

CAUGHT IN THE MIDDLE: THE EFFECT OF INCREASED VISA REQUIREMENTS ON NON-PROFIT PERFORMING ART ORGANIZATIONS

*Sara Elizabeth Macks**

I.	INTRODUCTION	109
II.	NONIMMIGRANT VISAS.....	112
III.	O AND P VISAS.....	113
IV.	OBTAINING A VISA	119
V.	PROBLEMS SINCE 9-11.....	122
	A. Revamping the INS	123
	B. Tracking of Visas	124
	C. Visa Interviews.....	126
	D. New Forms	127
VI.	EFFECT ON NON-PROFIT PERFORMING ART COMPANIES.....	127
VII.	MAKING CHANGES	130
VIII.	CONCLUSION	132

I. INTRODUCTION

September 11, 2001, illustrated the ease with which foreign terrorists can enter the United States.¹ This country is proactively attempting to prevent further attacks by developing a new federal agency, creating the Department of Homeland Security (“DHS”), and fighting wars overseas.² Congress has enacted new legislation to improve border security and to

*J.D. Candidate, Seton Hall University School of Law (expected May 2005).

1. Adam Cohen and Vivica Novek, *Lessons Learned: Immigration*, TIME, Dec. 31, 2001, at 130, available at <http://search.epnet.com/direct.asp?an=5742946&db=aph>. For a comprehensive review on September 11’s effect on the United States’ view of terrorism, see BORRADORI ET AL., *PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JURGEN HABERMAS AND JACQUES DERRIDA* (2003); THOMAS L. FRIEDMAN, *LONGITUDES AND ATTITUDES: THE WORLD IN THE AGE OF TERRORISM* (2d ed. 2003); C. WILLIAM MICHAELS, *NO GREATER THREAT: AMERICA AFTER SEPTEMBER 11 AND THE RISE OF A NATIONAL SECURITY STATE* (2003); VERNA GEHRING, *WAR AFTER SEPTEMBER 11* (2003); ULRICH BAER, *110 STORIES: NEW YORK WRITES AFTER SEPTEMBER 11* (2002).

2. Press Release, Department of Homeland Security, Executive Order Establishing Office of Homeland Security (October 8, 2001), at <http://www.dhs.gov/dhspublic/display?content=308> (last visited Nov. 6, 2003).

monitor the entry of foreigners into the country.³ One way the country proposes to protect its borders is by implementing an increasingly difficult process for foreigners attempting to enter the United States.⁴ In particular, the federal government is “cracking-down” on the issuance of nonimmigrant visas into the United States.⁵

Although the security reasons behind these new visa procedures are understandable in light of the September 11 attacks, these new procedures are causing undue hardship for students, visitors, and workers alike.⁶ All of the new procedures require more money and employees, yet the federal government has not supplied the embassies, consulates, or United States Citizenship and Immigration Services (“USCIS”) regional offices with these resources. This leads to an increase in time for the government to file visa applications, which frustrates many citizens and employers within the United States along with the foreigners attempting to get the visas.⁷

The arts community believes that performers attempting to deal with this difficult visa process provide an essential contribution to the arts in

3. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001). Although this Act is extremely controversial, it shows Congress’ seriousness in dealing with the threat of foreign terrorists. See Rachel King, *Q: Is Congress giving too much surveillance power to federal law enforcement?*, INSIGHT ON THE NEWS, Jan., 14, 2002, at 40, available at LEXIS, Nexis Library, INSGHT File (claiming that Congress is overstepping the boundaries of Executive Power through the PATRIOT ACT); Representative Lamar Smith, *Q: Is Congress giving too much surveillance power to federal law enforcement?*, INSIGHT ON THE NEWS, Jan. 14, 2002, at 41, available at LEXIS, Nexis Library, INSGHT File (declaring that safety is more important than personal liberty).

4. Cohen and Novek, *supra* note 1.

5. See *infra* text accompanying notes 86 through 135. The government does not provide a definition of nonimmigrant; instead, the statute defines an immigrant as “every alien except an alien who is within one of the following classes of nonimmigrant aliens” and proceeds to list twenty-two different categories of nonimmigrants. 8 U.S.C.A. § 1101(a)(15) (West 2003). Federal statute defines nonimmigrant visas as “a visa properly issued to an alien as an eligible nonimmigrant by a competent officer.” § 1101(a)(26). Alien is defined as “any person not a citizen or national of the United States.” § 1101(a)(3).

6. See Amy Gardiner and Thomas O’Toole, *Foreign Athletes Face More Scrutiny*, USA TODAY, July 11, 2002, at 12C, available at LEXIS, Nexis Library, USATDY File. The reason that nonimmigrant visas have been a target is because the September 11 hijackers entered the country on student (F, J, and M) and visitor (B) visas. *Id.* Performing arts visas (O and P) have not received the same attention until recently. Associated Press, *FBI: Terrorists Could Use Special Visas to Enter U.S.*, Apr. 2, 2004, available at www.foxnews.com (last visited April 3, 2004). At the end of March, the FBI sent 18,000 state and local law enforcement agencies a bulletin claiming to have received information that terrorists may enter the country using P visas. *Id.* The bulletin contained no specific information that any terrorist has ever entered the country with a P visa. *Id.*

7. Susan Martin et al., *U.S. Immigration Policy: Admission of High Skilled Workers*, 16 GEO. IMMIGR. L. J. 619, 628 (2002).

our country.⁸ More and more performers from all over the world come to the United States to partake in the vast opportunities this nation offers in the arts.⁹ These performers increase cultural awareness and educate this country on the various forms of art that exist throughout the world. In addition, the interest that the United States shows in various cultural art forms helps develop international connections.¹⁰ Unfortunately, the recent procedures implemented by the federal government make it increasingly difficult for the United States arts community to bring foreign artists to this country.¹¹ The arts provide the perfect opportunity for our country to expand diplomatic ties to other countries and to bring people of different nations together in the enjoyment of song, dance, and celebration. Yet in practice, these new visa procedures do more to isolate the United States than to bring everyone together.¹²

One group the new regulations largely affect is non-profit performing arts organizations. The increased time needed to obtain a visa combined with greater costs associated with navigating the new terrain of registration have prevented many organizations from offering a performance schedule that provides various cultural experiences.¹³ Cultural awareness and education are essential to living in today's global society, and the performing arts provide a perfect opportunity for such enrichment. Unfortunately, if the visa program continues as is, the arts may no longer be a viable option for expanding cultural horizons.

Consequently, something has to change. Non-profit performing arts

8. Simi Horwitz, *Int'l Theatre Scene in U.S. Feels Security Crackdown*, BACK STAGE, Aug. 2, 2002, at 2, available at LEXIS, Nexis Library, BCKSTG File.

9. Gwendolyn Freed, *Presenters Suffer While Visa Troubles Keep Foreign Artists From Local Stages*, STAR TRIB. (Minneapolis – St. Paul), Apr. 13, 2003, at 1F, available at 2003 WL 5533188.

10. The idea of developing connections with foreign countries is paramount in the war against terrorism. The arts provide an excellent opportunity for the federal government to show an appreciation of other cultures and ideas as well as establish the essential connection to develop a dialogue on working together to defeat terrorism. Many fear that international performances in the United States will dwindle, leading to a lack of education and understanding of foreign cultures. See Freed, *supra* note 9.

11. Freed, *supra* note 9; Chris Jones, *Stricter Visa Rules Put a Damper on International Arts Exchange*, CHI. TRIB., Oct. 27, 2002, at C-10, available at LEXIS, Nexis Library, CHTRIB File. Many of these new procedures originate from legislation. Since September 11, 2001, Congress has passed twenty-one acts which affect the Immigration and Nationalization Act (INA); this leads to constant restructuring by immigration officials and offices to stay abreast of the changes. See Public Laws Amending the INA, available at <http://uscis.gov/grapics/lawsregs/amendina.htm> (last visited Apr. 3, 2004).

12. See John Petkovic, *No Visa, No Show: Stiff Security is Keeping Artists from Scheduled U.S. Concerts*, PLAIN DEALER (Cleveland, Ohio), Oct. 2, 2003, at F1, available at LEXIS, Nexis Library, CLEVPD File.

13. Freed, *supra* note 9.

organizations will not be able to continue to recruit foreign performers if the current immigration procedures continue as is.¹⁴ Possible solutions include: waiving the one thousand dollar expedition fee for non-profit organizations,¹⁵ increasing the earliest visa application date to one year,¹⁶ reducing the O and P petition process to thirty days, updating the I-129 visa form and instructions, and requiring uniform policies and procedures at all USCIS Centers.¹⁷

Part II of this comment develops a basic understanding of nonimmigrant visas, while Part III specifically discusses the O and P visa categories that are operative for performing artists. Part IV then describes the procedures developed by the Immigration and Naturalization Service (“INS”) and begins to describe some recent changes to the process by the new immigration department, the USCIS. The most significant changes that affect the O and P visa categories and homeland security issues are discussed in Part V. Next, Part VI focuses on the particular problems that arise from the new procedures applied to O and P visas, and more specifically, the added problems that arise with non-profit performing arts companies. In Part VII, this comment addresses possible solutions to the problems along with an overview of what steps performing arts organizations are taking to protect performances from visa disasters.

