

The Final Curtain Call: Administrative Challenges in the United States O-Visa Process for Foreign Artists and Performers

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INTRODUCTION

In 2007, the media and entertainment field amounted to a \$930 billion industry.¹ The film industry brought in \$10.2 billion, and the video game industry brought in \$7.4 billion in U.S. revenues.² The advent of the Internet and other technological developments has created new platforms for, and transformed the meaning of, entertainment for a more globalized audience. No longer are American or foreign audiences confined to entertainment in their respective countries. Global audiences continue to broaden their international tastes, creating a culturally diverse demand and market for more international performers. From music to advertising, individuals focus on secular appeal. As the demand increases for global appeal in the entertainment arena, so too has the demand for foreign artists. Foreign-born artists like Rihanna, Jude Law and Yo-Yo Ma are from diverse countries and entertainment genres; yet they have one thing in common: they all need O-visas to enter into and perform in the United States. In 2010 alone, 63,984 foreign artists and personnel entered the U.S. on an O-visa.³

With the passage of the Immigration Act of 1990,⁴ Congress created the O- and P- visa categories for entertainers and artists.⁵ Congress viewed these visa categories as exceptional ones for extraordinary artists in their respective fields. Whether the United States grants an O-visa depends heavily on subjective standards and input from several different U.S. institutions: law firms, artist labor unions, the United States Citizenship and Immigration Services (USCIS) and the Department of State (which includes consulates and embassies). The inconsistent standards implemented by each of these institutions pose administrative issues in

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1. *Media & Entertainment*, WIKINVEST, http://www.wikinvest.com/industry/Media_%26_Entertainment (last visited Oct. 25, 2012); *see also Entertainment & Media Industry Overview*, PLUNKETT RESEARCH, <http://www.plunkettresearch.com/entertainment-media-publishing-market-research/industry-statistics> (last visited Oct. 25, 2012) (providing statistics on different sectors of the entertainment and media industry).

2. *Media & Entertainment*, *supra* note 1.

3. RANDALL MONGER & MEGAN MATHEWS, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., NONIMMIGRANT ADMISSIONS TO THE UNITED STATES: 2010 (2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2010.pdf.

4. Immigration Act (IMMACT) of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

5. *Id.*

the application process. These problems have a chilling effect on bringing talented individuals into the United States.

Part I of this Note provides a historical overview of the O- and P- visa categories for international artists and sketches the major concerns between the entertainment industry and labor unions regarding legislative policies. Part II outlines the application process to obtain an O-visa. Part III explores issues stemming from the differing institutions' subjective interpretations of the regulations governing the O-visa requirements. In particular, this Part highlights some of the administrative challenges of labor unions and guilds in the application process. Part IV discusses the effects of the varying interpretations of the O-visa regulations on artists, as well as the system's overall efficacy. Part V provides proposed changes to the current application process to alleviate problems caused by the different subjective interpretations incorporated throughout the application process.

Examining the subjective standards delineated throughout the application process reveals that the labor unions and bureaucratic requirements ultimately create barriers that prevent talented, international artists from entering the United States. This has heavy ramifications on the United States' intercultural, global presence. Modifying the visa petition process to create a more uniform procedure will ultimately enhance the arts domestically and will reposition American public diplomacy and interests around the globe.⁶

I. A HISTORICAL OVERVIEW OF THE O-VISA

A. THE MCCARRAN-WALTER ACT: INTRODUCTION OF THE H-VISA FOR ARTISTS

In 1952, Congress passed the McCarran-Walter Act to establish a preference-based quota system for nationalities and regions.⁷ The Act enumerated a list of nonimmigrant visa categories, which included the H-1 visa.⁸ Under the H-1 visa category, a foreign resident alien with "distinguished merit and ability" coming specifically to the United States to perform "temporary services of an exceptional nature requiring such merit and ability" would qualify for an H-1 visa.⁹ Under the H-2 category, an alien could come into the country to perform temporary services or labor, provided there were no unemployed American workers capable of

6. See generally MICHAEL DiNISCIA, THOMAS M. MCINTYRE & RUTH ANN STEWART, N.Y. UNIV. JOHN BRADEMAs CTR. FOR THE STUDY OF CONG., MOVING FORWARD: A RENEWED ROLE FOR AMERICAN ARTS AND ARTISTS IN THE GLOBAL AGE (2009), available at <http://www.nyu.edu/brademas/pdf/Brademas%20Arts%20Report%2012.09.pdf> (discussing the need to increase public diplomacy interests around the globe).

7. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, § 201, 66 Stat. 163, 175-76 (1952).

8. "Nonimmigrant" means "an alien who seeks temporary entry into the United States for a specific purpose." See *Definition of Terms*, U.S. DEP'T OF HOMELAND SECURITY, <http://www.dhs.gov/definition-terms#13> (last visited Oct. 25, 2012).

9. Immigration and Nationality (McCarran-Walter) Act § 101(a)(15)(H)(i).

performing such service or labor.¹⁰ The H-visa categories neither specified particular occupations of aliens who qualified nor defined “distinguished merit and ability.”¹¹ Entertainers and artists typically qualified under these categories, given the fact that artistic performances were more distinguishable and “exceptional in nature” than other occupations.¹² Although foreign artists could utilize the H-2 category as a potential means of obtaining a visa, the H-1 visa category was preferable because, unlike the H-2 visa, it did not require a labor certification process to verify that an American was incapable of performing the specific services requested.¹³

The lack of a clear definition of “distinguished merit and ability” led to the Immigration and Naturalization Service’s (INS) discretionary interpretation of the phrase.¹⁴ Prior to the Immigration Act of 1990 (IMMACT), INS’ liberal interpretation of this statutory term resulted in a high rate of approved artist visa petitions. This, in turn, spurred labor unions’ outcry for more restrictive legislation.¹⁵ Labor unions like the International Alliance of Theatrical Stage Employees (IATSE) and Actor’s Equity Association (AEA) were particularly concerned with INS’ inability to monitor artists after they entered the country. Foreign artists who remained beyond their approved projects competed with Americans for jobs in the entertainment industry (even though these foreign artists were supposed to reapply for a new H-1 visa).¹⁶ Contrary to labor unions’ concerns about job competition, however, a 1988 study concluded that the H-1 visa program did not adversely impact U.S. labor participants.¹⁷ As a result of this

10. *Id.* § 101(a)(15)(H)(ii).

11. *Id.* § 101(a)(15)(H)(i); Jon Jordan, Comment, *The Growing Entertainment and Sports Industries Internationally: New Immigration Laws Provide for Foreign Athletes and Entertainers*, 12 U. MIAMI ENT. & SPORTS L. REV. 207, 209 (1994).

12. See Jordan, *supra* note 11, at 209 (1994) (“It is important to note that the H category [under the 1952 Act] was not just limited to athletes and entertainers. This category applied to all nonimmigrant aliens who could fit in with the ‘distinguished merit and ability’ standard, or as workers seeking positions for which there were no qualified American workers available.”).

13. Under the H-2 visa regime, petitioning employers needed to undergo the Department of Labor’s certification process and prove that there was an insufficient number of workers in the United States who were willing, available or qualified to perform the job that the nonimmigrant intended to perform in the United States, and that the wages and working conditions would be undisturbed by allowing the foreign performer to work in the United States. *Id.* at 210–11. This additional procedural step proved to be onerous and time-consuming for employers petitioning for a foreign performer; for this reason, employers typically attempted to petition artists and entertainers under the H-1 visa category. See *id.*

14. The INS was abolished in 2003. In its place, the Department of Homeland Security was established, which includes U.S. Citizenship and Immigration Services. *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e00c0b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=e00c0b89284a3210VgnVCM100000b92ca60aRCRD> (last updated May 25, 2011).

15. Bernard P. Wolfsdorf, *Temporary Alien Workers Seeking Classification Under the Immigration and Nationalization Act (IMMACT) of 1990*, in KEY ISSUES IN IMMIGRATION LAW 35, 36 (Philip A. Boyle et al. eds., 1992).

16. Tibby Blum, *O and P Visas for Nonimmigrants and the Impact of Organized Labor on Foreign Artists and Entertainers and American Audiences*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 533, 536 (1993).

