Recommendations for Performing Arts Visa Policy

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Association of Performing Arts Professionals (APAP), Carnegie Hall, Dance/USA, Folk Alliance International, NAPAMA, National Independent Talent Organization, National Independent Venue Association (NIVA), OPERA America, Performing Arts Alliance, Recording Academy, Theatre Communications Group, Western Arts Alliance, and WESTAF

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The performing arts are an essential part of our global society, and in the United States there is a rich cross-section of cultures and art forms. Engaging international artists is a critical component of the arts and entertainment sector and essential to cultural diplomacy. Guest artists not only bring global talent to U.S. audiences, but the experience of performing alongside international talent is an enriching experience for U.S. artists as well. Unfortunately, by nature arts programming is uniquely time- and date-specific, so a delayed or poorly adjudicated visa petition can have severe financial and reputational consequences for a U.S. arts employer. With these many considerations in mind, a broad coalition of performing arts stakeholders have presented urgent policy requests to U.S. Citizenship & Immigration Services, the U.S. Department of State, and Customs & Border Protection. The following recommendations reflect priority areas of action by federal agencies that would present immediate relief and restore confidence in the visa process. The recommendations are organized by agency of jurisdiction, and many of which have been submitted through the Federal Register or during direct recent engagements with agency personnel. For more information about these prior submissions, please see Appendix B.

Regarding U.S. Citizenship and Immigration Services

I. **Implement reliable and efficient I-129 processing times:** Cultural performances are date-, time-, and location-specific. To schedule, confirm, and market highly sought-after international artists, U.S. presenters must have a visa process that is efficient and reliable. Few petitioners can afford premium processing, so most U.S. arts presenters depend on USCIS to meet the statutory mandate for regular visa processing.

   A. PRIORITY POLICY ASK: CIS has helpfully reinstated eligibility for "expedited processing" for nonprofit petitioners whose request is in furtherance of the cultural or social interests of the United States, but for this option to be usable, USCIS must provide clearer guidance on the eligibility conditions, process, and

expected processing time for accessing this service (*See* Appendix B, USCIS II.A).

B. PRIORITY POLICY or "CHANGE TO CODE OF FEDERAL REGULATIONS/CFR" ASK: A policy memorandum or Policy Manual amendment, or amendment to the Code of Federal Regulations ("Federal Regulations," "Regulations," or "CFR"), should affirm that 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 (*See* Appendix B, USCIS II.B).

C. SYSTEMIC IMPROVEMENT: Many of the problems that our sector experiences are the result of seemingly minor but impactful procedural and training issues. In aggregate, these problems create significant impediments to culture and business. We recommend a number of minor but specific changes to the USCIS Policy Manual and policies that guide these procedures and training for adjudicators regarding the standards of evidence required for O and P visas (*See* Appendix A, USCIS II.C for Executive Summary and Appendix B, USCIS II.C for comprehensive proposed solutions).

II. Support inclusion through fair implementation of evidentiary requirements and affordable fees: International cultural exchange uniquely supports a diversity of viewpoints in the public discourse, and contributes to international peace and mutual understanding. The United States should be easing – not increasing-–the visa burden for arts organizations engaging international guest artists so that U.S. audiences can benefit from the diversity of the world's cultures.

A. PRIORITY POLICY ASK: Amend policy guidance to strengthen deference to prior adjudications of artist visa petitions—another win/win measure that minimizes the burden on and waste of CIS and performing arts sector resources (*See* Appendix B, USCIS III.A).

B. PRIORITY POLICY ASK: Amend policy guidance to simplify evidentiary requirements for beneficiaries with "frequent filer" petitioners, which would conserve both government and performing arts sector resources (*See* Appendix B, USCIS III.B).

C. PRIORITY POLICY ASK: Prevent disproportionate fee increases for O and P visa petitions, which often raise insurmountable cost barriers to the visa process.

D. SYSTEMIC IMPROVEMENTS: Various policy practices around evidentiary requirements impede U.S. performing arts presenters from presenting international artists to U.S. audiences. We recommend a number of specific changes to the USCIS Policy Manual and policies to address these inequities and

we recommend specific training measures for adjudicators regarding the standards of evidence required for O and P visas (*See* Appendix A, USCIS III.C for Executive Summary and Appendix B, USCIS III.C for comprehensive proposed solutions).

Regarding U.S. Department of State

I. **Provide the performing arts sector with equitable access to interview waivers, consular interviews, and other services amidst COVID-19 and its aftermath:** Over these past years, COVID-related capacity issues have severely impeded consular posts' timely processing of O and P applications. Therefore, greater consideration should be given to the time- and date-specific nature of arts events, and timely issuance of O and P visas must be a State Department priority.

   A. PRIORITY POLICY ASK: After two years of COVID-related interruptions and cancellations, it cannot be emphasized enough just how essential it is that the performing arts sector be able to rely on the visa process to make plans and continue presenting. Until such time as routine consular visa processing is universally available at U.S. consulates around the world, DOS should strongly encourage all posts to grant interview waivers as broadly as possible to all eligible O and P applicants. Moreover, contracted public performances should be considered grounds for approving a request for an expedited consular interview (*See* Appendix B, DOS I.A and Appendix B, DOS I.C).

II. **Support inclusion through clear and consistent decision- and rulemaking:**

   A. PRIORITY POLICY ASK: Provide artists with clear and reliable guidance regarding whether certain scheduled activities may be appropriately undertaken without an employment-based visa (*See* Appendix B, DOS II.A).
   B. PRIORITY POLICY ASK: Publish a list of *bona fide* industry showcase events upon which performing artists may rely when determining whether they may enter the U.S. to attend on B-1 status (*See* Appendix B, DOS II.B).
   B. PRIORITY POLICY ASK: Discontinue the use of Form DS-5535, which has proven to facilitate discrimination against non-immigrant artists, especially those from the Global South (*See* Appendix B, DOS I.B).
   C. SYSTEMIC IMPROVEMENTS: A number of specific changes to DOS's Foreign Affair Manual and policies could increase efficiencies at DOS and contribute greatly to an improved artist visa process (*See* Appendix A, DOS II.C for

Executive Summary and Appendix B, DOS II.C for comprehensive proposed solutions).

Regarding U.S. Customs and Border Protection

I. **Support DOS's efforts to provide U.S. presenters of international performing artists with fair and inclusive access to immigration benefits:** The enormous burden on consular posts, particularly due to the onset of COVID-19 and its aftermath, has at times prevented them from issuing visas in a timely fashion, despite a timely approved I-129. CBP can assist in a key way that will enable arts engagements to proceed as scheduled.

A. PRIORITY POLICY ASK: Provide CBP at ports of entry with guidance advising that it should consider the I-193 "Application for Waiver of Passport and/or Visa" for any performing artists or essential support personnel arriving in the U.S. if these individuals have certain approvals and documentation in hand (*See* Appendix B, CBP I.A).

B. PRIORITY POLICY ASK: Amend officer guidance to reflect approved changes in consular processing for B1 visas for employment related activities, including the proposed annual listing of *bona fide* industry showcase events ((*See* Appendix B, CBP I.B).

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Recommendations for Performing Arts Visa Policy - Appendix A

Summary of Recommendations Addressing Minor Procedural Issues

Regarding U.S. Citizenship and Immigration Services

II. Implementing Reliable and Efficient I-129 Processing Times

C. Recommendations to Fix Minor Procedural Issues (*See* Appendix B, USCIS II.C for comprehensive proposal for each item)

a. Establish a cultural liaison to respond to and elevate the concerns of the performing arts
b. Address delays caused by specific errors in CIS mail rooms
c. Address persistent technical system-level difficulties, including with the PIMS system
d. Recommends that posted processing times be accurate
e. Address issue of vague RFEs; proposes a system for regular Ombudsman review of RFE templates
f. Address unnecessary delays that occur with respect to support petitions when a principal petition is RFE'ed
g. Address unnecessary delays that occur when RFE'ed petitions are upgraded to Premium Processing
h. Address unnecessary delays that occur in regards to typographical or clerical errors
i. Address CIS delays in processing NOIRs received from DOS consular offices

III. Supporting Inclusion Through Fair Implementation of Evidentiary Requirements

C. Recommendations to Fix Minor Procedural Issues (*See* Appendix B, USCIS III.C for comprehensive proposal for each item)

a. Address errors of law relating to applying the standard of an artist's U.S. renown while disregarding foreign renown
b. Address the problematic application of the "future prong" to the "distinguished reputation of future employment" criteria
c. Address the practice of inappropriately disregarding non-mainstream press presented as evidence
d. Address confusion around around the "expert" testimony standard
e. Address issue of RFEs that don't indicate what additional evidence is mandatory
f. Address the practice of truncating requested petition durations without RFE'ing the petitions
g. Address the practice of truncating requested petition durations when the Service perceives gaps in employment
h. Address the practice of CIS challenging itineraries where an agent performs the function of an employer
i. Address the practice of demanding unnecessary "secondary evidence"
j. Address the confusion around the regulations where an agent serves as the sponsor or petitioner
k. Address the burdens created by the narrow definition of an artist's field
l. Address confusion around whether certain professional activities allowed while in B-1 or B-2 status are permitted while in P-1B or O-1B status
m. Address CIS's frequent rejection of new media and technology as acceptable evidence
n. Implement a workable system for O-1B "comparable evidence"
o. Address the practice of incorrectly applying the P-1B standard of "international renown"

p. Address the practice of unreasonably demanding evidence that all P-3 productions will be "culturally unique"
q. Address the incorrect application of the standard of experience with respect to support personnel