II. NONIMMIGRANT VISAS

Quite simply, nonimmigrant visas give residents from other countries the ability to come to the United States for a specific, temporary time period, with special emphasis on the term temporary.¹⁸ The government will issue a visa only to someone who has the intention of moving back to her resident country.¹⁹ The United States government provides visas for a

14. Besides time and money, the new visa requirements take an emotional toll on the performers. Iranian film director, Bahman Qobadi, received an award at the 2002 Chicago International Film Festival for his film, “The Songs of My Motherland.” Jones, *supra* note 11. Qobadi was unable to receive his visa to attend the festival and therefore returned his prize. *Id.* He stated that the visa procedures required by the United States caused a three month postponement in his next film, and the whole process was “painful and lowered my spirits greatly.” *Id.*

15. See *infra* text accompanying notes 164-168.

16. See *infra* text accompanying note 163.

17. See *infra* text accompanying notes 157-162.

18. *U.S. Immigration Basics*, THE NEWS & OBSERVER (Raleigh, N.C.), July 6, 2003, at A18, available at LEXIS, Nexis Library, NWSOBV File. For a statutory definition of nonimmigrant, see *supra* note 5.

19. *Id.* An alien is considered “temporary” if she complies with the time limits established by statute or regulations. CHARLES GORDON, ET AL., IMMIGRATION LAW AND PROCEDURE § 25.01(3) (2003). The temporary requirement is not always clearly stated in the statute. For example, in one sub-category of O visas (for the actual artist, athlete, etc. as opposed to their family members which

variety of reasons other than immigration, such as temporarily working for a company in the United States or ministering in the United States as a foreign religious leader.²⁰ For people who come to the United States on a temporary basis to work, the government issues a nonimmigrant visa based on the amount of time expected to complete the project or work assignment.²¹ There are various types of work visas available for people with different backgrounds and education levels.²² For instance, the O and P visas are work visas for individuals who exhibit extraordinary ability in the arts, the sciences, education, business, or athletics, individuals with extraordinary achievement in motion pictures or television, and individuals who are internationally recognized athletes or group entertainers.²³

III. O AND P VISAS

The O and P visas were included as part of the Immigration Act of 1990.²⁴ This Act was credited with shifting the priorities of immigration to “labor-market-oriented policies” and gave greater flexibility and options

fall under another sub-category), the visa statute does not require the foreigner to be entering the country temporarily; instead, one must look to the regulations which state that an individual must be “coming temporarily to the United States.” 8 C.F.R. § 214.2(o)(1)(ii)(A)(1) (West 2003). Under the same sub-category in P visas, the statute only declares that an individual has to have a foreign residence in which there is “no intention of abandoning.” § 1101(a)(15)(P). Instead, it is the P-1 regulations that include the same language as O-1 regulations: the individual must be “coming temporarily to the United States.” § 214.1(p)(1)(ii)(A).

20. § 1101(a)(15). The United States provides nonimmigrant visas for diplomats (A), visitors (B), travelers in transit (C), foreign crewmen (D), commercial traders (E), students (F), foreign representatives (G), skilled workers (H), foreign media (I), students and teachers (J), fiancés/spouses of United States citizens (K), employees of United States companies (L), vocational students (M), parents of children with special immigration status (N), workers with extraordinary ability (O), internationally recognized artists and athletes (P), cultural exchange participants (Q), religious clergy (R), criminal informants (S), victims of slavery (T), victims of criminal abuse (U), and immigrants waiting for visas (V). *Id.*

21. 8 U.S.C.A. § 1184(a)(2)(b) (West 2003). For example, if a person is coming into the United States to tour with a ballet company for a year, the government will issue the visa for a duration, including the training and rehearsal before the first performance and the actual performance time. Specifically, the regulations state that “an approved petition. . . shall be valid for a period of time determined by the Director to be necessary to accomplish the event or activity.” § 214.2(o)(6)(iii)(A).

22. Martin et al., *supra* note 7, at 627. There are work visas for business visitors (B-2), crewmen (D), traders (E), specialty workers (H), media (I), international transfers (L), people with extraordinary ability (O), athletes or artists (P), and clergy (R). § 1101(a)(15). For a full list of nonimmigrant visas, see *supra* note 20.

23. § 1101(a)(15)(O); § 1101(a)(15)(P); Laura J. Danielson, *Navigating Difficult Waters: Immigration Laws as Applied to Foreign Artists, Entertainers, and Athletes*, 19-SPG ENT. & SPORTS L. 3 (2001).

24. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 6 (8th ed. 2002).

for work visas.²⁵ Before 1990, performing artists had to apply for H-1B visas for entrance into the United States as nonimmigrants.²⁶ The H-1B visa is for specialty occupations²⁷ and contains a cap on the number of visas issued.²⁸ The O and P visas have no cap.²⁹

The O category in the current statute provides visas for

an alien who has extraordinary ability³⁰ in the sciences, *arts*, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions[,] a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability.³¹

The P category provides visas for two groups of nonimmigrants: athletes and entertainment groups.³² This visa applies to an individual who

25. Leah Phelps Carpenter, *The Status of the H-1B Visa in These Conflicting Times*, 10 TULSA J. COMP. & INT'L L. 553 (2003).

26. Carpenter, *supra* note 25, at 557; GORDON, ET AL., *supra* note 19 at § 25.01(2). Some USCIS service centers are still granting H-1B visas for artists. Jonathan Ginsburg, *Immigration Procedures for Foreign Guest Artists*, COMPLETE GUIDE TO IMMIGRATION AND TAX REQUIREMENTS FOR FOREIGN GUEST ARTISTS at 6, at <http://www.artistsfromabroad.com> (last visited Nov., 7, 2003). For example, in 1999, the Immigration and Nationalization Service ("INS") did not approve an H-1B visa for a violinist in the Louisiana Philharmonic Orchestra, but the Orchestra had obtained three previous H-1B visas for other musicians. *La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800 (E.D. La. 1999) (holding that INS abused its discretion in denying H-1B visa for violinist when allowing previous H-1B visas for musicians).

27. KURZBAN, *supra* note 24, at 444. Specialty occupation is defined as "an occupation that requires (A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C.A. § 1184(i)(1) (West 2003). Fashion models are also included in the H-1B visa category but are not subject to the academic degree requirements. § 1101(a)(15)(H).

28. Carpenter, *supra* note 25, at 557. In 1999, the government issued only 115,000 visas. Gabrielle M. Buckley, *Hitting the H-1B Visa Cap: Immigration Strategies and Alternatives for Employers of Foreign Nationals*, THE METROPOLITAN CORP. COUNS., Feb. 2000, at 12, available at LEXIS, Nexis Library, MCC File. Although that number had increased from the 65,000 previously available, the government still used every available H-1B visa, as it did in 1998. *Id.* In fact, in 1999, immigration officials "announced that they may have issued from 10,000 to 20,000" more H-1B visas than were allowed. *Id.* The cap for the years 2001-2003 was 195,000, but after 2003, the number of visas was reduced back to 65,000. § 1184(g)(1)(A).

29. KURZBAN, *supra* note 24, at 477-87. The O and P visas have more requirements than H-1B visa. Thus, the trade-off is that foreigners who fall under the pre-requisites of these visas do not have the extra hurdle of capping like the H-1B visa. *Id.*

30. The term "extraordinary ability" is defined as "distinction." § 1101(a)(46).

31. § 1101(a)(15)(O)(i) (emphasis added). There are also O visas available for people coming to assist the artist (O-2) or the spouse and children of the artist or artist's assistant (O-3). § 214.2(o)(1)(i).

32. § 1101(a)(15)(P)(i). There are also visas available for "an artist or entertainer under a

“performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance, and [sic] seeks to enter the United States temporarily and solely for the purpose of performing as such an athlete with respect to a specific athletic competition”³³ or to an individual who “performs with or is an integral and essential part of the performance of an entertainment group that has . . . been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time.”³⁴ For entertainment groups, the P visa also contains the following two requirements: 1) each member of the group must have a “sustained and substantial relationship with that group (ordinarily for one year) and provides functions integral to the performance of the group”³⁵ and 2) each performer will only “enter the United States temporarily and solely for the purpose of performing” in that group performance.³⁶

Congress attempted to develop “a global interchange of creative professionals through developing the O and P visas.”³⁷ The only amendments to the O and P visas occurred in 1991, and these amendments basically just added clarifying language or deleted overly specific language.³⁸ In fact, in order to secure smooth implementation of the new

reciprocal exchange program [(P-2),] . . . an alien . . . coming . . . to perform, teach or coach under a program that is culturally unique” (P-3), or the spouse and children of any P-1, P-2, or P-3 alien (P-4). § 214.2(p)(1)(i).