17. *Id.*

report, INS modified its own regulatory definition from “distinguished ability” to “prominence,” which lowered the standard for artists and entertainers.¹⁸ Organized labor unions quickly lobbied for a more precise definition of “distinguished” to deter more average foreign entertainers from entering the U.S.¹⁹ In response to the unions’ lobbying efforts, President George H.W. Bush signed into law the Immigration Act of 1990, which implemented a vast change in the visa categories for which foreign performers and artists qualified.²⁰

B. IMMACT: INTRODUCTION TO THE O- AND P-VISA CATEGORIES

Congress originally created the O- and P- visa categories through the Immigration Act of 1990, known as IMMACT, for the new visa categories to take effect in 1991 and remove the entertainment occupations from the H-visa category. Congress devised these categories in order to respond to union lobbying efforts, to redefine and preserve the H-visa to “specialty occupations” that excluded artists and entertainers from the definition, and to create separate visa categories and standards for these aliens.²¹ Under the 1990 O- and P- visa categories, the O-1 visa applied to aliens with “extraordinary ability in the . . . arts . . . which has been demonstrated by *sustained national or international acclaim*”²² Artists in motion picture and television production had to show “a demonstrated record of *extraordinary achievement* . . . recognized in the field through extensive documentation.”²³ Unlike the H-visa requirements, the O-1 visa category generated a taxonomy of qualifying occupations, but it also distinguished between artists’ standard of success in the arts from that of artists in the film and television industries specifically.²⁴ The presumption made in this distinction was that a one-time achievement in film or television substantially proved an alien’s ability more so than a one-time achievement in other arts arenas.²⁵ In addition, the O-1 category also required the Attorney General, prior to approving a performer’s visa application, to determine whether the alien’s admission would “substantially benefit prospectively the United States.”²⁶ The O-2 applied to aliens who planned to join an O-1 visa holder and who provided unique, critical skills to an O-1 visa

18. *Id.* at 537.

19. *Id.*

20. Immigration Act (IMMACT) of 1990, Pub. L. No. 101-649, 101 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.). This Act amended the Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, 66 Stat. 163 (1952), and has been subsequently amended by the Miscellaneous and Technical Immigration and Naturalization Amendments (MTINA) of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (codified in scattered sections of 8 U.S.C.).

21. See Judith Kelley, *New O and P Nonimmigrant Visa Categories: A Lesson in Compromise*, 16 COLUM.-VLA J.L. & ARTS 505, 505 (1993).

22. See IMMACT § 207(a)(3)(O)(i) (emphasis added). Although not discussed in this Note, the 1990 O category also applies to aliens of extraordinary ability in the sciences, business or athletics.

23. *Id.* (emphasis added).

24. *Id.*

25. Kelley, *supra* note 21, at 519.

26. *Id.*; IMMACT § 207.

artist's performance.²⁷ The final category, the O-3 visa, applied to spouses or children of the O-1 performer who planned to join or accompany the principal O-1 visa holder.²⁸

Section 207 of the original legislation also required artists and entertainers to consult a union or bargaining guild before submitting petitions to the INS.²⁹ Such a requirement gave artist unions and guilds a weightier role in monitoring the influx of foreign artists. It also allowed the unions to utilize their expertise to determine which foreign artists and entertainers were of an extraordinary caliber.³⁰

A heated debate ensued between the entertainment industry and labor unions over section 207's O-visa requirements. Previously a silent force during Congress' creation of the O-visa category,³¹ the entertainment industry objected to the extensive documentation required to establish "extraordinary ability" under section 207.³² Artists could meet this standard by pointing to reviews, major internationally recognized awards and box-office records. Entertainment industry representatives argued that the statute required a high standard of proof of extraordinary ability, which was inappropriate for artists who would qualify as prominent internationally, but who were not sufficiently commercially visible.³³ They further argued that the visa category was underinclusive and would potentially bar young, emerging talent whose innovative ideas were needed to foster the arts.³⁴

The requirement that artists consult unions before submitting O- and P-visa petitions proved to be an even more contentious source of disagreement between the entertainment industry and unions. Motivated by their interest in protecting American workers, unions sought to maintain the consultation requirement in order to assist the INS in evaluating whether an artist's skill level was great enough to satisfy the extraordinary ability element.³⁵ Unions argued that their expertise of regulating the highly transient and unstable entertainment industry allowed them to analyze artists' work in order to determine whether they were, in fact, extraordinary.³⁶ They claimed that whereas INS officials would render decisions based solely on the evidence provided by visa petitioners and the arguments of petitioners' attorneys, the unions could contextualize an artist's work. This, the unions argued, would preserve their objective of protecting American workers who could perform the same role as a foreign artist.³⁷

27. IMMACT § 207(O)(ii).

28. *Id.* § 207(a)(3)(O)(iii).

29. *Id.* § 207(b)(3)(A).

30. *See* Kelley, *supra* note 21, at 532.

31. *Id.* at 505 ("[I]nput was lacking from certain significantly affected members of the U.S. arts community, specifically arts service organizations, and commercial and non-profit presenters, producers, and promoters ('arts organizations')."). The specific reason for this silence is unclear. *Id.* at 505 n. 6.

32. *Id.* at 520.

33. *Id.*

34. *Id.*

35. *Id.* at 532.

36. *Id.*

37. *Id.*

The entertainment industry argued, in turn, that the rules set no specific timeframe in which unions were required to provide their advisory opinion, thereby giving the unions the power to create significant processing delays in the application process.³⁸ Moreover, the industry contended that the INS' union consultation requirement input gave unions undue authority over the artistic decision making process; unions' determination about whether a producer or director of an event could hire a specific foreign artist was an artistic judgment outside of unions' scope of power.³⁹ Broadway producer Emanuel Azenberg testified on this point during House committee hearings on the IMMACT O and P nonimmigrant visa proposals:

[T]o leave in the hands of elected union officials the control of which artist is good enough to come to America . . . will rarely, if ever, provide any American with a job nor will it in fact save any American their job. . . . Artist unions, along with management, of which I am a part, have a history of putting nails in their own coffins. . . . A harsh and cynical statement is that the only jobs the union leaderships in this case have protected have been their own.⁴⁰

As debates over the IMMACT O-visa legislation continued in 1991, Congress came to a compromise between these two groups. By November 25, 1991, Congress agreed to amend IMMACT's O- and P-visa categories in the Miscellaneous and Technical Immigration and Naturalization Amendment (MTINA), discussed below.

C. MTINA OF 1991: AMENDING THE O- AND P-VISA CATEGORIES

In 1991, Congress amended IMMACT's O- and P-visa categories in MTINA to ameliorate review procedures and to satisfy the interests of the unions and entertainment industries. Under the revised provisions, Congress defined the term "extraordinary ability" to mean "distinction" as a way to distinguish the H-visa category's "prominence" standard.⁴¹ The amendments also eliminated the requirement that the Attorney General determine whether the foreign artist would

38. *Id.* at 531.

39. See *id.* at 532. For more discussion on this point, see *Admission of O and P Nonimmigrants: Hearing on H.R. 3048 Before the Subcomm. on Int'l Law, Immigration & Refugees of the H. Comm. on the Judiciary*, 102d Cong. 109 (1991).

40. *Admission of O and P Nonimmigrants: Hearings on H.R. 3048 Before the H. Subcomm. on Int'l Law, Immigration & Refugees of the H. Comm. on the Judiciary*, 102d Cong. 66 (1991) (statement of Emanuel Azenberg) (quoted in Kelley, *supra* note 21, at 531 n.187).

41. Miscellaneous and Technical Immigration and Naturalization Amendments (MTINA) of 1991, Pub. L. No. 102-232, § 205(a)(46), 105 Stat. 1733, 1740 (codified in scattered sections of 8 U.S.C.). For clarification, the USCIS defined "distinction" as "a high level of achievement in the field of the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well known in the field of arts." *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, U.S. CITIZENSHIP & IMMIGR. SERVICES [hereinafter *O-1 Visa*], <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b9930b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=b9930b89284a3210VgnVCM100000b92ca60aRCRD> (last updated Mar. 16, 2011).

“substantially benefit prospectively the United States.”⁴²

Regarding the hotly contested consultation requirement, Congress mandated more specific procedures to accommodate the entertainment industry’s concerns over the earlier IMMACT provisions. The revised provisions gave any labor union or peer group that received a copy of a petition fifteen days to submit a written advisory opinion in response.⁴³ The new rule also allowed visa petitioners to supply rebuttal evidence in response to an objection letter from a specific labor union or peer group.⁴⁴ To better outline the scope of the unions’ power, the amendment provisions also stipulated that the Attorney General shall give the advisory opinion letters only discretionary weight in evaluating the application.⁴⁵

Despite the modified provisions addressing the incorporated entertainment industry’s concerns, Congress still mandated the inclusion of a union advisory opinion letter in every petition sent to the Attorney General.⁴⁶ In the event that a petitioner failed to include a consultation letter in the petition, the amendment instructed the Attorney General to forward a copy of the petition to the appropriate labor organization specializing in the petitioner’s artistic field.⁴⁷ Failure to include a consultation letter therefore resulted in a delay in processing the visa petition. The Attorney General then had fourteen days from receipt of the petition with the consultation letter to adjudicate, as well as the discretion to request an expedited consultation to accommodate emergency situations where an unreasonable burden may delay production.⁴⁸

To address union fears about job competition between American and incoming foreign performers, Congress also included an annual GAO report requirement. In the amended rules under section 207, the Attorney General was required to annually submit to Congress a detailed report on the number of H-, O-, P- and Q- visas filed, the number approved according to occupation, the number denied, the number withdrawn and the number awaiting final action.⁴⁹ The purpose of this requirement was to assist both the INS and artist unions in determining whether tighter restrictions were needed to reduce job competition and increase job opportunities for American workers. Upon these changes to the IMMACT rules, on April 1, 1992 Congress codified the MTINA provisions, which continue to govern artists’ visa applications today.⁵⁰

42. MTINA § 205(b) (amending Immigration Act (IMMACT) of 1990, Pub. L. No. 101-649, 101 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.)).