Regarding U.S. Department of State

II. Support Inclusion Through Clear and Consistent Decision- and Rulemaking

C. Recommendations to Fix Minor Procedural Issues (*See* Appendix B, DOS II.C for comprehensive proposal for each item)

a. Address consulates routinely requiring that O-1B, O-2, and P applicants produce full I-129 petition at interviews
b. Address consulates routinely requiring that O-1B, O-2, and P applicants produce copy of I-797 at interviews
c. Address persistent technical system-level difficulties, including with the DS-160 and DOS's appointment scheduling system
d. Address consulates' staffs inappropriately re-adjudicating O-1B, O-2, and P applicants' petitions
e. Address consulates' inflexible procedures for receiving payment of fees
f. Addresses consulates creating unduly burdensome procedures for resolving cases that have been 221(g)'ed
g. Address consulates' staffs refusing to review documentation submitted by O-1B, O-2, and P applicants
h. Address consulates' staffs disregarding some types of evidence submitted to overcome 214(b) presumptions
i. Address the issue of how 221(g) refusals caused by delays at Service Centers and KCC negatively impact applicants
j. Address consulates refusing to schedule interviews for third-country nationals
k. Address consulates incorrectly issuing O-1 visas for five-year validity periods
l. Address consulates frequently failing to complete refusal documentation
m. Establish consular liaisons for the arts and entertainment industries
n. Provide more flexible appointment times for large ensembles
o. Address the issue of traveling on a valid O-1 or P-1 visa while adjustment is pending
p. Address issue of consulates instructing applicants to bring original I-797B work authorization forms to CBP ports of entry
q. Establish procedures allowing for substitutions for P beneficiaries, where the original beneficiaries entered the U.S. but subsequently left the country
r. Allow for substitutions for O-2, P-1S, and P-3S beneficiaries when O-1B, P-1, and P-3 artists experience unavoidable personnel changes
s. Address consulates frequently refusing to issue corresponding O-2 visas to the support personnel of O-1B artists who change or extend their status
t. Address the DS-160's requirement that applicants reveal social media information.

Recommendations for Performing Arts Visa Policy - Appendix B

Details of Proposed Solutions

Regarding U.S. Citizenship and Immigration Services

II. Implementing Reliable and Efficient I-129 Processing Times

A. Establish Conditions, Process, and Expected Timing for Accessing "Traditional Expedite" Service

Issue: USCIS's reinstatement of the "traditional expedite" option for non-profit organizations is a helpful step in the right direction, but successful implementation of this policy has not yet been realized. USCIS advised that to avail themselves of the "traditional expedite" option, non-profit petitioners must first contact the USCIS Contact Center. However, there is no clear way to reach the USCIS Contact Center, other than by navigating an extensive phone tree that generally is unable to assist with specific situations such as requesting a "traditional expedite." There is also no e-request option for "traditional expedite" service.

Rule: On June 9, 2021, USCIS reinstated the "traditional expedite" option for "nonprofit organization[s] (as designed by the Internal Revenue Service (IRS)), whose request is in furtherance of the cultural and social interests of the United States" (*USCIS Policy Manual*, Volume 1, Part A, Chapter 5 - Requests to Expedite Applications or Petitions).

Proposed Solution: USCIS should provide a workable procedure for nonprofits to effectively implement the "traditional expedite" option. This procedure should be clearly outlined on its "How to Make an Expedite Request" website, as well as in the *USCIS Policy Manual* at Volume 1, Part A, Chapter 5 - Requests to Expedite Applications or Petitions.

B. Amend Guidance to Affirm that Fully Submitted O/P Artist Petition must be Adjudicated within 14 Days pursuant to INA §214(c)(6)(D)[1]

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 O or P 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 leave the petitioner with no choice but to pay an additional $2,500 for premium processing service, 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.

[1] Performing Arts Visa Working Group, *Artist Visa Stakeholder Comments on Restoring Faith in Our Legal Immigration Systems - Letter to Samantha Deshommes - Regulatory Coordination Division Chief Office of Policy and Strategy*, May 19, 2021 (*See also Letter to Secretary Alejandro Mayorkas*, September 23, 2021) (hereinafter PAVWG Letter to USCIS 5/19/21, 9/23/21).

Rule: Section 214(c)(6)(D) of the Immigration and Nationality Act states that the Service "shall" adjudicate a fully-submitted O or P petition within 14-days. However, in 1994 when the Service issued its Federal Regulations (also, "Regulations" or "CFR") 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, and USCIS should issue a policy memorandum and/or include guidance in the *USCIS Policy Manual* committing to this two-week timeframe.

C. Fix Minor Procedural Issues to Improve Processing Times

a. Establish a cultural liaison to respond to and elevate the concerns of the performing arts[2]

Issue: Perhaps due to their lack of familiarity with the ever-evolving standards and practices of the performing arts and entertainment industry, USCIS officials often struggle when reviewing the petitions of O-1B, O-2, and P applicants. This unfamiliarity results in unnecessary delays in petition processing times, requests for evidence, and erroneous petition adjudications.

Rule: Under INA §103 (a)(2-3), the Secretary of Homeland Security is charged with managing the Service's employees, establishing Regulations under the Code of Federal Regulations , and issuing policy instructions. The role of the Director of the Bureau of Citizenship and Immigration Services is established under 6 U.S.C § 113 (a)(1)(E). Pursuant to both of these authorities, before the *Adjudicator's Field Manual ("AFM")* was replaced with the *USCIS Policy Manual,* Chapter 83.1 of the *AFM* stated, "It is equally important that liaison be maintained with other governmental agencies, *with foreign consulates and other entities, with non-governmental organizations*, *and with private organizations having dealings with the immigration-related components of DHS*" (emphasis added).

Proposed Solution: The volume and complexity of performing artist visa cases warrants dedicating a permanent USCIS staff member to serve as a cultural liaison in USCIS headquarters in Washington, D.C. Facilitating communication between USCIS and performing arts industry representatives about complexities specific to these visa types ultimately benefits all parties and is consistent with USCIS principles (as reflected in USCIS's statement in the former *AFM* regarding the importance of maintaining liaison with entities and organizations that have immigration-related dealings). USCIS headquarters should establish such a permanent USCIS staff member, knowable by name and reachable by email, to respond to issues from the arts and entertainment industry. This dedicated staff member would liaise between industry representatives, USCIS administrators, and supervisors at the Vermont and California Service Centers ("VSC") and ("CSC"). *USCIS Policy Manual*, Volume 2, Part M (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O)) and Volume 2, Part N (Athletes and Entertainers) (P)) should be revised to reference this cultural liaison and provide their contact information. Volume 1 of the *USCIS Policy Manual* (General Policies and Procedures) should reinstate the former *AFM* guidance that, "

[2] Tamizdat, *Signed White Paper on Artist Mobility to the United States - Annual Edition 2021, Section on U.S. Citizenship and Immigration Services - Issue #4*, September 1, 2021 (hereinafter WP CIS).

liaison be maintained with other governmental agencies, with foreign consulates and other entities, with non-governmental organizations, and with private organizations having dealings with the immigration-related components of DHS."

b. Address delays caused by specific errors in CIS mail rooms[3]

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: Under INA §103(a)(2-3), the Secretary of Homeland Security is charged with managing the Service's employees, establishing regulations, and issuing policy instructions. The role of the Director of the Bureau of Citizenship and Immigration Services is established under 6 U.S.C. § 113 (a)(1)(E). Unlike its predecessor (Chapter 10.1 of the *AFM*) Volume 1, Part B, Chapter 6, of the *USCIS Policy Manual* (General Policies and Procedures - Submission of Benefit Requests - Submitting Requests) does not describe the steps that USCIS officers should take upon receipt of applications and petitions at service centers.

Proposed Solution: The "Intake Processing" section of Volume 1, Chapter 6, Part B of the *USCIS Policy Manual* (General Policies and Procedures - Submission of Benefit Requests - Submitting Requests) 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, the answer to Part 4, Question 3 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.

c. Address persistent technical system-level difficulties, including with the PIMS system[4]

Issue: Various persistent technical difficulties lead to unnecessary slowdowns in the adjudication of artist visas. These problems include persistent failures by the Petition Information Management Service ("PIMS") to update its information so as to show petitions approved.

Rule: The Service is charged with timely visa adjudication and processing. Section 214(c)(6)(D) of the Immigration and Nationality Act states that the Service "shall" adjudicate a fully-submitted petition within 14-days.

Proposed Solution: USCIS should take immediate action to improve its systems technologies, including patching the PIMS system so that it promptly and accurately reflects petition approvals.

d. Post more accurate processing times online[5]

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

[3] WP CIS #5.
[4] WP CIS #6.
[5] WP CIS #7.

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."[6] From 2005 until 2018, USCIS's Mission Statement provided that, "USCIS will secure America's promise as a nation of immigrants by providing accurate and useful information to our customers…"[7]

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. We support the PAVWG's position on this matter. We also recommend that USCIS reinstate its prior mission statement, i.e. "USCIS secures America's promise as a nation of immigrants by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system."

e. Address issue of vague RFEs; proposes a system for regular Ombudsman review of RFE templates[8]

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(b)(8)(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." Before the *AFM* was replaced with the *USCIS Policy Manual,* Chapter 10.5(a)(2) of the *AFM* stated that, "RFEs should, if possible, be avoided," and further stated, "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(c), "the director shall provide the petitioner or the self-petitioner with a written notification of the decision that explains *the specific reasons* for the revocation" (emphasis added).

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[6] *Telecon Recap: Application Processing Times: A Conversation with USCIS Office of Performance and Quality*, U.S. Department of Homeland Security (Sept. 22, 2015).

[7] *About Us*, U.S. Citizenship and Immigration Services (Dec. 30, 2016), https://www.uscis.gov/aboutus. Miriam Jordan, *Is America a 'Nation of Immigrants'? Immigration Agency Says No*, THE NEW YORK TIMES at https://www.nytimes.com/2018/02/22/us/uscis-nation-of-immigrants.html.

[8] WP CIS #13.

