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Cover Page Footnote

The author gratefully acknowledges the invaluable collaborative assistance of Stefanie Syman, whose energy and diligence underlie every aspect of this Article. The author also acknowledges the contributions of Marybeth Fahey, a student at Fordham University School of Law, and Thomas J. Biow, Esq., who assisted in the preparation of this Article.

O and P Visas for Nonimmigrants and the Impact of Organized Labor on Foreign Artists and Entertainers and American Audiences

Tibby Blum*

INTRODUCTION

The influence of immigration law on the entertainment industry demonstrates the simultaneously far-reaching and prosaic effects of legislation enacted to control the flow of aliens into the United States. Many foreign musicians, artists, and entertainers have performed at American venues and jump-started their careers as a result of access to American fans and media. Recent changes to the laws governing the entrance of nonimmigrant artists, entertainers, and athletes into the United States, however, may make this formerly unremarkable phenomenon an exceptional event.

Under the Immigration and Nationality Act of 1952¹ ("INA"), foreign artists, entertainers, and athletes entered the United States with an H-1B work visa, which is granted to nonimmigrants of "distinguished merit and ability."² Under the Immigration Act of 1990³ ("IMMACT" or "1990 Act"), Congress redefined the H-1B visa to cover only nonimmigrants with skills in a "specialty occupation."⁴ IMMACT established new classes of temporary worker

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1. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

2. *Id.* § 101(a)(15)(H)(i), 66 Stat. at 168.

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

4. *Id.* § 205(c), 104 Stat. at 5020.

visas, O and P, for nonimmigrants who had previously qualified for the H-1B visa on the basis of distinguished merit and ability.⁵ When proposed, the new classifications sparked a heated debate between organized labor, whose interest was protecting American jobs, and the entertainment industry, which wanted to preserve its creative independence. The debate prolonged implementation of some of the proposed changes for over a year.⁶

The United States Immigration and Naturalization Service ("INS") has insisted that the new criteria for artists, athletes, and entertainers under the O and P categories does not differ from the former standards of the H-1B visa category.⁷ However, the new categorical requirement under IMMACT for an advisory opinion to the INS from a labor union complicates the process of obtaining a visa for foreign artists and entertainers, and leaves qualitative, subjective decisions (i.e., the artistic and cultural value of the performances) in the hands of organizations that have purely quantitative concerns (e.g., the number of American jobs lost to foreign performers). Thus, the evidentiary requirements of the new O and P categories, which are more rigorous than those of the former H-1B visa category, will likely prohibit innovative, but less widely recognized, foreign artists, who challenge conventional definitions of artistic merit, from performing in the United States. By enlarging the role of organized labor in the adjudication for visa petitions of foreign artists and entertainers, the O and P visa categories may further constrict the number and variety of aliens in the arts who may enter the United States.

This Article examines the likely effects of the new O and P nonimmigrant visa categories upon foreign artists and entertainers.⁸

5. *Id.* § 207, 104 Stat. at 5023-26. See PROGRAM EVALUATION AND METHODOLOGY DIVISION, U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/PEMD-92-17, IMMIGRATION AND THE LABOR MARKET: NONIMMIGRANT ALIEN WORKERS IN THE UNITED STATES (1992) (discussing temporary workers and the changes made by the 1990 Act).

6. See generally *INS Revised H, O and P Regulations*, 69 INTERPRETER RELEASES 442-44 (Apr. 13, 1992).

7. See *infra* notes 57-60 and accompanying text.

8. Although nonimmigrant scientists, educators, and business people also may fall under the O visa category, this Article will focus exclusively upon entertainers, artists, and athletes.

Part I briefly outlines the legislative and regulatory history of H-1B, H-2B, O, and P nonimmigrant visas. Part II discusses the current procedures for obtaining O and P visas. Part III analyzes the practical concerns and policy implications of the new regulations. This Article concludes with proposals that would alleviate the problems created by the new O and P visa categories.

I. BACKGROUND ON NONIMMIGRANT VISAS FOR ATHLETES, ARTISTS AND ENTERTAINERS

Generally, all foreigners must obtain a visa issued through the U.S. State Department by the U.S. Consulate to enter the United States.⁹ However, the issuance of a visa does not assure entrance; under INS regulations, aliens must also apply for admission at a port of entry into the United States.¹⁰ The INS, a branch of the U.S. Department of Justice, has jurisdiction over the admission and inspection of aliens at such ports.¹¹

Both the U.S. Consulate and the INS must find the alien admissible—the former, at the time of application for a visa,¹² and the latter, at the time of application for admission at a port of entry.¹³ There are nine groups of exclusion grounds.¹⁴ Waivers and exemptions, however, are available for some of these categories.¹⁵

The INA created a statutory presumption that all aliens seeking entry to the United States, except H and L nonimmigrant visa

9. For State Department regulations pertaining to visas and Nationality and Passports, see 22 C.F.R. §§ 40-53 (1993).

10. 8 C.F.R. § 212.1 (1993).

11. 8 U.S.C. § 1225(a) (1988).

12. 8 U.S.C. § 1103(a) (1988).

13. 8 C.F.R. § 212.1 (1993).

14. 8 U.S.C. § 1182(a) (1988 & Supp. IV 1992). The nine groups of exclusion grounds are the following: (1) mental and physical health (e.g., HIV-positive individuals, drug abusers); (2) criminal; (3) security (e.g., terrorists, Nazis); (4) public charge; (5) labor certification; (6) immigration violators (e.g., visa fraud); (7) documentary (e.g., without visa); (8) ineligible for citizenship (e.g., draft evasion); (9) miscellaneous (e.g., polygamists). *Id.*

15. 8 U.S.C. §§ 1182(a)(1)(B), (2)(A)(ii), (2)(F), (3)(C)(ii)-(iii), (3)(D)(ii)-(iv), (6)(E)(iii), (7)(A)(ii), (7)(B)(ii)-(iv), (9)(C)(ii) (1988 & Supp. IV 1992).

holders, are immigrants.¹⁶ Other nonimmigrant visa holders carry the burden of proof to demonstrate that he or she is a nonimmigrant coming to the United States for a temporary stay and maintains a foreign residence that the alien has no intention of abandoning.¹⁷

A. *History of the H-1B Visa Classification*

Under the INA, the H-1B nonimmigrant visa category included entertainers, athletes, artists, and models who could demonstrate "pre-eminence" in their fields.¹⁸ The willingness of the INS to liberally interpret the term "pre-eminence" and to approve a high percentage of H-1B visa petitions provoked organized labor to lobby for more restrictive legislation.¹⁹ Unions were particularly distressed by the flexibility that the three-year period of stay afforded H-1B aliens once inside the United States. Foreign assistant camera persons who can demonstrate "pre-eminence," for example, could enter the United States with an H-1B for a three-month project but then stay for the remaining thirty-three months of the visa. Such H-1B aliens look for subsequent work, thereby competing with Americans for jobs in the entertainment industry, even though they were supposed to reapply for a new H-1B visa for subsequent projects.