43. *Id.* § 204(6).

44. *Id.*

45. *Id.*

46. *See id.* § 204.

47. *Id.*

48. *Id.*

49. *Id.* § 207(c)(1).

50. Although these rules are still codified, the INS (now known as the USCIS) has subsequently added further provisions and clarified interpretation of the regulations since 1992, as will be explained *infra* Part III.

II. THE APPLICATION PROCESS FOR O-VISAS

To understand the current issues that exist today, one must first have a basic understanding of the government institutions involved and the application process itself. Under the Homeland Security Act of 2002, Congress delegated the authority to regulate visa issuances to the Department of Homeland Security (DHS).⁵¹ The Department of Homeland Security consists of three agencies: the U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP).⁵² The USCIS, formerly known as the INS, is responsible for reviewing and approving visa petitions.⁵³ The agency is also responsible for promulgating the policies and priorities for immigration services.⁵⁴

The Department of State Bureau of Consular Affairs (DOS) is a separate department with sole authority to issue visas to non-U.S. citizens prior to entry into the United States.⁵⁵ Whereas the USCIS has the exclusive authority to approve or deny visa petitions, the DOS' responsibility is solely to review the petition and perform background checks prior to the beneficiary receiving an actual visa stamp.⁵⁶ Despite the DOS' exclusive, discretionary authority to issue the visa, however, it may not readjudicate petitions.⁵⁸ Even if a U.S. consulate grants a visa to a nonimmigrant applicant, the visa does not entitle the applicant to guaranteed admission into the United States.⁵⁷ Rather, the Customs Border Patrol (CBP) determines who may be admitted at the border.⁵⁸

The application process for an O-visa involves several steps dependent upon the USCIS and DOS, as well as other regulating institutions. Before a foreign artist can apply for an O-visa, the artist must first obtain a U.S. Agent or employer who

51. RUTH ELLEN WASEM, VISA SECURITY POLICY: ROLES OF THE DEPARTMENTS OF STATE AND HOMELAND SECURITY 4 (2011).

52. *See Our History*, *supra* note 14.

53. *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=fb89520b9f9a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=fb89520b9f9a3210VgnVCM100000b92ca60aRCRD> (last updated Sept. 2, 2009).

54. *Office of Communications*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=16a4c70794758310VgnVCM100000082ca60aRCRD&vgnnextchannel=16a4c70794758310VgnVCM100000082ca60aRCRD> (last updated Oct. 5, 2012).

55. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, § 221(a), (g), (i), 66 Stat. 163, 191-92 (1952); *see also id.* § 104(a) ("The Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws . . . *except those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas . . .*") (emphasis added); *id.* § 222(d) ("All nonimmigrant visa applications shall be reviewed and adjudicated by a consular officer.").

56. *Id.* § 221 (g), (i) (stating that an applicant who falls under section 212 of the INA can be excluded from the United States); *see also id.* § 212(a)(1)-(31) (listing reasons for which an applicant can be excluded, including drug addition, conviction of a crime involving moral turpitude, prior arrest and deportation and membership in certain groups). For more information on consulate screening procedures, see WASEM, *supra* note 51, at 6-8.

57. Immigration and Nationality (McCarran-Walter) Act § 221(h); *see also* WASEM, *supra* note 51, at 1.

58. WASEM, *supra* note 51, at 1.

will petition on the artist's behalf.⁵⁹ The petitioner must fill out an I-129 Petition for Nonimmigrant Worker Form.⁶⁰ This is a critical step, as the USCIS must approve the petition before it is sent to the DOS. Along with the I-129 Form, the petitioner must provide documentation demonstrating the beneficiary artist's "extraordinary ability."⁶¹

Once an artist obtains counsel, the attorney helps to convey the artist's extraordinary ability and assembles the necessary evidence; this may include playbills, press releases and critical reviews.⁶² At this stage in the process, the attorney generally asks the artist about the type of work the artist would like to do, what awards the artist has won and any publicity surrounding the artist's work.⁶³ Typically, an attorney asks his or her potential clients to submit resumes, a list of publications and references who can attest to artistic distinction.⁶⁴ Immigration attorney Lauren Debellis-Aviv, who frequently handles O-visa applications, describes the consultation process that her office conducts with potential clients:

When we sit down and meet with the artist for the first time, we try to accomplish two goals: (1) [to identify] what the individual is about (their type of work) and their

59. See *O-1 Visa*, *supra* note 41. A U.S. 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 the place of, the employer as its agent. *Id.*

60. *Id.* To view the form, see U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T HOMELAND SEC., OMB NO. 1615-0009, I-129, PETITION FOR A NONIMMIGRANT WORKER (2011), available at <http://www.uscis.gov/files/form/i-129.pdf>.

61. See 8 C.F.R. § 214.2(o)(2)(ii), (o)(3)(iii) (2012).

62. See *id.* § 214.2(o)(3)(iv) (requiring the O-1 visa petitioner to demonstrate the following though evidentiary criteria: "(A) Evidence that the alien has been nominated for, or recipient of, significant national or international awards or prizes in the field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award, or; (B) At least three of the following forms of documentation: (1) Evidence that the alien has performed, and will perform, services as a lead or star participant in productions or events that have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications contracts, or endorsements; (2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications; (3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles, newspapers, trade journals, publications, or testimonials; (4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications; (5) 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. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or (6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced contracts or other reliable evidence; or if the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.").

63. Telephone Interview with Lauren Debellis-Aviv, Partner, Law Office of Daniel Aharoni & Partners, LLP (Jan. 9, 2012); see also Telephone Interview with Daniel Aharoni, Senior Partner, Law Office of Daniel Aharoni & Partners, LLP (Jan. 10, 2012).

64. Telephone Interview with Lauren Debellis-Aviv, *supra* note 63.

intentions in the United States (temporarily staying or permanent residency); (2) to examine their credentials to identify a match to their desires and the reality of their situation with a potential visa.⁶⁵

Similarly, Martindale-Hubbell A/V immigration attorney Daniel Aharoni explains that throughout the process, he is conscious of the evidentiary requirements and of what specific types of evidence would be most relevant for a client's field: "If the artist is a theatrical actor, I look to see if they have any playbills. For every play, there is a playbill and hopefully there are reviews and mention of the particular actor."⁶⁶ Such documentation may help satisfy the statutory requirement of "evidence that the alien has performed . . . in productions or events which have a distinguished reputation as evidenced by critical reviews or advertisements"; it may also amount to "evidence that the alien has performed . . . in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation."⁶⁷

Along with the application, applicants must submit contracts with employers (known as "deal memos" in the entertainment industry) and a list of events or productions in which the artist will be engaged while in the United States.⁶⁸ A copy of a written contract between the petitioner and beneficiary, a summary of the terms of the oral agreement in the form of email communications between the parties or a written summation of the terms are acceptable under the USCIS guidelines.⁶⁹ The USCIS notes that the summary does not have to be signed by both parties to constitute proof of an oral agreement, but it must contain approximate employment dates and the wages accepted, as well as describe the artist's role in the production or event.⁷⁰ In the case of a petitioner who is filing as an agent for other project employers, the petitioner must establish that it is authorized to act as an agent, and it must include contracts between the actual employer and the beneficiary that explain the terms and conditions of employment.⁷¹ Petitioners may provide proof of agent authorization by submitting separate documentation from each project employer authorizing petitioner to act as an agent for purposes of the O-visa application.⁷²

Additionally, the petitioner must include an explanation of the production or project events, as well as the start and end dates of all the projects in which the foreign artist will participate throughout the artist's requested stay.⁷³ Although the

65. *Id.*

66. Telephone Interview with Daniel Aharoni, *supra* note 63.

67. *See* 8 C.F.R. § 214.2(o)(iv)(B)(1), (3).

