

February 22, 2016

Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of the Director (MS2000)  
20 Massachusetts Ave., NW  
Washington, D.C. 20529-2000

Submitted via: [ope.feedback@uscis.dhs.gov](mailto:ope.feedback@uscis.dhs.gov)

Re: PM602-0123: Comparable Evidence Provision for O Nonimmigrant Visa Classification

On behalf of the undersigned organizations, we submit the following comments in response to the USCIS Policy Memorandum, "Comparable Evidence Provision for O Nonimmigrant Visa Classifications," (PM 602-0123), as it applies to the O-1B classification for individuals of extraordinary ability in the arts.

We commend the efforts of USCIS to clarify its guidance on this topic and streamline the adjudication process for petitions involving comparable evidence. We agree that USCIS adjudicators should be encouraged to interpret the comparable evidence provision with flexibility. We are, however, concerned that the draft policy guidance may not accomplish that purpose. Indeed, as drafted, it could have the opposite effect, depending on how USCIS adjudicators interpret and apply it.

Our concern stems from the steep increase since early 2014 in the rate of Requests for Evidence and denials USCIS has issued in response to petitions for the O-1B classification, an increase that suggests USCIS tacitly has adopted new standards of evidence and proof in relation to O-1B petitions. This apparent change in policy already has harmed our collective membership, and deprives American audiences of important opportunities to participate in international cultural activity. We are concerned that the draft Memorandum contains within it the potential to make it even more difficult for foreign artists to appear before U.S. audiences.

**First**, and foremost, we note that the draft Memorandum focuses on the applicability of the listed evidentiary criteria at 8 CFR § 214.2(o)(3)(iv)(B) to the beneficiary's *occupation*. We understand that this is because the comparable evidence provision at 8 CFR § 214.2(o)(3)(iv)(C) states that comparable evidence may be submitted if the listed criteria "do not readily apply to the beneficiary's occupation," but the singular focus on the word "occupation" raises a significant concern.

By way of example, innumerable artists have extraordinary ability, but many have not won awards of any kind, let alone significant national or international ones, nor have they received the benefit of attention from major newspapers, trade journals or the like, nor will they receive a high salary. In such cases (and many others), what assurance do petitioners have that USCIS will accept the simple explanation that a given criterion, though applicable to the occupation, does not pertain to the artist himself or herself? And how can petitioners be assured that adjudicators can predictably apply the definition of an occupation as "a person's job or profession?" In the field of the arts, in which there are highly specialized "jobs and professions" unique to the artist, the emphasis on the broader term of "occupation" is problematic. Dancers and musicians, for instance, specializing in unique sub-genres of dance and music may very narrowly define the parameters of their "job."

Indeed, in the fifth paragraph of Section III, the draft Memorandum suggests that USCIS adjudicators will reject comparable evidence solely because a given criterion applies to the *occupation*, even if not to the *individual*:

Comparable evidence will not be considered if the evidence is submitted in lieu of a particular criterion that is readily applicable to the beneficiary's occupation simply because the beneficiary cannot satisfy that criterion.

Needless to say, Legacy INS drafted the listed criteria in as general a fashion as possible, to cover as many occupations as possible. In consequence, though, if it now is taking the position that comparable evidence will not be considered if the listed criteria somehow apply to a beneficiary's occupation, without regard to their applicability to an actual beneficiary, USCIS is in effect announcing a very significant change in regulatory policy, and certainly one that requires a formal rulemaking in accordance with the Administrative Procedure Act.

**Second**, the draft Memorandum states in the last paragraph of Section III that a petitioner relying on comparable evidence "must still establish the beneficiary's eligibility by satisfying at least three separate evidentiary criteria as required under the regulations." With due respect, this makes no sense. We understand that USCIS does not intend for the Memorandum to alter either the statutory standard of extraordinary ability or the burden of proof, but petitioners relying on comparable evidence because an insufficient number of the listed criteria apply by definition cannot satisfy "at least three evidentiary criteria." There is no suggestion in either the statute or the regulations that petitioners may establish extraordinary ability *only* by providing three different types of evidence, and we must assume that USCIS does not intend to impose such a new requirement in a policy memorandum.