In 1988, a report by Booz, Allen and Hamilton, a consulting firm commissioned by the INS, concluded that the H-1 visa program did not impact negatively upon U.S. labor.²⁰ Soon after the

16. 8 U.S.C. § 1184(b) (1988 & Supp. IV 1992). The INS exempts H and L petitioners from 8 U.S.C. § 1184(b). A Department of State cable confirms this: "Even if the [H-1A, H-1B, H-4, L-1, or L-2] alien has a clearly articulated intention of acquiring permanent residence, the application may not be denied for that reason." Cable no. 91-State-171115 (May 24, 1991), reprinted in *State Dep't Liberalizes Dual Intent for H and L Nonimmigrant*, 68 INTERPRETER RELEASES 681, 683 at ¶ 8 (June 3, 1991).

17. 8 U.S.C. § 1184(b) (1988 & Supp. IV 1992).

18. Bernard P. Wolfsdorf, *Temporary Alien Workers Seeking Classification Under the Immigration and Nationalization Act of 1990 (IMMACT 1990)*, in *KEY ISSUES IN IMMIGRATION* 35, 36 (Philip A. Boyle et al. eds., American Immigration Lawyers Ass'n 1992). This Article will not consider the other immigrants visa categories F, J, K, L, M, and Q.

19. *Id.*

20. *Id.*

publication of this report, INS promulgated regulations which reduced the standard for artists and entertainers from "pre-eminence" to "prominence."²¹ Organized labor swiftly mobilized to block the implementation of these regulations and proceeded to play a significant role in crafting provisions of the 1990 Act.²²

As redefined by IMMACT, the H-1B category covers only aliens employed in "specialty occupations"²³ and alien fashion models of "distinguished merit and ability."²⁴ Under the INS regulations, such aliens may apply for an H-1B visa for an initial period lasting up to three years.²⁵ Employers may obtain an extension of stay which will permit employment of the alien for a maximum period of stay of six years.²⁶

B. H-2B Visa Classification

Employers seeking to bring entertainers to the United States who do not meet the standards of the new O and P visa categories²⁷ frequently use the only other nonimmigrant visa option available: the H-2B visa category.²⁸ However, obtaining an H-2B visa is a cumbersome process. The employer must demonstrate in a labor certification application that (1) he or she has only a temporary need for the services provided by the alien, and (2) qualified U.S.

21. *Id.*

22. *Id.*

23. 8 U.S.C. § 1184(i) (Supp. IV 1992); *see* 8 C.F.R. § 214.2(h)(1)(ii)(B)(1) (1993). Under the INS regulations, a "specialty occupation" is defined as an "occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor . . . and which requires the attainment of a bachelor's degree or higher in specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States." 8 C.F.R. § 214.2(h)(4)(ii) (1993). Such aliens must hold certain requisite qualifications. *See* 8 C.F.R. § 214.2(h)(4)(iii)(a)(1)-(4) (1993).

24. 8 U.S.C. § 1101(a)(15)(H)(i)(b) (Supp. IV 1992); 8 C.F.R. § 214.2(h)(1)(ii)(B)(3) (1993).

25. 8 C.F.R. § 214.2(h)(9)(iii)(B)(3) (1993).

26. 8 C.F.R. § 214.2(h)(15)(ii)(B)(1) (1993). To obtain an extension of stay, employers must file Form I-129 and H Supplement with the particular INS Service Center which has jurisdiction over the location where the alien's services are rendered. 8 C.F.R. § 214.2(h)(15)(i) (1993); *see generally* 8 C.F.R. § 214.2(h)(2)(i) (1993).

27. 8 C.F.R. § 214.2(o)(3)(iii)-(v) (1993).

28. 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (1988 & Supp. IV 1992).

workers are not available to fill the position.²⁹

In response to pressure exerted by the entertainment labor unions in the United States, the U.S. Department of Labor has promulgated special procedures to test the job market for "qualified" American entertainers.³⁰ As a result, the process of obtaining the H-2B visa has become much more lengthy and complicated.³¹ This makes the H-2B visa category an unfortunate and often untenable alternative for many American producers since production schedules are erratic and producers often lack sufficient lead time to complete the H-2B procedural requirement of testing the American job market.

An approved H-2B petition gives the employer permission to hire the alien for a temporary period of up to one year.³² The alien's visa to enter the United States corresponds to the same period as the employer's petition.³³ While extensions of the H-2B are available for three years, the maximum length of stay of the H-2B nonimmigrant visa is one-half that of its H-1B counterpart.³⁴

C. Legislative History of the O and P Visa Categories

Congress originally created the O and P visa categories in section 207 of IMMACT,³⁵ intended to take effect on October 1, 1991.³⁶ However, because of the controversy created by section

29. *Id.* Under the INS regulations, the employer must conduct two types of recruitment: (1) advertisement in a national publication that is likely to bring responses from U.S. workers; and (2) consultation with the appropriate labor organization. 8 C.F.R. § 214.2(h)(6)(v)(E)(2) (1993).

30. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, *IMMIGRATION FUNDAMENTALS* 5-80 to 81 (2d prt. 1992).

31. H. Ronald Klasko, *New Immigration Strategies For Transferring Personnel to the U.S.*, LEGAL INTELLIGENCER, Jan. 20, 1993, at 4.

32. 8 C.F.R. § 214.2(h)(9)(iii)(C)(1) (1993).

33. *Id.*

34. 8 C.F.R. § 214.2(h)(4)(i)(B) (1993). The employer can apply for an extension of stay in one-year increments. *Id.*

35. Immigration Act of 1990, Pub. L. No. 101-649, § 207(a), 104 Stat. 4978, 5023-25 (1990) (codified as amended at 8 U.S.C. § 1101(a)(15)(O), (P) (Supp. IV 1992)).

