Request for Accommodation by Department of State In Response to the COVID-19 Pandemic From the U.S. Cultural Sector

League of American Orchestras & Tamizdat

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The COVID-19 pandemic has created staggering losses throughout the U.S. economy, but few sectors have been harder hit than live entertainment and the performing arts. Venue closures and restrictions on public gatherings suspended performances for more than a year.. Related industries that rely on live performance -- from record labels (depending on concerts for the promotion of releases) to beverage makers (supplying venues) -- have suffered staggering losses. This spring, as live venues begin to reopen, international travel restrictions continue to hobble a significant percentage of the sector that relies on international talent, because:

- Many international entertainers and performers are unable to secure a national interest exception ("National Interest Exception" or "NIE") to the COVID-19 travel restrictions outlined in the the various Presidential Proclamations suspending U.S. entry of nonimmigrants who pose a risk of transmitting COVID-19 (collectively, the "COVID-19 Travel Ban Proclamations");
- Many international entertainers and performers are unable to secure O and P visas due to many consulates in countries subject to the COVID-19 Travel Ban Proclamations refusing to schedule interviews and issue visas to applicants without NIEs, though multiple court rulings have held that DOS's policy of refusing to issue visas in the absence of an NIE is unlawful; and
- Many U.S. entertainment and arts organizations will not be able to afford to seek new visas for rescheduled events that were cancelled due to COVID-19.

The U.S. entertainment and performing arts sector respectfully requests that Department of State ("DOS" or "State Department") adopt several "win/win" policies regarding a specific and limited set of visa applications, which would provide substantial benefit to the U.S. economy and save the struggling U.S. entertainment and performing arts sector tens of millions of dollars in legal fees.

(1) The sector requests that DOS reinstate consular posts' authority to adjudicate the "substantial economic benefit" criterion of the National Interest Exception, and provide posts with guidance ensuring that the reopening of the U.S. entertainment and performing arts sectors are not hampered by the delays or denials of such National Interest Exceptions for necessary contracted foreign nationals. Additionally, the fact that NIEs can only be applied for 30 days in advance, because they are only valid 30 days from issuance, creates an untenable situation: U.S. presenters cannot possibly know whether a foreign artist will be able to travel to the U.S. until it is much too late to properly plan and promote such live performances.

Issue: The current iteration of the National Interest Exception is overly narrow and an undue burden on U.S. business interests whose recovery is reliant on the physical presence of contracted foregn talent in the U.S.

Rule: The prior administration provided guidance on the National Interest Exception that applied to various travel ban proclamations and included provisions whereby the State Department could determine that certain nonimmigrants qualified for the NIE if they were, "engaging in temporary travel that [provided] a substantial economic benefit to the U.S." On March 2, 2021, the State Department issued updated guidance that removed this "substantial economic benefit" criterion from DOS's purview and adjudication of the National Interest Exception and replaced it with an exception for, "travelers providing vital support for critical infrastructure sectors, or directly linked supply chains." This new criterion creates additional hurdles for the U.S. artist visa process. Additional obstacles are created by the fact that there is currently a 30-day limit on the validity of the NIE, meaning that U.S. presenters that wish to present international talent for the benefit of the U.S. economy and international cultural exchange can only apply for an NIE 30 days in advance of travel. This makes it virtually impossible for U.S. presenters to plan and promote a show with any assurance that their international talent will be granted NIEs.

Recommendation: DOS should reinstate consular posts' authority to adjudicate the "substantial economic benefit" criterion of the National Interest Exception, and provide posts with guidance ensuring that the reopening of the U.S. entertainment and performing arts sectors are not hampered by the delays or denials of such NIEs for necessary contracted foreign nationals. Such guidance should recommend that all holders of approved O and P petitions who are contracted for competition or performance in the U.S. should be granted NIEs. This would include all such athletes, performing artists, and entertainers, and their essential support personnel. Additionally, the validity of a foreign artist's NIE must be extended beyond the current 30-day limit, so that U.S. presenters can secure NIEs for foreign talent with sufficient time to plan and promote their events.

(2) The sector requests that U.S. consulates in countries subject to the COVID-19 Travel Ban Proclamations resume issuing visas.

Issue: Most U.S. consulates in countries subject to the COVID-19 Travel Ban Proclamations continue to refuse to issue visas to individuals who have not been granted NIEs. However, the travel restrictions allow anyone to travel to the U.S. from countries not listed in the pandemic travel bans, which creates a situation where banned-country travelers who must travel to the U.S. for engagements are compelled to seek visas as third-country nationals in non-banned countries. This result is neither in the State Department's interest or the "national interest." Furthermore, multiple court rulings have held that DOS's policy of refusing to issue visas in the absence of an NIE is unlawful.