33. § 1184(c)(4)(A).

34. § 1184(c)(4)(B)(i)(I). In special circumstances, the Attorney General may waive the international recognition requirement for “an entertainment group that is recognized *nationally* as being outstanding in its discipline for a sustained and substantial period of time.” § 1184(c)(4)(B)(ii) (emphasis added).

35. § 1184(c)(4)(B)(i)(II). The one-year relationship requirement applies only to seventy-five percent of all performers. § 1184(c)(4)(B)(iii)(I). The Attorney General may waive the one-year requirement for “an alien who because of illness or unanticipated and exigent circumstances replaces an essential member of the group and for an alien who augments the group by performing a critical role.” § 1184(c)(4)(B)(iii)(II).

36. § 1184(c)(4)(B)(i)(III). In a strange exception, circus performers do not have to be an “integral and essential part of the performance” or have a “sustained and substantial relationship” but do have to “enter the United States temporarily and solely for the purpose of performing.” § 1184(c)(4)(B)(iv).

37. Laurence S. Zakson, *Peer Group/Labor Organization Review of the Admission of Extraordinary and Accompanying Aliens to Work in the Entertainment Industry: A Plea for Precedent*, 21 LOY. L.A. ENT. L. REV. 417, 418 (2001).

38. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991). Following is a list of changes made to the O visas:

1) In § 1101(a)(15)(P), the amendment replaced the language:

(i)(I) performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance, or performs as part of an entertainment group that has been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time and has had a sustained and substantial relationship with that

visa program, the first O and P visas were not issued until 1992.³⁹

The regulations developed for the O visa require that an "alien who has extraordinary ability. . . [in the] arts"⁴⁰ must prove either a) nomination

group over a period of at least one year and provides functions integral to the performance of the group, and (II) seeks to enter the United States temporarily and solely for the purpose of performing as such an athlete or entertainer with respect to a specific athletic competition or performance

with "as described in section 1184(c)(4)(A) of this title (relation to athletes), or [sic] is described in section 1184(c)(4)(B) of this title (relating to performance groups)" referencing a new subsection of the code that explained the P visa more thoroughly. Miscellaneous and Technical Immigration and Naturalization Amendments § 203(a).

2) In § 1184(a)(2)(B), the changes deleted subsection ii which stated

(ii) An alien who is admitted as a nonimmigrant under clause (ii) or (iii) of section 101(a)(15)(P) may not be readmitted as such a nonimmigrant unless the alien has remained outside the United States for at least 3 months after the date of the most recent admission.

The Attorney General may waive the application of the previous sentence in the case of individual tours in which the application would work an undue hardship.

Miscellaneous and Technical Immigration and Naturalization Amendments § 206(a).

3) In § 1101(a)(15)(P)(ii)(II), the amendment deleted "between the United States and the foreign states involved" and adding "or organizations" after "and an organization." Miscellaneous and Technical Immigration and Naturalization Amendments § 205(b)-(c).

4) In § 1101(a)(15)(P)(iii)(II), the new law deleted "for the performing" and replaced it with "to perform, teach, or coach," and placed "commercial or noncommercial" before "program." Miscellaneous and Technical Immigration and Naturalization Amendments § 206(d).

5) In § 1184(c)(4)(E), the changes struck "in order to assure reciprocity in fact with foreign states." Miscellaneous and Technical Immigration and Naturalization Amendments § 205(c)(2).

Following is a list of changes to the O visas:

1) In § 1101(a)(46), the new law added a definition of "extraordinary ability." Miscellaneous and Technical Immigration and Naturalization Amendments § 205.

2) In § 1101(a)(15)(O), the amendment deleted "but only if the Attorney General determines that the alien's entry into the United States will substantially benefit prospectively the United States" in subsection i and replaced "significant principal photography" with "significant production (including pre- and post-production work)" in subparagraph ii. Miscellaneous and Technical Immigration and Naturalization Amendments § 205(b)-(c).

3) In § 1184, the law gave the Attorney General an option to waive the consultation requirement in certain instances and added "(or events)" after "events" in subparagraph (a)(2)(A) to clarify that alien may enter the country on a visa for more than one event. Miscellaneous and Technical Immigration and Naturalization Amendments § 205(d)-(e).

4) In § 1184(c)(6), the changes inserted a detailed explanation of the consultation requirement. Miscellaneous and Technical Immigration and Naturalization Amendments § 204. The consultation requirement affects both the O and P visas. This consultation requirement is explained *infra* text accompanying notes 66 through 69.

39. See Judith A. Kelley, *New O and P Nonimmigrant Visa Categories: A Lesson in Compromise*, 16 COLUM.-VLA J.L. & ARTS 505 (1992).

40. 8 C.F.R. § 214.2(o)(1)(i). "Arts" is defined as "fields of creative activity or endeavor such as, but not limited to, fine arts, visual arts, and performing arts." § 214.2(p)(3). The regulations split the visa requirements into those for "extraordinary ability in the arts," which is listed in the above text, and those for "extraordinary ability in the field of science, education, business or athletics." § 214.2(o)(3)(ii). "Extraordinary ability in the field of arts means distinction[.]" and distinction is defined 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

or receipt of “significant national or international awards or prizes in the particular field”⁴¹ or b) three of the following six criteria: 1) “lead or starring participant in productions or events which have a distinguished reputation,”⁴² 2) national or international recognition,⁴³ 3) “lead, starring, or critical role for organizations and establishments that have a distinguished reputation,”⁴⁴ 4) commercial or critical success,⁴⁵ 5) significant recognition from experts in the field,⁴⁶ or 6) commands a high

prominent is renowned, leading, or well-known in the field of arts.” *Id.* “Extraordinary in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.” *Id.* An alien who petitions for a visa because of “extraordinary ability in the field of science, education, business, or athletics” must be the recipient of a major, internationally recognized award (the example given in the regulations is the Nobel Prize) or meet three of the following eight criteria: 1) recipient of national or international prizes for excellence in the field of endeavor; 2) membership in an association in the field that requires outstanding achievements of their members; 3) published material in a professional publication in the field; 4) participation on a panel as a judge of others in the field; 5) original scientific, scholarly, or business contributions of major significance in the field; 6) authorship of scholarly articles in the field; 7) employment in a critical role for organizations with a distinguished reputation; or 8) high salary, either previous or in the future. § 214.2(o)(3)(iii). There are different requirements for an alien “who has demonstrated a record of extraordinary achievement in the motion picture or television industry.” *Id.* There must be “[e]vidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field.” § 214.2(o)(3)(v)(A). If the individual cannot produce such evidence, at least three of the following factors must be met: 1) performing (or performed) as a lead or starring participant in a distinguished production as proved by reviews, marketing, contracts, etc.; 2) national or international recognition through reviews or other published materials; 3) lead, starring or critical role for an organization with a distinguished reputation shown through articles; 4) major commercial or critical success proven by rating, box office receipts, and other occupational achievements; 5) significant recognition for achievements from experts in the field; or 6) high salary, either now or in the future. § 214.2(o)(3)(v)(B).

41. § 214.2(o)(3)(iv)(A). The regulations give examples, such as an Academy Award, a Grammy, or a Director’s Guild Award. *Id.*

42. § 214.2(o)(3)(iv)(B)(1). This criterion can be illustrated through critical reviews, advertisements, publicity releases, publications, contracts, or endorsements. *Id.* Examples are playing Ophelia in Shakespeare’s *Hamlet* or opening for Sting on his tour of South America.

43. § 214.2(o)(3)(iv)(B)(2). This criterion can be illustrated through publicized material in major newspapers, trade journals, publications or testimonials. *Id.* Examples include an article in Rolling Stone Magazine or a reviewed performance in the New York Times or the South China Morning Post.

44. § 214.2(o)(3)(iv)(B)(3). This criterion can be illustrated by newspapers, trade journals, publications, or testimonials. *Id.* Examples include principle dancer of the Moscow Ballet, member of the Peking Opera, or working in a small theater group with a good reputation on the West End of London.

45. § 214.2(o)(3)(iv)(B)(4). Some ways to show critical success include title, rating, standing in the field, box office receipts, or other occupational achievements. *Id.* Examples are sold out tours, Billboard lists, or head director credits.