36. *See id.* § 231, 104 Stat. at 5028. For a discussion of the political context surrounding the creation of the O and P visa categories, see Jonathan Ginsburg & R. Patrick Murphy, *Nonimmigrant Visas for Entertainers, Artists, Athletes, and Other Aliens of Extraordinary Ability*, in REGULATORY OVERVIEW: PUTTING THE PIECES

207 and the INS regulations drafted to implement section 207,³⁷ Congress delayed the effective date of the O and P visa categories until April 1, 1992.³⁸ Moreover, Congress included foreign artists, entertainers, athletes, and fashion models in the H-1B category as in effect on September 30, 1991.³⁹

The original section 207 legislation⁴⁰ laid out more stringent eligibility requirements for the O and P visas than those applicable to the H-1B. Section 207(a) required that artists, entertainers, and athletes obtain the consultation of a union or bargaining unit before submitting their petitions to the INS.⁴¹ This provision in IMMACT gave organized labor a particularly weighty role in deciding which artists should enter the United States.

The publication of the proposed regulations to implement the new H, L, O, and P nonimmigrant visa categories⁴² spurred immediate reaction. The INS received 1,046 comments on the proposed regulations; approximately 70 percent of these comments related to the O and P categories.⁴³ According to INS Commissioner Gene McNary, "The vast majority of these comments . . . were from representatives of the entertainment industry, who [were] 'alarmed by the restrictive nature of the O and P.'"⁴⁴

TOGETHER 146 (R. Patrick Murphy et al. eds., American Immigration Lawyers Ass'n 1992).

37. Pub. L. No. 101-649, § 207(b), 104 Stat. 4978, 5025-26 (1990).

38. Armed Forces Immigration Adjustment Act of 1991, Pub. L. No. 102-110, § 3, 105 Stat. 555, 557 (1991) (codified at 8 U.S.C. § 1101(a)(27)(K) (Supp. IV 1992)).

39. *Id.*

40. Immigration Act of 1990, Pub. L. No. 101-649, § 207(b), 104 Stat. 4978, 5023-26 (1990) (codified as amended at 8 U.S.C. § 1101(a)(15)(O), (P) (Supp. IV 1992)).

41. *Id.* § 207(b)(1), 104 Stat at 5025-26.

42. Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 31,553 (1991) (codified as amended at 8 C.F.R. § 214.2 (1993)) (proposed July 11, 1991).

43. *Immigration and Nationality Act Amendments: Hearings on H.R. 3048 Before the Subcommittee on International Law, Immigration and Refugees of the House Committee on the Judiciary*, 102d Cong., 1st Sess. (1991) [hereinafter *Hearings*]; see *Compromise Reached on O and P Aliens; Subcommittee Holds Hearing*, 68 INTERPRETER RELEASES 1427, 1428 (Oct. 11, 1991) [hereinafter *Compromise Reached*].

44. *Compromise Reached*, *supra* note 43, at 1428.

At the October 9, 1991, hearing of the House of Representatives Subcommittee on International Law, Immigration, and Refugees, called by Chairman Romano L. Mazzoli (D-KY) to discuss revamping the O and P visa categories, representatives from organized labor and the entertainment industry made impassioned pleas to protect their respective constituents.⁴⁵ Several high level executives of prominent arts organizations testified that the new regulations would prevent talented, but not yet famous, artists and entertainers from reaching American audiences and that this could hobble existing programs and festivals that feature such artists.⁴⁶ These executives argued that the new regulations would virtually eliminate American debuts of lesser known alien entertainers and artists—events which often propel these artists and entertainers into the international spotlight.⁴⁷

They further argued that unduly harsh eligibility requirements for alien entertainers and artists might affect the current employment of Americans in various foreign artistic productions and might also spark retaliation in the form of reciprocal restrictions by foreign governments.⁴⁸

45. See *Compromise Reached*, *supra* note 43, at 1428-29. Bills were already pending in both the House and the Senate. *Id.*

46. *Hearings*, *supra* note 43; see also *Compromise Reached*, *supra* note 43, at 1428-29.

47. Wayne Brown, executive director of the Louisville Orchestra, described a 1987 international festival that his orchestra sponsored which featured young musicians from six countries. He contended that, had the O and P provisions of the 1990 Act been in place in 1987, the festival would not have occurred because most of the performers would not have been able to meet the rigorous requirements of the provisions. *Hearings*, *supra* note 43, at 41-42; see generally *Compromise Reached*, *supra* note 43, at 1429.

Mark Scorca, executive vice president of OPERA America, noted that Luciano Pavarotti and Placido Domingo both made their U.S. debuts years ago with small regional operas long before they were widely known internationally. Scorca argued that had the new provisions been in effect, those debuts might not have occurred. *Hearings*, *supra* note 43, at 43; see generally *Compromise Reached*, *supra* note 43, at 1429.

48. Scorca also expressed concern about the potential for reciprocal restrictions on U.S. performers by other countries. In some German opera companies, U.S. citizens fill about 50 percent of the roles. Scorca argued that reciprocal restrictions would hurt those performers. *Hearings*, *supra* note 43, at 43; see generally *Compromise Reached*, *supra* note 43, at 1429.

In their testimony before the Subcommittee, representatives from organized labor stressed the weak economy and the lack of jobs for American artists and performers.⁴⁹ In the absence of tough regulations, the unions feared that employers would bring in cheap labor.⁵⁰

D. 1991 Amendments to the O and P Categories

At a meeting of the Senate Subcommittee on Immigration and Refugee Affairs in September 1991, certain senators expressed their concerns about the impact of the new O and P visa categories.⁵¹ As a result of these concerns, legislation was introduced in both branches of Congress to amend the provisions that created the O and P visa categories in the 1990 Act.⁵² Senator Edward Kennedy, in a speech on the Senate floor, highlighted some of the modifications in the Senate proposal, Senate Bill 1776. The bill would

According to the testimony of Rick Kauzlarich, Deputy Assistant Secretary of State for European Affairs at the U.S. State Department, many Member States of the European Community ("EC") protested the strict requirements of the O and P categories. He reported that in June of 1991, the Cultural Ministers of the EC adopted a resolution asking the United States to modify the provisions, and both the EC and Canada threatened reciprocal restrictions on U.S. artists and entertainers. *Hearings, supra* note 43, at 22-23; *see generally Compromise Reached, supra* note 43, at 1429.

49. *Hearings, supra* note 43, at 104-05; *see generally Compromise Reached, supra* note 43, at 1429.

50. Steve Sprague, Secretary-Treasurer of the American Federation of Musicians, argued that fewer musicians than ever are making a living in the United States, and that these performers are vulnerable to the "casual alien" who comes into this country temporarily and then returns home. With regard to alien artists and entertainers entering the United States, Sprague said, "We [unions] don't want a veto, only a voice." *Hearings, supra* note 43, at 104-05; *see generally Compromise Reached, supra* note 43, at 1429.