Rule: Under 8 U.S.C. § 1182(f) and the COVID-19 Travel Ban Proclamations, certain immigrants and nonimmigrants who pose a high risk of transmitting COVID-19 are banned from entering the U.S. DOS has *incorrectly* interpreted the statutory authority at 8 U.S.C. § 1182(f) to mean that issuance of a visa is precluded if the visa applicant is subject to a suspension of entry under § 1182(f) (absent an exemption such as the National Interest Exception). This practice ignores the fact that 8 U.S.C. § 1185(d) carefully delineates between the consular interview step and the port-of-entry step, by providing that, "Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued [such as a visa] to enter the United States if, upon arrival in the United States, he is found to be inadmissible." Moreover, multiple courts have ruled that a § 1182(f) suspension of entry does not mean that DOS may establish a policy whereby officers refuse to process and issue visas to impacted visa applicants (*See*, *Gomez v. Trump*, No. 20-cv-01419 (APM), 2020 WL 5367010 at *45 (D.D.C. Sept. 04, 2020); In *Milligan v. Pompeo*, No. 20-cv-2631 (JEB), 2020 WL 6799156 at *10 (D.D.C. Nov. 19, 2020); *Young v. Trump*, No. 20-cv-07183-EMC, 2020 WL 7319434 (N.D. Cal. Dec. 22, 2020); *Tate v. Pompeo*, No. 20-cv-3249 (BAH), 2021 US Dist. Lexis 8813 (D.D.C. Jan 16, 2021)).

Recommendation: All U.S. consulates must resume the normal and timely processing of O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S visas.

(3) The sector requests the creation of a viable mechanism for altering visa validity dates to accommodate rescheduled tours and engagements.

Issue: Thousands of foreign entertainers and artists secured O and P visas prior to the COVID-19 pandemic, and many of those visas were rendered wholly or partially unusable by COVID-19 travel restrictions and event cancellations. The legal and administrative costs of securing new visas for rescheduled events will cost the U.S. cultural sector as much as $60,000,000, a sum that is untenable for a sector that has already been devastated by over a year of closures.

Rule: 22 CFR § 41.55(c) and 22 CFR § 41.56(c) state that, "the period of validity of a visa issued on the basis of paragraph (a) to this section must not exceed the period indicated in the petition, [notification or confirmation] [confirmation or extension of stay] required in paragraph (a)(2) of this section." 9 FAM 402.13 and 9 FAM 402.14 reflect these Federal Regulation guidelines, providing that the validity of O and P visas may not exceed the period of validity approved to accord O or P status.

Recommendation: Regarding O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S beneficiaries with approved visas or approved I-797B forms with the validity dates that are wholly or partially between the dates March 13, 2020 and December 31, 2020, DOS should consider petitioners' requests to amend beneficiaries' visa validity periods, notwithstanding the validity dates indicated on the approved I-797B. Petitioners' requests should establish to a preponderance standard that a substantial amount of the employment contemplated in the original I-129 petition was impossible or impracticable due to COVID-19 travel and public gathering restrictions, and that the new planned employment is substantially similar to the cancelled employment, by providing the following:

- a new DS-160;
- completion of a new consular interview;
- a statement from the petitioner requesting the revised validity period, the span of which should not exceed the total number of days approved in the original validity period;
- evidence of the rescheduling of the contemplated employment; and
- for itinerary-based petitions, a revised itinerary.

22 CFR § 41.55(c) and 22 CFR § 41.56(c) should be temporarily revised to provide consular officers with more flexibility to amend visa validity dates for the aforementioned visa classifications (irrespective of the validity dates contained in the USCIS-approved petitions) and to incorporate the above proposed provisions and solution. 9 FAM 402.13 and 9 FAM 402.14 should be amended accordingly.

Signed:

U.S. ORGANIZATIONS

APAP/Association of Performing Arts Professionals
Arab American National Museum
Artistic Freedom Initiative
Arts Midwest
CEC ArtsLink
China Residencies
Dance Managers Collective
Dan McDaniel Management
Elsie Management
Folk Alliance International
globalFEST
HotHouse
Illinois Presenters Network
KMP Artists
Kristopher McDowell Productions, Inc.
League of American Orchestras
Lisa Booth Management, Inc.
Live Sounds
Martinez Arts Consulting, ALC
NAPAMA/Association of North American Performing Agents and Managers
National Sawdust
New Music USA
NIVA: National Independent Venue Association
PEN America - Artists at Risk Connection
Portland Institute for Contemporary Art/PICA
Rhizome Arts Consulting
Tamizdat
Western Arts Alliance
Wisconsin Union Theater

INTERNATIONAL ORGANIZATIONS

alba KULTUR, Germany
British Musicians' Union, United Kingdom
British Underground, United Kingdom
Canadian Arts Presenting Association (CAPACOA)
Canadian Association of Stand-up Comedians, Canada
Canadian Live Music Association, Canada
Dutch Music Export, Netherlands
ITI/International Theatre Institute, Germany
Music Managers Forum, Canada
New Zealand Music Commission, New Zealand
Pearle* Live Performance Europe, Belgium
PRS Foundation, United Kingdom
Production Services Association, United Kingdom
Sounds Australia, Australia
Taklit Artist & Concert Management, France