46. § 214.2(o)(3)(iv)(B)(5). These testimonials must indicate the author’s authority, expertise, and knowledge of the alien’s achievement. *Id.*

salary.⁴⁷ Also, the regulations contain a catch-all provision for other evidence the petitioner might add to establish the beneficiary's extraordinary ability.⁴⁸ Artists may receive O visas for up to three years with the possibility of one -year extensions as necessary.⁴⁹

The P visa requires that "an alien who is coming to the United States to perform services as a . . . member of an internationally recognized entertainment group"⁵⁰ must provide three categories of documentation. First, the group must show that it "has been established and performing regularly for a period of at least one year."⁵¹ Second, the group's petition must provide a statement showing when each member joined the group.⁵²

47. § 214.2(o)(3)(iv)(B)(6). Contracts are one way to prove this. *Id.* A high salary will vary depending on the art form.

48. § 214.2(o)(3)(iv)(C). However, the immigration courts do not seem to use this catch-all provision often when they determine eligibility.

49. § 214.2(o)(6)(iii); *see also* Danielson, *supra* note 23, at 4. Specifically, O visas are limited to the amount of time "determined by the Director to be necessary to accomplish the event or activity, not to exceed 3 years." § 214.2(o)(6)(iii)(A); *see also* Zakson, *supra* note 37, at 420. There seems to be no limit to the number of extensions an individual may receive. *See* § 214.2(o)(12). As of July 16, 2004, the U.S. State Department stopped the re-issuance of C, E, H, I, L, O, and P visas because equipment needed to produce the biometric identifiers required on all visas will not be available inside the United States, only at consular offices abroad. Discontinuation of Reissuance of Certain Nonimmigrant Visas in the United States, Public Notice 4747, 69 Fed. Reg. 35121 (June 23, 2004). The State Department did not say if this re-issuance ban is temporary or permanent. *Id.* Because the reason is lack of equipment, once the State Department offices inside the United States get the equipment, the ban will probably be lifted.

50. § 214.2(p)(1)(i). "Internationally recognized means having a high level of achievement in a field as evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the extent that such achievement is renowned, leading, or well known in more than one country." § 214.2(p)(3) If the group is nationally recognized as being outstanding for a "sustained and substantial period of time" the Director may waive the international recognition requirement because of special circumstances. § 214.2(p)(4)(iii)(C)(2).

There are separate regulations for individuals "coming to the United States to perform services as an internationally recognized athlete, individually or as part of a group." § 214.2(p)(1)(i). The athlete(s) must be able to show participation in "athletic competitions which ha[ve] a distinguished reputation and which require participation" of the athlete(s). § 214.2(p)(4)(ii)(A). "A tendered contract with a major United States sports league or . . . sport commensurate" is used to prove such participation. § 214.2(p)(4)(ii)(B)(1). In addition, there must be documentation of two of the following: 1) Evidence of previous participation with a major U.S. sports league, 2) participation in international competition, 3) significant participation in U.S. intercollegiate athletics, 4) written statement from governing body of the sport that details international athletic reputation, 5) written statement from member of the sports media stating the distinguished stature, 6) ranking in international sports rankings, or 7) receipt of significant honor in the sport. § 214.2(p)(4)(ii)(B)(2).

51. § 214.2(p)(4)(iii)(B)(1). Providing receipts, tour schedules, and sources of income would satisfy this requirement.

52. § 214.2(p)(4)(iii)(B)(2). The reason this information is needed is because the petition must include proof that at least "seventy-five percent of the members of the group must have a sustained a substantial relationship with the group for at least one year and must provide functions integral to the group's performance." § 214.2(p)(4)(iii)(A). If exigent circumstances exist, the Director has the

Finally, to prove international recognition, the group must include evidence of three of the following six criteria: 1) “starring or leading entertainment group in productions or events which have a distinguished reputation,”⁵³ 2) international acclaim in the field of performance,⁵⁴ 3) “leading or starring group for organizations or establishments that have a distinguished reputation,”⁵⁵ 4) commercial or critical success,⁵⁶ 5) significant recognition of achievement in field of performance,⁵⁷ or 6) commanding a high salary.⁵⁸ Each of the above criteria must be met as for the group; individual recognition is not acceptable.⁵⁹ P visas may be issued for up to one year with an option for one year extensions.⁶⁰

IV. OBTAINING A VISA

The first step in obtaining a nonimmigrant O or P visa is for the employer to petition the United States Citizenship and Immigration Services (“USCIS”)⁶¹ for the immigrant.⁶² USCIS Service Centers are located throughout the United States.⁶³ This petitioning process is very

discretion to waive the one-year relationship requirement. § 214.2(p)(4)(iii)(C)(3).

53. § 214.2(p)(4)(iii)(B)(3)(i). Examples of events or performances with a distinguished reputation include International Pro-Am Ballroom Dancing Competitions or the Irish dancing Riverdance™ production.

54. § 214.2(p)(4)(iii)(B)(3)(ii). International acclaim can be proven through press releases, marketing posters, or, if the entertainment group is extremely famous, reputation alone.

55. § 214.2(p)(4)(iii)(B)(3)(iii). Examples of organizations with distinguished reputations include the London Symphony or National Bunraku Theater in Japan.

56. § 214.2(p)(4)(iii)(B)(3)(iv). Commercial or critical success may be shown through reviews in magazines and newspapers, or rankings in national or international ranking systems.

57. § 214.2(p)(4)(iii)(B)(3)(v). Some ways to prove significant recognition or achievement include winning prestigious awards (such as the Prix de Lausanne for ballet) or receiving accolades from a well-known peer group.

58. § 214.2(p)(4)(iii)(B)(3)(vi). This may be proven by box office receipts or pay checks.

59. § 214.2(p)(4)(iii)(A).

60. § 214.2(p)(14)(ii)(B); Danielson, *supra* note 23, at 5. There is no limit to the amount of extensions a petitioner may request, although athletes are limited to ten years in the country on the same visa. § 214.2(p)(14)(ii).

61. The USCIS was previously called the Bureau of Citizenship and Immigration Services (BCIS) under the Department of Homeland Security and the Immigration and Naturalization Service (INS) under the Department of Justice.

62. Laura Froote Reiff, *Entertainers and Immigration*, American Law Institute – American Bar Association Continuing Legal Education, Entertainment, Arts, and Sports Law, SH046 ALI-ABA 287, 289 (Jan. 9-11, 2003). Petitioners can include agents who may represent self-employed artists, but the agent must be from the United States, unlike employer petitioners, which may be foreign. GORDON, *supra* note 19, at § 25.01(4). In order to satisfy the requirement that the alien show proof of contracts in the U.S., an employer is any “user of the beneficiary’s services.” *Id.* The petitioner requirements for O and P visas are essentially the same. *Id.* at § 25.06(4). For P visas, an established organization may also be the petitioner. *Id.*

63. *Service Center Offices by State*, at http://uscis.gov/graphics/fieldoffices/service_centers/

important because this is the first step towards obtaining a visa, and the USCIS must approve the petition before it moves to the State Department to begin background checks, interviews, etc.⁶⁴ The petitioner must fill out the Form I-129 along with providing the documentation required to show “extraordinary ability” or “international recognition.”⁶⁵

Aside from the petition, the employer must file a written consultation opinion from a local union or labor group in the specific art field.⁶⁶ Depending on the visa, the group must show through a factual determination how the artist has “extraordinary ability” or “international acclaim.”⁶⁷ The consultation must specifically show the alien’s achievement along with an explanation of the work to be done by the alien in the United States and why that position requires an alien of extraordinary ability.⁶⁸ The USCIS “may still approve an application without a favorable [consultation], but it is far easier to get an approval with one.”⁶⁹

After the USCIS approves the visa application, the alien must complete the DS-156 Nonimmigrant Visa Application form at the State Department’s Consulate Offices in the alien’s country of citizenship or residency.⁷⁰ The alien must pass through various security checks at the consulate to determine if she is “safe” to enter into the country.⁷¹ The

index.htm (last visited April 18, 2004). The four service centers are found in Mesquite, TX, Lincoln, NE, Saint Albans, VT, and Laguna Niguel, CA. *Id.* Petitioners must file with one of the four service centers; they may not file a petition with a local USCIS office. GORDON, *supra* note 19, at § 25.05(1). The correct service center for filing is determined by the geographic area where the alien will first perform. *Id.*

64. Zakson, *supra* note 37, at 419.

65. GORDON, *supra* note 19, at § 25.05(1); 8 C.F.R. § 214.2(o); § 214.2(p).

66. 8 U.S.C.A. § 1184(c)(6)(A); 8 C.F.R. § 214.2(p)(7). An excellent list of groups that provide consultations can be found at GORDON, *supra* note 19, at § 25.11(3). The regulations allow consultation with peer groups, labor groups, or management organizations, which may also include individuals with expertise in the art form. 8 C.F.R. § 214.2(o)(5)(i)(B). Even though the government allows peer groups and management organizations to provide consultations, there is a preference for labor groups. Bernard P. Wolfsdorf and Mandy Tomson, *Entertainment Law: Minding Your O’s and P’s*, 25 L.A. LAW. 47, 48 (2001), available at LEXIS, Nexis Library, LOSAL File.