The process by which certain changes should be made to USCIS administrative practices is addressed under § 452 of the Homeland Security Act at 6 U.S.C. § 272(b)(2) (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 (6 U.S.C. § 272(d)4)).

Proposed Solution: Volume 1 of the *USCIS Policy Manual* (General Policies and Procedures) should reinstate the former *AFM* section that provided, "RFEs should, if possible, be avoided," and that "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." Volume 1 of the *USCIS Policy Manual* should be further 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.[9] 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.

f. Address unnecessary delays that occur with respect to support petitions when a principal petition is RFE'd[10]

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: Before the *AFM* was replaced with the *USCIS Policy Manual,* Chapter 10.5(a)(1) of the *AFM* stated that the purpose of issuing an RFE is "to request missing initial or additional evidence from applicants or petitioners who filed for immigration benefits;" the purpose of issuing RFEs is *not* to delay processing.

Proposed Solution: Volume 1 of the *USCIS Policy Manual* (General Policies and Procedures) 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. This section of the *USCIS Policy Manual* should also reinstate and provide that 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.

[9] PAVWG Letter to USCIS 5/19/21, 9/23/21.
[10] WP CIS #14.

g. Address unnecessary delays that occur when RFE'ed petitions are upgraded to Premium Processing[11]

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: Before the *AFM* was replaced with the *USCIS Policy Manual,* Chapter 10.5(a)(2) of the *AFM* stated that, "Initial case review should be thorough. Although the burden of proof is on the applicant, petitioner, or requestor, before issuing an RFE or NOID, an officer may assess whether the information needed is available in USCIS databases or systems. Occasionally, certain evidence or information not submitted with the application, petition, or request may be readily accessible in other USCIS records or otherwise available from external sources. If such information is available in USCIS databases or systems, an officer may obtain the information from these sources rather than issuing an RFE or a NOID. Adjudicators have the discretion to validate assertions or corroborate evidence and information by consulting USCIS or other governmental files, systems, and databases, or by obtaining publicly available information. 8 U.S.C. 1357(b). An officer should not request evidence that is outside the scope of the adjudication or otherwise irrelevant to an identified deficiency." This section underscores that other officers' efforts should not be duplicated and that unnecessary RFEs should be avoided so as not to unnecessarily burden USCIS resources.

Proposed Solution: Volume 1 of the *USCIS Policy Manual* (General Policies and Procedures) should reinstate the former *AFM* section that provided, "Initial case review should be thorough. Although the burden of proof is on the applicant, petitioner, or requestor, before issuing an RFE or NOID, an officer may assess whether the information needed is available in USCIS databases or systems. Occasionally, certain evidence or information not submitted with the application, petition, or request may be readily accessible in other USCIS records or otherwise available from external sources. If such information is available in USCIS databases or systems, an officer may obtain the information from these sources rather than issuing an RFE or a NOID. Adjudicators have the discretion to validate assertions or corroborate evidence and information by consulting USCIS or other governmental files, systems, and databases, or by obtaining publicly available information. 8 U.S.C. 1357(b). An officer should not request evidence that is outside the scope of the adjudication or otherwise irrelevant to an identified deficiency." Volume 1 of the USCIS Policy Manual should be further amended to re-incorporate USCIS prior guidance stating that, "RFEs should, if possible, be avoided," that "[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" (emphasis added), and that, "requesting additional evidence or returning a case for additional information may unnecessarily burden USCIS resources, duplicate other adjudication officers' efforts, and delay case completion." Finally, Volume 1 of the *USCIS Policy Manual* 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.

[11] WP CIS #15.

h. Address unnecessary delays that occur in regards to typographical or clerical errors[12]

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: Before the *AFM* was replaced with the *USCIS Policy Manual,* Chapter 10.5(b) of the *AFM* stated that a USCIS officer's "[I]nitial case review should be thorough. Though the burden of proof is on the applicant, petitioner, or requestor, before issuing an RFE or NOID, an officer may assess whether the information needed is available in USCIS databases or systems. Occasionally, certain evidence or information not submitted with the application, petition, or request may be readily accessible in other USCIS records or otherwise available from external sources. If such information is available in USCIS databases or systems, an officer may obtain the information from these sources rather than issuing an RFE or a NOID." As for information to be requested by way of an RFE, 8 CFR §103.2(b)(8)(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. Volume 1 of the *USCIS Policy Manual* (General Policies and Procedures) 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.

i. Address CIS delays in processing NOIRs received from DOS consular offices[13]

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: Before the *AFM* was replaced with the USCIS Policy Manual, Chapter 20.3(b)(1) of the *AFM* provided 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."

Proposed Solution: Volume 1 of the *USCIS Policy Manual* (General Policies and Procedures) should be revised to state that any NOIRs received from DOS must be adjudicated in a timely fashion. In addition, Volume 1 of the *USCIS Policy Manual* 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.

[12] WP CIS #16.
[13] WP CIS #18

III. Supporting Inclusion Through Fair Implementation of Evidentiary Requirements

A. Expand Upon Deference to Prior Determinations when Adjudicating Artist Visa Petitions[14]

Issue: Petitioner and Government resources are wasted when USCIS does not give reasonable deference to its own prior determinations, where eligibility has already been established.

Rule: Volume 2, Part A, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Nonimmigrant Policies and Procedures - Extension of Stay, Change of Status, and Extension of Petition Validity) provides that in certain cases "officers should defer to a prior determination that the beneficiary or applicant is eligible for the nonimmigrant classification sought," absent evidence that: (i) there was a material error involved with previous approval(s); (ii) there has been a material change in circumstances or eligibility requirements; or (iii) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility.

Proposed Solution: USCIS should amend the aforementioned section of the *USCIS Policy Manual* so that it also applies to O-1B , P-1B and P-3 artist petitions. In most circumstances this deference should obviate the need for petitioners to submit new evidence to reestablish previously approved beneficiaries' credentials, such as the "extraordinary ability"of an O-1B beneficiary; membership in an "internationally recognized entertainment group" for a P-1B beneficiary; or participation in a "culturally unique program" for a P-3 beneficiary.

B. Simplify Evidentiary Requirements for Beneficiaries with "Frequent Filer" Petitioners[15]

Issue: In cases of O-1B, P-1B, and P-3 petitions for touring performers and entertainers, petitioner and government resources are wasted when USCIS requires petitioners to prove the *bona fides* of individual engagements when evidence of the *bona fides* of the beneficiary's contract with a recognized agent satisfy the "preponderance of the evidence" standard.

Rule: It is a well-established rule in administrative immigration proceedings that the petitioner or applicant must establish by a "preponderance of the evidence" that they are eligible for the benefit sought (*Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO Precedent Decision 2010); *see also*, *Matter of Acosta*, 19 I&N Dec. 211, 215 (AAO Precedent Decision 1985)). The precedent decision of *Matter of Chawathe* provides that, "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 "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place)." Volume 1, Part E, Chapter 4 of the *USCIS Policy Manual* (General Policies and Procedures - Adjudications - Burdens and Standards of Proof) provides that, "[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: A new procedure should be created to evaluate and certify the *bona fides* of "frequent filer" agent petitioners, and USCIS should maintain a list of these certified agent petitioners for O-1B, P-1B, and P-3

[14] PAVWG Letter to USCIS 5/19/21, 9/23/21; WP CIS #23.
[15] PAVWG Letter to USCIS 5/19/21, 9/23/21.

beneficiaries. This system could be analogous to the process used for petitioners seeking P-2 or J-1 visas. Once certified, for a determined period of time (we would suggest three years) evidence required to prove eligibility would be provided in the following manner, which should meet the "preponderance of the evidence" standard of proof for O-1B, P-1B, and P-3 visas:

(i) evidence of the beneficiary's contract with a certified agent for the sought visa duration would be considered *prima facie* evidence of *bona fide* employment; and
(ii) evidence of the beneficiary's contract with a certified agent would be considered *prima facie* evidence of beneficiary's credentials, i.e. the "extraordinary ability"of an O-1B beneficiary; membership in an "internationally recognized entertainment group" for a P-1B beneficiary; or participation in a "culturally unique program" for a P-3 beneficiary.

All other requirements, including the union or peer consultation, would remain in force.

C. Recommendations to Fix Minor Procedural Issues to Ensure Fair Implementation of Evidentiary Requirements

a. Address errors of law relating to applying the standard of an artist's U.S. renown while disregarding foreign renown[16]

Issue: The Service occasionally indicates that either the 'past prong' or the 'future prong' of O-1B or P-1B 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-1B 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-1B RFE templates, and Volume 2, Part M, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - O-1 Beneficiaries), and Volume 2, Part N, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Documentation and Evidence) 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.

[16]PAVWG Letter to USCIS 5/19/21, 9/23/21; WP CIS #8.

b. Address the problematic application of the "future prong" to the "distinguished reputation of future employment" criteria[17]

Issue: There is both a "past prong" and a "future" prong" to the "employment reputation" criteria of Evidence Types One and Three under the O-1B and P-1B Regulations. However there are situations where it is impossible to show what the reputation of a production, event, organization, or establishment *will be* at the time of the artist's performance in the future. For example, an O-1B applicant actor may be engaged to perform in new production of a play with a distinguished reputation, at a U.S. theater with a distinguished reputation, directed by a director with a distinguished reputation, and it would be reasonable to infer that the production will more likely than not have a distinguished reputation; applied strictly, however, the unknowability of the future would require any evidence to fail to *prove* the distinguished reputation of the production which does not yet exist. This is the unreasonable result of an inflexible application of the future prong. When the Service applies an inflexible standard to the "future prong" of the "distinguished reputation" of a production, performance, organization or establishment, it disregards the "preponderance of the evidence" standard, places an undue burden on the petitioner, creates unnecessary delays for the beneficiary, and produces 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-1B 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)).

