Artist Visa Stakeholder Comments on Restoring Faith in Our Legal Immigration Systems

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Thank you for the opportunity to provide public comment in support of achieving President Biden's February 2, 2021 Executive Order 14012, "Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans." The undersigned national arts organizations are encouraged by the efforts of federal agencies to identify strategies that promote "integration, inclusion, and citizenship" and "identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits." In the Federal Register Notice (Federal Register Number 2021-07987) posted on April 19, 2021, the Department of Homeland Security (DHS) states it is also seeking input "to help identify current USCIS processes or those previously in place that promote equity and inclusion."

An important part of the larger immigration process and responsibilities that fall within the jurisdiction of U.S. Citizenship and Immigration Services is the approval process for non-immigrant visas, including O and P visas in use to engage foreign guest artists. The following comments seek to raise the continuing concerns we and other U.S.-based national arts organizations raised in joint comments submitted on December 16, 2019 in response to DHS Docket No. USCIS-2019-0010, which proposed disproportionate fee increases and several very harmful policy changes.[1] Although that DHS proposal is under federal injunction, we wish to draw your attention to long-standing requests from the broad U.S. arts community—which are especially needed after enduring unprecedented cancelations and closures due to COVID-19 since last March.

The arts have a unique ability to support and align with the priorities and objectives of the Biden Administration when it comes to rebuilding the global perception of the United States as a cooperative partner on the international stage. The value of international cultural exchange cannot be understated, especially after a prolonged period during which citizens of communities large and small have had to isolate and refrain from their usual activities. Economic recovery and the reopening of businesses very much counts on people wishing to gather outside of their homes; the communal experience of live performing arts is something this Administration and USCIS should support in the effort to restore a more equitable and inclusive process in the U.S. Immigration Systems, because enjoyment of and participation in the arts involves not only U.S. artists but many international artists and ensembles as well.

It is with great anticipation that arts organizations and artists are planning a return to live performances. However, the climate for international travel continues to be highly restricted and unaccountably opaque, with U.S. consulates inconsistently interpreting the standards by which beneficiaries can qualify for the National Interest Exception (NIE) when seeking a visa and waiver to travel from certain restricted countries. The ability for the U.S. arts sector to reopen as quickly as federal, state, and local governments are all encouraging is highly dependent on all parts of the U.S. visa system to run smoothly, predictably, and sensibly. There are several classes of people that meet the NIE standard, but artists are neither explicitly included nor excluded. The decision by some consulates to deny an NIE waiver to artists who play a leading role—in some cases as the top artistic leadership of U.S. based arts organizations—is to severely and directly hamper their ability to restart activity and plan speedy returns to the stage. While we acknowledge that actions related to NIEs are specific to State Department and Customs and Border

[1] https://americanorchestras.org/wp-content/uploads/2020/11/Arts-O-and-P-Visa-2019-Comments-12-11-19.pdf

Protection implementation, we reference them here as important context regarding the current environment for facilitating international cultural activity.

Immediate action is needed to reduce the regular processing times for O and P visas. Congress recognized the time-sensitive nature of arts events when writing the 1991 federal law regarding O and P visas, in which the USCIS is instructed to process O and P arts visas in 14 days. Section 214(c)(6)(D) of the Immigration and Nationality Act (8 USC § 1184(c)(6)(D)) states that USCIS "shall" adjudicate a fully-submitted petition within 14 days. From the inception of the current O and P provisions on April 1, 1992, the Legacy Immigration and Naturalization Service routinely complied with this statutory requirement. However, when Premium Processing Service (PPS) was introduced in June 2001, guaranteeing processing within 15 calendar days at a current additional cost of $2,500 on top of the base filing fee, compliance with this provision by Legacy INS and, later, USCIS, has become extremely inconsistent. Following the creation of the PPS, regular O and P visa processing has varied widely, ranging from 30 days to six months. In the summer of 2010, USCIS pledged to meet the statutory 14-day regular processing time and promised public stakeholders that significant improvements would be made to the quality of artist visa processing.