67. Zakson, *supra* note 37, at 422.

68. *Id.* “If the advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which supports the conclusion reached in the opinion.” § 214.2(o)(5)(ii)(A).

69. Danielson, *supra* note 23, at 4. Conversely, the Immigration Courts may deny the petitioner’s request to let the artist into the country with a favorable consultation opinion, meaning the opinion is merely a recommendation that does not bind the government. *See In re (redacted name)*, File # SRC 02 072 56104, Texas Service Center (Jan. 9, 2003).

70. Ginsburg, *supra* note 26, at VIII-A.

71. Michael D. Patrick, *Immigration Law: Immigration Changes Since Sept. 11, 2001*, N.Y. L.J., Sept. 23, 2002, available at <http://search.epnet.com/direct.asp?=IUC05059>

main security check is database referencing.⁷² The two main databases that provide information on foreign visitors are IAFIS and INDENT.⁷³

The consulate security checks may also include registration,⁷⁴ which involves fingerprinting and photographing,⁷⁵ and mandatory interviews for all nonimmigrants.⁷⁶ These are both recent additions to the security checks.⁷⁷ These face-to-face interviews occur at the United States consulate office in the artist's country of residence with a State Department official.⁷⁸ Once a nonimmigrant has passed the State Department and consulate requirements,⁷⁹ she is issued a visa from the United States consulate in her country.⁸⁰ Unfortunately, there is no review process for consular decisions, so if the State Department refuses to issue a visa, there is no appeal available to the alien.⁸¹

Both the O and P visas have a six-month pre-entry limitation.⁸² The

09423NYLJ&db=aphb.

72. *Id.*

73. *Id.* "IAFIS" stands for the Integrated Automated Fingerprint Identification System. *Id.* This database is compiled by various law enforcement agencies and includes criminal and terrorist activity. INDENT is a database compiled by DHS that checks various issues that may make foreigners "suspicious." *Id.* DHS, State Department, and FBI are now working together in a more effective way to improve communication between the different agencies and to combine the various electronic database systems. *Preventing Terrorism from Entering the United States: Before the House Comm. on International Relations, Sub-committee on International Terrorism, Nonproliferation and Human Rights*, 107th Cong. (2004) (testimony of David Stewart, Consul General) [hereinafter *Preventing Terrorism*].

74. Stanley Mailman and Stephen Yale-Loehr, *Immigration Law: The New Rule on Alien Registration*, N.Y. L.J., Oct. 28, 2002, available at <http://search.epnet.com/direct.asp?an=IU C3305832241NYLJ&db=aphb>.

75. *Id.* Fingerprinting and photographs are required for visa applications from various, mostly Islamic, countries. Patrick, *supra* note 71. These countries include, although not limited to: Iran, Iraq, Libya, Sudan, and Syria. *Id.* See *infra* text accompanying notes and notes 110-122 for more information regarding fingerprinting.

76. Mark Bixler, *U.S. Gets Tougher On Visa Interviews*, THE ATLANTA J. & CONST., May 28, 2003, at 1F, available at LEXIS, Nexis Library, ATLJNL File.

77. *Id.* This new requirement took effect on August 1, 2003. *Id.*

78. *Id.* For discussion on this process and the concerns associated with it, see *infra* text accompanying notes and notes 127-132. In addition to security checks, the consulate office will require the alien to show that they do not intend to stay in the United States permanently. Ginsburg, *supra* note 26, at VIII-B. The alien may provide information such as a list of known friends in the country, his employment intentions, or his business in his home country to satisfy this requirement. *Id.*

79. Each consulate has very different requirements, so early contact with and information gathering from the consulate is essential to smooth visa issuance. Ginsburg, *supra* note 26, at VIII-A.

80. Ginsburg, *supra* note 26, at VIII-A. Even if a person has a valid visa, green card, or comes from a visa exempt country, they still may be stopped at a U.S. border and refused admission "if found to be inadmissible by the U.S. immigration inspector." Patrick, *supra* note 71.

81. Ginsburg, *supra* note 26, at VIII-A.

82. 8 C.F.R. § 214.2(o)(2)(i); § 214.2(p)(2)(i). The six-month time limitation for O and P visas

earliest the alien may file the petition is six months before he needs to enter the United States.⁸³ In practice, this means that the whole procedure to obtain a visa may not begin until it gets close to the time that the alien needs to be in the country to perform. In addition, all the other steps required for the visa must occur within this six-month time limit.⁸⁴ This truncated time period, coupled with the changes made since September 11, has created various problems in the issuance of visas to artists.⁸⁵

V. PROBLEMS SINCE 9-11

Since September 11, all nonimmigrant visas have come under closer scrutiny.⁸⁶ The increasing difficulty in obtaining visas has created worries that O and P applicants may not receive their visas in the timely manner required or at all.⁸⁷ The government's policy shift stems from the fact that most of the September 11 hijackers were in the country on nonimmigrant visas.⁸⁸ This caused Congress and the INS to focus on nonimmigrant visas as a point of reform.⁸⁹

The main reason for reforming the non-immigration visa system is to create secure borders in an attempt to prevent another foreign terrorist attack.⁹⁰ The government has devised three primary ways of increasing security: reorganizing the INS,⁹¹ tracking nonimmigrants,⁹² and requiring new forms with visa requests.⁹³

is identical. § 214.2(o)(2)(i); § 214(p)(2)(i).

83. § 214.2(o)(2)(i). Specifically, the regulations state that "[t]he petition may not be filed more than 6 months before the actual need for the alien's services." *Id.*

84. *Id.*

85. See *infra* text accompanying notes and notes 136-156.

86. Joseph J. Kranyack and Bruce A. Hake, *O-1 Petitions in a Time of Stress*, 8 BENDER'S IMMIGR. BULL. 780 (May 1, 2003).

87. *Id.*

88. See Douglas Pasternak, *A Welcome Mat for Terrorists*, U.S. NEWS & WORLD REP., Oct. 8, 2001, at 31, available at LEXIS, Nexis Library, USNEWS File.

89. See Cohen and Novek, *supra* note 1.

90. See, e.g., David R. Francis, *Immigrants Pour into US, Unabated by War on Terror*, CHRISTIAN SCI. MONITOR, Nov. 25, 2002, at 2, available at LEXIS, Nexis Library, CSM File; Jessica Reaves, *Should We Keep Them Out?*, TIME, Oct. 11, 2001, available at <http://www.time.com/time/nation/article/0,8599,179255,00.html>.

91. Douglas Pasternak, *A Welcome Mat for Terrorists*, U.S. NEWS & WORLD REP., Oct. 8, 2001, at 31, available at LEXIS, Nexis Library, USNEWS File.

92. *Coming and Going: New System Would Track Foreign Visitors*, SAN DIEGO UNION-TRIB., Sept. 14, 2002, at B-8, available at LEXIS, Nexis Library, SDUT File [hereinafter *Coming and Going*].

93. See *infra* text accompanying notes and notes 133-135 for a discussion of who must fill out the new forms.

A. Revamping the INS

Many Congressmen believed the INS needed to be overhauled.⁹⁴ In response to the INS criticism, President Bush urged the formation of a new executive agency under the DHS to deal with immigration issues.⁹⁵ The USCIS now controls almost all aspects of the immigration system.⁹⁶ The State Department still has control of the consulate offices in foreign countries, so they deal with the immigration program on the foreign front, but the USCIS deals with all domestic immigration issues, including accepting petitions for O and P visas from United States employers.⁹⁷ The official duties of the USCIS include “promot[ing] national security, continu[ing] to eliminate immigration adjudication backlogs, and implement[ing] solutions for improving immigration customer services.”⁹⁸

Part of revamping the INS included adding more screening requirements during the visa issuance process.⁹⁹ Screening is the process by which the government attempts to discover information about the alien that may make him or her a possible danger inside the United States.¹⁰⁰ In an attempt to tighten security, the State Department conducts background screening at the foreign consulates.¹⁰¹ These checks entail contacting other agencies (such as the FBI) for information regarding the visa applicant.¹⁰² Nonimmigrants may wait eight months or more for these checks to be completed.¹⁰³ Screening delays also occur at service centers and district offices of the USCIS in the United States.¹⁰⁴ The USCIS must screen all

94. Bill Saporito et al., *Deporting the INS*, TIME, March 25, 2002, at 46, available at <http://search.epnet.com/direct.asp?an=6347915&db=aph>. Congressman James Sensenbrenner (R-WI) said the issuance of student visas to some of the September 11 attackers is “indicative of the enormous mismanagement of the INS.” *Id.*

95. Press Release, Department of Homeland Security, Ridge Sworn in as Secretary of Homeland Security (Nov. 19, 2002), at <http://www.dhs.gov/dhspublic/display?content=136> (last visited Nov. 6, 2003)

96. This is USCIS, <http://uscis.gov/graphics/aboutus/thisisimm/index.htm> (last visited Nov. 6, 2003). The official inception of the USCIS began with the inception of DHS. *Id.*

97. See James Dao, *Threats and Responses: The State Department; Consoles Lax in Screening for Visas, Report Says*, N.Y. TIMES, Dec. 22, 2002, at 24, available at LEXIS, Nexis Library, NYT File.