Proposed Solution: 8 C.F.R. 214.2(o)(3)(iv)(B)(1), 8 C.F.R. 214.2(o)(3)(iv)(B)(3), 8 C.F.R. 214.2(o)(3)(iv)(B)(1) and 8 C.F.R. 214.2(o)(3)(iv)(B)(3) should be revised to replace the "has performed, and will perform…" language with, "has performed, *or* will perform" (emphasis added).

In addition, the O-1B and P-1B RFE templates, and Volume 2, Part M, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - O-1 Beneficiaries), and Volume 2, Part N, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Documentation and Evidence) should be revised to clarify that the requirement of "distinguished reputation" for the beneficiary's future employment with productions, events, organizations, or establishments must be applied flexibly, with the understanding that it is not possible to wholly predict the reputation of future employment.

c. Address the practice of inappropriately disregarding non-mainstream press presented as evidence[18]

Issue: The list of published materials from which O-1B and P-1B 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

[17] PAVWG Letter to USCIS 5/19/21, 9/23/21; WP CIS #10.
[18] PAVWG Letter to USCIS 5/19/21, 9/23/21; WP CIS #11.

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-1B 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: The O-1B and P-1B RFE templates, and Volume 2, Part M, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - O-1 Beneficiaries) and Volume 2, Part N, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Documentation and Evidence) 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).

d. Address confusion around around the "expert" testimony standard[19]

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-1B 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: Before the *AFM* was replaced with the *USCIS Policy Manual,* Chapter 11.1(i) of the *AFM* stated 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. In order to provide such opinion testimony, the witness must be qualified as an expert by 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,* as qualified by the expert's *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: Volume 1 of the *USCIS Policy Manual* (General Policies and Procedures) should reinstate the former *AFM* section on Expert and Opinion Evidence, including the statement explaining 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. In order to provide such opinion testimony, the witness must be qualified as an expert by 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." Volume 2, Part M, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - O-1 Beneficiaries) and Volume 2, Part N, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Documentation and Evidence) 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

[19] WP CIS #12.

evidence. The relevant sections of Volume 2, Part M, Chapter 4, and Volume 2, Part N, Chapter 4, of the *USCIS Policy Manual* should be further amended to reflect that such a letter does not require an enumeration of the beneficiary's specific accomplishments.

e. Address issue of RFEs that don't indicate what additional evidence is mandatory[20]

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" 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 C.F.R. 214.2(o)(3)(iv)(C)). Similarly, 8 C.F.R. 214.2(p)(4)(iii)(B) requires that P-1B 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-1B RFE templates, and Volume 1 of the *USCIS Policy Manual* (General Policies and Procedures), should be revised to underscore that RFEs issued to O-1B or P-1B 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.

f. Address the practice of truncating requested petition durations without RFE'ing the petitions[21]

Issue: The Service routinely approves O-1B, P-1B, and P-3 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, P-1B, and P-3 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

[20] WP CIS #13.
[21] WP CIS #20.

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, P-1B, or P-3 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: Volume 2, Part M, Chapter 9 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - Admission, Extension of Stay, Change of Status, and Change of Employer), and Volume 2, Part N, Chapter 5 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Adjudication) 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.

g. Address the practice of truncating requested petition durations when the Service perceives gaps in employment[22]

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, P-1B, P-1S, P-2S, or P-3S 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-1B, P-1S, P-2S, or P-3S 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-1B 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

[22] WP CIS #21.

single petition was filed for separate events rather than a continuous event." The corresponding section at Volume 2, Part M, Chapter 9 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - Admission, Extension of Stay, Change of Status, and Change of Employer) states 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 "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-1B, P-1S, P-2S, and P-3S 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, Volume 2, Part M, Chapter 9 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - Admission, Extension of Stay, Change of Status, and Change of Employer), and Volume 2, Part N, Chapter 5 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Adjudication) 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 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.

h. Address the practice of CIS challenging itineraries where an agent performs the function of an employer[23]

Issue: Often O-1B, P-1B and P-3 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.

[23] WP CIS #22.

Rule: Under the Regulations, an O-1B, P-1B 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-1B, P-1B, and P-3 petitions.

For O-1B 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-1B 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: Additionally, Volume 2, Part M, Chapter 7 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - Documentation and Evidence) and Volume 2, Part N, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Documentation and Evidence) 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[24] 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."

i. Address the practice of demanding unnecessary "secondary evidence"[25]

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,

[24] PAVWG Letter to USCIS 5/19/21, 9/23/21.
[25] PAVWG Letter to USCIS 5/19/21, 9/23/21; WP CIS #24.

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 and P-1B eligibility, narrow the field of eligible O-1B and P-1B artists, and, most importantly, drift farther and farther afield from the applicable *preponderance* standard of evidence.

Rule: Regarding "primary evidence" versus "secondary evidence," before the *AFM* was replaced with the *USCIS Policy Manual*, Chapter 11.1(f) of the *AFM* provided 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.

Before the *AFM* was replaced with the *USCIS Policy Manual*, Chapter 11.1(c) of the *AFM* stated, "[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 **e**vidence 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: Volume 1 of the *USCIS Policy Manual* (General Policies and Procedures) should incorporate the prior *AFM* guidance at Chapter 11.1(f) and 11.1(c), discussed above. Volume 2, Part M, Chapter 7 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - Documentation and Evidence) and Volume 2, Part N, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Documentation and Evidence) should 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) should not be sought. Volume 2, Part M, Chapter 7 of the *USCIS Policy Manual* and Volume 2, Part N, Chapter 4 of the *USCIS Policy Manual* should also be revised to provide that when secondary evidence is sought, the standard applied to the secondary evidence should be, per prior Chapter 11.1(c) of the *AFM*, that "if the petitioner submits relevant, probative, and credible **e**vidence 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."

j. Address the confusion around the regulations where an agent serves as the sponsor or petitioner[26]

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 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: Volume 2, Part M, Chapter 3 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - Petitioners) and Volume 2, Part N, Chapter 3 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Petitioners) 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. Volume 2, Part M, Chapter 3 of the *USCIS Policy Manual* and Volume 2, Part N, Chapter 3 of the *USCIS Policy Manual* should also state that USCIS officers must not request documentation to the effect that the petitioner is authorized to

[26] WP CIS #25.

"act in the place of" the employer. Finally, Volume 2, Part M, Chapter 3 of the *USCIS Policy Manual* and Volume 2, Part N, Chapter 3 of the *USCIS Policy Manual* 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).

k. Address the burdens created by the narrow definition of an artist's field[27]

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 Volume 2, Part M, Chapter 7 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - Documentation and Evidence) and Volume 2, Part N, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Documentation and Evidence). 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: Volume 2, Part M, Chapter 7 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - Documentation and Evidence) and Volume 2, Part N, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Documentation and Evidence) should be revised to state that for purposes of establishing the eligibility of O-1B and P-1 beneficiaries, 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.

l. Address confusion around whether certain professional activities allowed while in B-1 or B-2 status are permitted while in P-1B or O-1B status[28]

Issue: Under the "amateur exception," the "showcase exception," the "academic exception," the "cultural exception," the "international competition exception," and the "recording exception," artists may engage in certain activities in the U.S. *without* an O-1B or P-1B visa -- but with a B-1 or B-2 visa. Despite the fact that these activities would be inherently related to the "event" or "events" described in an O-1B or P-1B petition, there is a great deal of confusion within the performing arts community about whether O-1B and P-1B visa holders can engage in these delineated activities, which do not threaten labor interests and thus are permitted on the B-1 or B-2 visa, while in the U.S. on an O-1B or P-1B visa.

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. These six circumstances are described as the "amateur exception," the "showcase exception," the "academic exception,"

[27] WP CIS #26.
[28] WP CIS #27.

the "cultural exception," and the "recording exception." Meanwhile, foreign persons who meet the qualifications for O-1B status may seek a visa to enter the U.S. to "perform services relating to an *event or events*…" (8 CFR §214.2(o)(1)(i) (emphasis added)), and foreign persons who meet the qualifications for a P visa must provide, "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 C.F.R. 214.2(p)(2)(ii)(C) (emphasis added)). Event is broadly defined for O visa holders as including "short vacations, promotional appearances and stopovers which are incidental and/or related to the event" ((8 CFR §214.2(o)(3)(ii)), and for P visa holders as "an activity including "short vacations, promotional appearances for the petitioning employer relating to the competition, event, or performance, and stopovers which are incidental and/or related to the activity. An athletic competition or entertainment event could include an entire season of performances. A group of related activities will also be considered an event" (8 C.F.R. 214.2(p)(3)).

The agency intent of of these O and P Regulations is made clear in the commentary to the implementing section of the Federal Register, which provides, "Forty-four commenters suggested that the final rule include a definition of the term "event" to provide guidance to petitioners as to what activities are covered by the petition. In response to these comments, the final rule now contains a definition of the term 'event.' The definition recognizes that short vacations often occur during an event or performance which are incidental and/or related to the event or performance. The Service will not include the term 'layoffs' in the definition of the term 'event,' as the term commonly implies a negative and adverse action of unemployment. However, the definition will include language which allows for short stopovers between performances, such as in a tour. The Service believes that business events are adequately considered in the definition as business projects." (59 Fed. Reg. 41818, 41819 (August 15, 1994)). The agency commentary on the P Regulations provides, "One commenter suggested that the definition of the term "event" as contained in the interim final rule be amended to include the duration of the alien's contract. The Service agrees with this suggestion and will adopt it in the final rule" (59 Fed. Reg. 41818, 41823)).