68. *Id.* § 214.2(o)(2)(ii)(C).

69. *See O-1 Visa*, *supra* note 41; *see also* 8 C.F.R. § 214.2(o)(2)(ii)(B).

70. *See O-1 Visa*, *supra* note 41.

71. *See id.*; *see also* Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations, USCIS, to Serv. Ctr. Dirs. (Nov. 20, 2009), available at <http://www.uscis.gov/USCIS/New%20Structure/Laws%20and%20Regulations/Memoranda/2009/o-p-visa-agents-11-20-2009.pdf> (discussing requirements for agents and sponsors filing as petitioners for the O and P Visa classifications).

72. *See* Memorandum from Donald Neufeld, *supra* note 71.

73. *See O-1 Visa*, *supra* note 41.

itinerary is a required document that must provide details about the events, the USCIS has taken into account industry standards and is flexible as to how detailed an itinerary must be in the description of the event(s) and ancillary services or activities in connection with the event(s).⁷⁴ Immigration law experts Austin Fragomen, Jr. and Careen Shannon note the following regarding USCIS' regulation of the itinerary:

8 C.F.R. §214.2(O)(1)(i) states that the O Classification is for a nonimmigrant coming to the U.S. "to perform services relating to an event or events." Thus there is a clear indication in the regulations that a petition may be approved to cover not only the actual event or events but also services and/or activities in connection with that event or events. Moreover, the focus of the statute (INA § 214(a)(2)(A)) is on whether the foreign national will work in the area of extraordinary ability.⁷⁵

One immigration practitioner's rule of thumb is that petitioners and beneficiaries draft the itineraries in "good faith," or what they reasonably believe are legitimate services or activities that the beneficiary will be engaged in during his or her stay.⁷⁶

In addition to the itinerary, deal memos and other evidentiary documents, the petitioner must also file an advisory opinion letter from an appropriate peer group or a person designated by the group with expertise in the beneficiary's area of ability.⁷⁷ The artist's field determines which specific labor group or guild a petitioner must consult. The peer group to be consulted for an advisory opinion letter in turn depends on the type of project the foreign artist is performing his or her work while in the United States. For instance, if the artist is a television and/or film actor, the artist must consult with both the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) and a management organization such as the Alliance of Motion Picture and Television Producers (AMPTP).⁷⁸ If the artist is a theatrical actor or stage manager, the artist must consult the Actor's Equity Association (AEA).⁷⁹ The International Alliance of Theatrical Stage Employees (IATSE) governs theatrical, television and motion picture crew personnel.⁸⁰

A favorable consultation letter must describe an artist's prior achievements,

74. See U.S. CITIZEN & IMMIGRATION SERVS., PM-602-0003, CLARIFYING GUIDANCE ON "O" PETITION VALIDITY PERIOD (2010), available at http://www.uscis.gov/USCIS/Laws/Memoranda/2010/July/guidance-O-petition-gap_memo-07-20-10.pdf.

75. Austin T. Fragomen Jr., & Careen Shannon, *USCIS Publishes Final Policy Memorandum on O Petition Validity Period*, in FRAGOMEN BUS. ALERTS, July 21, 2010, Westlaw FRAGALERTS 2 7-21-10.

76. Telephone Interview with Lauren Debellis-Aviv, *supra* note 63.

77. 8 U.S.C.A. § 1184(c)(6)(A) (West 2012); see also *O-1 Visa*, *supra* note 41. In certain circumstances, where no peer group or labor organization exists, the USCIS will waive the requirement of the consultation letter and base the case on the record of evidence. See *O-1 Visa*, *supra* note 41.

78. See *O-1 Visa*, *supra* note 41; see also U.S. CITIZEN & IMMIGRATION SERVS., ADDRESS INDEX FOR I-129 O & P CONSULTATION LETTERS [hereinafter USCIS, ADDRESS INDEX], available at <http://www.uscis.gov/ilink/docView/AFM/DATAOBJECTS/AFMMapdx33-1.pdf> (providing a non-exhaustive list of known organizations that have agreed to provide consultation letters).

79. See USCIS, ADDRESS INDEX, *supra* note 78.

80. *Id.*

explain the work the foreign artist will perform in the United States, and articulate why that work requires an alien of extraordinary ability.⁸¹ An unfavorable consultation letter must state specific facts to justify the peer group's conclusion that the artist is not extraordinary.⁸² As a third option, a peer group or labor union may submit a letter of no objection if it has no objection to an artist's visa petition.⁸³

The attorney is responsible for compiling a completed visa application, which includes an attorney cover letter, a letter from the petitioner, an I-129 form, background information and passport biographical data for the artist, a detailed evidence list, exhibits, consultation letters, deal memos and an itinerary of engagements.⁸⁴ After the application materials are complete, the petitioner may finally submit the application to the USCIS for consideration. The USCIS' role is to consider the application in its entirety to determine whether the performer or artist proves his or her extraordinary ability.⁸⁵ If the USCIS does not approve the visa application, it must notify the petitioner and provide specific reasons for the denial,⁸⁶ it must also explain the process by which the petitioner may appeal.⁸⁷ If the USCIS approves the visa application, the alien must then schedule a personal interview at the Department of State location closest to his or her home country.⁸⁸

USCIS approval of a visa petition does not automatically grant the artist admission into the United States: a U.S. Department of State office closest to the artist's home must process, analyze and approve the petition.⁸⁹ As part of this process, the beneficiary must complete a DS-156 Nonimmigrant Visa Application Form available at the Department of State, the completion of which requires identification and fingerprinting.⁹⁰

81. 8 C.F.R. § 214.2(o)(5)(ii), (iii) (2012); see also Elizabeth Macks, *Caught in the Middle: The Effect of Increased Visa Requirements on Non-Profit Performing Art Organizations*, 15 SETON HALL J. SPORTS & ENT. L. 109, 120 (2005).

82. 8 C.F.R. § 214.2(o)(5)(ii).

83. *Id.* For O-2 beneficiaries, the standard is not whether they are extraordinary, but how essential they are to the specific production. See *id.* § 214.2(o)(5)(iv) ("If the advisory opinion is favorable to the petitioner, the opinion provided by the labor and or/management organization should describe the alien's *essentiality to, and working relationship with the O-1 artist or athlete and state whether there are available U.S. workers who can perform the support services if the alien will accompany and O-1 alien involved in a motion picture or television production.*" (emphasis added)).

84. *Id.* § 214.2(o)(2)(i)–(iii).

85. *Id.* § 214.2(o)(6)(i).

86. Immigration Act (IMMACT) of 1990, Pub. L. No. 101-649, § 207(b), 104 Stat. 4978, 5026 (codified as amended in scattered sections of 8 U.S.C.). Although the statute states that the Attorney General handles these cases, since September 11, 2001, the USCIS now handles the adjudication of these cases. See WASEM, *supra* note 51, at 4–5.

87. See *Questions and Answers: Appeals and Motions*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=343df95c93228210VgnVCM100000082ca60aRCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD> (last updated Nov. 28, 2012).

88. AUSTIN T. FRAGOMEN, JR., CAREEN SHANNON, & DANIEL MONTALVO, IMMIGRATION PROCEDURES HANDBOOK § 9:3 (West 2012); *Temporary Worker Visas: Applying for a Visa*, U.S. DEP'T ST., http://www.travel.state.gov/visa/temp/types/types_1271.html#5 (last visited Nov. 28, 2012).

89. See *Temporary Worker Visas*, *supra* note 88.

90. Macks, *supra* note 81, at 120; see also Christopher Morrissey King, *Visa Administration*

A consulate's role is solely to review the visa petition materials and issue approved visas.⁹¹ Although consular officers may not readjudicate the merits of an artist's visa petition, consulates have discretionary authority to review the artist's background information to determine whether he or she is inadmissible for entry into the United States.⁹² To facilitate this determination, foreign artists may need to demonstrate sufficient ties to their home countries that would compel them to return.⁹³ Relevant evidence includes home ownership, bank accounts, employment in the home country and family connections.⁹⁴

In addition to examining a foreign artist's background and financial history, the consulate also performs criminal background checks to determine whether an artist may be inadmissible based on prior criminal convictions.⁹⁵ It may deny a visa application because of an artist's criminal record; it may also classify the alien as "detrimental to the interest of the United States."⁹⁶ In 2008, British singer Amy Winehouse was denied an O-visa for alleged illegal drug use, which prevented her from performing at the Grammy Awards where she was nominated for several accolades.⁹⁷ Cuban musician Ibrahim Ferrer, recipient of BBC Radio 3's Best New Artist award, was also denied a visa because he was classified as "detrimental to the interest of the United States."⁹⁸

Local consulates also have discretion in determining whether foreign artists are "nonimmigrants" under the statute, but they may not review a USCIS finding about whether a foreign artist or performer is "extraordinary."⁹⁹ There is an exception, however, if a consulate uncovers material facts indicating a misrepresentation that was unknown to USCIS at the time USCIS granted the petition.¹⁰⁰ The USCIS discourages consulates from second-guessing USCIS' visa determinations otherwise.¹⁰¹ If a foreign artist passes consulate approval, the consulate issues a visa stamp and the beneficiary may begin working in the United States on the approved date.

