AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

February 22, 2016

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via e-mail: **feedback@uscis.dhs.gov**

Re: RFE Template: Form I-129, Petition for Nonimmigrant Worker, O-1B Extraordinary Ability in the Arts

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the draft RFE template for Form I-129, Petition for a Nonimmigrant Worker, O-1B Extraordinary Ability in the Arts.

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this RFE template and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

Preliminarily, we note a number of instances where it appears that the draft RFE template strays from the regulations. Thus, our comments are largely focused on these areas. In addition, it is important to recognize that the regulations regarding agents as sponsors (8 CFR §214.2(o)(2)(iv)(E) and 8 CFR §214.2(p)(2)(iv)(E)) are cumbersome and do not reflect real-world agency relationships. For example, the list of three types of agents is non-exhaustive, and the regulation implies that an agent can represent both the employer and the beneficiary, even though this type of relationship would not exist in real life. Further, USCIS seems to interpret an "employer" to be a performance venue, though this is also generally not the case. Venues often contract with booking agents, production companies, and other producers and do not "employ" the performer. Even where a venue pays a performer directly for a performance, wage and hour requirements do not apply, benefits are not provided, payment is not made by W-2, etc. And yet, USCIS still requires the petitioner to obtain authorization from the venue to "act in the place of" the employer for immigration purposes. The ultimate solution to these and other problems is to publish a Notice of Proposed Rulemaking to rewrite the regulations regarding agents. In the meantime, USCIS should apply the standard evidentiary requirements for O and P petitions set

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forth at 8 CFR §214.2(o)(2)(ii) and 8 CFR §214.2(p)(2)(iv)(E) to the agency situations that do not fall into the listed three.

Comments on RFE Template

In response to your request for overall adjudicatory issues:

1. What are the top five issues you have with RFEs in the classifications that are currently under review?

    - ✓ Officers do not appear to be applying the correct standard of review: preponderance of the evidence.
    - ✓ RFEs requiring the agency relationship to be defined by the three examples in the regulations.
    - ✓ RFEs questioning itineraries.
    - ✓ Blanket statements in RFEs, such as "the evidence you submitted is not sufficient," without reason or explanation.
    - ✓ RFEs asking for signatures on summaries of oral contracts.

2. What improvements can be made to the current RFE process in these classifications?

    - ✓ More education on the spirit of the O and P visa classifications (i.e., encouraging international talent to come to the U.S. to contribute and enhance athletics, culture, entertainment, and science in the U.S. and stimulate economic growth).
    - ✓ Where industry practice does not include advance contracts for itineraries, past schedules should be taken as evidence of future performance dates.
    - ✓ More education for officers on industry standards and more deference to industry experts.
    - ✓ Officers should provide an explanation as to why evidence submitted is not sufficient and not just state the regulations.
    - ✓ Officers should not feel bound to the RFE template.

3. What types of evidence are frequently unavailable for these classifications when requested, and why? What evidence could be submitted as an alternative?

    - ✓ Traditional magazines and newspapers are often no longer used; Internet press should be readily allowed.
    - ✓ Traditional sound scans and record sales are often no longer used; the number of "hits" on YouTube, Spotify, iTunes, Beatport, etc. should be accepted
    - ✓ Articles and reviews about productions which have not yet occurred often do not exist; evidence regarding prior productions should be acceptable for this criterion.
    - ✓ Traditional press and publicity is not always available for O-1Bs who are not the principal creators and performers (e.g., set designers, lighting designers, sound designers, choreographers, stage technicians, etc.). More weight should be given to letters and testimonials tying these beneficiaries to the productions.

Specific Comments:

1. **Opening Section of Draft Template**: In the last paragraph of the opening section on page 1, the last sentence "Also note that statements made in cover letters should be supported with corroborating evidence" needs to be clarified and corrected. Does "cover letters" refer to support letters from the petitioner or a cover letter from an attorney? In addition, the word "should" should be changed to "may." Corroborating evidence should not necessarily be required.