51. *See* 137 CONG. REC. S13,979, 13,981-85.

52. *See* H.R. 3048, 102d Cong., 1st Sess. (1991) (introduced July 25, 1991 by Rep. Mazzoli (D-Ky.)); S. 1776, 102d Cong., 1st Sess. (1991) (introduced Sept. 30, 1991 by Sens. Edward Kennedy (D-Ma.), Paul Simon (D-Il.), and Alan Simpson (R-Wy.)). Senate Bill 1776 addressed some of the concerns voiced by the entertainment industry regarding the new O and P visa categories. In his opening remarks to the Senate, Senator Edward Kennedy noted, "The arts community had expressed alarm over the new O and P visa provisions. They perceived last year's changes as being not only a major departure from current practice, but a serious threat to their artistic programs." 137 CONG. REC. S13,979, S13,981 (daily ed. Sept. 30, 1991) (statement of Sen. Kennedy).

repeal the arbitrary maximum of 25,000 nonimmigrant O and P visas granted yearly and require the U.S. General Accounting Office ("GAO") to conduct a two-year investigation regarding the O and P visas' use and impact on the American labor force.⁵³ The bill also instituted a fifteen-day limit for a union or collective bargaining unit to submit a written advisory opinion, comment, or letter of non-objection in response to an appropriate inquiry by the Attorney General.⁵⁴

In late November 1991, Congress enacted substantive changes to the H, O and P categories when it passed the O and P Nonimmigrant Amendments of 1991 ("1991 Amendments") as part of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 ("MTINA").⁵⁵ The MTINA included many of the changes mentioned by Senator Kennedy in Senate Bill 1776, such as a modification of the O-1 standard to apply only to aliens with extraordinary ability in the arts. The MTINA also retained the revised implementation date as April 1, 1992.⁵⁶

At first blush, the revised O and P visa categories appear more restrictive than the H-1B category. Under the 1991 Amendments, the INS requires a consultation from a union or peer group, if one exists, for all O and P visa petitions.⁵⁷ Under the INS regulations implementing the 1991 Amendments, if a consultation is not included in the application, the INS will forward the petition and supporting documents to the appropriate union which will have fifteen days to submit an advisory opinion or non-objection.⁵⁸

53. This impact was in reference to what barriers, if any, U.S. citizens with the same occupations encounter in their efforts to seek similar employment abroad. 137 CONG. REC. S13,976, S13,981 (daily ed. Sept. 30, 1991) (statement of Sen. Kennedy).

54. *Id.* at S13,984 (statement of Sen. DeConcini).

55. Pub. L. No. 102-232, tit. II, §§ 201-08, 105 Stat. 1733, 1736-42 (1991) (codified as amended in scattered sections of 8 U.S.C.) (enacting O and P Nonimmigrant Amendments of 1991 as title II of MTINA).

56. *Id.* § 208, 105 Stat. at 1742.

57. *Id.* § 204, 105 Stat. at 1738-39.

58. 8 C.F.R. § 214.2(o)(5)(i)(F) (1993). In expedited cases, telephonic contact between the labor organization or peer group and the INS will fulfill the consultation requirement. "In a case where . . . the Service has determined that a petition merits expeditious handling, the Service shall telephonically contact the appropriate peer group, labor, and/or management organization and request an advisory opinion if one

Furthermore, the requirement for O-1 visa applicants of demonstrating "extraordinary ability" in the field of arts has been defined in the INS regulations as meaning "distinction."⁵⁹ However, the INS has instructed officials to interpret the term "distinction," as it relates to O-1 artists, as identical to the prior H-1B standard for prominent aliens.⁶⁰

The 1991 Amendments represent a compromise between the entertainment industry and organized labor in which the unions retain a good deal of influence in determining which artists may or may not perform in the United States. Indeed, in its explicit emphasis on the importance of the consultation and the underlying need to assuage the unions' fear of being excluded from the application process, the INS admits in its policy guidelines that its priority is to accommodate organized labor under almost any circumstances.⁶¹ Because the legislation is so new, the INS has also directed its officials to "adopt a lenient policy towards accepting consultations submitted by [alien] petitioners, as long as they appear reasonable."⁶² However, the INS has recommended that the inability of the consulting entity to provide the appropriate consultation should not penalize petitioners.⁶³ If the union or peer group submits an opinion or non-objection that does not contain all of the elements required in the regulation, the INS will adjudicate the accompanying petition on its merits.⁶⁴

is not submitted by the petitioner. The peer group, labor and/or management organization shall have 24 hours to respond telephonically to the Service's request." 8 C.F.R. § 214.2(o)(5)(i)(E) (1993).

59. 8 C.F.R. § 214.2(o)(3)(ii) (1993).

60. Memorandum from INS Office of Adjudications, Policy Guidelines for the Adjudication of O and P Petitions (July 24, 1992), reprinted in 69 INTERPRETER RELEASES 6 (Aug. 31, 1992) [hereinafter O & P Policy Guidelines]. The O & P Policy Guidelines were prepared by Lawrence J. Weinig, Acting Assistant Commissioner of Adjudications, and were sent to all INS Center Directors.

61. The INS notes that "[l]abor organizations are very sensitive to the consultation process and the Immigration and Naturalization Service . . . must ensure that such entities are consulted *at all costs*." O & P Policy Guidelines, *supra* note 60, at 1 (emphasis added).

62. *Id.* at 1.

63. *Id.* at 2.

64. *Id.* at 2-3.

For aliens seeking entry for a motion picture or television production in either the O-1 or O-2 categories, the 1990 Act requires consultation with both a labor union and a management organization.⁶⁵ Mandatory consultation with a management organization was specifically added for O-2 aliens by the 1991 Amendments.⁶⁶

II. PROCEDURAL ASPECTS OF THE O AND P

A. *O and P Visas*

1. Categories of O and P Visas

The O and P visa categories were created by the 1990 Act and amended in 1991 to cover the nonimmigrant artists, entertainers, and athletes who were previously eligible for H-1B visas.⁶⁷ The new O and P visa categories afford visas to: (1) nonimmigrant workers who can demonstrate "extraordinary ability" in the sciences, arts, education, business, or athletics, as "demonstrated by sustained national or international acclaim;"⁶⁸ (2) certain aliens accompanying or assisting those nonimmigrant workers; and (3) the nonimmigrant worker's family members.⁶⁹

To qualify for O or P status, aliens must have sustained national or international recognition evidenced by extensive documentation⁷⁰ and must be entering the United States to work in their field.⁷¹ Nonimmigrant workers seeking to enter the United States to work in the television or motion picture industry, in particular, must possess a demonstrated record of "extraordinary achievement,"⁷² a slightly less rigorous standard than the "sustained nation-

65. 8 U.S.C. § 1184(c)(3)(A)-(B) (Supp. IV. 1992).