Sings a Discordant Tune for Entertainers, 22 GEO. IMMIGR. L.J. 133, 133 (2007).

91. U.S. DEP'T OF STATE, 9 FAM 42.43 N1, SUSPENDING ACTION IN PETITION CASES (2010); U.S. DEP'T OF STATE, 9 FAM 41.111, AUTHORITY TO ISSUE VISA (2009).

92. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, § 221(a), (g), (i), 66 Stat. 163, 191-92 (1952).

93. *Visa Denials*, U.S. DEP'T ST., http://www.travel.state.gov/visa/frvi/denials/denials_1361.html (last visited Nov. 4, 2012).

94. *Id.*

95. 8 U.S.C.A. § 1182(a)(2)(A)-(B) (West 2012).

96. See *US Blocks Cuban Grammy Nominees*, BBC NEWS, <http://news.bbc.co.uk/2/hi/entertainment/3464801.stm> (last modified Feb. 6, 2004).

97. Felicia R. Lee, *New Bill May Speed U.S. Visas for Artists*, N.Y. TIMES, Apr. 3, 2008, at E1.

98. See *US Blocks Cuban Grammy Nominees*, *supra* note 96.

99. U.S. DEP'T OF STATE, 9 FAM 41.55 N8.4, APPROVED PETITION IS PRIMA FACIE EVIDENCE OF ENTITLEMENT TO O CLASSIFICATION (2011).

100. *Id.*

101. U.S. DEP'T OF STATE, 9 FAM 41.55 N8.5, REFERRING APPROVED O PETITION TO DEPARTMENT OF HOMELAND SECURITY (DHS), U.S. CITIZENSHIP AND IMMIGRATION SERVICES FOR RECONSIDERATION (2010).

III. EXAMINING THE ISSUE OF SUBJECTIVITY IN PRACTICE

Pragmatic problems arise for a foreign artist navigating the immigration process. The process involves both a variety of institutions—e.g., law firms, unions and guilds, the USCIS and the Department of State—and institutions with differing interests and subjective interpretations of the O-visa regulations.

A. THE ATTORNEY-CLIENT STAGE

Practical issues begin within the attorney-client relationship. For example, the way artists prefer to understand their own artistic field may differ from the way an attorney chooses to describe the field in order to convey the artist's "extraordinary ability." Because the USCIS' decision to grant an O-visa heavily depends upon the applicant's evidence of extraordinary ability in a particular field and the nature of the services the artist will perform in connection with the specific employment projects, it may be more difficult for an attorney to cast an artist as a generalist for a visa that requires expertise and distinction in a specific field. USCIS' requirement that petitioners submit deal memos and a project list forces artists to define their artistic field narrowly. Lauren Debellis-Aviv further describes this discretionary process:

A lot of artists do not like to be constrained in one category. They have their hand in many artistic forms and we must place a title on them. The more broad strokes their career is, the more problematic it can become. The difficulty is identifying which art form is the strongest and not too constrictive on their artistry. If you submit a visa and label an artist as a painter [and it gets approved], that artist cannot do dance. The hard part is classifying the job true to their art form, but within the boundaries of the immigration regulations.¹⁰²

Lawyers retained by an artist with multiple artistic forms must strike a balance and impose their own judgment on the artist's extraordinary ability in order to cast a sufficiently broad argument that such artist holds distinction in each and every field. Acting as an advocate for their clients, an attorney thus engages in the creative process and challenge of defining a client's artistry.

The attorney's tasks of drafting an attorney letter and compiling evidence proving an artist's extraordinary ability entail both creativity and subjectivity. Debellis-Aviv explains: "Determining whether a foreign artist is extraordinary is like an onion: you must peel back the layers of the artist's position to decipher the distinguishable creative aspect of their role that truly makes them extraordinary in their field."¹⁰³ Daniel Aharoni states: "This is where the creative aspect of the attorney's role comes into play in the application process It is the attorney's duty to set the scene to create an image of the artist's work as if the artist is in the room talking to the examiner about his or her extraordinary ability. You really try

102. Telephone Interview with Lauren Debellis-Aviv, *supra* note 63.

103. *Id.*

to put them in the room.”¹⁰⁴ A petitioner’s specific artistic field partly determines how difficult it may be for an attorney to demonstrate extraordinary ability. For example, it may be more difficult for an artist who works for a well-known branding agency and who creates and manages a branding concept to demonstrate extraordinary ability and creativity than it may be for a traditional musician.¹⁰⁵

It is the attorney’s responsibility to highlight the critical creative aspect of productions or events in which the petitioning artist participated as evidence of their ability. To accomplish this, the attorney must incorporate evidence to contextualize the client’s artistic role in the production or event and establish the reputation of the project.¹⁰⁶ If an attorney discovers that an artist was involved with a project but received no formal credit or publicity for the project, the attorney could ask the previous employer of the project whether it can recognize the artist’s contributions to the project by furnishing a letter of support. This may be critical in order to establish the artist’s extraordinary ability.¹⁰⁷ For example, a Romanian performer successfully proved, in part, his extraordinary ability as a Romanian film star, comedian and musician by providing letters of support from premier artistic circles to verify that he performed in a leading and critical role for distinguished organizations.¹⁰⁸

In cases involving artists from remote regions, however, or artists who produce obscure forms of art, it may be arduous to prove that the artist has a record of “prominence.”¹⁰⁹ For example, consider an artist who performs the regional Indian folk music known as Chutney, a blend of Carribean and Indian folk traditions.¹¹⁰ Because only a small population understands the relevant language, it may be difficult to establish record sales or even the national prominence necessary to claim distinction.¹¹¹ But an attorney, by questioning the Chutney artist, may learn of a nationally recognized weekly paper or media publication that has commented on the artist’s work. If the artist has sold records throughout the various Indian diaspora communities in the Carribean or even throughout the world, such

104. Telephone Interview with Daniel Aharoni, *supra* note 63.

105. *Id.*

106. See VAUGHAN DE KIRBY & HENDRIK PRETORIOUS, O-1 VISA GUIDE: USING YOUR EXTRAORDINARY ABILITY IN FILM, T.V., ARTS, ATHLETICS, BUSINESS AND MORE TO WORK IN THE U.S. 3 (2010) (available for order at <http://www.dekirby.net/reports/o1-visa-guide-using-your-extraordinary-ability-to-work-in-the-us.cfm>); see also *Extraordinary Ability: Who’s Got It and Who Doesn’t?*, 71 Interpreter Releases 782 (1994).

107. See Telephone Interview with Daniel Aharoni, *supra* note 63.

108. See *Extraordinary Ability: Who’s Got It and Who Doesn’t?*, *supra* note 106.

109. See 8 C.F.R. § 214.2(o)(3)(iv) (2012). The regulations define prominence as “a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.” *Id.* § 214.2(o)(3)(ii).

110. See Tina Karina Ramnarine, “Indian” Music in the Diaspora: Case Studies of “Chutney” in Trinidad and London, 5 BRIT. J. ETHNOMUSICOLOGY 133, 133 (1996) (discussing Chutney music as a blend Indian-Caribbean tradition and expression of specific Indian-Caribbean identity in multiple geographic contexts).

111. Telephone Interview with Danial Aharoni, *supra* note 63; see also Ramnarine, *supra* note 110, at 134 (“[C]hutney as public performance is a recent phenomenon. Although it is well-known in the Caribbean and Latin America, it has not yet established its presence in the market of world music.”).

information may provide enough evidence to satisfy the distinction requirements. Rather than depicting the artist's extraordinary ability as a musician or recording artist, an attorney may narrow the artist's extraordinary ability as a renowned performer of Chutney music. By defining the field as narrowly as possible, an attorney could be more successful in demonstrating the artist's extraordinary ability.¹¹² Such an attorney might portray the Chutney art form in a manner that best highlights the artist's distinction. The above example thus illustrates the role of attorney subjectivity in presenting the case for a foreign artist.