98. This is USCIS, *supra* note 96.

99. *Impact of Visa Backlog on Small Business: Before the House Comm. on Small Business*, 107th Cong. (2003) (statement of Palma R. Yanni, President Elect, America Immigration Lawyers Association) [hereinafter *Visa Backlog*].

100. *See id.*

101. *Id.*

102. *Id.* The type of information gathered varies, but is usually criminal or terroristic in nature.

103. *Visa Backlog, supra* note 99.

104. Patrick, *supra* note 71.

names through the Interagency Border Inspection System (IBIS).¹⁰⁵ This additional screening procedure increases time delays by ten to forty percent.¹⁰⁶

B. Tracking of Visas

Tracking visas is not a new concept. For example, in 1996, Congress first requested an electronic tracking system of visas.¹⁰⁷ The plan was never implemented, but after September 11, Congress ordered the Department of State to develop an electronic system.¹⁰⁸ In October of 2002, the Department of State finally developed a system where both the entry and exit of all nonimmigrant visas were recorded into a centralized system.¹⁰⁹

The main component to tracking of visas is biometrics.¹¹⁰ Biometrics is the gathering of biographic information about people in an attempt to discover if they pose a security threat.¹¹¹ The main forms of biometrics at the United States borders are fingerprinting and photography.¹¹² The

105. *Visa Backlog*, *supra*, note 99. The DHS manages the IBIS, a database of information on possibly dangerous foreigners. *Preventing Terrorism*, *supra* note 73. Only recently has this database begun to receive information from the State Department or to incorporate information from the now defunct INS. *Id.*; *Visa Backlog*, *supra*, note 99.

106. *Visa Backlog*, *supra* note 99.

107. *Coming and Going*, *supra* note 92.

108. *Id.*

109. *Id.* The systems will be set-up at every air, land, and seaport in the United States. *Id.* Until the summer of 2004, only the Baltimore International Airport tracked exits. *Coming to America: New Security Checks for Foreign Visitors*, SAN DIEGO UNION-TRIB., Jan. 6, 2004, at B-6, available at LEXIS, Nexis Library, SDUT File [hereinafter *Coming to America*]; Donna M. Airoidi, *New Strictures Further Impact Visitors*, MEETING NEWS, Oct. 11, 2004, available at LEXIS, Nexis Library, MEETNW File. Eleven new airports began tracking exits as of September 30, 2004 – including Chicago O'Hare which started a pilot program in August. Airoidi, *supra* note 109; Michael Grabell, *D/FW Expands Screening Effort: Airport to Check 600 More Foreigners Daily Under U.S. Program*, THE DALLAS MORNING NEWS, Sept. 17, 2004, at B1, available at LEXIS, Nexis Library, DALNWS File. The Department of Homeland Security is trying different pilot programs to see what works best in anticipation of all U.S. Airports tracking exits by the end of 2006. Grabell, *supra* note 109; *Safeguarding America's Borders: Panel One of a Hearing Before the Infrastructure and Border Security Subcommittee of the House Select Homeland Security Committee*, 107th Cong. (2004) (statement of Steward Verdery, Assistant Secretary for Border and Transportation Security Policy and Planning).

110. *Preventing Terrorism*, *supra* note 73.

111. Michael D. Patrick, *Immigration Law: Foreign Visitors Face New Procedures at U.S. Borders*, N.Y. L.J., Jan. 29, 2004, at 3, available at LEXIS, Nexis Library, NYLAWJ File.

112. *Preventing Terrorism*, *supra* note 73. The photography of aliens for visa issuance has occurred for a while, but the extensive fingerprinting system began in early 2004 after a trial run at the Atlanta International Airport in 2003. *Out of Hand? New U.S. Fingerprinting Policy has Some People Up in Arms*, CURRENT EVENTS, Feb. 6, 2004, at 3, available at LEXIS, Nexis Library, ASAPII File [hereinafter *Out of Hand*]; see also *Coming to America*, *supra* note 109.

program consists of three steps.¹¹³ First, when the consulate issues the visa, it fingerprints and photographs the alien and enters the information into DHS's INDENT system to look for matches to terrorists or other criminals.¹¹⁴ Then, if no matches occur, the information is sent to IBIS.¹¹⁵ Finally, IBIS provides this information to the United States Visitor and Immigration Status Indication Technology ("US-VISIT") system, which the inspectors at the Ports of Entry ("POE") have access to when the visa holders enter the country.¹¹⁶ At the POE, customs officials digitally fingerprint and photograph all nonimmigrants coming into the United States. These fingerprints and photographs are entered into the US-VISIT system and are compared with the information gathered in IBIS.¹¹⁷

Tom Ridge, Secretary of DHS, is proud of the success the US-VISIT program had during its test run in Atlanta.¹¹⁸ For example, during the short time the customs program was in place, officials prevented twenty-one people from entering the United States.¹¹⁹ But having this program has also created problems. Some countries, such as Brazil, have chosen to retaliate by setting up their own biometric systems.¹²⁰ Also, there are worries that the government will misuse the information gathered through the US-VISIT system.¹²¹ Timothy Edgar, from the American Civil Liberties Union, claims that these new procedures are too broad and that the government is treating everyone like a terrorist.¹²²

Another way the government is attempting to track visas is through the registration program.¹²³ DHS has broad discretion in choosing which visa

113. *Preventing Terrorism*, *supra* note 73. The recent changes to the biometrics systems occur at the border crossings. *Id.* Previously, fingerprinting happened but the information gathered at the consulates was not shared with the customs agents at U.S. borders. *Id.*

114. *Id.*

115. *Id.* The IBIS is the DHS system used by the USCIS service centers. *See* note 105.

116. Patrick, *supra* note 111.

117. *Coming to America*, *supra* note 109. In the beginning of April 2004, the government announced that citizens from twenty-seven more countries would now have to be fingerprinted and photographed at POE. Associated Press, *U.S. Expands Fingerprinting Program to Closest Allies*, Apr. 3, 2004, available at <http://www.cnn.com/2004/TRAVEL/04/02/fingerprinting.allies.ap/index.html> (last visited Apr. 3, 2004). These countries were traditionally countries whose citizens could travel into the U.S. for up to ninety days without visas, such as the United Kingdom and Japan. *Id.* Even though aliens from these countries must provide fingerprints and photographs at POE, they are still not required to engage in interviews, background checks, or fingerprinting and photographing at U.S. consulate offices. *Id.*

118. *Out of Hand*, *supra* note 112.

119. *Id.* The people stopped were charged with crimes ranging from drug offenses to immigration violations. *Id.*

120. Associated Press, *supra* note 117.

121. *Out of Hand*, *supra* note 112.

122. *Id.*

123. Mailman and Yale-Ioehr, *supra* note 74. Requiring registration for a visa holder is

applicants need to register upon entering the United States; so which aliens need to register is not always clear until the alien reaches a POE.¹²⁴ Registration is merely a more stringent form of visa tracking. To illustrate, once an alien registers, the nonimmigrant must report to a USCIS office within ten days if staying in the country more than thirty days, or if the nonimmigrant stays more than one year, the visa holder must report annually to the office after the original visit to the USCIS office.¹²⁵ The person must again appear before a USCIS official when leaving the country.¹²⁶

C. Visa Interviews

Visa interviews also create increased time delays.¹²⁷ Each alien attempting to enter the United States must now go through two separate interviews, one at the consulate office and one with a customs official when entering the country. The interview with the customs official at the POE is very brief, but the interview at the consulate office creates more problems for aliens who want to enter the United States.¹²⁸

In August 2003, the Department of State began to interview every visa applicant at consulate offices.¹²⁹ Crystal Williams, Director of Liaison for the American Immigration Lawyers Association, questions the effectiveness of this new procedure since the interviews only last one minute and rarely lead to new information not found on the application.¹³⁰ The government will not increase personnel or facilities to accomplish these interviews, which stretches thin an agency that is already struggling

discretionary, which creates uncertain expectations for the alien. *Id.*

124. Suspending the 30 Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67,578 (Dec. 2, 2003) (to be codified at 8 C.F.R. pt. 264) [hereinafter *Suspending the Interview Requirements*]. Not only can the DHS make people register at POEs, but they can also make aliens already in the U.S. report to a local office for registration. *Id.*

125. Mailman and Yale-Ioehr, *supra* note 74; see *Suspending the Interview Requirements, supra* note 124. Through a recent addition to DHS rules, some nonimmigrants do not have to come in for an interview at USCIS offices. See *Suspending the Interview Requirements, supra* note 124. The registered nonimmigrant must also report a change of address or of employment. Mailman and Yale-Ioehr, *supra* note 74.