2. The section regarding "**Agents as Petitioners**" starting on page 2 contains errors and does not accurately reflect the regulations.

   a. First sentence: "Petitions for O-1B nonimmigrants may be filed by a …" should be changed to read: "Petitions for O-1B nonimmigrants may ***only*** be filed by a …" to conform to the regulations.
   b. In the last sentence of the paragraph regarding U.S. Agents "A. U.S. Agent may:" the following language should be inserted after "may" to accurately reflect the regulations:

      be (but is not required to 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.

   c. The bulleted paragraphs that start with "Perform, "Represent the" and "Represent a" should all be deleted as they do not accurately reflect the regulations.
   d. Under "An Agent Performing the Function of an Employer," the words "and conditions" should be inserted in the first sub-bullet between "terms" and "of" in both of the sub-bullets on pages 2 and 3 "Specifies the wage offered and other terms of employment;"
   e. The two sub-bullets starting with "Details" and "An explanation" should be deleted; these two sub-bullets do not apply to an agent performing the function of an employer. (*See* 8 CFR §214.2(o)(2)(iv)(E)(1).) These two sub-bullets should be deleted from both pages 2 and 3 under "An Agent Performing the Function of an Employer."
   f. Add to the start of the section "Agents Representing Both the Beneficiary and One or More Employers": "[NOTE TO ISO: The following category of agents is extremely rare as agent representatives normally cannot represent both a beneficiary and the employer.]"
   g. Delete both instances of the bullet starting with "Evidence of authorization." This is not in the regulations and would require the creation of evidence that is not in accord with normal industry business practices.
   h. The wording of the second sub-bullet that starts with "Provides the names" is not in the regulations applicable to agents representing both the beneficiary and one or more employers. Both instances of this sub-bullet should be edited to conform to the regulations as follows: "Provides the names and addresses of the actual employers;"

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3. The section on page 5 regarding “**General Requirements for All O Nonimmigrant Petitioners**” contains errors and does not accurately reflect the regulations.

    a. To comply with the regulation, the first bullet starting with “Copies of contracts” should be edited to simply state “Copy of contract between Petitioner and Beneficiary;”
    b. The bullet “At least, generally, one consultation” should be modified to read “A written advisory opinion from the appropriate consulting entity unless waived pursuant to 8 CFR 214.2(o)(5)(ii)(3)” to comply with the regulations.
    c. In the paragraph “Contracts,” edit “Note to ISO” language to read “(Note to ISO: If a U.S. Agent that falls into one of the limited list of options above is filing, go to the Agent section for the specific contract requirements. For situations other than the stated three, the standard evidentiary requirements for O and P petitions set forth in 8 CFR 214.2(o)(2)(ii) and 8 CFR 214.2(p)(2)(iv)(E) still apply.”
    d. Edit the bullet starting with “A written contract” to state: “A written contract or a summary of the terms of an oral agreement between the petitioner and the beneficiary must specify:” The regulations do not state that the contract must be detailed, and the sub-bullets only apply to an agent performing the function of an employer, <u>not</u> to all agent relationships. (*See* 8 CFR §214.2(o)(2)(iv)(E)(1).)
    e. Revise the language on page 6 so that the bullet reads “Copies of itineraries, if any, which show dates, names of the employers, and locations of the events.” Also add: “[NOTE TO ISO: Consider industry standards and practices, in addition to the O-1’s history of performing to show indicia of future itinerary.”

4. Evidence of Prominence in the Field of Endeavor

a. Receipt of a significant national or international award– Direct the ISO to consider flexibility from AFM:

> *Awards such as an Academy Award, an Emmy, a Grammy or a Director's Guild Award would certainly qualify the alien**; however, even if he/she has not received such an award there may be sufficient other evidence submitted to establish that he or she has attained a high level of accomplishment in the television or motion picture industry**. The regulations do not limit these individuals to the small percentage who have risen to the top of their field.*

Additionally, the RFE template suggests tips for the examiner to assess the impact of the award. Five are listed. The first four are familiar, but the fifth is new. Giving the examples of awards listed in the regulations suggests that other awards would not fulfill this criterion. The RFE template should include other awards that are recognized as a major award in industry. For example, the Juno Awards and Brit Awards are equivalent to the Grammy Awards in Canada and the United Kingdom, respectively, and should be given the same weight. Moreover, this precludes other major awards for niche fields (electronic music, body art) and the award, albeit major to that field, may lack that type of evidence.

b. Beneficiary Seeks to Establish Prominence in the Field of Endeavor by Meeting at Least Three of the Following Six Criteria