B. LABOR UNIONS, PEER GROUPS AND THE CONSULTATION STAGE

The advisory opinion letter process is another stage that entails subjectivity that poses some challenges. The regulations require an applicant to obtain a written consultation letter "from the appropriate consulting entity or entities."¹¹³ The regulations further define "peer group" as follows: "[A] group or organization which is comprised of practitioners of the alien's occupation. If there is a collective bargaining representative of an employer's employees in the occupational classification for which the alien is sought, such a representative *may* be considered the appropriate peer group for purposes of consultation."¹¹⁴ According to the language of the regulations, collective bargaining representatives (i.e., unions) may be consulted, but are not the required peer group from which an applicant must seek a written advisory opinion letter.¹¹⁵ In practice, however, petitioners are either required to consult with labor unions or specifically encouraged to obtain a consultation letter from them.¹¹⁶ For O-2 applicants who are critical support personnel for an O-1 principal visa holder, it is especially the case in practice that they seek a consultation letter from the appropriate labor union.¹¹⁷

112. See *Extraordinary Ability: Who's Got It and Who Doesn't?*, *supra* note 106.

113. 8 C.F.R. § 214.2(o)(2)(ii)(D) (2012).

114. *Id.* § 214.2(o)(3)(ii) (emphasis added); see also *id.* § 214.2(o)(5)(i)(A) ("Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor, and/or management organization regarding the nature of work to be done and the alien's qualifications is mandatory before a petition for an O-1 or O-2 classification can be approved.")

115. See *id.* § 214.2(o)(3)(ii). Due to the strong political power of the television and motion picture industries, the USCIS clearly states that applicants within these industries must consult both an "appropriate labor union" and a management organization. *O-1 Visa*, *supra* note 41. Now that the Screen Actors Guild and the American Federation of Television and Radio Artists have merged to become SAG-AFTRA, SAG-AFTRA is now considered the labor union to consult. See *About Us*, SAG-AFTRA, <http://www.sagaftra.org/content/about-us> (last visited Dec. 4, 2012).

116. See CAROLELINDA DICKEY, THEATRE COMMUNITIES GROUP, INC., A QUICK GUIDE TO SUCCESSFUL VISA APPLICATIONS 9 (2001), available at <http://www.tcg.org/Pdfs/Advocacy/Immigration.pdf>; see also *Requesting a Visa Support Letter*, LEAGUE AM. COMPOSERS, <http://www.americanorchestras.org/advocacy-government/visa-and-tax-for-foreign-guest-artists/requesting-a-visa-support-letter.html> (last visited Dec. 4, 2012) ("Peer consultation letters are an optional addition to visa petitions and do not take the place of the required labor consultation that U.S. Citizenship and Immigration Services requires from the appropriate labor organization.")

117. See *Union Consultation*, STIENJES & TOLU, LLC, <http://toluimmigration.com/visas/visa-o-extraordinary-ability-or-achievement/o-1-visa/union-consultation> (last visited Dec. 4, 2012).

Moreover, determining which union to consult as the “appropriate peer group” depends upon how a petitioner classifies a production and how a labor union classifies the production. For instance, a contemporary, interdisciplinary work that involves live dramatic acting, dancing and singing may require a consultation letter from Actor’s Equity Association (AEA), the American Guild of Musical Artists (AGMA) or the American Guild of Variety Artists (AGVA).¹¹⁸ Sending either a non-labor union letter or the wrong labor union letter could result in a processing delay for the petitioner.¹¹⁹

Assuming a petitioner submits a request to the appropriate labor union, there are simply no statutory guidelines that mandate the standards the peer groups must apply to determine whether an artist has an “extraordinary ability” or “achievement.” As a result, labor organizations and guilds impose varying procedural and qualitative standards for evaluating foreign artists. The Alliance of Motion Picture and Television Producers (AMPTP) requires that the petitioner provide a complete, signed copy of a contract between the petitioner and the beneficiary in order for AMPTP to review the application.¹²⁰ USCIS regulations, however, make clear that the contract does not have to be signed by both parties.¹²¹ AMPTP also requires that any form of employment within AMPTP’s scope must not be speculative or unsecured.¹²² This creates a clash between AMPTP’s standards and actual entertainment industry practices. Particularly in motion picture productions, evolving budget constraints may greatly affect the duration and nature of an actor’s employment on a project. The employer’s needs may change over time. Even though labor unions heavily influence the motion picture industry, it is common industry knowledge that production schedules require flexibility. On the one hand, AMPTP sees itself as responsible for protecting American workers within the entertainment industry.¹²³ Yet AMPTP’s stringent requirements for reviewing an applicant’s contracts create pressure for the foreign artist to negotiate the details of deals far in advance; this may reduce the number of employment opportunities, as employers may not wish to enter such a formal contractual relationship so prematurely.

Similarly, AMPTP requirements about the kinds of publicity materials that it will consider when evaluating applications create potential problems for performance artists who work backstage, such as set designers and other below-the-line artists. Under AMPTP guidelines, “press about past productions that do not specifically mention the beneficiary and beneficiary’s skills” and “press or bios

118. See DICKEY, *supra* note 116, at 9.

119. See 8 C.F.R. § 214.2(o)(5)(i)(F) (describing USCIS’ process in sending the application to the appropriate labor union).

120. ALLIANCE OF MOTION PICTURE & TELEVISION PRODUCERS (AMPTP), GUIDELINES FOR REQUESTING O-1/O-2 ADVISORY OPINIONS 1 [hereinafter AMPTP, GUIDELINES], available at <http://www.amptp.org/files/immigration.pdf> (last visited Nov. 4, 2012).

121. See *O-1 Visa*, *supra* note 41.

122. AMPTP, GUIDELINES, *supra* note 120, at 1.

123. See *Welcome*, ALLIANCE MOTION PICTURE & TELEVISION PRODUCERS, <http://www.amptp.org/index.html> (last visited Dec. 4, 2012).

about the petitioner or third parties” should not be sent with the application.¹²⁴ It may be difficult or impossible, however, for someone like a costume designer to find press that recognizes her by name. AMPTP also imposes a fifty-page limit on applications, which creates a further burden for applicants.¹²⁵ The restriction on the type of press submitted as evidence from other employment opportunities outside of motion picture—including, for example, theatrical productions—presumably creates an even greater burden on the applicant to prove the merits of his or her ability.¹²⁶

Moreover, labor unions and guilds rely on other substantive, subjective considerations to determine whether an artist is extraordinary. A labor union’s primary concerns are working conditions, wages and the protection of American jobs.¹²⁷ Unlike immigration attorneys or the U.S. government, unions are particularly concerned with the number of American jobs in the arts that could be lost to foreign artists.¹²⁸ Union considerations involve a more quantitative analysis of the merits of a foreign artist’s case.¹²⁹ A union’s analysis of whether a particular foreign artist may eliminate a job for an American worker, however, fails to consider the possibility that a particular production may create more jobs for American workers.¹³⁰ Immigration and nationalization attorney Tibby Blum explains this point:

Unlike concert-hall managers, producers in theater, film, and television do not always seek high visibility talent for very specific artistic reasons that relate both to the particular entertainer as well as to the role. According to Broadway producer Emanuel Azenberg, the decision to import an actor or actress from another country is not one that a producer would make frivolously; Azenberg describes it as an artistic judgment.¹³¹

Suppose an American director specifically creates a role for a specific foreign actress. If the actress lacks the credentials to demonstrate extraordinary achievement in at least three of the categories, the labor union most likely will submit an objection letter. The union might contend that the actress lacks the requisite credentials and that an American worker is available to perform the work. If the USCIS subsequently denies the foreign actress’s visa application, the American director may have to withdraw his offer. The sudden termination of a production thus suspends or even denies an employment opportunity for American

124. AMPTP, GUIDELINES, *supra* note 120, at 2.

125. *See id.*

126. *See id.*

127. *See* Blum, *supra* note 16, at 559 (arguing that the “*raison d’etre*” of labor unions is to protect American jobs, and that their focus is therefore on how many jobs might be lost to American workers in bringing in a foreign artist of extraordinary ability).

128. Kelley, *supra* note 21, at 509.

129. Blum, *supra* note 16, at 560.

130. *Id.*

131. *Id.* at 557 (citing *Immigration and Nationality Act Amendments: Hearings on H.R. 3048 Before the Subcommittee on International Law, Immigration and Refugees of the House Committee on the Judiciary*, 102d Cong. 65 (1991); *see also* *Compromise Reached on O and P Aliens; Subcommittee Holds Hearing*, 68 Interpreter Releases 1427, 1429 (1991)).

union workers until they find new employment.¹³² Unions may also object if they believe that a foreign artist will be underpaid or exploited.¹³³

Peer groups also search the Internet to learn about a foreign artist. Labor unions often perform search queries on IMDB, Google and Wikipedia to verify whether such artists are well known.¹³⁴ Underlying this practice is an assumption that artists will generally have an Internet presence if they are in fact extraordinary. Yet certain highly talented artists may not have a significant Internet presence. These artists include such “below the line artists” as lighting specialists, set designers and costume designers. Additionally, exceptional artists from developing countries may lack an Internet presence.