66. Pub. L. No. 102-232, § 204(2), 105 Stat. 1736, 1738 (1991) (codified at 8 U.S.C. § 1184(c)(3)(B) (Supp. IV. 1992)).

67. 8 U.S.C. § 1101(a)(15)(O), (P) (Supp. IV 1992).

68. 8 U.S.C. § 1101(a)(15)(O) (Supp. IV 1992); *see* 8 C.F.R. §§ 214.2(o)(1)(i), (p)(1)(i) (1993).

69. 8 U.S.C. § 1101(a)(15)(O) (Supp IV 1992).

70. For a discussion of the specific requirements of documentation, *see infra* notes 82, 89, 104-105, 112 and accompanying text.

71. 8 U.S.C. § 1101(a)(15)(O)(i) (Supp. IV 1992).

72. 8 U.S.C. § 1101(a)(15)(O) (Supp. IV 1992); 8 C.F.R. § 214.2(o)(3)(v) (1993). The alien must possess a "high level of accomplishment . . . evidenced by a degree of

al or international acclaim" requirement for other O and P aliens.⁷³ In addition, the P-2 and P-3 visas allow aliens engaged in an exchange program or aliens with a special cultural contribution, respectively, to enter the United States.⁷⁴ The qualitative requirements for these P visas differ markedly from those required for the O and P-1 visas.⁷⁵

2. Illustrating the Regulations Implementing the O and P Visas

The following hypothetical scenario will serve as an illustration of the practical and procedural aspects of the new O and P visa categories, the different types of visas now available to artists and entertainers, and the implications of the new requirements, particularly as they relate to alien entertainers. Under the new nonimmigrant visa application process, if Bono, the lead singer of the band U2, decided to cut a solo album and then tour the United States as a solo artist, he would have to complete the elaborate process for obtaining an O-1 visa,⁷⁶ even though he has toured the United States as a performer on numerous occasions in the past. The set designer and business manager whom Bono brings would apply for O-2 visas,⁷⁷ designated for aliens who are an integral part of the performance and/or have critical skills and experience not of a general nature. Siobhan, an up-and-coming band in the Irish club scene which Bono chooses to bring as his opening act, would apply for a P-1 visa⁷⁸ since the band would constitute a "group" accord-

skill and recognition substantially above that ordinarily encountered." 8 C.F.R. § 214.2(o)(3)(ii) (1993).

73. 8 C.F.R. § 214.2(o)(1)(ii)(A)(1) (1993).

74. 8 U.S.C. § 1101(a)(15)(P)(iii) (Supp. IV 1992); 8 C.F.R. § 214.2(p)(1)(i)(B), (C) (1993).

75. "Since there are no qualitative standards for the P-2 classification, the consultation is the most essential part of the adjudication process. Therefore, the consultation must include all of the items described in the regulation without exception." O & P Policy Guidelines, *supra* note 60, at 5.

76. 8 U.S.C. § 1101(a)(15)(O)(i) (Supp. IV 1992); 8 C.F.R. § 214.2(o)(3) (1993); *see infra* notes 80-86 and accompanying text.

77. 8 U.S.C. § 1101(a)(15)(O)(ii) (Supp. IV 1992); 8 C.F.R. § 214.2(o)(4) (1993); *see infra* notes 87-92 and accompanying text.

78. 8 U.S.C. § 1101(a)(15)(P)(i) (Supp. IV 1992); 8 C.F.R. § 214.2(p)(4) (1993); *see infra* notes 93-109 and accompanying text.

ing to the INS definition.⁷⁹

B. *Requirements for O and P Visas*

1. O-1 Visas

Because Bono has performed live shows and recorded with U2—a band which has received at least one Grammy Award, has cut numerous platinum albums, and enjoys high visibility internationally—he would easily fulfill the “extraordinary ability in the arts” criteria for the O-1 visa.⁸⁰ Under the regulations, a Grammy Award or nomination alone would serve as sufficient proof of extraordinary ability.⁸¹ Luckily, the INS does not consider a Grammy to be the only measure of extraordinary ability for musicians, since only a small percentage of prominent musicians have received this particular honor. The regulations also allow alien entertainers and performers to produce other types of evidence to demonstrate their extraordinary ability.⁸² While most of the regulatory requirements set forth specific types of achievement,⁸³ the last type of documentation of merit allowed—“other comparable evidence”—leaves the performer with some leeway, depending upon what will constitute “comparable evidence” in upcoming interpretations of this standard.⁸⁴

Although the INS regulations insist that the alien produce evi-

79. “Group means two or more persons established as one entity or unit to perform or to provide a service.” 8 C.F.R. § 214.2(p)(3) (1993).

80. 8 C.F.R. § 214.2(o)(3)(v) (1993).

81. 8 C.F.R. § 214.2(o)(3)(v)(A) (1993).

82. To qualify for O-1 visas, artists and entertainers must demonstrate their talent with evidence of a combination of at least three of the following benchmarks of success in the entertainment industry: (1) star or lead in the production which has a distinguished reputation and/or has received critical acclaim; (2) receipt of national or international recognition for past achievements in the form of either magazine or newspaper reviews; (3) lead or starring role for an established organization with a distinguished reputation; (4) record of commercial or critically acclaimed successes; (5) significant recognition from organizations, government agencies, and critics; (6) commands a high salary or other substantial remuneration; or (7) other comparable evidence. 8 C.F.R. § 214.2(o)(3)(v)(B)-(C) (1993); *see also* 8 U.S.C. § 1101(a)(15)(O)(i) (Supp. IV 1992).

83. 8 C.F.R. § 214.2(o)(3)(v)(A)-(C) (1993).

84. 8 C.F.R. § 214.2(o)(3)(v)(C) (1993).

dence of critical success to qualify for an O-1 visa,⁸⁵ such evidence seems to delineate a particularly mainstream version of success. It is unlikely that a stellar review of a performing artist published in an academic journal or an "alternative" newspaper would serve as a substitute for the sheer quantity of documentation of "extraordinary ability" that the INS requires. However, the "other comparable evidence" allowance may temper this tilt against innovative and newer foreign artists and entertainers who have not yet reached mainstream audiences.

