Arts Comments on Proposed Fee Increase and Policy Changes

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Via Federal eRulemaking Portal
Re: DHS Docket No. USCIS-2019-0010

On behalf of the undersigned arts organizations, we submit these comments in response to the proposed rule published in 84 Fed. Reg. 62280 (November 14, 2019) to adjust the U.S. Citizenship and Immigration Services (USCIS) immigration and naturalization benefit application and petition fee schedule.

As a community of national organizations that support thousands upon thousands of U.S.-based arts organizations, we are dedicated to improving opportunities for international cultural exchange. Arts organizations and artists provide an important public service and advance international diplomacy by presenting foreign guest artists in highly valued performances, educational events, and cultural programs in communities large and small throughout the United States. International cultural exchange uniquely supports a diversity of viewpoints and contributes to international peace and mutual understanding. Inviting foreign artists to perform in the U.S. enables American audiences to experience a diversity of artistic talent and encourages a supportive climate for U.S. artists to perform abroad.

Foreign guest artists engaged by U.S. arts-related organizations are required to obtain an O visa for individual foreign artists, or a P visa for groups of foreign artists, individual entertainers joining U.S.-based internationally recognized entertainment groups, reciprocal exchange programs, and culturally unique artists. As an industry, we field many inquiries from, and provide technical assistance to, U.S.-based arts organizations and artist managers from all regions of the country and in communities of all sizes undertaking the nonimmigrant O and P visa petition process. We also serve international arts organizations and artists with guidance for successfully navigating the U.S. visa requirements.

As professional organizations on the frontlines of the artist visa process, we are aware that artists and U.S. nonprofit arts organizations are already confronting uncertainty in gaining approval for visa petitions due to lengthy and inconsistent processing times, uneven interpretation of statute and implementation of policies, increased expenses, unwarranted requests for further evidence to support petitions, and even the occasional groundless denial. The U.S. Department of Homeland Security's (DHS) proposal is recommending splitting the Form I-129 into separate forms for O and P petitions, requiring P petitions to be submitted on a new Form I-129MISC with a substantial filing fee increase; requiring O petitions to be submitted on a new Form I-129O, also with a substantial filing fee increase; limiting group petitions to a maximum of 25 beneficiaries per petition; and, increasing the timeframe of the Premium Processing Service from 15

calendar days to 15 federal working days. The proposed changes will increase the financial burden on U.S.-based visa petitioners without offering the assurance of improving the quality of USCIS processing, which has been the justification for previous fee increases. The United States should be easing—not increasing—the visa burden for nonprofit arts organizations engaging foreign guest artists so that U.S. audiences can enjoy artistry from across the globe.

We object to the dramatic and disproportionate fee increase proposed for O and P visa petitions. Under the proposal, the I-129 petition currently in use for both O and P visa petitions would be split into distinct petitions, separating O and P visas onto different forms and increasing the O petition fee from $460 to $715 (a 55% increase in cost per petition) and increasing P petition fee from $460 to $705 (a 53% increase in cost per petition). While the subsequent proposal at 84 FR 67243 (December 9, 2019) predicts that the proposed increase may be lessened by $10 to $12 per petition, the resulting fee increase remains a severe cost barrier for petitions. And, while the DHS proposal communicates a weighted average increase of 21% across visa petitions, the proposed increase for O and P applications appears to be disproportionately out of sync given that all O visas (including artists, and also scientists, athletes, and other non-arts O petitioners) comprise just 0.33% of all fee-paying petitions projected for FY2019/2020.

The financial burden associated with presenting international artists to American communities had already grown heavier following the December 2016 decision by DHS to impose a 42% increase in the regular filing fee. The petitioners served by our member organizations are primarily nonprofit organizations, small entities, and artists whose mission is to serve their communities through the arts. The proposal to further increase the fee burden will have a significant financial impact on U.S.-based petitioners and will surely prevent some organizations from presenting international artists. The budgets that support presenting international artists are extremely lean and accommodating the fee increase will be very challenging for all, and impossible for many.

Further, USCIS has not indicated a timeline for implementing such a substantial change. Recent experience with fee increases indicates a pattern of increased fee and form changes with little advanced notice to petitioners, whose businesses are unable to turn on a dime to absorb sudden increases in expenses and associated staff capacity to navigate the visa process.

Any fee increase must be accompanied by immediate and measurable improvements to the O and P artist visa process. This proposal to increase the cost burden for those endeavoring to bring international artists to the U.S. comes at a time when confidence in the USCIS petition adjudication process is particularly low. At 62339, the published rule states, “Adjustment to the fee schedule is necessary to recover costs and maintain adequate service.” We urge USCIS to ensure that any fee increase is accompanied not merely by a maintenance of service, but by significant policy improvements, especially critical given the previous disproportionate fee hike in 2016 and the failure to improve service since that time. The current quality of service—particularly over the past 6 months—is inadequate, inconsistent, and creates harmful barriers to international cultural activity.

