the reason for the refusal is that he or she has not persuaded you that he or she will return to his or her country. Fitting a certain demographic profile ("young", "single", etc.) is not grounds for a visa refusal. In a 214(b) refusal, the denial must always be based on a finding that the applicant's specific circumstances failed to overcome the intended immigrant presumption. Written 214(b) and 221(g) refusal letters are more than mere formalities; they can be an effective method of conveying information to the applicant."

Proposed Solutions: 9 FAM 403.10-3(A)(1) must be revised to require officers to include detailed information in the refusal documentation.

14. U.S. interests would be served by posts establishing consular liaisons to respond to the concerns of the performing arts and entertainment industry.

Issue: Perhaps due to their lack of familiarity with the performing arts industry, consular officers often struggle when interviewing O-1B, O-2, and P applicants. This results in inappropriate interview questions, unnecessary delays, flawed petition re-adjudication, and incorrect decisions.

Rule: 9 FAM 402.2-2(F) states that, "The policy of the U.S. Government is to facilitate and promote international travel and free movement of people of all nationalities to the United States for the cultural and social value to the world and for economic purposes." The commitment of the U.S. Government and the U.S. Department of State to engage in international cultural exchange was further underscored by the passage of the Mutual Educational and Cultural Exchange Act of 1961, whereby the U.S. Department of State's Bureau of Educational and Cultural Affairs (ECA) was set up. Under this statute, the ECA was established as a division of DOS to "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange (Mutual Educational and Cultural Exchange Act, Pub. L. No. 87–256, § 101, 75 Stat. 527 (1961)).

Proposed Solution: At some posts, the volume and complexity of cases regarding performing artist visa applicants warrants dedicating staff to respond to the needs of the performing arts community. Facilitating communication with applicants on complicated visa cases ultimately benefits all parties and is consistent with DOS principles, as articulated in the FAM and the Mutual Educational and Cultural Exchange Act of 1961. 9 FAM 402.13 and 9 FAM 402.14 should be revised to recommend that consular posts establish a permanent staff designation, knowable by name and reachable by email, to respond to issues from the arts and entertainment industry. This liaison could conceivably be an officer in the Bureau of Educational and Cultural Affairs, as ECA officers may have greater familiarity with the local arts community than the reviewing consular officers do.

15. The expenses associated with presenting large ensembles at consular interviews at posts can be unnecessarily burdensome.

Issue: For large ensembles (e.g. circuses or symphony orchestras), the cost of all beneficiaries attending consular interviews, including transportation, accommodation, wages, and expenses, can render an otherwise viable U.S. tour financially impossible. The problem is compounded by the narrow window of interview times available at most consulates, necessitating that applicants shoulder the cost of accommodations the night before their interviews in the city where the consulate sits.

Rule: INA §222(e) states that, "The application for a nonimmigrant visa or other documentation as a nonimmigrant shall be disposed of as may be by regulations prescribed." 22 CFR §41.102 requires that applicants for nonimmigrant visas make a personal appearance before a consular officer, except in limited circumstances. 9 FAM 504.7-2 reiterates this interview requirement. However, this condition must also take into account 9 FAM 402.2-2(F), which states that, "The policy of the U.S. Government is to facilitate and promote international travel and free movement of people of all nationalities to the United States for the cultural and social value to the world and for economic purposes."

Proposed Solution: 9 FAM 504.7-2 should be revised so as to require that the Department of State offer greater variety in the appointment times available for consular interviews, including morning and afternoon appointments. We recommend that the emergency interview scheduling system, already functioning at most consulates, be expanded to allow beneficiaries to request interview times outside of those normally scheduled for interviews.

16. Under the current system, travel on a valid O-1 or P-1 while adjustment is pending creates undue burdens and inefficiencies. (ACES VIII)

Issue: Artists on O-1 or P-1 visas sometimes apply for adjustments of status. If the artist then leaves the U.S. without advance parole while the adjustment is pending, the adjustment of status application will be treated as abandoned. This system creates professional impediments for touring artists who are often contracted for engagements not only in the United States, but also abroad. Because there is a 90-day wait period for advance parole, in order to perform abroad, artists with pending AOS applications have no choice but to apply for emergency advance parole at field offices. This system places an unnecessary burden on the petitioner, and creates inefficiencies at the Service.

Rule: Under Section 245 of the INA, an artist may apply to adjust her status to that of a U.S. permanent resident. If an artist makes such application and then leaves the U.S., under 8 CFR §245.2(a)(4)(ii)(A) the departure is generally treated as an abandonment and termination of the application for adjustment of status. There is an exception to this rule for applicants who apply for advance parole (8 CFR §245.2(a)(4)(ii)(B)) or certain applicants in lawful H-1, or L-1 status (8 CFR §245.2(a)(4)(ii)(C)). This exception does not apply to applicants in O or P status.

Proposed Solution: USCIS should amend 8 CFR §245.2(a)(4)(ii)(C) by adding O and P nonimmigrants. Likewise, the P-4 and O-3 categories should be added wherever "H-4" or "L-2" appears in this section.

17. Consulates incorrectly instruct applicants to bring the original I-797B work authorization form to U.S. Customs and Border Protection ports of entry when traveling into the U.S.

Issue: There has been a pattern of DOS officers instructing beneficiaries who have received approved I-797B work authorizations that they must, when traveling to the U.S., bring the *original* I-797 with them for the benefit of the reviewing Customs and Border Protection officer. This guidance is incorrect, as Form I-797 is not a visa and may not be used in place of a visa. Moreover, though there may be multiple beneficiaries traveling separately to the U.S., USCIS only provides one original copy of the approved I-797 Form to the petitioner,

Rule: The first paragraph of USCIS Form I-797B, *Notice of Action*, states, **"THIS FORM IS NOT A VISA AND MAY NOT BE USED IN PLACE OF A VISA."** Furthermore, regarding nonimmigrant visa issuances and related case notes, 9 FAM 403.9-2(B) (U) (c) provides that, "As case notes are replicated in the Consular Consolidated Database (CCD), issuance notes may assist travelers at the port of entry (POE). In the event the Department of Homeland Security/Customs and Border Protection (CBP) refers a traveler for secondary inspection, the issuance notes may provide CBP with an understanding of why the traveler was found to be eligible for a visa. Clear notes also assist the Visa Office's Public Outreach and Inquiries Division (CA/VO/F/OI) to assist with inquiries into cases that attract outside attention. Good case notes facilitate consular managers' online NIV adjudication review."

Proposed Solution: 9 FAM 403.9-2(B) (U) should be revised to include the statement that DOS officers should not instruct beneficiaries to bring the original approved Form I-797B with them to the U.S. for the benefit of the reviewing Customs and Border Protection officer. Any visa-related case notes should be input into the Consular Consolidated Database (CCD).