Labor unions, then, consider a variety of factors not discussed in the O-visa guidelines. If a labor union recommends that a visa application be denied, the regulations instruct the union to set forth specific reasons why the petitioning artist is not extraordinary.¹³⁵ The statute is unclear about whether a union may provide reasons unrelated to a specific petitioner’s artistic ability when recommending a denial.

C. THE USCIS AND DOS STAGES

Even more difficulties and perplexing issues occur at the USCIS and Department of State stages of the application process. In the last several years, the USCIS has interpreted its own O-visa requirements beyond the plain language of the statute. In *Kazarian v. United States Citizenship and Immigration Services*, the Administrative Appeals Office (AAO) concluded that “publication of scholarly articles is not automatically evidence of sustained acclaim; USCIS must consider the research community’s reaction to those articles.”¹³⁶ On appeal, the Ninth Circuit held that consideration of the community’s reaction is appropriate for considering “sustained national or international acclaim” because postdoctoral candidates are expected to publish their work.¹³⁷ The dissent noted in its opinion, however, that publication itself already shows the community’s reaction and proves

132. See Blum, *supra* note 16, at 560 (arguing that the employment of a foreign based artist may create more jobs for American workers than detract from them). Similar issues can arise for documentary films in which a producer wants to create a film about a famous artist and have the artist play himself or herself. Telephone Interview with Daniel Aharoni, *supra* note 63.

133. See Jonathan Ginsburg, *Immigration Procedures for Foreign Guest Artists*, in *ARTISTS FROM ABROAD: THE COMPLETE GUIDE TO IMMIGRATION AND TAX REQUIREMENTS FOR FOREIGN GUEST ARTISTS* 1, 37 (2012), available at <http://www.artistsfromabroad.org/ArtistsFromAbroadWebsite.pdf>.

134. Telephone Interview with Sasha Aronson, Former Exec. Assistant, Am. Fed’n of Television & Radio Artists (Jan. 11, 2012).

135. 8 C.F.R. § 214.2(o)(5)(ii)(A) (2012).

136. *Kazarian v. U.S. Citizenship & Immigration Servs.*, 580 F.3d 1030, 1036 (9th Cir. 2009) (upholding the USCIS’ conclusion that an Armenian theoretical physicist failed to establish “sustained or international acclaim” based on the evidence submitted). The decision in *Kazarian* was later withdrawn and superseded. *Kazarian v. U.S. Citizenship & Immigration Servs.*, 596 F.3d 1115 (9th Cir. 2010) (affirming the District Court’s grant of USCIS’ summary judgment motion). Judge Pregerson supported the decision, but “[wrote] separately, however, to emphasize the injustice perpetrated by our immigration laws and system in this case.” *Id.* at 1123.

137. *Kazarian*, 580 F.3d at 1036.

extraordinary ability due to authorship, which is the only thing required by the statutory language.¹³⁸

The decision in *Kazarian* reverberated in the immigration arts communities. Attorneys and labor unions questioned how much evidence was sufficient to support an artist's claim of extraordinary ability. The higher threshold proved difficult for applicants to overcome in order to obtain an O-visa or renew their visas, since the USCIS' interpretation required more from applicants than was necessary before the Ninth Circuit's decision in 2009. The indeterminacy in the post-*Kazarian* aftermath on the sufficiency of evidence has led to questionable case results. For instance, in *Rijal v. USCIS*, the court noted that the USCIS erred in concluding that a Nepalese film producer's evidence failed to satisfy the evidentiary criteria.¹³⁹ In its opinion, the district court acknowledged that Rijal's published material, participation as a judge over the work of others in his field and evidence of work displayed at numerous competitions and festivals satisfied the evidentiary criteria.¹⁴⁰ Despite this determination, the court affirmed USCIS' decision, concluding that USCIS' denial had a rational basis in analyzing the final merits of the application.¹⁴¹ In some circumstances, O-visas have been denied to applicants because a petition that included published material about the beneficiary failed to be *solely* about the beneficiary and the beneficiary's work in the field.¹⁴² Overall, the scant case law regarding interpretations of "extraordinary ability" or "extraordinary achievement" and the accompanying evidentiary requirements indicates the deference given to the USCIS and its restrictive view of the O-visa classification.¹⁴³

The Department of State's discretionary power further complicates issues for foreign artists. Regardless of whether an artist is found to be extraordinary by the USCIS office, the DOS may reject the visa approval for the artist's criminal history, poor financial background, terrorist connections or other latent considerations.¹⁴⁴ A more perturbing recent trend has been the DOS' readjudication of visa petitions and remanding of cases to the USCIS.¹⁴⁵ Some foreign artists fail to receive an issuance of a visa because the Department

138. *Id.* at 1037 (Pregerson, J., dissenting) ("The plain language of the regulation does not state that an applicant is required to submit evidence of the research community's reaction to the publications."). "Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media" can alone serve as evidence of extraordinary ability. 8 C.F.R. § 204.5(h)(3)(vi).

139. *Rijal v. U.S. Citizenship & Immigration Servs.*, 772 F. Supp. 2d 1339, 1346–47 (W.D. Wash. 2011), *aff'd*, 683 F.3d 1030 (9th Cir. 2012).

140. *Id.*

141. *Id.* at 1347–48.

142. Telephone Interview with Daniel Aharoni, *supra* note 63. The plain language of the rules only requires "[p]ublished 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." 8 C.F.R. § 214.2(o)(3)(iv)(B)(2).

143. *Kazarian*, 580 F.3d at 1035.

144. King, *supra* note 90, at 133, 135.

145. Telephone Interview with Lauren Debellis-Aviv, *supra* note 63.

determined that the artist did not qualify for the O-visa category.¹⁴⁶ Dismayed, foreign artists have to incur the additional time and cost to appeal the decision so that their attorneys can remind the Department of State that its scope of power does not include adjudication of whether an artist is extraordinary.¹⁴⁷ All of these practical issues and subjective standards combined create a murky process for foreign artists to navigate in the hopes of obtaining an O-visa.

IV. EFFECT OF THE DISCRETIONARY STANDARDS IMPOSED AT THE INSTITUTIONAL LEVELS

Some of the subjective standards arising in the application process are more problematic than others. The lack of coordination and communication among the three primary institutions in the process—the labor unions, USCIS and the State Department—adversely influences the visa process and impedes the United States' ability to participate in cultural exchange. Labor unions' concerns about the impact of the transient population of temporary immigrant workers on the wages and working conditions for American workers are legitimate. Especially in light of the flight of production overseas in some of the arts industries and its detrimental impact on below-the-line personnel, labor unions' concerns in protecting the employment opportunities of American workers is even more paramount.¹⁴⁸ At the same time, the unions' restrictive, politically subjective views of foreign artists devalue foreign artists' unique, artistic contributions. Unions' failure to communicate their reasons for recommending that a petition be denied could create a more contentious relationship between petitioners and the labor unions.¹⁴⁹ Some labor unions' interest in restricting immigrant artists potentially disrupts the desires of their own constituents.¹⁵⁰ The lack of communication between the USCIS and labor unions about approved visa petitions also calls into question the efficacy of these organizations' involvement in the application process. USCIS' failure to accurately track the number of O-visas that it denies and approves for each artistic occupation exacerbates the labor unions' issue in maintaining an effective automatic tracking system within the current immigration regime.¹⁵¹ Labor unions have subjective institutional interests in conflict with foreign artists—a conflict which only frustrates the visa application process. Although labor unions serve a legitimate position to be included in the O-visa process, their discretionary

146. *Id.*

147. U.S. DEP'T OF STATE, 9 FAM 41.55 N8.5, *supra* note 101.

148. See Joni Maya Cherbo, *Issue Identification and Policy Implementation: Union Involvement in the Immigration of Temporary Cultural Workers*, 31 J. ARTS MGMT., L. & SOC'Y, 149, 164 (2001) (discussing the differing political interests among labor unions and their influence on the artist visa application process).

149. *But see* Blum, *supra* note 16, at 555. Unions can sometimes help make the case for a nonimmigrant worker. *See id.* at 557.

150. *See, e.g., id.* at 559–60.