Immediate action is needed to reduce the regular processing times for O and P visas. Congress recognized the time-sensitive nature of arts events when writing the 1991 federal law regarding O and P visas, in which the USCIS is instructed to process O

and P arts visas in 14 days. Section 214(c)(6)(D) of the Immigration and Nationality Act states that USCIS "shall" adjudicate a fully-submitted petition within 14 days. From the inception of the current O and P provisions on April 1, 1992, the Legacy Immigration and Naturalization Service routinely complied with this statutory requirement. However, when Premium Processing Service (PPS) was introduced in June 2001, guaranteeing processing within 15 calendar days at a current additional cost of $1,440 on top of the base filing fee, compliance with this provision by Legacy INS and, later, USCIS, has become extremely inconsistent. Following the creation of the PPS, regular O and P visa processing has varied widely, ranging from 30 days to six months. In the summer of 2010, USCIS pledged to meet the statutory 14-day regular processing time and promised public stakeholders that significant improvements would be made to the quality of artist visa processing.

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

As of early December 2019, the processing times publicly posted by USCIS for O and P visas are between 2 weeks to 2.5 months at the Vermont Service Center, and from two months to four months at the California Service Center–far exceeding the statutorily mandated timeframe. In practice, the actual processing times for O and P petitions filed by the regular petition process are currently exceeding even these USCIS-reported processing estimates and can vary dramatically, which is a cause for great concern especially given the USCIS warning at 62294 that it may take "several years before USCIS backlogs decrease measurably."

To engage foreign guest artists and facilitate international cultural exchange, the arts community *must* be able to rely upon timely and reliable visa processing. Demonstrated improvements to processing times must be made before a substantial fee increase can be justified, let alone one that proposes to increase the fees so disproportionately for a sliver of petitions that furthers cultural interests in the U.S. and brings sought-after international artistry to U.S. audiences. Any increase in the regular processing fee must be accompanied by proven and consistent implementation of the current 14-day statutory requirement for regular O and P processing times and immediate improvements to the quality of petition adjudication.

The DHS proposal to lengthen the Premium Processing Service timeframe from 15 calendar days to 15 business days will diminish the service provided to petitioners, even as the cost of Premium Processing increases. USCIS failure to make reliable improvements in the regular petition process has forced many nonprofit performing arts organizations to pay the $1,440 (as of December 2, 2019) Premium Processing Service fee, or risk extreme financial and reputational harm by canceling planned performances by international guest artists. The Premium Processing Service comes at an ever-rising cost that is both unaffordable and unsustainable to most U.S.-

based arts petitioners. USCIS instituted a nearly 15% increase in the premium processing fee effective October 2018, and yet another PPS increase effective December 2019, all of which reduces the amount of money available for a production/performance and represents a significant portion of an organization's operating budget and costs. Arts engagements are time- and date-specific, and those organizations that must upgrade to the PPS are already making difficult budgetary decisions to free up those funds. Given the extremely harmful inefficiencies of the regular petition process, as well as the most recent increase to the Premium Processing fee, any change that shortens the window of response time imposes a serious additional burden on nonprofit performing arts petitioners. For the PPS to take even longer than 15 calendar days would mean organizations would have to make the decision to upgrade to the PPS much earlier, and the added uncertainty of just how long "15 business days" means when applied to the federal calendar exacerbates the uncertainty arts petitioners already experience with the current state of delays and uneven quality of processing. We therefore strenuously object to the proposal to change Premium Processing Service from 15 calendar days to 15 business days.

Reinstate the traditional expedite option for nonprofit entities seeking to further the cultural and social interest of the U.S. While regular processing times swell and the cost of the Premium Processing Service rises well beyond the reach of many arts organizations, USCIS has also revoked the option of seeking expedited processing for cases that require rapid processing. Since implementing the Premium Process Service, the USCIS has allowed non-profit organizations to remain eligible for the traditional expedite, which made faster processing available at no additional fee in cases where petitioners experience an unforeseen emergency, and where failure to expedite the petition will result in serious harm, economically or otherwise, to the petitioner. A November 2001 memorandum had previously identified nonprofit organizations as eligible for expedited processing in certain circumstances, without payment of the Premium Processing Fee. While not a consistently reliable option, this expedited service has been used in some emergency cases in which, through no fault of their own, nonprofit arts petitioners require rapid visa processing. As recently as 2016, USCIS confirmed the process by which qualifying nonprofit arts petitioners could pursue a traditional expedite request. However, the current USCIS webpage, last updated on May 10, 2019, reveals that three prior grounds for an expedite request have now been excluded: no longer listed are "extreme emergencies," "nonprofit entities seeking to further the cultural and social interests of the U.S.," and "compelling interests of USCIS." USCIS should reinstate and implement uniform policies to once again provide access to the traditional expedite service and recognize the unique needs of and benefits provided by nonprofit arts petitioners that promote the cultural and social interests of the U.S.

