Date: February 12, 2013

To: U.S. Citizenship and Immigration Services

From: Performing Arts Visa Working Group

Re: Draft RFE Templates for O-1B and O2 Artists

Via: scopsrfe@dhs.gov

We are writing in response to the request for comments posted by U.S. Citizenship and Immigration Services (USCIS) for the draft RFE templates for O-1B Aliens of Extraordinary Ability in the Arts and O-2 Artists.

The Performing Arts Visa Working Group is an ad-hoc coalition of national organizations including the American Federation of Musicians, Association of Performing Arts Presenters, Dance/USA, League of American Orchestras, North American Performing Arts Managers and Agents, OPERA America, Performing Arts Alliance, and Theatre Communications Group, collectively representing more than 18,000 members. Descriptions of each of these national organizations are included in the attached document.

The working group is dedicated to improving opportunities for international cultural exchange, and to informing U.S.-based nonprofit arts petitioners about compliance with U.S. visa requirements, particularly as they pertain to the engagement of foreign guest artists through the O and P visa categories. Through interaction with arts-related visa petitioners, we frequently field inquiries from our member organizations and provide technical assistance for U.S.-based arts organizations and artist managers undergoing the visa petition process. International cultural activity is a significant function of the U.S. arts sector, and the arts sector is a substantial economic engine for our country. Nationally, the nonprofit arts industry alone generates $135.2 billion of economic activity—$61.1 billion by the nation’s nonprofit arts and culture organizations in addition to $74.1 billion in event-related expenditures by their audiences. This economic activity supports 4.13 million full-time jobs and generates $86.68 billion in resident household income.

We applaud USCIS for the ongoing measurable improvements to the processing times and quality of adjudication for O and P arts-related visa petitions. Since July 2010, when the USCIS announced a commitment to reduce processing times for regular petitions to 14 days, petitioners have reported to us greatly improved processing times at both the California (CSC) and Vermont (VSC) service centers. Thank you for the progress made to-date on shortening processing times for artist visas, and for the public commitment USCIS has made to engender a climate that facilitates international cultural exchange.

We firmly believe that opportunities for international cultural exchange will only be improved if U.S.-based organizations and foreign artists continue to regain confidence in the artist visa process. Following years of lengthy processing times, and unpredictable issuances of Requests for Evidence (RFE) and petition denials, the process of re-building trust in the visa system is likely to take time, and will require ongoing stewardship by USCIS. Confidence in the artist visa process will only be rebuilt if both the timeframe for processing visa petitions is consistently reasonable, and the quality and predictability of adjudication improves.
It is our hope that the RFE template effort underway will contribute to improved predictability in both the visa petition preparation and adjudication processes. In an ideal environment, the petitioners and adjudicators will approach the petition process with a consistent understanding of the requirements for petition preparation and adjudication. Above all, the RFE should be clear, concise, and provide petitioners – most of whom are not represented by U.S. counsel - with guidance that a layman can follow. Accordingly, the RFE templates will be most helpful if they are consistent with publicly available USCIS guidance regarding petition preparation. With that in mind, we offer the following comments and cite corresponding USCIS guidance:

**I-129 O-1B RFE Template**

1. Page 4, Contracts. The RFE should specify that the summary of the terms of an oral agreement does not have to be signed by both parties to establish the oral agreement.¹

2. Page 5, Consultation. The template lacks reference to two circumstances under which a written advisory opinion is not required. Petitioners should be notified in the RFE that petitioners may respond with alternative documentation if either of the following circumstances apply: If the petitioner can demonstrate that an appropriate peer group, including a labor organization, does not exist, the decision will be based on the evidence of record. A consultation may be waived for an alien with extraordinary ability in the field of arts if the alien seeks readmission to perform similar services within 2 years of the date of a previous consultation. Petitioners should submit a waiver request and a copy of the previous consultation with the response to the RFE.² The RFE should also advise that if a petitioner responds with a non-labor consultation, and a relevant labor group exists, USCIS will seek a labor consultation, which will entail a minimum of an extra 29 days of processing.

3. Page 11, Agents. The section addressing “Agents representing both the beneficiary and one or more employers” includes a bullet point regarding, “Evidence that the agent is authorized to act as an agent on behalf of the beneficiary and all of the entities with whom the beneficiary is contracted to perform the services.” Petitioners would be aided by adding the following, “For example, the petitioner/agent may present a document signed by the beneficiary’s other employers which states that the petitioner is authorized to act in that employer’s place as an agent for the limited purpose of filing the O petition with USCIS.”³

**I-129 O-2 RFE Template**

1. General Requirements for all O Nonimmigrant Petitions. The first sentence states, “In general, petitions seeking O-1 nonimmigrant status must include the following…” As this RFE template relates to the O-2 classification, we suggest USCIS intends to reference “O-2,” rather than “O-1.”