151. Cherbo, *supra* note 148, at 154; *see also* NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-93-6, NONIMMIGRANT VISAS; REQUIREMENTS AFFECTING ARTISTS, ENTERTAINERS, AND ATHLETES 4 (1992).

practices pose major difficulties in creating a uniform standard with which foreign artists can comply.¹⁵²

Additionally, the USCIS' inconsistent application of its own O-visa regulations further complicates the process and creates more restrictive standards that can potentially limit the admission of extraordinary artists into the United States. More restrictive measures could potentially create a ripple effect, thereby causing other countries to retaliate by imposing stricter regulations on American performers and personnel working overseas.¹⁵³ The USCIS' unclear application of the regulations not only imposes more restrictions on foreign artists but also affects the United States' cultural diplomacy.¹⁵⁴ Domestically, its interpretation of the regulations damages cultural exchange and enhancement of the arts. The expensive, cryptic and restrictive regulatory regime discourages artists from touring in the United States and discourages U.S. employers from hiring foreign talent. For example, between 2008 and 2010, visa denials increased from 9.6% to 19.6% at the California USCIS service center alone.¹⁵⁵ Requests for Evidence also grew from 16.2% to 37.5%.¹⁵⁶ The USCIS must undertake changes to encourage the promotion of the arts within the United States.

V. RECOMMENDATIONS

To alleviate the hurdles facing foreign artists, the USCIS should implement several changes in order to create a more fluid application process. The USCIS alone, however, cannot resolve all the issues in the O-visa application process. Collaboration and coordination among all interested parties is key to successful reform.

The reform process should originate with the USCIS because it is the ultimate decision-maker on O-visa petitions. First, USCIS should establish and publish uniform guidelines on the evidentiary criteria acceptable to the agency. This would facilitate more transparency in the O-visa process.¹⁵⁷ Posting guidelines will not suffice, however. The USCIS should also train agency officials on how to interpret the evidentiary requirements and should strive for greater consistency among individual officers and service centers.¹⁵⁸ Further, the USCIS should provide a nonexhaustive list of the specific types of evidence acceptable for establishing

152. See *infra* Part V.

153. Kelley, *supra* note 21, at 512–13.

154. See generally Alexa K. Fang, *U.S. Immigration Law: A Barrier to Effective Cultural Diplomacy*, 19 CARDOZO J. INT'L & COMP. L. 201 (2011) (arguing for a reform of the existing visa process to promote cross-cultural exchange).

155. Teresa Watanabe, *Immigration Agency Working to Fix Visa Denials to Artists, Others*, L.A. TIMES (Aug. 10, 2010), <http://articles.latimes.com/2010/aug/10/local/la-me-workvisa-20100810>.

156. *Id.* Requests for Evidence are formal responses the USCIS sends regarding a lack of evidence in petitions.

157. U.S. CITIZENSHIP & IMMIGRATION SERVS., EXECUTIVE SUMMARY: LISTENING SESSION ON O AND P NONIMMIGRANT CLASSIFICATIONS 2 (2010), available at <http://www.uscis.gov/USCIS/Outreach/Public%20Engagement/National%20Engagement%20Pages/2010%20Events/July%202010/Executive%20Summary%20Listening%20Session%20on%20O%20and%20P%20Visas.pdf>.

158. *Id.*

“recognition,” “expertise” or “essentiality.”¹⁵⁹ Finally, one major problem in the visa application process is that labor unions require signed contracts, while the USCIS accepts unsigned copies of contracts. To remedy this problem, the USCIS should issue more specific guidance about whether unsigned contracts are sufficient. This would also reduce delayed processing of paperwork.¹⁶⁰

When the USCIS denies a visa because an artist has not established extraordinary ability, it should clearly state why the evidence submitted by the artist is insufficient. This would provide valuable guidance for attorneys, and it would reduce transactional costs for artists. When denying an application, the USCIS should also provide guidance on the requirements.¹⁶¹ Alternatively, the USCIS should release the name and contact information of the immigration official who reviews each visa petition; this would facilitate dialogue between the officer and attorney involved in a visa request.¹⁶² Both of the above recommendations would create an administrative burden, yet ensure accountability in enforcing conformity in the interpretation of the regulations.

The USCIS should also accept some digital and nontraditional forms of information—for example, blogs—as evidence of an artist’s qualifications. The agency need not accept all digital publications as evidence, but it should give credible media the same weight as it gives to traditional publication forms. A conference among different industries—particular those whose major forms of publications are digitized—should be conducted to determine the credibility of digital publications and create a guiding representative list of acceptable forms of electronic publications.

The USCIS should also create and disseminate a memorandum that specifically outlines the role of labor unions and consulates in the visa process. The USCIS should implement a mechanism to ensure that consulates are not readjudicating cases that the USCIS has already approved. As for the labor unions and guilds, the USCIS should clarify their role in the visa application process. The regulations state that the advisory opinions are not binding on the USCIS.¹⁶³ Accordingly, the USCIS should issue a memorandum in which it specifies exactly what it expects from the labor unions and explains how it uses union advisory opinion letters when determining whether an applicant possesses an extraordinary ability. The USCIS and labor union should jointly create a database system that tracks employment opportunities that are lost to American workers.

The unions should also collaborate with each other and USCIS to establish and specify consistent standards for reviewing applications. The unions and guilds fail to collaborate with one another to determine which organization should have authority to review a particular artist’s application. For more clarity, the labor unions should thus post an index list on their websites to specify the types of artists and productions for which they will write consultation letters.

159. *Id.*

160. *Id.*

161. *Id.*

162. Telephone Interview with Lauren Debellis-Aviv, *supra* note 63.

163. 8 C.F.R. § 214.2(o)(5)(i)(D) (2012).

There are three major reasons why the USCIS involves unions and guilds in the visa review process: these groups are skilled at evaluating the potential loss of American jobs, they promote safe working conditions and adequate wages, and they help evaluate whether an applicant displays the requisite extraordinary ability or achievement.¹⁶⁴ To make their role more efficacious, the unions and guilds should work with the USCIS to create a system that allows the unions to track the number of petitions for which the unions issue both positive letters and no-objection letters. The USCIS should notify interested peer groups when it approves an application, so that the peer groups could then maintain an electronic database of approved petitions. It is true that this would create an administrative burden for the agency and would be costly for the labor unions and guilds. At the same time, it would reduce the uncertainty about the number of jobs that are lost to foreign artists. It would also create a more efficient process when the peer groups determine whether an artist extending his stay requires an advisory opinion letter, especially where the peer group has submitted such a letter within a two-year period for the same artist.¹⁶⁵ These reforms would also help the Government Accountability Office to collect data on the number of O-visas issued. This in turn would aid the government in its goal of controlling the number of foreign artists entering the country and overstaying their authorized work period in the United States.

Furthermore, the standards that the peer groups apply when reviewing applications should better conform to the USCIS' own internal standards. Presumably, the USCIS would train its staff and would issue clear and transparent guidelines to labor unions. In addition, the USCIS should properly train the peer groups on how to review applications, and it should monitor the peer groups' review to ensure compliance with USCIS O-visa regulations.

Finally, peer groups must provide more specific reasoning when they conclude that an artist lacks extraordinary ability. On the one hand, it is important for the unions to consider whether there is the potential for foreign artists to undermine American wages. The statute, however, only gives these groups authority to determine whether an artist is extraordinary; the statute does not expressly authorize the unions and guilds to weigh additional considerations when evaluating an artist's visa application. Because the USCIS seeks union input in order to respect union interests in the visa process, the USCIS should permit peer groups to consider only relevant factors when issuing an advisory opinion. The USCIS might amend its guidelines to make this clear. The peer groups themselves should state candidly if protectionist reasons are why an artist fails to receive a positive letter or a no-objection opinion. Peer groups are concerned about their reputations. But, collectively, they should challenge entertainment studios and management agencies that are possibly exploiting the very foreign artists they are petitioning to enter the country. More transparency from the peer groups would better allow attorneys to

164. See Blum, *supra* note 16, at 559–61.

165. See 8 C.F.R. 214.2(o)(5)(ii)(B) (describing the waiver of a consultation requirement if artist seeks readmission within two years to perform similar services).

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THE FINAL CURTAIN CALL

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respond in the final visa application submitted to USCIS.

VI. CONCLUSION

There are many problems with the current O-visa regime that create potential barriers for foreign artists and entertainers trying to enter the United States. The above recommendations are not exhaustive but are meant to address some of the major procedural issues surrounding interpretative subjectivity at varying stages in the application process. More changes are needed. At the same time, some problems will gradually disappear once all interested parties improve the channels of communication. Both the USCIS and the labor unions and guilds will play critical roles in successfully implementing improved, transparent visa guidelines. Addressing these issues is necessary to further intercultural exchange within the arts.