For several years, petitioners experienced incremental improvements to processing times, only to encounter at-times lengthy and highly unpredictable delays once again. In a March 30, 2016 national O and P stakeholder forum, leadership from USCIS Service Center Operations stated a commitment to again reduce regular processing to the statutorily mandated 14-day timeframe and to improve the policy guidance and training for adjudicators regarding the standards of evidence required for O and P visas. We applauded USCIS for this stated commitment, but as feared, those policy improvements were unevenly applied and have for many months before the onset of the pandemic had been completely absent, which jeopardized engagements for petitioners seeking to obtain visas far in advance of planned performance dates.

As of mid-May 2021, the processing times publicly posted by USCIS for O and P visas are between 2 weeks to 2.5 months at the California Service Center, and from 3 weeks to 3 months at the Vermont Service Center–far exceeding the statutorily mandated timeframe. In practice, processing turnaround can vary dramatically, so before any other recommendations are considered, there must be consistent implementation of the current 14-day statutory requirement for regular O and P processing times and immediate improvements to the quality of petition adjudication; doing so would go a long way toward restoring faith in the visa process for all arts visa filers.

Immediate and measurable improvements can and should be made to the O and P artist visa process. Confidence in the USCIS petition adjudication process has been particularly low for the last four years. Adjudicators must be more clearly trained on the evidentiary criteria for O-1B, P-1B, P-3, and supporting O and P visa approval. Periodically, Requests for Evidence will cite unreasonable demands for evidence that no longer reflect the media landscape of what kind of documentation is still available, and requests to prove the reputation of venues, employers, and well-established awards artificially raise the hurdle for qualification beyond the intention of the regulatory standard.

Reinstate the traditional expedite option for nonprofit entities seeking to further the cultural and social interest of the U.S. While regular processing times swell and the cost of the Premium Processing Service rises well beyond the reach of many arts organizations, under the Trump Administration USCIS has also revoked the option of seeking expedited processing for cases that require rapid processing. Since implementing the Premium Process Service, the USCIS has allowed non-profit organizations to remain eligible for the traditional expedite, which made faster processing available at no additional fee in cases where petitioners experience an unforeseen emergency, and where failure to expedite the petition will result in serious harm, economically or otherwise, to the petitioner. A November 2001 memorandum had previously identified nonprofit organizations as eligible for expedited processing in certain circumstances, without payment of the Premium Processing Fee. While not a consistently reliable option, this expedited service has been used in some emergency cases in which, through no fault of their own, nonprofit arts petitioners require rapid visa processing. As recently as 2016, USCIS confirmed the process by which qualifying nonprofit arts petitioners could pursue a traditional expedite request. However, the current USCIS webpage, last updated on December 20, 2020, shows that three prior grounds for an expedite request have been excluded: no longer listed are "extreme emergencies,"

"nonprofit entities seeking to further the cultural and social interests of the U.S.," and "compelling interests of USCIS." USCIS should reinstate and implement uniform policies to once again provide access to the traditional expedite service and recognize the unique needs of and benefits provided by nonprofit arts petitioners that promote the cultural and social interests of the U.S.

Expand upon deference to prior determinations when adjudicating visa petitions. There are several actions USCIS could take to show meaningful support for a post-COVID resumption of international activity. Firstly, USCIS could expedite adjudicating visas of engagements that had been previously approved but had to be rescheduled due to COVID. The justification and method for this comes from an April 27, 2021 update in policy guidance[2] in the USCIS Policy Manual instructing officers to give deference to prior determinations when adjudicating extension requests involving the same parties and facts unless there was a material error, material change, or new material facts. The public communication of this update indicated USCIS is reverting in substance to prior long-standing guidance issued in 2004 (and rescinded in 2017), which directed officers to generally defer to prior determinations of eligibility when adjudicating extension requests involving the same parties and facts as the initial petition or application. The decision to revert to the 2004 guidance was noted as being in accordance with E.O. 14012 and that USCIS concluded "Affording deference to prior approvals involving the same parties promotes efficient and fair adjudication of immigration benefits." We applaud this reinstatement of deference to prior determinations and propose this practice can be very reasonably applied beyond extension requests to new petition filings as well, starting with rescheduled engagements that could not take place due to COVID-19 restrictions.