126. Mailman and Yale-Ioehr, *supra* note 74. Traditionally, visa applications were either admitted or denied by the INS, but now registered nonimmigrants are part of a new intermediate category of visa applicants that are "admitted but closely monitored." *Id.* Thus, they are in a perpetual state of limbo – never sure if they are going to have to leave the country. *Id.*

127. *Visa Backlog, supra* note 99.

128. Patrick, *supra* note 111. Usually, the customs official only asks about the purpose of the alien's stay. Patrick, *supra* note 111.

129. Bixler, *supra* note 76.

130. *Id.*

due to post-September 11 security requirements.¹³¹ For example, in South Korea, the consul-general of the Embassy in Seoul said that the number of interviews conducted in 2004 would rise from sixty-five percent to ninety-five percent of all visa applicants.¹³²

D. New Forms

The government's new administrative policies demand that the prospective visa applicants (or their petitioners) spend an increasing amount of time and money.¹³³ In addition, if the visa applicant is a male between the ages of sixteen and forty-five from one of twenty-six countries, especially those with extensive Arabic or Muslim populations, there is an extra twenty-day waiting period along with a special form that must be submitted to the State Department.¹³⁴ Many of the same applicants who have waited an extra twenty days must also register when entering the country.¹³⁵

VI. EFFECT ON NON-PROFIT PERFORMING ART COMPANIES

Although these new visa requirements have made the process of visa issuance to foreign employees difficult for all employers, one of the industries hit the hardest is non-profit performing art companies.¹³⁶ The USCIS alone can "hold a visa petition for up to 100 days," which causes theater companies to wonder if the performer will be able to enter the country after money and time was spent on publicity, marketing, and advertising.¹³⁷ For example, the Minneapolis Cedar Cultural Center, according to executive director Bill Kubeczko, has lost an estimated \$140,000 from September 11, 2001 to April 2003 due to cancelled performances.¹³⁸

131. *Visa Backlog*, *supra* note 99.

132. Kim So-Young, *U.S. to Fingerprint Korean Visa Applicants*, THE KOREA HERALD, Jan. 26, 2004, available at LEXIS, Nexis Library, KHERLD File.

133. Patrick, *supra* note 71.

134. *Id.* The twenty-six countries are: Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen.

135. *Id.*; Mailman and Yale-Loehr, *supra* note 74.

136. Horwitz, *supra* note 8.

137. *Id.* All visas must go through the procedures at the State Department as well as the USCIS procedures.

138. Freed, *supra* note 9. Cedar Cultural Center is not the only performance art venue affected. The Cleveland Museum of Art lost two artists from July 2003 until September 2003 alone. Petkovic, *supra* note 12. John Petkovic notes that in the two years after September 11, fifty tours were cancelled because of visa problems and that number does not include individual shows. *Id.*

Cancellations occur due to a variety of reasons, ranging from intimidation flowing from all of the new regulations to uncertainty whether visa applications will be processed in time.¹³⁹ For example, in February 2003, New York's Lincoln Center for the Performing Arts wanted Germany's Ballet Freiburg to perform at its annual New Visions festival.¹⁴⁰ One week before the performance, the Center's staff discovered that dancer Emma-Louise Jordan had not cleared the background check because of her birthplace.¹⁴¹ Ms. Jordan was born in Libya and lived there for two months before moving to England.¹⁴² Eventually, a former company manager with connections at the American consulate in Germany "pulled some strings," and Ms. Jordan's visa received approval.¹⁴³ On the other hand, the Walker Art Center in Minneapolis was not as lucky.¹⁴⁴ In April 2003, the Center had to cancel a concert by Pakistani Singer Faiz Ali Faiz because of concerns that Faiz would not receive his nonimmigrant visa in time for the performance.¹⁴⁵ Before September 11, processing visas took up to three months.¹⁴⁶ With the increase in processing requirements, there is fear that the visa process could stretch beyond six months.¹⁴⁷

Although the new requirement that each applicant for a nonimmigrant visa come to a consulate office to partake in a face-to-face interview hurts all artists attempting to enter the United States, the mandatory interview requirement creates an additional problem for entertainment groups.¹⁴⁸ Ray Tulipan, CEO of Traffic Control Group, a firm that assists touring

139. Horwitz, *supra* note 8.

140. Kate Mattingly, *Artists Denied Entry: New Hope for the Rejected, Lobbying for Relaxation of Entry Rules for International Artists*, DANCE MAG., Aug. 1, 2003, at 11, available at LEXIS, Nexis Library, ASAPII File.

141. *Id.*

142. *Id.* Her visa was never rejected but rather held for further investigation. *Id.*

143. *Id.*

144. Freed, *supra* note 9.

145. *Id.* Stuart Patt, spokesman for consular affairs at the State Department, admits that some people have missed performances because of the new visa process. Petkovic, *supra* note 12.

146. See Leigh Polk Cole, *H-1B Visa Update*, VT. EMP. L. LETTER, Dec. 2001, available at LEXIS, Nexis Library, MSVTEM File (discussing an approximate pre-September 11 time period for visa issuance with a focus on the H-1B visa).

147. See *Immigration and Naturalization Service Offers Faster Processing of Visa Applications for Entertainers and Athletes*, ENT. L. REP., June 2001, at 7, available at LEXIS, Nexis Library, ENTREP File. Notably, O and P visas may not be filed more than six months before the date the performer enters the country. See *supra* text accompanying notes and notes 82-85 discussing the six month requirement.

148. Ray Waddell, *Visa Rules Could Hamper Touring: More Stringent Controls to Tighten National Security May Pose Problems for Artists*, BILLBOARD, May 31, 2003, available at 2003 WL 10159177.

international entertainment groups, is worried that the consulate interviews may become “a real nuisance for performance groups... [because] everyone will have to be in the country at a certain time and be available.”¹⁴⁹

To attempt to side-step all of these problems, O and P visa petitioners can pay a fee of one thousand dollars in order to expedite visa issuance.¹⁵⁰ The program guarantees that the USCIS will decide whether to admit the artists within fifteen days.¹⁵¹ If the USCIS fails to reply within fifteen days, the petitioner receives the one thousand dollars back while the visa continues to be processed in an expedited manner.¹⁵² This program, called the Premium Processing Program (“PPP”), is available for the following visa categories: E, H, L, O, P, Q, R and TN.¹⁵³

The problem that arises in regards to non-profit performing arts organizations with the expediting fee is the cost.¹⁵⁴ For many of these organizations, paying \$1,000 for even one performer to use the PPP program will put the organization over its budget. Accordingly, if there is a performance with many international performers, the cost becomes fiscally impossible for the non-profit performing arts organization.¹⁵⁵ Since O and P visa regulations do not allow a petition to be filed until six months before the performance, and with the new visa regulations increasing the visa processing time, many performing arts companies feel forced to pay the one thousand dollar fee in order to guarantee a performer will be in the country on the performance date.¹⁵⁶

149. *Id.* Tulipan highlights that the biggest management issue for performers is time, such as scheduling events and booking stages. *Id.* The increased visa requirements aggravate an already difficult time management issue. *Id.*

150. Mattingly, *supra* note 140.

151. *Id.*

152. Robert Charles Hill and Donald Kerwin, *International Legal Developments in Review: 2001 Public International Law*, 36 INT'L LAW 527, 536 (2002).

153. *Id.* E visas are for treaty traders and investors, H visas are for specialty workers, L visas are for intra-company transferees, Q visas are for international cultural exchanges, R visas are for religious occupations, and TN visas are for NAFTA professionals. 8 U.S.C.A. § 1101(a)(15); Hill and Kerwin, *supra* note 152.