At the outset, we note that if the author of a letter and/or testimonial gives an explanation as to the significance of the evidence submitted to establish one or more criteria, and the explanation is more than 50% probable, the letter or testimonial should be accepted by USCIS, absent an articulated material doubt.

i. **Lead or starring participant in productions or events which have a distinguished reputation.** While the initial paragraph tracks the regulations and AFM, the RFE template adds "*Please include an explanation as to the significance of the evidence submitted in response to this request."* The RFE should specify why the ISO did not find the productions or events to be distinguished

ii. **National or international recognition.** The RFE template adds a new demand that limits the type of evidence of "major" to circulation. This ignores *inter alia* assessing the "major" nature via the stature, reputation, or quality of readership of the publication. Example: The *New York Review of Books* magazine is far more respected and has a far higher quality of readers than *Readers Digest*. The same could be said for an artist profile in *New Yorker Magazine* versus *USA Today*. Too many RFEs reject publications that are not *solely* about the artist. The RFE template should remind ISOs that the articles only have to contain some information by or about the artist, and the examiner has discretion to assess the probative weight thereof. Too many RFEs demand hard proof of the existing prestige of future events. That can be impossible. Instead the template should state: "*the prestige of a future event can be discerned from, but not be limited to, evidence such as similar past events as well as current facts about the future event such as media discussion, levels of monies and stature of personnel committed to the production, etc."*

iii. **Lead, starring, or critical role for distinguished organizations.** The RFE template directs the ISO to insert detailed reason(s) why the evidence listed is not sufficient. Too many RFEs improperly demand proof that the artist was hired because of his or her existing possession of the criteria of sustained recognition. However, this is extra-regulatory and contrary to the spirit of the regulations. This is a two part criterion: (1) Lead, starring, or critical role; and (2) Organization with a distinguished reputation. The ISO should be required to specify why the evidence was insufficient and for which portion of the criterion. For example, did the documentation submitted establish that the organization has a distinguished reputation, but additional evidence is required to demonstrate the beneficiary's role was "lead, starring, or critical?"

iv. **Commercial or critically acclaimed success.** ISOs should be aware of the numerous advancements in demonstrating commercial or critical acclaim in the arts. Digital and social media have become key indicators of commercial or critical acclaim and even traditional sources of commercial or critical acclaim are adopting such advancements. For example, the Recording Industry of America (RIAA) announced on February 1, 2016, that digital

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streaming will now contribute to the certification of albums as Gold or Platinum.[1] Over the past six decades, the music industry has advanced from vinyl, to cassette tapes, to CDs, to downloads, and now streaming. USCIS should follow suit and adapt to industry shifts in indicators of success. This is also applicable to other forms of commercial or critical acclaim, such as YouTube, where artists are paid royalties for each stream.[2] If an indicator is significant to the beneficiary's industry, it should be sufficient to establish its significance. Moreover, we have observed the following language in RFEs: "According to widely available sources … YouTube [or other forms of digital media] are not indicators of commercial or critical success." ISOs should indicate the sources that are relied upon to make these assertions so that the petitioner can attempt to refute them with reliable and named sources to the contrary. In the alternative, these sources should satisfy this criterion as "occupational achievements reported in other publications."

v. **Significant Recognition.** ISOs should provide detailed reason(s) why the evidence provided under this subsection is not sufficient. There is also a typographical error in this section: "You must provide evidence to establish that the beneficiary received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field of endeavor."

vi. **Substantial Remuneration.** DOL wage information should be considered authoritative in establishing the baseline wage for comparison. DOL is the primary source of wage data and statistics for the U.S. workforce as determined and defined by the federal government. Moreover, in numerous other immigrant and nonimmigrant contexts, USCIS turns to DOL prevailing wage data to ensure employer compliance and equal treatment of workers.

5. The section on comparable evidence on page 14 includes the sentence "When submitting comparable evidence, you must also…" This should be deleted, along with the first two bullets thereafter. Petitioners should not be burdened with a requirement to explain which regulatory criteria are not applicable and why and how the evidence is comparable to each applicable regulatory criterion.

Conclusion

AILA appreciates the opportunity to comment on this RFE template and we look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

[1] *See* http://www.billboard.com/files/pdfs/Bulletin/february-1-2016-billboard-bulletin.pdf
[2] *See* http://www.rollingstone.com/music/news/youtubes-billion-dollar-payout-provide-new-revenue-for-musicians-20140205).