Along with evidence of "extraordinary ability," the alien entertainer must obtain the consultation of either a labor organization or, if no labor organization exists for that particular field or type of performer, a peer group or a person or persons with expertise in the alien's field of endeavor.⁸⁶ Bono would seek consultation of The American Federation of Musicians.

2. O-2 Visas

Bono's business manager and stage designer, who have worked with him and U2 for over ten years in this scenario, would probably qualify for O-2 visas, which are issued to persons "accompanying and assisting in the artistic or athletic performance . . . for a specific event or events."⁸⁷ An alien applying for an O-2 visa must demonstrate that he or she is an integral part of the actual performance or that the alien has critical skills and experience that are not of a general nature and thus cannot be performed by other individuals.⁸⁸ In this example, Bono's set designer would meet this criteria if, for example, she has worked with him extensively during past performances and in the production of his videos. Additionally, his business manager would likely qualify for an O-2 visa

85. 8 C.F.R. § 214.2(o)(3)(v) (1993).

86. 8 C.F.R. § 214.2(o)(5)(i)(A) (1993). "*Peer group* means a group or organization which is comprised of practitioners of the alien's occupation who are of similar standing with the alien and which is governed by such practitioners." 8 C.F.R. § 214.2(o)(3)(ii) (1993).

87. 8 U.S.C. § 1101(a)(15)(O)(ii)(I) (Supp. IV 1992); 8 C.F.R. § 214.2(o)(4)(ii)(B) (1993).

88. 8 U.S.C. § 1101(a)(15)(O)(ii)(II)-(III) (Supp. IV 1992); 8 C.F.R. § 214.2(o)(4)(ii)(A) (1993).

if, for example, he has secured contracts with venues and record labels and also manages all of Bono's financial arrangements.⁸⁹ As with the O-1 visa, the regulations require that petitioners for O-2 visas submit an advisory opinion from a labor organization with expertise in the skill area involved.⁹⁰

In this illustration, Siobhan performs as a group, not as a solo singer. Therefore, the band would apply for a P-1 visa. If, however, the lead singer of Siobhan decided to come to the United States as a solo act without her usual back up band, she would apply for an O-1 visa. In this case, unlike Bono, she would probably not be able to meet the rigorous evidentiary requirements for an O-1 visa since she has not received much attention outside of some small local Irish newspapers and an Irish fan magazine.⁹¹ Some musicians who have received critical acclaim in the independent rock world, but have garnered little mainstream recognition and thus cannot meet the stringent O-1 requirements, have circumvented the O-1 criteria altogether by entering the United States on tourist visas and borrowing their instruments from American musicians. This activity, of course, is illegal if they get paid to perform.⁹²

3. P-1 Visas

The P category covers group entertainers and athletes who cannot qualify under the extraordinary ability standard for the O category and, unlike the O category, requires that the alien maintains

89. Aliens who petition for an O-2 visa must submit evidence which establishes that his or her skills are essential to the O-1 alien, as well as evidence of both his or her current and past experience with the O-1 alien, and a statement from the O-1 alien verifying the essential nature of these skills and substantial past experience performing these support services. 8 C.F.R. § 214.2(o)(4)(ii)(C) (1993); *see generally* 8 U.S.C. § 1101(a)(15)(O)(ii) (Supp. IV 1992).

90. 8 C.F.R. § 214.2(o)(5)(i)(A)-(B) (1993).

91. *See supra* notes 81-84 and accompanying text.

92. Tourists usually obtain B-2 visas for pleasure in which case pleasure is defined as "legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature." 22 C.F.R. § 41.31(b)(2) (1993). Employment is not permitted even where the only remuneration is room, board and pocket change. *Matter of Hall*, 18 I. & N. Dec. 203 (B.I.A. 1982).

a foreign residence that he or she has no intention of abandoning.⁹³ P-1 alien athletes must demonstrate that they are competing at an internationally recognized level, and P-1 alien entertainers must demonstrate that they are an integral part of a performance by an entertainment group that has received international recognition as "outstanding" for a "sustained and substantial period of time."⁹⁴ Siobhan might find obtaining the requisite advisory opinion (non-objection) from a union or peer organization an arduous task because the group has not yet garnered international acclaim and name recognition.⁹⁵ Although the P-1 standards seem to differ from those of the O-1 visa category, the INS has indicated that these requirements are virtually identical.⁹⁶

The P category differentiates between athletes and performers: individual athletes may be admitted as P-1 aliens while individual entertainers may not.⁹⁷ While Siobhan, a club band consisting of four members who have played together for the past two years, appears to fall unequivocally under the P-1 category, the INS has adopted a lenient policy regarding the definition of an entertainment group.⁹⁸ The INS has stated that "[i]f a solo artist or entertainer traditionally performs on stage with the same group of aliens (e.g., back-up singers or musicians), the act may be classified as a group" for P-1 purposes.⁹⁹ Furthermore, the manner in which the performers are billed does not determine whether they constitute a

93. 8 U.S.C. § 1101(a)(15)(P) (Supp. IV 1992); 8 C.F.R. § 214.2(p)(1)(i) (1993).

94. 8 U.S.C. § 1101(a)(15)(P)(II)-(III) (Supp. IV 1992); 8 C.F.R. § 214.2(p)(1)(ii)(A)(2) (1993).

95. 8 C.F.R. § 214.2(p)(1)(i) (1993) (requiring that the group be "internationally recognized").

96. The O & P Policy Guidelines, *supra* note 60, at 3, state that "there is no difference in standards between the O-1 artist and the P-1 classification." Therefore, those acts that do not fulfill requirements pertaining to sustained group membership, and thus apply for an O-1 visa rather than a P-1, will "not be penalized in any way." *Id.*

97. If individual entertainers are merely outstanding and are not a part of an entertainment group, they may qualify in the H-2B category on the basis of a labor certification affirming the unavailability of qualified U.S. workers. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (Supp. IV 1992).

98. *See* O & P Policy Guidelines, *supra* note 60, at 3.

99. *Id.*

group.¹⁰⁰ Additionally, only 75 percent of the members of the group must have a sustained and substantial relationship with the group for at least one year.¹⁰¹ This so-called 75 percent rule was one of the amendments included in MTINA.¹⁰²

Because individual athletes may enter the United States under the P-1 category, but individual entertainers may not,¹⁰³ the P-1 category lays out different evidentiary requirements for athletes and entertainment groups.¹⁰⁴ However, both types of aliens must demonstrate that they have achieved international recognition in their respective fields.¹⁰⁵ The INS will waive the international recogni-

100. *Id.*

101. 8 C.F.R. § 214.2(p)(4)(i)(B) (1993); see O & P Policy Guidelines, *supra* note 60, at 3.