**Third**, we do not understand the assertion in the last paragraph of Section IV of the Memorandum that, "[i]t is important that the standards of the extraordinary ability classifications not be diluted by the kind of evidence submitted." How can those standards be "diluted" by the submission of relevant, probative evidence, whether it corresponds to one of the listed criteria or qualifies as comparable evidence? If the point is that the petitioner must meet the preponderance of evidence standard, the Memorandum addresses that issue in Section V. This sentence adds nothing of value to the Memorandum, and USCIS should strike it.

**Fourth**, the accompanying Request for Evidence template raises another concern respecting how USCIS adjudicators might interpret the Memorandum. In its discussion of the comparable evidence provision, at page 14, the template states that a petitioner submitting comparable evidence must "[e]xplain how the evidence...is "comparable" to *each* applicable regulatory criterion that the beneficiary seeks to meet..." (emphasis added). This is confusing and burdensome. After all, petitioners submitting comparable evidence *are not trying to meet the applicable regulatory criteria*. Why would USCIS impose on petitioners the burden of explaining how their evidence is comparable to each criterion they do not seek to meet?

The ultimate issue each O-1B petition presents to USCIS, after all, is whether the beneficiary has the requisite degree of extraordinary ability. To impose the additional burden on petitioners first of showing that certain types of evidence are not "readily available," and then of showing how evidence that is available is "comparable" to the very types of evidence that are not available, is to divert the precious time and resources of all concerned away from a focus on a beneficiary's extraordinary ability. The regulations and all policies implementing them ought to encourage petitioners to present all relevant, probative and credible evidence, rather than bogging petitioners down first in an effort to demonstrate why certain types of evidence are not "readily available"—

the sole requirement of 8 CFR § 214.2(o)(3)(iv)(C)—and then in an effort to show how the evidence they *do* have somehow is comparable to evidence they do *not* have.

Indeed, to require petitioners, as a threshold for establishing eligibility under the O-1 comparable evidence provision, to demonstrate that some, or all, of the listed criteria do not apply, is to ignore the very “catch-all” purpose of the comparable evidence provision, which is designed to ensure that all relevant, probative and credible evidence is brought to bear on the question of a beneficiary’s extraordinary ability.

To conclude, we trust that the intent of USCIS is to encourage adjudicators to consider comparable evidence when the listed extraordinary ability criteria do not apply. Properly interpreted, perhaps the draft Memorandum can assist in this regard. In light of the recent and significant increase in RFEs and denials, however, and given our understanding of the training of incoming adjudicators and their rate of turnover, we fear that this Memorandum will not accomplish the goal we presume it has in its current draft form. We urge USCIS to engage further with the arts community before it adopts a final policy memorandum, and we urge USCIS to publish the proposed revisions to Adjudicators Field Manual Chapter 33.4(d) regarding comparable evidence for public notice and comment, *before* it issues a final memorandum.

Thank you for your consideration.

**Association of Performing Arts Presenters**  
**Dance/USA**  
**League of American Orchestras**  
**North American Performing Arts Managers and Agents**  
**OPERA America**  
**Performing Arts Alliance**  
**Tamizdat**  
**Theatre Communications Group**

**Organization Descriptions for Signatories**  
**Comments on Comparable Evidence Provision for O Nonimmigrant Visa Classification**

**Association of Performing Arts Presenters**

Founded in 1957, the Association of Performing Arts Presenters (Arts Presenters) is the largest service and advocacy organization for the presenting and touring field in the United States. With more than 1,700 members worldwide, Arts Presenters represents colleges and universities; performing arts centers; regional, state, and local arts agencies; festivals; historic theaters; community centers, artists and artists managements. Arts Presenters is committed to increasing community participation, promoting global cultural exchange and fostering an environment for the performing arts to thrive. A leader in the field, Arts Presenters works to effect change through professional development, resource sharing and civic engagement.