Proposed Solution: It is clear from both the O and P Regulations themselves, as well as the original agency intent in the commentary in the implementing section of the Federal Register, that the "amateur exception," the "showcase exception," the "academic exception," the "cultural exception," and the "recording exception" would be included in the "event or events" definition applicable to O and P visa holders. This should be clarified by adding language to the *USCIS Policy Manual* stating that all artist activities permitted on a B-1 or B-2 visa may also be undertaken by O-1B and P-1B visa holders. These revisions should be made to Volume 2, Part M, Chapter 9 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - Admission, Extension of Stay, Change of Status, and Change of Employer), and Volume 2, Part N, Chapter 5 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Adjudication).

m. Address CIS's frequent rejection of new media and technology as acceptable evidence[29]

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

[29] PAVWG Letter to USCIS 5/19/21, 9/23/21.

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). Before the *AFM* was replaced with the *USCIS Policy Manual*, Chapter 11.1(c) of the *AFM* stated, "[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 **e**vidence 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: Volume 1 of the *USCIS Policy Manual* (General Policies and Procedures) should incorporate the prior *AFM* guidance at Chapter 11.1(c), discussed above. Volume 2, Part M, Chapter 7 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - Documentation and Evidence) and Volume 2, Part N, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Documentation and Evidence) 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 *USCIS Policy Manual* should be further revised to emphasize that where new media evidence is submitted, adjudicators should be particularly mindful of the preponderance of evidence standard.

n. Implement a workable system for O-1B "comparable evidence"[30]

Issue: The ability to add additional engagements to an O-1B petition without filing an amended petition is hindered by the requirement at 8 CFR § 214.2(o)(2)(iv)(D), which states that any such additional performances must "requir[e] an alien of O-1 caliber." This requirement runs contrary to legislative intent, unnecessarily burdens petitioners, and creates inefficiencies at the Service.

Rule: Under 8 CFR § 214.2(o)(2)(iv)(D), "a petitioner may add additional performances or engagements during the validity period of the petition without filing an amended petition, provided the additional performances or engagements require an alien of O-1 caliber."

The requirement that the performances or engagements require a foreign person of O-1 caliber runs contrary to legislative intent, as discussed in the Service's 1994 preamble to issuing the implementing Regulations to the O and P provisions of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, which state,

[30] WP CIS #30.

"After careful consideration, the Service agrees that there is no statutory support for the requirement that an O-1B alien must be coming to the U.S. to perform services requiring an alien of O-1 caliber. As a result, this paragraph has been deleted from the final rule. The alien, however, must be coming to perform services in the area of extraordinary ability as is required in the statutory definition of the classification." As such, it appears that the "O-1 caliber" language was included at 8 CFR § 214.2(o)(2)(iv)(D) in error.

Proposed Solution: The clause "provided the additional performances or engagements require an alien of O-1 caliber" should be removed from 8 CFR § 214.2(p)(2)(iv)(D).

o. Address the practice of incorrectly applying the P-1B standard of "international renown"[31]

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: Volume 2, Part N, Chapter 4 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Documentation and Evidence) 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.

p. Address the practice of unreasonably demanding evidence that all P-3 productions will be "culturally unique"[32]

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

[31] WP CIS #31.
[32] WP CIS #32.

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: Volume 2, Part N, Chapter 4.C of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Documentation and Evidence - Evidence for P-3 Nonimmigrant Classification) 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.

q. Address the incorrect application of the standard of experience with respect to support personnel[33]

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-1B, 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, while the Federal Regulations provide that the evidence for an O-2 beneficiary must, "establish the current essentiality, critical skills, and experience of the O-2 alien with the O-1 alien and that the alien has substantial experience performing the critical skills and essential support services for the O-1 alien" (8 CFR §214.2(o)(4)(ii)(C)). The corresponding statutory provisions for the P-1S, P-2S, and P-3S beneficiaries require that the beneficiary be an "integral part of the performance of the group" (INA §101(a)(15)(P)(ii)(I)), which is in line with 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 performance of the entertainment group," though *only* the performers must have had a prior relationship to the group. The Federal Regulations define P-1S, P-2S, and P-3S "essential support" as, "a highly skilled, essential person determined by the Director to be an integral part of the

[33] WP CIS #33.

performance of a P-1, P-2, or P-3 alien because he or she performs support services which cannot be readily performed by a United States worker and which are essential to the successful performance of services by the P-1, P-2, alien. Such alien must have appropriate qualifications to perform the services, critical knowledge of the specific services to be performed, and experience in providing such support to the P-1, P-2, or P-3 alien" (8 CFR §214.2(p)(3)).

Proposed Solution: Volume 2, Part M, Chapter 5 of the *USCIS Policy Manual* (Nonimmigrants - Aliens of Extraordinary Ability or Achievement (O) - O-2 Beneficiaries) and Volume 2, Part N, Chapter 2 of the *USCIS Policy Manual* (Nonimmigrants - Athletes and Entertainers (P) - Eligibility Requirements) 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."

Regarding U.S. Department of State

I. Providing the Arts Sector with Equitable Access to Consular Services

A. Encourage all consular posts to grant interview waivers as broadly as possible to all eligible O and P applicants.

Issue: Over these past years, COVID-related capacity issues have impeded consular posts' ability to process O and P applications in a timely fashion, notwithstanding the time-and date-specific nature of arts events. Compounding this issue, some consulates refuse to schedule emergency interviews except in "life or death" situations.

Rule: On December 23, 2021, The Department Of State announced that posts would have more discretion regarding the waiver of the requirements for consular interviews pursuant to obtaining a number of visa classifications, including O and P visas.[34] Under this authority, consular officers have the discretionary authority to waive the visa interview requirement for O and P applicants (among others), provided they: (i) have previously been issued a visa, have never been refused a visa (unless overcome or waive), and have no apparent ineligibility; or (ii) are first-time O O/P visa applicants who are nationals of a Visa Waiver Program country, have previously traveled to the U.S. on ESTA, and have no apparent ineligibility.[35]

Proposed Solutions: Until such time as routine consular interviews are universally available at U.S. Consulates around the world, DOS should strongly encourage all posts to grant waivers as broadly as possible to all eligible O and P applicants.

B. Discontinue the Use of the DS-5535[36]

Issue: The DS-5535 is a security form used by consular officers during the visa process and is also known as "Supplemental Questions for Visa Applicants." The question of when an interviewing consular officer should issue the DS-5535 to a visa applicant is at the officer's discretion, and the practice is prone to discriminatory abuse; the

[34] U.S. Department of State, *Important Announcement on Waivers of the Interview Requirement for Certain Nonimmigrant Visas*, December 23, 2021.
[35] *Id.*
[36] Arts Organizations' Submission to Federal Register, 30 Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants (86 FR 8475, 2/5/21), 2/16/21.

form is predominantly used by non-immigrant visa units at U.S. consulates in Africa and the Middle East, *where its use rarely correlates to legitimate security concerns*. When the DS-5535 form is required, the processing time of a visa application often increases from approximately *one week* to *more than six month***s**, which, even prior to the pandemic, led to processing delays that impacted, canceled, or delayed, tours for numerous world-renowned artists. The arbitrary and capricious use of the DS-5535 hobbles U.S. arts presenters in their efforts to compete on the world market for international artists and undermines the critical work of U.S. cultural diplomacy and exchange. In 2019, DS-5535 processing delays impacted, canceled, or delayed tours for numerous world-renowned artists, including Malian singer Hawa Kassé Mady Diabaté, Malian band Songhoy Blues, Nigerien band Tal National, Mauritanian band Noura Mint Seymali, and Somalian singer Farxiya Fisk—among many others.

Rule: As part of the Biden administration's review of immigration screening and vetting procedures, as announced in its *Proclamation on Ending Discriminatory Bans on Entry to the United States* (January 20 2021), DOS requested comments on the DS-5535. In response to the Federal Register's call for comments, Tamizdat, the League of American Orchestra, and numerous other arts organizations submitted a letter to the Federal Register objecting to the use of the form DS-5535 in its entirety.

Proposed Solution: DOS should end the use of the DS-5535. The DS-5535 adds an untenable layer of unpredictability to the process, even as there is no public evidence that this intrusive and burdensome form serves or has served to protect national security or otherwise further national interests. These "extreme vetting" questions impede international cultural exchange, damage commerce, and facilitate discrimination against non-immigrant artists, especially those from from Muslim-majority countries and the Global South, as well as the U.S. arts organizations that seek to present these artists to U.S. audiences.

C. Contracted public performances should be considered grounds for approving a request for an expedited consular interview[37]

Issue: Over these past years, COVID-related capacity issues have impeded consular posts' ability to process O and P applications in a timely fashion, notwithstanding the time-and date-specific nature of arts events. Compounding this issue, some consulates refuse to schedule emergency interviews except in "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 §403.3-3(a) on scheduling appointments states that, "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, students, and those with emergent [*sic.*] or humanitarian purposes of travel, 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: Until such time as routine consular interviews are universally available at U.S. Consulates around the world, DOS should strongly encourage all posts to consider contracted public performances grounds for approving a request for an expedited consular interview. 9 FAM §403.3-3 should be temporarily revised to make it clear that O-1B, O-2, and P applicants traveling to complete contracted public performances qualify as "legitimate

[37] WP #11.

business travelers" who should be granted expedited emergency consular interviews as necessary. Additionally, 9 FAM §403.3-3 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. Also, the term "emergency" should replace "emergent" [sic.] at 9 FAM §403.3-3(a) and should be defined to include contracted public performances. Finally, 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.

II. Supporting Inclusion through Clear and Consistent Decision- and Rulemaking

A. Provide Artists with Clear and Reliable Guidance on Whether Certain Scheduled Activities may be Appropriately Undertaken without an Employment-Based Visa[38]

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"), including 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. 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:

> a. … 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

[38] WP DOS #2.

> 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.

9 FAM §403.9-5(B) provides guidance on annotating B-1 visas but does not address the six exceptions for artists and entertainers discussed above.