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¹ [www.uscis.gov](http://www.uscis.gov), Temporary Workers, O-1 Visa – Individuals with Extraordinary Ability or Achievement, Application Process O-1 Visa, Contract between Petitioner and Beneficiary.

² [www.uscis.gov](http://www.uscis.gov), Temporary Workers, O-1 Visa – Individuals with Extraordinary Ability or Achievement, Application Process O-1 Visa, Exceptions to the Consultation Requirement.

³ November 20, 2009 USCIS memorandum, “Requirements for Agents and Sponsors Filing as Petitioners for the O and P Visa Classifications.”
2. Contracts. The RFE should specify that the summary of the terms of an oral agreement does not have to be signed by both to establish the oral agreement.4

3. Consultation. There are two, seemingly repetitive, consultation sections separated by a section on “specific requirements.” We recommend merging the two consultation sections to avoid confusion. The consultation section should be supplemented to explain that if a petitioner can demonstrate that an appropriate peer group, including a labor organization, does not exist, the decision will be based on the evidence of record.5

The first consultation section in the draft RFE template states: “The U.S. peer group may include a person or persons with expertise in the field, labor, or management organization.” The statute at INA 214(C)(6)(A)(ii) requires only an advisory opinion from a labor organization. There is no reference to a peer group, outside the O-1B context. Introducing references to peer groups can only confuse petitioners regarding this otherwise straightforward requirement for a labor consultation. The first consultation section also goes on to state that the advisory opinion must state: “Whether the position requires the services of an alien of extraordinary ability.” The standard of “extraordinary ability” does not apply to O-2 beneficiaries, so this reference should be removed.

4. Agents. The first sentence begins, “Petitions for O-1 nonimmigrants may be filed...” As this RFE template relates to the O-2 classification, we suggest USCIS intends to reference “O-2,” rather than “O-1.” The section addressing “Agents representing both the beneficiary and one or more employers” includes a bullet point regarding, “Evidence that the agent is authorized to act as an agent on behalf of the beneficiary and all of the entities with whom the beneficiary is contracted to perform the services.” Petitioners would be aided by adding the following, “For example, the petitioner/agent may present a document signed by the beneficiary's other employers which states that the petitioner is authorized to act in that employer's place as an agent for the limited purpose of filing the O petition with USCIS.”6

5. Specific Requirements. In four instances, the RFE template calls for documentation that the beneficiary has “skills which are not possessed by a U.S. worker,” that a U.S. worker could not perform the stated duties,” and “whether there are available U.S. workers who can perform the support services.” Repeating this phrase without guidance to its meaning will be confusing to petitioners. There is not a statutory nor regulatory required test of the U.S. labor market to determine whether a U.S. worker is available, and USCIS does not guide O-2 petitioners to provide such evidence in an original petition filing. USCIS eligibility guidance states, “The evidence should establish the current essentiality, critical skills, and experience of the O-2 beneficiary with the O-1 beneficiary and that the beneficiary has substantial experience performing the critical skills and essential support services for the O-1.”7 And, the instructions to Form I-129 explicitly state for O-2, “No test of the U.S. labor market is required.”8 Further, USCIS

4 www.uscis.gov, Temporary Workers, O-1 Visa – Individuals with Extraordinary Ability or Achievement, Application Process O-1 Visa, Contract between Petitioner and Beneficiary.
5 www.uscis.gov, Temporary Workers, O-1 Visa – Individuals with Extraordinary Ability or Achievement, Application Process O-2, Consultation.
6 November 20, 2009 USCIS memorandum, “Requirements for Agents and Sponsors Filing as Petitioners for the O and P Visa Classifications.”
7 www.uscis.gov, Temporary Workers, O-1 Visa – Individuals with Extraordinary Ability or Achievement, Evidentiary Criteria for O-2.
public guidance specifies that a consultation must be from an appropriate labor organization, and the draft template specifies that the consultation must state “the alien’s essentiality to and working relationship with the O-1 artist.” Assuming the petitioner establishes the beneficiary’s duties to be performed, critical skills and experience with the O-1 alien, and that the requirements for supplying a labor consultation are met, further evidence should not be required to demonstrate that a U.S. worker could not perform the stated duties. As the draft RFE template currently stands, petitioners may be misled to conclude that a test of the U.S. labor market is required. We request that in each case USCIS references the availability of U.S. workers in the RFE template, that the template also specifies that proof of a U.S. labor market test is not required.

We appreciate this opportunity to comment, and are also appreciative of the ongoing efforts of USCIS to engage the public in open feedback and dialogue regarding stakeholder concerns. To that end, we hope that this comment opportunity is just one part of an ongoing dialogue regarding the RFE process. We look forward to further communication with USCIS as new templates are implemented and as petitioners report their resulting experiences.

Sincerely,

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

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9 [www.uscis.gov](http://www.uscis.gov), Temporary Workers, O-1 Visa – Individuals with Extraordinary Ability or Achievement, Application Process O-2, Consultation.