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**Dance/USA**

Dance/USA, the national service organization for not-for-profit professional dance, seeks to advance the art form by addressing the needs, concerns and interests of professional dance. To fulfill its mission, Dance/USA offers a variety of programs for the membership and arts community, including data research and regional professional development, as well as works with organizations within and outside the arts field with whom common goals are shared. Dance/USA's membership currently consists of over 400 ballet, modern, ethnic, jazz, culturally specific, traditional and tap companies, dance service and presenting organizations, artist managers, individuals, and other organizations nationally and internationally. Dance/USA's member companies range in size from operating budgets of under \$50,000 to over \$30 million.

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**League of American Orchestras**

The League of American Orchestras leads, supports, and champions America's orchestras and the vitality of the music they perform. Its diverse membership of more than 2,000 organizations and individuals across North America runs the gamut from world-renowned symphonies to community orchestras, from summer festivals to student and youth ensembles, from businesses serving orchestras to individuals who love symphonic music. Founded in 1942 and chartered by Congress in 1962, the League links a national network of thousands of instrumentalists, conductors, managers and administrators, board members, volunteers, and business partners.

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### **North American Performing Arts Managers and Agents**

The North American Performing Arts Managers and Agents (NAPAMA) is a not-for-profit service organization, founded in 1979 and dedicated to promoting the professionalism of its members and the vitality of the performing arts. NAPAMA promotes the mutual interests of its members, their work with presenting organizations, government agencies, unions and other organizations serving the performing arts locally, nationally and internationally.

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### **OPERA America**

OPERA America leads and serves the entire opera community, supporting the creation, presentation, and enjoyment of opera. Artistic services help opera companies and creative and performing artists to improve the quality of productions and increase the creation and presentation of North American works. Information, technical, and administrative services to opera companies reflect the need for strengthened leadership among staff, trustees, and volunteers. Education, audience development, and community services are designed to enhance all forms of opera appreciation. Founded in 1970, OPERA America's worldwide membership network includes nearly 200 Company Members, 300 Affiliate and Business Members, 2,000 Individual Members, and 11,000 subscribers to the association's electronic news service.

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### **Performing Arts Alliance**

Founded in 1977, the Performing Arts Alliance (PAA) is a 501c4 multi-disciplinary coalition of 15 national service organizations from the professional nonprofit performing arts field. Through legislative and grassroots action, PAA advocates before Congress and key policymakers for national policies that recognize, enhance, and foster the contributions the performing arts make to America. The PAA network includes over 3,000 artists, ensembles, organizations, and supporters. PAA members include Alternate ROOTS, American Composers Forum, Association of Performing Arts Presenters, Chamber Music America, Chorus America, Dance/USA, Fractured Atlas, League of American Orchestras, National Alliance for Musical Theatre, National Association of Latino Arts and Cultures, National Performance Network, Network of Ensemble Theaters, New Music USA, OPERA America, and Theatre Communications Group.

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**Tamizdat**

Founded in 1998, Tamizdat is a 501(c)(3) non-profit organization that facilitates international cultural exchange. It is involved with a wide range of activities, including festival showcases, tours, media distribution, education, and performing artist visa assistance. Each year, Tamizdat plays a critical role in bringing nearly 6,000 performing artists to the U.S.

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**Theatre Communications Group**

Theatre Communications Group (TCG), the national organization for the American theatre, offers a wide array of services in line with our mission: to strengthen, nurture and promote the professional not-for-profit American theatre. As the U.S. Center of the International Theatre Institute, a worldwide network, TCG supports cross-cultural exchange through travel grants and other assistance to traveling theatre professionals. TCG seeks to increase the organizational efficiency of our member theatres, cultivate and celebrate the artistic talent and achievements of the field, and promote a larger public understanding of and appreciation for the theatre field. TCG serves nearly 500 member theatres nationwide.

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