Proposed Solution: 9 FAM §403.9-5(A)(d)(2) should be revised to include B-1 and B-2 visas issued for the classifications 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), and 9 FAM §402.2-5(G)(4). 9 FAM §403.9-5 should also be 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 re-adjudicate whether the U.S. event 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.

B. Provide Clear Guidance on "Bona Fide Industry Showcase" Events[39]

Issue: When an artist seeks to enter the U.S. on a B-1 visa for a "showcase event," neither the applicant nor DOS or CBP has reliable authority upon which to rely as to whether a specific scheduled event qualifies for the showcase exception.

Rule: Under 9 FAM 402.2-5(B)(a) (and pursuant to the statutory and regulatory authority at INA §101(a)(15)(B), INA §212(q), and 22 CFR §41.31), an individual may seek to enter the U.S. on a B-1 visa (if otherwise eligible) if they are traveling to the U.S. to "[e]ngage in commercial transactions, which do not involve gainful employment in the United States" (*see also, Matter of Hira*, 11 I&N 824 (BIA 1965; *aff'd by* A.G. 1966). In the context of the performing arts, this has commonly been referred to as the "showcase exception." In an AILA/DOS Liaison meeting, DOS explained the "showcase exception," providing that, "[t]he Visa Office has advised posts in the past that it may be permissible for an individual or group of performers to appear in a showcase, such as South by

[39] League of American Orchestras & Tamizdat, *Email from Elizabeth Moller to DOS - Michael Yohannan and Elizabeth Evashwick*, December 2, 2020.

Southwest, on a B-1 visa, provided the activity is more akin to an audition than a public performance before a paying audience and provided the applicant will not perform in any other capacity outside of the showcasing event. All B visa applicants, regardless of purpose of travel, must still overcome the presumption of immigrant intent and be able to demonstrate that he or she has a residence in a foreign country that the applicant has no intention of abandoning."[40]

Proposed Solution: In collaboration with the performing arts industry, DOS should issue and update on an annual basis a non-exhaustive list of *bona fide* industry showcase events upon which performing artists may rely when determining whether they may enter the U.S. to attend on B-1 status. This list should be included at 9 FAM 402.2-5(B)(a)(1) annually.

C. Fix Minor Procedural Issues to Reduce Inefficiencies and Produce More Consistent and Equitable Visa Determinations

a. Address consulates routinely requiring that O-1B, O-2, and P applicants produce full I-129 petition at interviews[41]

Issue: Numerous consulates routinely demand that O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S 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), and 22 CFR §41.56, 9 FAM §402.13-9(B) and 9 FAM §402.14-10(B)(a) provide that, "PIMS or the Person Centric Query Service (PCQS) are the resources available to you to confirm that a petition for a visa has been approved. Posts may use an approved Form I-129 and Form I-797 presented by the applicant at post as sufficient proof to schedule a visa interview or may schedule an interview based on the applicant's confirmation that the petition has been approved, but an O petition visa must not be issued to a potentially eligible applicant unless the petition is approved in PIMS or PCQS.

In the past, the FAM helpfully advised consulates 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."

Confusing the state of affairs, however, is 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: There should be a reinstatement in the FAM at 9 FAM §402.13-9(B) and 9 FAM §402.14-10(B)(a) of the prior provisions discussed under the Rule, above, providing that, "You should not require an

[40]American Immigration Lawyers Association-Department of State Liaison Meeting, October 19, 2017, Q23, AILA Doc. No. 17102030.
[41] Tamizdat, *Signed White Paper on Artist Mobility to the United States - Annual Edition 2021, Section on U.S. Department of State - Issue #3*, September 1, 2021 (hereinafter WP DOS).

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." 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") would be superseded by this FAM update, following the introduction of PIMS and PCQS. Consular staff should be trained regarding this rule.

Additionally, the July 19, 2005 Policy Memo should be re-issued without the contradicting statement, or the applicable FAM provisions 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.

b. Address consulates routinely requiring that O-1B, O-2, and P applicants produce copy of I-797 at interviews[42]

Issue: Numerous consulates routinely demand that O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S 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), and 22 CFR §41.56, 9 FAM §402.13-9(B) and 9 FAM §402.14-10(B)(a) provide that, "PIMS or the Person Centric Query Service (PCQS) are the resources available to you to confirm that a petition for a visa has been approved. Posts may use an approved Form I-129 and Form I-797 presented by the applicant at post as sufficient proof to schedule a visa interview or may schedule an interview based on the applicant's confirmation that the petition has been approved, but an O petition visa must not be issued to a potentially eligible applicant unless the petition is approved in PIMS or PCQS.

In the past, the FAM helpfully advised consulates 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."

Confusing the state of affairs, however, is 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)."

[42] WP DOS #4.

Proposed Solution: There should be a reinstatement in the FAM at 9 FAM §402.13-9(B) and 9 FAM §402.14-10(B)(a) of the prior provisions discussed under the Rule, above, providing 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." 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") would be superseded by this FAM update, following the introduction of PIMS and PCQS. Consular staff should be trained regarding this rule.

Additionally, the July 19, 2005 Policy Memo should be re-issued without the contradicting statement, or the applicable FAM provisions 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.

c. Address persistent technical system-level difficulties, including with the DS-160 and DOS's appointment scheduling system[43]

Issue: Crashes, failure-to-load issues, time-outs, lockouts, and other internet bugs that plague the DS-160 Online Nonimmigrant Visa Application (DS-160) frustrate artist visa applicants' ability to properly complete the form, causing unnecessary delays for U.S. petitioners and the artists. DOS's appointment scheduling system also complicates the U.S. artist visa process.

The three different appointment scheduling systems (DOS's own Evisaforms system, AIS's Yatri system, and CGI's Traveldocs) have significant issues and are incompatible with one another, which is especially problematic for touring artists handling visa processes in multiple consulates. DOS's Evisaforms is the least buggy platform. The Yatri system and CGI Traveldocs are built either for Internet Explorer 5 (c. 1999), or Netscape 6.2 (c. 2002), which leads to significant browser issues. The biggest problem, however, is that many illegitimate visa sites pose as the official visa DOS appointment system. Since most of the world is served by commercial third party sites (which for most users are indistinguishable from fraudulent sites), mass confusion exists in foreign communities, creating vulnerability among applicants and contributing to fraud.

Rule: 9 FAM §403.2-2 states that, "You [consular officer] should ensure that NIV procedures are kept simple and consistent with effective administration of existing laws and regulations. Posts should review their procedures at intervals and revise workflow to adapt to changing conditions. Every applicant is to be given prompt and courteous service." Additionally, 9 FAM §403.2-5(A)(a)(3) states that it is the responsibility of consular officers that the DS-160 is "properly and promptly processed in accordance with the applicable regulations and instructions."

Regarding appointment scheduling, 9 FAM §403.3-3(a) provides that, [a]n effective appointment system must be flexible and must accommodate the largest number of applicants consistent with effective interviewing and security processing."

[43] WP DOS #5.

Proposed Solution: DOS should take immediate action to update its systems technologies in order to improve the overall reliability of the DS-160 Online Nonimmigrant Visa Application. When specific technical issues arise, an online chat assistant service could help applicants troubleshoot the DS-160 website. Second, if issues with the website make completing the DS-160 online impossible for a given applicant, the chat assistant could circumvent the process by directing them to a hard copy of the form and providing them with an e-mail address to submit a scan of the form directly to a particular consulate. Finally, it would be helpful to provide a link whereby applicants could contact DOS's IT team to report major issues such as when a DS-160 form page is completely broken.

Regarding DOS's appointment scheduling system, DOS should make Evisaforms the standard online appointment scheduling platform for all applicants, as it is the most reliable and most "flexible … consistent with effective interviewing and security processing." Eliminating commercial third party sites would make online appointment scheduling more dependable, reduce fraud, and lessen any confusion caused by cross-platform incompatibility. It would be helpful to provide a link on the consular appointment scheduling websites whereby applicants could contact consular staff to report the existence of fraudulent visa appointment scheduling websites and services.

d. Address consulates' staffs inappropriately re-adjudicating O-1B, O-2, and P applicants' petitions[44]

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

Rule: In the past, 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) provided 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, in the past, the provisions of 9 FAM §402.13-5(G) and 9 FAM §402.14-6(F) instructed 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: There should be a reinstatement of the prior provisions discussed under the Rule, above, stating that:

[44] WP DOS #6.

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, there should be a reinstatement the prior provisions discussed under the Rule, above, instructing 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."

The *Foreign Affairs Manual* at 9 FAM §402.13 and 9 FAM §402.14 should also be revised to emphasize and clarify the limits on consular officers' authority, by providing 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, P-1B, P-2, P-3, P-1S, P-2S, or P-3S 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

e. Address consulates' inflexible procedures for receiving payment of fees[45]

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:

[45] WP DOS #7.

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

f. Addresses consulates creating unduly burdensome procedures for resolving cases that have been 221(g)'ed[46]

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). Prior provisions (outlining suggestions for posts to manage workload) specifically stated that, "Using 221(g) to avoid decisions or hold open reapplication invites abuse." Current 9 FAM §403.10-4(B)(a) (on overcoming post refusals) states that, "When the requested information is submitted by the applicant or the necessary clearances received, you should retrieve the original Form DS-160 from post's files, note the new information or results of the clearance process, and issue or refuse the visa. If one year or more has elapsed since the latest refusal, the applicant must submit a new Form DS-160 and pay the MRV fee again for the case to proceed. If the cause of the delay leading to the 221(g) refusal is a lack of U.S. Government action, or U.S. Government error, the period of reapplication is extended indefinitely. Hence, the MRV fee is not charged again when the application is pursued." Finally, 9 FAM §402.2-2(F) states that, "The policy of the U.S. Government is to facilitate and promote legitimate international travel and the free movement of people of all nationalities to the United States, consistent with nationality security and public safety concerns, both for the cultural and social value to the world and for economic purposes."