154. Mattingly, *supra* note 140. As of May 2003, the USCIS charged \$130 for each I-129 petition. Ginsburg, *supra* note 26, at VII-C. In addition, each applicant for a nonimmigrant visa must pay \$100 MRV fee so machines set up at POEs may read their visas. *Id.* at VIII-A. This fee is paid to the consular office. *Id.*

155. *Id.* The Peking Opera was supposed to tour the United States in 2003, but due to visa problems, they cancelled the tour. Freed, *supra* note 9. Also, twenty-two Cuban musicians could not perform at the Latin Grammy Awards because of immigration issues. *Id.*

156. Mattingly, *supra* note 140.

VII. MAKING CHANGES

Various arts groups are lobbying Congress in an attempt to minimize the financial complications in acquiring O and P visas.¹⁵⁷ Both Opera America, a service organization representing opera, and Dance/USA, an organization representing dancers, are part of a coalition of national art services that want the USCIS to restructure its policies in regard to performing arts organizations.¹⁵⁸ Some desired reforms include: reducing the O and P petition process to thirty days, updating the I-129 visa form and instructions, increasing the earliest visa application date to one year, and requiring uniform policies and procedures at all USCIS Centers.¹⁵⁹ The coalition has achieved some success.¹⁶⁰ Notably, in March 2003, three senators, Ted Kennedy (D-MA), Orrin Hatch (R-UT), and Saxby Chambliss (R-GA) sent a letter to the director of the USCIS, Eduardo Aguirre, requesting improvements of the visa system to better meet the needs of non-profit art organizations.¹⁶¹ Unfortunately, neither Mr. Aguirre nor the USCIS has officially responded to the senators.¹⁶²

Probably the most effective reform procedure is to increase the earliest visa application date to one year. Because the O and P petitioners have a limited amount of time to complete the visa procedure, the new regulations imposed at USCIS, consulate offices, and POE create delays in processing visas. These delays did not exist when the time limitation was first enacted in 1990.¹⁶³ By increasing the time period, the government can still keep the country safe through the new visa process, and O and P visa applicants will have enough time to pass all of the security measures before those applicants are needed in the United States to perform.

Another possible reform procedure is to waive the one thousand dollar fee for non-profit organizations.¹⁶⁴ The USCIS already provides a waiver of some visa fees for non-profit organizations.¹⁶⁵ With the new extended

157. Freed, *supra* note 9.

158. Mattingly, *supra* note 140. The coalition was originally formed after September 11 when "visa applications came under increased scrutiny." *Id.*

159. *Id.*

160. *Id.*

161. Mattingly, *supra* note 140.

162. *Id.* The only response as of the time of this publication was a statement that different proposals are being studied. Petkovic, *supra* note 12.

163. See *supra* text accompanying notes and notes 82-85 for discussion on six month limitation; see *supra* text accompanying notes and notes 86-135 for information on the new nonimmigrant visa procedures since September 11.

164. Cf., *Complete Guide to Immigration and Tax Requirements for Foreign Guest Artists*, at <http://www.artistfromabroad.org> (last visited Nov. 7, 2003) [hereinafter *Guide to Immigration*].

165. See, e.g., 8 U.S.C.A. § 1184(c)(9)(A). Specifically, the statute states that "[t]he Attorney

time periods occurring in visa processing, most performing art companies are pressured to pay the one thousand dollars to guarantee the artist can enter the United States in time for the performance.¹⁶⁶ Thus, the PPP fee has in effect become mandatory, and regulations intended to provide a waiver of the original visa fee for non-profits have become moot.¹⁶⁷ To save non-profits money, as originally intended by visa fee waivers, the PPP fee should also be waived.¹⁶⁸

Education is another important tool in minimizing the negative effects of the new visa restrictions.¹⁶⁹ Thus, a website was developed to better educate the public, or more particularly, the performing arts industry.¹⁷⁰ The Association of Performing Arts Presenters ("APAP") developed the website to help performing arts groups with immigration and tax problems.¹⁷¹ One of the tools offered at the website is an outline of the procedure for obtaining a nonimmigrant visa.¹⁷² Also, the website serves as a forum to discuss various changes the performing arts industry seeks.¹⁷³ Sandra Gibson, president and CEO of the APAP, hopes that this website will help "promote global cultural exchange."¹⁷⁴ In addition, the education of performers and performing arts organizations will help make the visa process easier for all the parties involved.¹⁷⁵

General shall impose a fee on an employer (excluding any employer that is a primary or secondary education institution, an institution of higher education, a *nonprofit* entity related to or affiliated with any such institution, a *nonprofit* entity which engages in established curriculum-related clinical training of students registered at any such institution, a *nonprofit* research organization, or a governmental research organization)" under the H-1B visa. *Id.* (emphasis added).

166. Mattingly, *supra* note 140.

167. *See* § 1184(c)(9)(A); *cf.*, Mattingly, *supra* note 140.

168. *See supra* text accompanying notes and notes 150-156.

169. *See Guide to Immigration, supra* note 164. The website contains the following categories of information: O & P Visa Classifications, Consultation Requirements, Spouses and Dependents, Preparation and Filing Procedure, Consular Processing, Inspection and Entry at POE and Pre-Flight Inspections, Canadians, and Other Nonimmigrant Categories. *Id.* Also, the website has the following: a section of definitions, key concepts and cautions, an appendix with many USCIS forms, examples of required information, locations of USCIS offices, and memorandum from the USCIS. *Id.*

170. Roger Armbrust, *APAP Assist Foreign Artists: Website Helps Weave Through Bureaucracy*, BACK STAGE, July 18, 2003, at 40, available at LEXIS, Nexis Library, BCKSTG File.

171. *Id.* The website is funded by the National Endowment for the Arts (NEA). *Id.*

172. *See Immigration Procedures for Foreign Guest Artists, at* <http://www.artistsfromabroad.org/immigration/index.html> (last visited Nov. 7, 2003) [hereinafter *Immigration Procedures*]. The website was prepared by Jonathan Ginsburg, Esq. of Fettmann, Tolchin & Majors, P.C. *Id.*

173. Armbrust, *supra* note 170.

174. *Id.*

175. *Immigration Procedures, supra* note 172.

VIII. CONCLUSION

The increasing use of temporary foreign employees has hit a stumbling block with the new visa regulations issued by the State Department and USCIS.¹⁷⁶ From international corporations to universities to cultural dance troupes, any organization wanting to bring in foreigners to perform has had to re-evaluate its approach to obtaining nonimmigrant visas. The prolonged USCIS and consulate procedures have created large increases in the amount of time required to obtain a nonimmigrant visa.¹⁷⁷ The need for the PPP and immigration lawyers who understand the new regulations has greatly increased the amount of money spent on visas.¹⁷⁸ With this increase in time and money, non-profit organizations do not consider the promotion of cultural performing artists fiscally feasible.¹⁷⁹ Even though the increase in security along the borders continues, the interest in foreign and cultural performances in the United States remains high.¹⁸⁰ In order for non-profit performance art groups to take advantage of this interest and attempt to educate United States citizens about foreign cultures, reform needs to occur in the visa system.¹⁸¹

A perfect example of the importance of foreign culture in the United States comes from American music:¹⁸²

American music articulates the genius of this nation: its promiscuous cultural commingling. While imported styles like polka, klezmer, flamenco, and reggae have all flourished here, it's the bastard progeny of the immigrant forms that are truly revolutionary. Take the case of the Acadian settlers kicked out of Canada by the British in the 18th Century, who eventually landed in the bayous of Louisiana. Mixing with the Haitians, French, and blacks, singing in a Creole patois and scratching washboards for rhythm, they birthed Cajun and zydeco music.¹⁸³

Hopefully, by lobbying Congress and the USCIS, reforms will soon be on the horizon.¹⁸⁴ The formation of a coalition of performing arts groups should help keep government officials aware of the struggles of non-profit

176. Martin et al., *supra* note 7, at 627. In the early twentieth century, 770,000 temporary visas were provided by the United States. *Id.* In the 1950s, the number of visas rose to seven million. *Id.* By the end of the twentieth century, that number had risen to two hundred thirty million. *Id.*

177. *See supra* text accompanying notes 99-135.

178. *See supra* text accompanying notes 150-156.

179. *See* Mattingly, *supra* note 140.

180. Freed, *supra* note 9.

181. *See supra* text accompanying notes 157-175.

182. Sara Sklaroff and Nancy L. Bentrup, *Music & America*, U.S. NEWS & WORLD REP., July 8, 2002, at 18, available at LEXIS, Nexis Library, USNEWS File.

183. *Id.*

184. *See* Mattingly, *supra* note 140.

art organizations. Additionally, the advent of www.artistsfromabroad.org will keep foreign artists and United States art organizations abreast of changes in immigration procedures.

Unfortunately, not all of the non-immigration visa problems will simply disappear because of non-profit waivers and education. There will still be a fear of another attack and the reluctance of artists "to come to a country at war."¹⁸⁵ But through showing a desire to embrace various cultural experiences, foreign artists who currently feel political pressure to stay outside the borders of the United States will come to embrace the desire for new experiences that encompass the American culture and spirit. By keeping our borders open to foreign artists, one hopes the United States will continue to embrace the "innovative ideals and entrepreneurial spirit" that foreigners bring to our country.¹⁸⁶

185. Freed, *supra* note 9. A Senegalese singer cancelled a thirty-eight city tour of the United States due to a "matter of conscience." *Id.*

186. Daniel T. Griswold, *Q: Should Washington Stem the Tide of Both Legal and Illegal Immigration?*, INSIGHT ON THE NEWS, Mar. 11, 2002, at 41, available at LEXIS, Nexis Library, INSIGHT File (declaring that immigrants and foreigners are an essential component of American society).