102. Pub. L. No. 102-232, tit. II, § 203(b), 105 Stat. 1733, 1737 (1991); see also *Back to the Future: Congress Corrects Immigration Act of 1990*, 68 INTERPRETER RELEASES 1717, 1751 (1991).

103. 8 C.F.R. § 214.2(p)(4)(i)(A)-(B) (1993).

104. 8 C.F.R. § 214.2(p)(4)(ii)(B), (iii)(B) (1993). To paraphrase the regulation, a petition for a P-1 athlete or athletic team shall include: (1) a tendered contract with a major United States sports league or team, or a tendered contract in an individual sport commensurate with international recognition in that sport; and (2) documentation of at least two of the following: (i) evidence of having participated to a significant extent in a prior season with a major United States sports league; (ii) evidence of having participated in international competition with a national team; (iii) evidence of having participated to a significant extent in a prior season for a United States college or university in intercollegiate competition; (iv) a written statement from an official of a major United States sports league or an official of the governing body of the sport which details how the alien or team is internationally recognized; (v) a written statement from a member of the sports media or a recognized expert in the sport which details how the alien or team is internationally recognized; (vi) evidence that the individual or team is ranked if the sport has international rankings; or (vii) evidence that the alien or team has received a significant honor or award in the sport. 8 C.F.R. § 214.2(p)(4)(ii)(B)(1)-(2)(i)-(vii) (1993).

105. 8 C.F.R. § 214.2(p)(4)(iii)(B)(3) (1993). P-1 entertainers may submit evidence of the group's nomination or receipt of significant international awards or prizes for outstanding achievement or three of the following types of documentation: (1) star or lead entertainment group in a production or events which have a distinguished reputation and/or have received critical acclaim; (2) receipt of national or international recognition for past achievements in the form of either articles in magazines or journals, or newspaper reviews; (3) has and will perform as a lead or starring group for an established organization with a distinguished reputation; (4) record of commercial or critically acclaimed successes; (5) significant recognition from organizations, government agencies, and critics; or (6) commands a high salary or other substantial remuneration.

tion requirements in some instances, particularly when entertainment groups have a sustained substantial national reputation.¹⁰⁶

While the 1990 Act seemed to preclude support personnel for P-1 aliens,¹⁰⁷ the 1991 Amendments to the Act permit support personnel to apply for P-1 visas if they are highly skilled, essential, and are considered an integral part of the performance.¹⁰⁸ These aliens must have appropriate qualifications for and critical knowledge of the specific services, as well as experience providing support to the P-1 alien.¹⁰⁹

4. P-2 Visas and Cultural Exchange

The P-2 category covers those artists and entertainers—both individuals and groups—who come to the United States under the auspices of a reciprocal exchange program between a foreign-based and a U.S.-based organization.¹¹⁰ The exchange must involve artists and entertainers of similar caliber, as well as similar terms and conditions of employment and number of artists and entertainers involved in this exchange. However, this category does not necessarily preclude individual group exchanges.¹¹¹

Unlike the O category, the decision by the INS to grant this type of P visa depends solely upon the petitioner's ability to supply documentation of the contract and other relevant details of the arrangement between the American and foreign organizations or programs.¹¹² Evidence of the alien's merit within his or her field

neration. *Id.*; see generally 8 U.S.C. § 1101(a)(15)(P)(ii) (Supp. IV 1992).

106. 8 C.F.R. § 214.2(p)(4)(iii)(C)(2) (1993).

107. Pub. L. No. 101-648, § 207(a), 104 Stat. at 5024-25.

108. 8 C.F.R. § 214.2(p)(3) (1993). Section 214.2(p)(3) states:

Essential support alien means a highly skilled, essential person determined by the director to be an integral part of the performance of a P-1, P-2, or P-3 alien because he or she performs support services which cannot be readily performed by a United States worker and which are essential to the successful performance of services by the P-2 alien. Such alien must have appropriate qualifications to perform the services, critical knowledge of the specific services to be performed, and experience in providing such support to the P-1, P-2, or P-3 alien. *Id.*

109. 8 C.F.R. § 214.2(p)(4)(i)(C) (1993).

110. 8 C.F.R. § 214.2(p)(5)(i)(A) (1993).

111. 8 C.F.R. § 214.2(p)(5)(i)(B) (1993).

112. 8 C.F.R. § 214.2(p)(5)(ii)(A)-(D) (1993). Documentary requirements for P-2

of endeavor is only relevant insofar as both the alien and American artists participating in the exchange possess the same level of achievement and ability.¹¹³ The documentation must also include evidence that an appropriate labor organization in the United States participated in the negotiation of the contract or has concurred with the reciprocal exchange.¹¹⁴

The INS considers this category underutilized thus far, and encourages unions to establish reciprocal arrangements with their foreign counterparts, particularly those in Canada and the United Kingdom.¹¹⁵

5. P-3 Visas and Cultural Uniqueness

The P-3 visa category encompasses aliens—including groups and accompanying aliens—who perform (or are an integral part of a performance), teach, or coach under a commercial or non-commercial program that is culturally unique.¹¹⁶ The original legislation imposed annual numerical limitations on both the P-1 and P-3 categories which were later removed with the enactment of MTINA. While the INS describes the P-3 category as “basically the same as the prior H-1B culturally unique [classification],”¹¹⁷ unlike the H-1B, the P-3 visa covers aliens performing in commercial as well as non-commercial events as long as those perfor-

classification should be accompanied by: (1) a copy of the formal reciprocal exchange agreement between the United States organization(s) and the foreign country which will receive the foreign entertainers or artists; (2) a statement from the sponsoring organization describing the reciprocal exchange of United States artists or entertainers as it relates to the specific petition; (3) evidence that the appropriate labor organization was involved in negotiating, or has occurred with the reciprocal exchange of United States or foreign artists and entertainers; and (4) evidence that the artists or entertainers subject to the reciprocal exchange are experienced artists or entertainers with comparable skills and that the terms and conditions of employment are similar. *Id.*

113. 8 C.F.R. § 214.2(p)(5)(i)(B), (ii)(D) (1993).

114. 8 C.F.R. § 214.2(p)(5)(ii)(C) (1993).

115. As of April 1993, the American Federation of Television and Radio Artists (“AFTRA”) and the Screen Actors Guild (“SAG”) have reciprocal arrangements with Canada, and the Actors’ Equity Association has a formalized exchange with both Canada and the United Kingdom. Lawrence J. Weinig, Report presented at the AILA Conference in New York City (Apr. 19, 1993).