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). The prior provisions discussed under the Rule, above, providing that, "Using 221(g) to avoid decisions or hold open reapplication invites abuse," should be reinstated at 9 FAM §403.10-4(A).

g. Address consulates' staffs refusing to review documentation submitted by O-1B, O-2, and P applicants[47]

Issue: O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S 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, prior provisions of 9 FAM §403.10-4 on overcoming or waiving refusals stated that, "INA §291 places the burden of proof upon the applicant to establish eligibility to receive a visa. However, the applicant is entitled to present evidence 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

[46] WP DOS #8.
[47] WP DOS #9.

establish eligibility to receive a visa. This policy is the basis for the review of refusals at consular offices and by the Department. 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)."

Current 9 FAM §403.10-4 on overcoming or waiving refusals provides that, "You should find that an applicant has overcome a nonimmigrant visa (NIV) refusal under INA 221(g) in two instances: when the applicant has presented additional evidence that allows you to re-open and re-adjudicate the case, or when the administrative processing on a case is completed…Similarly, if an applicant refused under INA 212(a)(4), subsequently presents sufficient evidence to overcome the public charge *ineligibility*, you should process the case to completion. d. In general, you should not find that an applicant has overcome a refusal under INA 214(b) in the same application. Most INA 214(b) cases are refused because the applicant has not convinced the officer of his or her intent to return abroad after his or her stay in the United States, as required under INA 101(a)(15)(B) (see 9 FAM 402.2-2(C) and 9 FAM 302.1-2(B)). As such, the only way to reassess the applicant's eligibility would be for the applicant to reapply. In this situation, you should create a new case in the system. e. (U) However, Overcome/Waive (O/W) may be appropriate for INA 214(b) cases when a supervisor believes the INA 214(b) refusal was in error; for example, if you did not believe the applicant fit the standards of the NIV classification for which he or she had applied (see 9 FAM 302.1-2(B)(1)). If a supervisor overcomes such a case, he or she should discuss it with the refusing officer and take personal responsibility for the case. See 9 FAM 403.12-2 for adjudication review procedures."

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" (Mutual Educational and Cultural Exchange Act, Pub. L. No. 87–256, § 101, 75 Stat. 527 (1961)).

Proposed Solution: Past provisions that provided that, "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 the Department. 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)" should be reinstated. 9 FAM §403.10-4 should be further revised to require that documentation submitted by an O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S 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. Finally, 9 FAM §402.13-10 and 9 FAM §402.14-11 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.

h. Address consulates' staffs disregarding some types of evidence submitted to overcome 214(b) presumptions[48]

Issue: Under INA §214(b) there is a presumption that O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S 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).

[48] WP DOS #10.

Because O-1B, P-1B, P-2, P-3, P-1S, P-2S, and P-3S 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, P-1B, P-2, P-3, P-1S, P-2S, and P-3S 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, P-1B, P-2, P-3, P-1S, P-2S, and P-3S applicant will depart the U.S.

Rule: The statutory presumption that all O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S 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 (L) or (V) of section 1101(a)(15) of this title, and other than a nonimmigrant described in any provision of section 1101(a)(15)(H)(i) of this title except subclause (b1) of such section) 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) of this title."

That O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S 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, P-1B, P-2, P-3, P-1S, P-2S, and P-3S applicants to this effect should be considered as evidence that rebuts a 214(b) presumption.

Proposed Solution: 9 FAM §402.13-10, 9 FAM §402.14-11, 9 FAM §403.10, and 9 FAM §401.1 should be revised to indicate that where an application for an O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, or P-3S 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.

i. Address the issue of how 221(g) refusals caused by delays at Service Centers and KCC negatively impact applicants[49]

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)(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 (*see* 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.

[49] WP DOS #12.

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, P-1B, P-2, P-3, P-1S, P-2S, and P-3S 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)(2)(d) 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.

j. Address consulates refusing to schedule interviews for third-country nationals[50]

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 §403.3-3(a) 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 legitimate international travel and the free movement of people of all nationalities to the United States, consistent with nationality [*sic*] security and public safety concerns, both for the cultural and social value to the world and for economic purposes."

[50] WP DOS #13.

Proposed Solution: Posts should not be allowed to refuse to schedule interviews for third-country national O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S applicants that request interviews, nor create administrative obstructions to inhibit third-country nationals from scheduling interviews. 9 FAM §403.3-3 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, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S interviews.

k. Address consulates incorrectly issuing O-1 visas for five-year validity periods[51]

Issue: Certain consulates are issuing O-1B 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-1B beneficiaries who have incorrectly received five-year O-1B 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). Accordingly, an O-1B visa has a maximum allowable validity period of three years.

Proposed Solution: 9 FAM §402.13-8 should be revised to underscore that the validity period of an O visa must not exceed three years.

l. Address consulates frequently failing to complete refusal documentation[52]

Issue: When denying a visa application, many consulates provide denial documentation that lacks critical information about the refusal.

Rule: 9 FAM §403.10-3(A)(1)(d) 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 an INA 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)(d) is helpful guidance but must be revised to require officers to include sufficient detail in the refusal documentation so that the applicants can understand the reason for the refusal.

m. Establish consular liaisons for the arts and entertainment industries[53]

Issue: Perhaps due to their lack of familiarity with the performing arts industry, consular officers often struggle when interviewing O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S applicants. This results in inappropriate interview questions, unnecessary delays, flawed petition re-adjudication, and incorrect decisions.

[51] WP DOS #14.
[52] WP DOS #15.
[53] WP DOS #16.

Rule: 9 FAM §402.2-2(F) states that, "The policy of the U.S. Government is to facilitate and promote legitimate international travel and the free movement of people of all nationalities to the United States, consistent with nationality [*sic*] security and public safety concerns, both 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.

n. Provide more flexible appointment times for large ensembles[54]

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 general condition (unless waived pursuant to a waiver authority) should 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 legitimate international travel and the free movement of people of all nationalities to the United States, consistent with nationality [sic] security and public safety concerns, both for the cultural and social value to the world and for economic purposes."

Pursuant to authority under INA§222(e), INA §222(h), 22 CFR §41.102, and 22 CFR §41.103, 9 FAM §403.3-3(a) 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, students, and those with emergent [*sic.*] or humanitarian purposes of travel, 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

[54] WP DOS #17.

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: 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. Additionally, FAM 403.3-3 should be revised to make it clear that O-1B, O-2, P-1B, P-2, P-3, P-1S, P-2S, and P-3S applicants traveling to complete contracted public performances qualify as "legitimate business travelers" who should be granted expedited emergency consular interviews as necessary. 9 FAM §403.3-3 should be further 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 replace "emergent" [*sic.*] at 9 FAM §403.3-3(a) and should be defined to include contracted public performances.

o. Address the issue of traveling on a valid O-1 or P-1 visa while adjustment is pending[55]

Issue: Artists on O-1B or P-1B 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.

p. Address issue of consulates instructing applicants to bring original I-797B work authorization forms to CBP ports of entry[56]

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,

[55] WP DOS #18.
[56] WP DOS #19.

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)(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) 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).

q. Establish procedures allowing for substitutions for P beneficiaries, where the original beneficiaries entered the U.S. but subsequently left the country[57]

Issue: Frequently, an ensemble with an approved P I-129 petition, the duration of which covers multiple trips to the United States, may experience unavoidable personnel changes. As a result, one or more beneficiaries included on the original approval may be unable to travel with the group on subsequent trips to the U.S. When this happens, the petitioner needs to be able to substitute new beneficiaries on the P petition. The *FAM* does not permit substitutions for a P visa holder if they have been "admitted to the United States on that visa;" there is, however, a lack of clarity as to whether that P visa holder can be substituted once they are again *outside* of the United States, but prior to the expiration of the term of the visa. This ambiguity is reflected by inconsistent policies at U.S. consulates around the globe, which places a great, unnecessary burden on U.S. arts presenters and performance ensembles in regards to the schedules and personnel management of their employed ensembles.

Rule: 8 CFR §214.2(p)(2)(iv)(H) states, in relevant part, "A petitioner may request substitution of beneficiaries in approved P-1, P-2, and P-3 petitions for groups. To request substitution, the petitioner shall submit a letter requesting such substitution, along with a copy of the petitioner's approval notice, to the consular office at which the alien will apply for a visa or the Port-of-Entry where the alien will apply for admission." 9 FAM §402.14-7(G)(d) provides that, "If a beneficiary of a petition has already been issued a visa and has been admitted to the United States on that visa, a substitution may not be made." 9 FAM §402.14-7(G)(d) states simply, "If a beneficiary of a petition has already been issued a visa and has been admitted to the United States on that visa, a substitution may not be made." As the *CFR* allows for substitutions, regardless of whether the beneficiary has already been admitted to the U.S., the language in the *FAM* is broad and ambiguous and goes beyond the Service's statutory and regulatory authority.

Proposed Solution: 9 FAM §402.14-7(G) should be revised to allow for the substitution of beneficiaries on P petitions where the original beneficiaries have entered the U.S. but have subsequently left the country. The procedure should follow the requirements of 8 CFR § 214.2(p)(2)(iv)(H), whereby the petitioner submits "a letter requesting such substitution, along with a copy of the petitioner's approval notice, to the consular office at which the alien will apply for a visa or the Port-of-Entry where the alien will apply for admission." The approved petitioner should also provide proof that the initial beneficiary has left the country. In order to protect against exceeding the total number of beneficiaries issued under the approved I-129 petition, if the request to substitute one P-visa

[57] WP DOS #20.

beneficiary for another is approved, the consular officer can both revoke the issued visa in the NIV system and physically cancel the visa foil of the substituted beneficiary, as is currently done under the FAM regime for H-2 visas. (9 FAM §402.10-9(E)(d)).

r. Allow for substitutions for O-2, P-1S, and P-3S beneficiaries when O-1B, P-1, and P-3 artists experience unavoidable personnel changes[58]

Issue: Frequently, an O-1B, P-1B, or P-3 artist with an approved I-129 petition, the duration of which covers multiple trips to the United States, may experience unavoidable personnel changes. As a result, one or more O-2, P-1S, and P-3S beneficiaries included on the original approval may be unable to travel with the group on subsequent travel to the U.S. When this happens, the petitioner needs to be allowed to substitute new beneficiaries on the O or P petition. The *FAM* does not permit substitutions for an O-2 visa holder, a P-1S, or a P-3S visa holder that has been "admitted to the United States on that visa."