The newly-proposed Form I-129MISC for P visas threatens to create new inefficiencies in artist visa processing. While we do not object to the overall concept of separate forms for O and P visas, we caution USCIS against including the P visa category on the proposed I-129MISC. USCIS states that separating the forms will help tailor the forms to the individual classifications, but the P, Q, R and H-3 are vastly different classifications. Out of all the classifications, the P most closely mirrors the O, which suggests that the O and P would make a more logical combination for using one form, or that the P visa classification be given its own form entirely. As DHS has already stated that USCIS will be still be using supplements in the case of the I-129MISC, combining the O and P onto one form and thus removing the need for P visas to use supplements would reduce the burden on both petitioners and USCIS. Using one form

type for both the O and P (or separating the P to its own specialized form), would allow better training of USCIS officers on the specific nuances of the O and P classifications. The classifications combined for the proposed I-129MISC are so vastly different that there is a higher risk that an officer will apply certain criteria to the P that are only applicable to another classification.

Imposing a 25-beneficiary cap for arts ensembles unfairly multiplies costs for performing arts organizations and creates new risks for USCIS confusion and processing delays. An internationally renowned orchestra or ballet company can easily exceed 100 performers, and the prospect of dividing what is currently one $460 petition into four or more petitions each costing $705 to file goes far beyond reasonable expectation. The logistical challenges of processing multiple petitions that arbitrarily separate performers of a single known entity raises far too many possibilities for error, delays, and staggered approvals that would threaten consular processing and the ability to keep U.S. engagements.

When the evidentiary standard for engaging an internationally renowned performing group relies upon demonstrating that the group has an established reputation and that 75% of the members have been in the group for at least one year, this becomes much more difficult to present if one must divide a petition into separate pieces. Limiting the number of beneficiaries of clearly established group will cause undue burden on practitioners to make sure that each filing meets the 75% rule.

There is a potential for multiple officers to be assigned to different component filings for the same group, arriving at different conclusions regarding the applicable criteria. This would then cause further delays in timely adjudication. Unlike the H-2 classification, in which a company can at least begin or maintain operations on some level as long as some of the petitions are approved, a performance company cannot present its production without all of its members. By requiring additional filings, DHS is also increasing the USCIS staff capacity needed to adjudicate petitions, uploading petitions into the Petition Information Management System, mailing receipts and approvals, and updating case status.

DHS is basing the proposal of limiting a filing to 25 beneficiaries on an Office of Inspector General audit on the H-2 classification. There is no evidence to suggest that either the O or the P classifications have such a high number of petitions with over 25 beneficiaries that this rule would be equitable when applied to the O and P categories. The relative infinitesimal percentage of petitions that engage more than 25 beneficiaries argues for an exception to be made in favor of maintaining the current policy of filing for a single group on a single petition.

USCIS must take steps to adequately inform petitioners and train USCIS personnel well in advance of implementing the fee increase schedule and related changes to the Form I-129. We urge USCIS to ensure that implementation of any fee increase and changes in the required forms takes place with adequate advance notice to petitioners and provide for sufficient time for related adjudicator training. In the weeks surrounding the previous fee increases, petitions submitted with the appropriate fee were erroneously rejected by USCIS service centers, jeopardizing time-sensitive performing arts events. Appropriate steps must be taken to ensure that the proposed fee increase does not result in unwarranted petition rejections.

High costs, delays and unpredictability in the visa process create high economic risks for U.S. nonprofit arts organizations and the local economies they support. DHS is proposing new barriers that harm the ability of U.S. arts organizations to present international artists to local communities. The loss will affect not only the guest artists seeking to perform in the U.S., but it will also affect U.S. artists and communities. Nonprofit arts groups frequently sell tickets in advance, creating a financial obligation to their audiences. Inconsistency of the U.S. visa process for foreign guest artists—as well as broad travel restrictions that hinder cultural exchange—creates harmful results for everyone. The absence of international guest artists costs American artists important employment opportunities. If an international guest artist cannot obtain a visa in time to make a scheduled performance, then the many American artists who were scheduled to work alongside the extraordinary guest artist lose a valuable and much-needed source of income, professional experience, and artistic promotion. In addition to these immediate costs, there can also be long-lasting harmful reciprocal effects on the ability of U.S. artists to tour, perform, and create art abroad.

When artists are unable to come to the United States for guest engagements, the American public is denied the opportunity to experience international artistry. Performances and other cultural events are date-, time-, and location-specific. The nature of scheduling and confirming highly sought-after guest artists in the U.S. requires that the visa process at USCIS be efficient, affordable, and reliable so that U.S. audiences may experience extraordinary artistic and cultural events. We have sought to illustrate in these comments that an increase in regular processing fees must be proportional and accompanied by immediate and consistent improvement in the adjudication procedures and processing timeframe for O and P petitions. The Administration can once again take action that will feel like meaningful help to the U.S. arts community and our global partners by producing measurable improvements to the U.S. visa process. We urge DHS to reconsider and revise the proposed changes to the O and P visa process and stand ready to be of assistance in further informing USCIS of opportunities to support international cultural activity through improved visa policy. Thank you for the opportunity to comment on this proposed rule.

Sincerely,

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Alternate ROOTS
American Alliance of Museums
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Americans for the Arts
Association of Art Museum Directors
Association of Performing Arts Professionals
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Dance/USA
Folk Alliance International
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