Secondly, this same deference for prior determinations could be applied to new petition filings in which the same parties and facts apply – not just extensions or rescheduled events. When U.S. audiences experience international guest artists and when U.S. artists work alongside them, it is often the case that a relationship builds in which the guest artist returns for future engagements. A great deal of time and effort can be saved on the part of USCIS adjudicators if USCIS acknowledged that the only material change in these petitions are the date and the specific repertoire to be performed. This acknowledgment of having satisfied the major evidentiary requirements would result in a designation of "Frequent Filers" who have demonstrated an understanding of and success navigating the visa process. This is a concept that received initial consideration under the Obama Administration, with the idea of expediting the vetting of petitions filed by experienced petitioners that understand the O and P artist visa process and can demonstrate this fact with a recent history of successful filings. When both a frequent filer and a frequent beneficiary are united on a new petition, the adjudication process could be greatly streamlined without fear of compromising security concerns by simply recognizing the work USCIS adjudicators have already done in approving petitioners, employers, and beneficiaries for performances in the U.S. for prior approved engagements. To approach each filing as if it is entirely new wastes valuable time and effort, not to mention jeopardizes the reputation of the U.S. petitioner in the event delays at USCIS or ill-trained adjudicators are applying overly strict interpretations of statute, which can then result in significant changes or even cancelation of announced performances. Great reputational and financial harm is done whenever this occurs, and the climate for international cultural exchange grows more difficult with each instance of what appears to be an unreasonable delay or denial.

Another application of the directive to give deference for prior determinations would be to **fast-track petitions involving artists who have been previously approved but are being engaged by new petitioners**. Since the Form I-129 asks whether beneficiaries have received approval within the last 7 years, more weight should be given to that proven history, when applicable, in order to more equitably allow petitioners who may less frequently engage international guest artists to do so. There have been numerous Requests for Evidence that have questioned the reputation of the U.S. petitioner, much in the same way USCIS adjudicators seek evidence of the beneficiary's reputation, but an overly rigid and unrealistic standard of evidence has prevented many petitioners from bringing esteemed artists to their communities, simply because they lack sufficient media coverage or prior engagement of other esteemed artists. **In order for a truly equitable and inclusive environment that encourages communities of all sizes and in all regions of our country to engage international artists, there should be more deference to beneficiaries that meet the O and P standard and more flexibility to U.S. organizations seeking to broaden the cultural events to their local communities.**

[2] https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf

Thank you for providing an opportunity for U.S. stakeholders to share suggestions with the Biden Administration and agency leadership to improve our legal immigration system, including nonimmigrant policies and issuance of temporary visas. Our recommendations can be implemented without imposing any new burdens on USCIS, and in fact would be valuable time- and cost-saving measures because these are common sense ways to expedite processing without sacrificing security concerns. These win-win solutions reduce the processing burden on adjudicators by consistently applying "deference to prior determinations" to more petitions that warrant deference due to prior, recent approvals, re-establishing a traditional expedite category that costs nothing to reinstate, and respectfully asking the agency not to implement the very many harmful proposals set forth in the proposed rule published in 84 Fed. Reg. 62280 (November 14, 2019). The arts community is in dire need of a supportive, affordable, and fair immigration system that will allow the resumption of international cultural activity as soon as possible. We request that USCIS resume stakeholder meetings, which were a very helpful venue for addressing specific concerns with the service centers and headquarters, as well as getting clarification on USCIS policies. We stand ready to work with USCIS staff to craft more detailed approaches to any and all of the suggestions included herein.

Sincerely,

American Alliance of Museums

Association of Art Museum Directors

Association of Performing Arts Professionals

Chamber Music America

Chorus America

Dance/USA

Folk Alliance International

Future of Music Coalition

globalFEST

League of American Orchestras

National Assembly of State Arts Agencies

OPERA America

Recording Academy

Tamizdat

Theatre Communications Group