Rule: There is no authority in the Statute or the Regulations prohibiting the substitution of O-2 beneficiaries. For P-1, P-2, and P-3 petitions, 8 CFR §214.2(p)(2)(iv)(H) states, in relevant part, "A petitioner may request substitution of beneficiaries in approved P-1, P-2, and P-3 petitions for groups. To request substitution, the petitioner shall submit a letter requesting such substitution, along with a copy of the petitioner's approval notice, to the consular office at which the alien will apply for a visa or the Port-of-Entry where the alien will apply for admission." However, 9 FAM §402.13-6(G) provides that substitutions of beneficiaries are not permitted on O-2 petition cases, and 9 FAM §402.14-7(G)(d) states simply, "If a beneficiary of a petition has already been issued a visa and has been admitted to the United States on that visa, a substitution may not be made." As neither the Statute nor the Regulations prohibit substitutions for O-2 beneficiaries, and the P Regulations explicitly allow for substitutions, the current language in the FAM is broad and ambiguous and goes beyond the Service's statutory and regulatory authority.

Proposed Solution: 9 FAM §402.13-6(G) and 9 FAM §402.14-7(G) should be revised to allow for the substitution of O-2, P-1S, and P-3 beneficiaries on petitions, as long as the original beneficiaries who can no longer work but who entered the U.S. have left the U.S. The procedure should follow the requirements of 8 CFR §214.2(p)(2)(iv)(H), whereby the petitioner submits "a letter requesting such substitution, along with a copy of the petitioner's approval notice, to the consular office at which the alien will apply for a visa or the Port-of-Entry where the alien will apply for admission." The approved petitioner should also provide proof that the initial beneficiary has left the country. In order to protect against exceeding the total number of beneficiaries issued under the approved I-129 petition, if the request to substitute one P-visa beneficiary for another is approved, the consular officer can both revoke the issued visa in the NIV system and physically cancel the visa foil of the substituted beneficiary, as is currently done under the FAM regime for H-2 visas. (9 FAM §402.10-9(E)(d)).

s. Address consulates frequently refusing to issue corresponding O-2 visas to the support personnel of O-1B artists who change or extend their status [59]

Issue: Artists who are in the U.S. often seek to change their status to O-1B, or extend their O-1B status. Like all O-1B beneficiaries, these artists may rely on the essential support of specific individuals. A problem arises when DOS officers take the position that an O-2 visa may not be issued where the O-1B principal is already in the U.S. in

[58] WP DOS #21.
[59] WP DOS #22.

valid O-1 status as a result of a change or extension of status. In these cases, the essential support personnel to the O-1B artists in the US are unable to obtain O-2 visas.

Rule: The Statute provides in relevant part that the O-2 visa applicant may, "enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events..." (INA §101(a)(15)(O)(ii)), and the Regulations state that the O-2 visa holder must, "(1) [b]e an integral part of the actual performances or events and possess critical skills and experience with the O-1 alien that are not of a general nature and which are not possessed by others; or (2) In the case of a motion picture or television production, have skills and experience with the O-1 alien which are not of a general nature and which are critical, either based on a pre-existing and long-standing working relationship or, if in connection with a specific production only, because significant production (including pre- and post-production) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production" (8 CFR §214.2(o)(ii)(B)). There is no legal authority in the Statute or the Regulations for the proposition that an O-2 visa may not be issued solely because the related O-1B visa has not been issued. Moreover, at an April 11, 2019 meeting with the American Immigration Lawyers Associations' Department of State Liaison Committee meeting with DOS, DOS confirmed that an O-2 visa could be issued if the O-1 principal were already in the U.S. in valid O-1 status as the result of a change or extension of status.[60]

Proposed Solution: 9 FAM §402.13-4(B) should be amended to affirm that consular officers must be willing to issue O-2 visas to O-2 beneficiaries on evidence that the O-1B beneficiary has or will have O-1B status throughout the duration of the related O-2 beneficiary's petition.

t. The Form DS-160's requirement that applicants reveal social media information creates undue burden for visa applicants, and results in the chilling of free speech and cultural diplomacy worldwide[61]

Issue: Form DS-160 now demands that visa applicants provide social media data. Because performing artists are public figures, their social media is often voluminous, and the content is largely beyond the control of the artists themselves. Moreover, U.S. artists might fear that exercising their own right to free speech would -- through their association with foreign artists -- both endanger their foreign associates and bring government scrutiny to their own work. Finally, there is a concern that other countries may deem similar measures appropriate and impose them reciprocally on U.S. artists. In this way, the proposed information collection may have the effect of chilling the free speech of U.S. artists who work globally.

Rule: The DS-160 social media questions chill free speech and discourage artists from coming to the U.S to share their work with American audiences., thus impacting the First Amendment rights of U.S. citizens to receive information from and interact with artists from overseas (*Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *see also*, *Martin v. City of Struthers,* 319 U.S. 141, 143 (1943)). The Supreme Court has also observed that social media platforms now serve as among the "most important places . . . for the exchange of views" (*Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017)).

Proposed Solution: 9 FAM §402.13 and 9 FAM §402.14 should be revised to posit that the public persona of an artist is distinct from their actual identity, and as such, for example, a beneficiary should not be denied a visa under INA § 214(d), solely on the grounds that their social media references drugs. Moreover, 9 FAM §402.13 and 9 FAM

[60] American Immigration Lawyers Association-Department of State Liaison Meeting on April 11, 2019, AILA Doc. No. 19060432.
[61] Tamizdat, *Signed Arts Organizations Comment on Department of State's "60-Day Notice of Proposed Information Collection: DS-160, Online Application for Nonimmigrant Visa and DS-156, Nonimmigrant Visa Application"* (86 FR 44766, 8/13/21); WP DOS #23.

§402.14 must be amended to establish that political free speech is protected, and that though social media may raise suspicion, it cannot be used as disqualifying evidence.

Regarding U.S. Customs and Border Protection

I. Supporting DOS's Efforts to Provide U.S. Presenters of International Performing Artists with Fair and Inclusive Access to Immigration Benefits

A. Officers at Ports of Entry should consider approving I-193 "Applications for Waiver of Passport and/or Visa" to performing artists who, due to consular delays or closures, have been unable to consular process O or P visas.

Issue: Performances and other cultural events are date-, time-, and location-specific. The nature of scheduling, confirming, and marketing highly sought-after guest artists in the U.S. requires that the visa issuance process be efficient and reliable. Unfortunately, the enormous burden on consular posts sometimes prevents them from issuing visas in a timely fashion, despite a timely approved I-129.

Rule: Under INA §212(d)(4), the requirement that nonimmigrants be in possession of a "valid nonimmigrant visa or border crossing identification card" (*see* INA §212(a)(7)(B)(2)) may be waived by, "the Attorney General and the Secretary of State acting jointly (A) on the basis of unforeseen emergency in individual cases…" The Regulations at 8 CFR §212.1(g) further provide, "Upon a nonimmigrant's application on Form I-193, or successor form, "Application for Waiver of Passport and/or Visa," a district director may, in the exercise of its discretion, on a case-by-case basis, waive either or both of the documentary requirements of section 212(a)(7)(B)(i) if satisfied that the nonimmigrant cannot present the required documents because of an unforeseen emergency."

Proposed Solution: CBP should issue a policy directive to CBP officers at ports of entry advising that such officers should consider the I-193 Waiver of Passport and/or Visa for any performing artists or essential support personnel who are arriving in the U.S. if the individuals have:

1. An approved I-797 for O or P status valid on the date of inspection,
2. An approved ESTA or a valid U.S. visa of any classification, and
3. Documentation establishing that it is more likely than not that the individual made a reasonable effort but was unable to process their visa at their home U.S. consulate or embassy**.**

The applicable sections of the CBP policy directives and/or handbooks should be revised to include such a directive and underscore that such a scenario constitutes an "unforeseen emergency."

B. CBP should amend officer guidance to reflect approved changes in consular processing for B1 visas for employment related activities, including the proposed annual listing of bona fide industry showcase events.

Issue: An individual artist 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* (including, but not limited to, the "showcase exception") there is no way for (G)(2) (the "international competition exception"), or 9 FAM §402.2-5(G)(4) (the "recording exception"). However, the artist cannot definitively rely on CBP's familiarity with and recognition of these permitted activities upon arrival at the U.S. border.

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:

> a. … 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.

9 FAM §403.9-5(B) provides guidance on annotating B-1 visas but does not address the six exceptions for artists and entertainers discussed above. As discussed at DOS II.A and II.B, above, DOS should annotate in the CCD and visa foil the exception under which an artist has received their approved B-1 or B-2 visa.

Proposed Solution: CBP policies should align with the aforementioned DOS policy proposals, above at DOS II.A and DOS II.B. Accordingly, CBP should treat individuals seeking admission to the U.S. and holding B-1 or B-2 visas that are annotated in the CCD in the proposed manner with a degree of deference, should not re-adjudicate whether the U.S. event or organization falls within the exception, and should 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. CBP should also refer to the non-exclusive list of aforementioned "showcase events" proposed above at DOS II.B.