

Performing Arts Visa Task Force

March 6, 2007

Director
Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Avenue, NW, 3rd Floor
Washington, D.C. 20529

Re: DHS No. USCIS-2006-0044

On behalf of the Performing Arts Visa Task Force, we submit these comments in response to the proposed rule published in 72 Fed. Reg. 4888-4915 (February 1, 2007) to adjust the immigration and naturalization benefit application and petition fee schedule.

We are opposed to the proposed increase of the filing fees for nonimmigrant worker petitions. The proposed increase in the Form I-129 filing fee - from \$190 to \$320 – will be financially burdensome to U.S. nonprofit performing arts petitioners and performers. Moreover, the increase in the Form I-824 – from \$200 to \$340 – is prohibitive. Before the USCIS contemplates any price increase, **regular processing procedures must be improved.**

The Performing Arts Visa Task Force is a coalition of national arts organizations including the American Arts Alliance, American Federation of Musicians, American Symphony Orchestra League, Association of Performing Arts Presenters, Dance/USA, North American Performing Arts Managers and Agents, OPERA America, and Theatre Communications Group.

The Task Force is dedicated to improving opportunities for international cultural exchange, and to informing U.S.-based nonprofit performing arts petitioners about compliance with U.S. Citizenship and Immigration Services (USCIS) requirements, particularly as they pertain to the engagement of foreign guest artists through the O and P visa categories. As national arts service organizations, we frequently provide technical assistance for U.S.-based arts organizations and artist managers undergoing the visa petition process. Through interaction with arts-based visa petitioners, we receive frequent feedback regarding the visa process.

American nonprofit arts organizations provide an important public service by presenting foreign guest artists in performances, educational events and cultural programs in communities across the country. Delays and unpredictability in visa processing have made it increasingly difficult for international artists to appear in the United States. USCIS should not consider a fee increase without first improving regular processing procedures in the following ways:

USCIS SHOULD MAKE THE FOLLOWING IMPROVEMENTS:

1. Reduce the maximum processing period for O & P petitions to 30 days.

Nonprofit performing arts organizations typically use the O and P visa categories to bring artists to the United States for guest performances. Receipt notices from USCIS often indicate that processing periods for regular petitions will range anywhere between 30 and 120 days. This time span is simply too ambiguous and lengthy to accommodate booking and presenting foreign guest artists for performances with a fixed date.

Non-profit organizations cannot afford to routinely pay \$1,000 per petition to secure for the 15-day Premium Processing Service. In its current state, the regular petition process is unreliable and unpredictable. We fear that the current process is hindering the ability of arts organizations to present foreign guest artists, particularly at a time when international cultural exchange is most essential.

To engage foreign guest artists, and more freely facilitate international cultural exchange, the nonprofit performing arts community must be able to rely upon a 30-day maximum processing period.

2. Improve the reliability and consistency in adjudication of O and P petitions.

Current USCIS policies and practices result in inefficient processing of O and P visas - causing delay, expense, and unwarranted requests for further evidence.

USCIS must implement uniform policies, procedures, and training for efficient processing of petitions in the following areas:

Standards for Artists in the O-1B Classification

The USCIS frequently misinterprets the O-1 standard of distinction, resulting in the denial of some artist petitions. Performing artists are required to meet the standard of distinction under INA § 101(a)(46) and further clarified under 8 CFR §214.2(o)(3)(ii) as follows:

Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

This definition of distinction is not uniformly applied by USCIS examiners. However the regulatory phrase “substantially above that ordinarily encountered” may be interpreted, it is not the same as the requirements for “extraordinary achievement” or “extraordinary ability” in other areas. It simply means "distinction."

Comparable Evidence

Many examiners incorrectly believe that an artist is not “distinctive” unless the artist is being hired for a leading or principal role. Artists hired for engagements with U.S. arts organizations may meet the standards of “distinction” even if performing in secondary, supporting, or ensemble roles. In addressing the standard of “distinction,” petitioners are not limited to providing the documentation listed in 8 CFR §214.2(o)(3)(iv) and 8 CFR §214.2(p)(4)(i), but can rely on comparable evidence. Examiners should not treat the suggested documentation list as a fixed checklist. They should look to the overall weight of the evidence provided regardless of whether specific types of suggested evidence have been provided.

Qualified Petitioners

Some examiners incorrectly believe that an artist’s employer cannot petition on behalf of other employers or that the only type of petitioner who can petition on behalf of more than one employer is a professional agent or manager. Under 8 CFR §214.2(o)(2)(i) and (iv)(E) and 8 CFR §214.2(p)(2)(iv)(E)(2), there can be three different types of petitioners: (1) an artist’s employer; (2) a professional agent or management company; or (3) any U.S. citizen, corporation, or organization appointed by the artist or the artist’s employers to petition on behalf of all employers of the artist during a requested classification period.

Itineraries

Artists frequently perform for multiple employers - and at multiple theatres and venues - during a requested classification period. In reviewing an artist’s proposed itinerary of performances, examiners need to be aware that there will be gaps between performances to allow for travel time, rehearsals, rest, etc. Such gaps should be anticipated and, within reason, permitted.

3. Reduce the errors in I-797 notices.

Petitioners report frequent instances of erroneous, incomplete, or missing I-797 notices of approval. These errors jeopardize the ability of artists to travel to the U.S. in time for scheduled performances.

Moreover, according to the USCIS, the processing time for I-824 Application for Action on an Approved Application or Petition is nearing six months. In cases in which an arts organization requires a duplicate I-797 delivered to a consulate, this lengthy processing time is unacceptable.

4. Implement uniform policies to improve the traditional expedite service.

The USCIS has made traditional expedite processing available at no additional fee in cases where petitioners, through no fault of their own, experience an unforeseen emergency, and where failure to expedite the petition will result in serious harm, economically or otherwise, to the petitioner. Since implementing the Premium

Process Service, the USCIS has allowed non-profit organizations to remain eligible for the traditional expedite.

However, the USCIS standards for granting expedited processing requests are unclear. The traditional expedite is not helpful unless there are clear, uniform policies appropriately followed and administered by USCIS.

We are grateful for the opportunity to comment on this proposed fee increase. We oppose the proposed fee increase and urge the USCIS to demonstrably improve processing of regular petitions before burdening petitioners with any increase in processing fees.

Thank you for your consideration.

Sincerely,

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

Attachment: Performing Arts Visa Task Force Contact List

Cc: Dr. Emilio Gonzales, Director, U.S. Citizenship and Immigration Services
Sen. Patrick Leahy, Senate Judiciary Committee Chair
Sen. Arlen Specter, Senate Judiciary Committee Ranking Member
Sen. Edward Kennedy, Immigration Subcommittee Chairman
Sen. John Cornyn, Immigration Subcommittee Ranking Member
Rep. John Conyers, House Judiciary Committee Chair
Rep. Lamar Smith, House Judiciary Committee Ranking Member
Rep. Sheila Jackson-Lee, Immigration Subcommittee Chair
Rep. Steve King, Immigration Subcommittee Ranking Member
Prakash Khatri, U.S. Citizenship and Immigration Services Ombudsman
Michael Biggs, Director of Policy, U.S. Citizenship and Immigration Services