116. 8 U.S.C. § 1101(a)(15)(P)(iii)(II) (Supp. IV 1992).

117. O & P Policy Guidelines, *supra* note 60, at 5.

mances are "sponsored primarily by educational, cultural, or governmental agencies."¹¹⁸ However, alien entertainers should not consider the P-3 category to be a catch-all for less prominent artists. The INS explicitly warns alien entertainment groups who cannot meet the rigorous international recognition standards required by the P-1 category against petitioning for a P-3 visa.¹¹⁹ Thus, those alien entertainers and artists who attempt to attach cultural significance where none exists will not qualify for P-3 visas. For example, it appears that Siobhan, the hypothetical band, would not qualify for a P-3 visa, even if the group argued that Irish club music is a unique facet of Irish culture. On the other hand, a Chinese performance artist whose work recounts the Tiananmen Square uprising and promotes U.S.-China cultural exchange would likely qualify for P-3 status.

Both the P-2 and P-3 visas permit aliens to enter the United States exclusively for the period required to engage in the performances for which they sought admission—a period which cannot exceed one year.¹²⁰ Like P-1 aliens, those aliens who petition for a P-3 visa must obtain an advisory opinion from the appropriate labor organization or peer group.¹²¹

III. IMPLICATIONS OF THE NEW O AND P VISA CATEGORIES

A. *Practical Concerns*

In an attempt to appease both organized labor and the entertainment industry, Congress required in the 1991 Amendments that the GAO conduct a two-year investigation of the effects of all aspects of the regulations implementing the new revisions, including the O and P visa categories.¹²² Published only ten months after the De-

118. *Id.*; see 8 C.F.R. § 214.2(p)(6)(i)(B) (1993).

119. "The P-3 category should not be used by entertainment groups who cannot meet the international recognition standard required of the P-1 aliens." O & P Policy Guidelines, *supra* note 60, at 5.

120. 8 C.F.R. § 214.2(p)(8)(iii)(C) (1993).

121. 8 C.F.R. § 214.2(p)(7)(iv) (1993).

122. 8 U.S.C. § 1184(c)(8) (Supp. IV 1992); 137 CONG. REC. S13,976, S13,981 (daily ed. Sept. 30, 1991) (statement of Sen. Kennedy). The 1991 Amendments provide that the U.S. Attorney General shall submit annually to the House and Senate

ember 12, 1991, implementation of the O and P visa regulations, the first report by the GAO contained little concrete information on the effects of the changes.¹²³ Although the INS has a legislative mandate to report by occupation the number of people included in petitions and the current INS petition form for the O and P visas asks for beneficiaries' occupations, the INS does not enter this information into its automated data system.¹²⁴ Thus the number of O and P visa petitions filed is available, but the percentage filed in the arts, as opposed to business or education, is not.¹²⁵ Similarly, although the U.S. State Department reports on the number of visas it issued by class at the end of each fiscal year,¹²⁶ it does not break down the information by occupation within each class.¹²⁷

Despite the dearth of statistical information regarding O and P petitions filed, and visas received, by alien artists, entertainers, and athletes, comments by practitioners and one union representative, as well as specific cases, suggest that the new O and P categories may have broad ramifications in the future. At a conference sponsored by the American Immigration Lawyers Association ("AILA") held in New York City on April 19, 1993 ("AILA Conference"), Lawrence J. Weinig, Assistant Commissioner for Adjudications, G.

Committees on the Judiciary a report describing, inter alia, the number of O and P petitions filed and approved. 8 U.S.C. § 1184(c)(8) (Supp. IV 1992). The 1991 Amendments also mandate that the GAO submit a report regarding "the admission of artists, entertainers, athletes, and related support personnel as nonimmigrant under subparagraphs (O) and (P) of section 101(a)(15) of the Immigration and Nationality Act, and information on the laws, regulations, and practices in effect in other countries that affect United States citizens and permanent resident aliens in the arts, entertainment, and athletics, in order to evaluate the impact of such admissions, laws, regulations, and practices on such citizens and aliens." § 202(b)(1), 105 Stat. at 1737 (codified as amended at 8 U.S.C. § 1184(a) (Supp. IV 1992)).

123. See NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION, U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-93-6, NONIMMIGRANT VISAS; REQUIREMENTS AFFECTING ARTISTS, ENTERTAINERS, AND ATHLETES 5 (1992) [hereinafter GAO REPORT]. Ironically, the report served as an opportunity to expose piracy of sound recordings, films, and videos produced by American artists as well as protectionist trade practices by a number of foreign countries.

124. *Id.* at 3.

125. *Id.*

126. *Id.* at 4.

127. *Id.*

Bryan Unger, International Representative for the International Alliance of Theatrical Stage Employees ("IATSE"), and Austin T. Fragomen, Jr., Esq., discussed the effects of the new INS regulations.¹²⁸ If their experience is at all representative of the impact of the new regulations on immigration law practitioners, the INS and the unions find that the new regulations are less cumbersome and possibly less restrictive than expected.¹²⁹ This may be due in part to a self-regulating approach resulting from the enactment of the new visa categories. Wary of denials, practitioners only encourage those clients who will unequivocally meet the evidentiary requirements (e.g., Paul McCartney) to petition for an O or P visa.¹³⁰

According to the discussions at the AILA Conference, the INS and practitioners differed over the degree to which the INS consulted with unions *ex parte* when entertainers and artists were still eligible for H-1B visas.¹³¹ According to practitioners at the AILA Conference, the INS informally consulted with unions on many petitions.¹³² In these instances, petitioners did not have access to the content of the advisory opinions and, therefore, could not rebut objections.¹³³ By formalizing the consultation process, some practitioners argue, the new regulations give petitioners a chance to work with unions to address their concerns—supplanting a potentially combative relationship with one of cooperation and openness.¹³⁴ Because the new regulations require that unions specify the reasons they object to a particular petition,¹³⁵ the petitioner can contest the

128. *See generally* Remarks at the AILA Conference in New York City (Apr. 19, 1993) (author's notes on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*).

129. Of the approximately 1,148 O petitions filed, only 39 have been denied and of the 1,062 P petitions filed, only 27 have been denied. Lawrence J. Weinig, Remarks at the AILA Conference in New York City (Apr. 19, 1993) (author's notes on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*).

130. Remarks at the AILA Conference in New York City (Apr. 19, 1993) (author's notes on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. 8 C.F.R. § 214.2(o)(5)(i)(D) (1993).

unions' rationale point by point. However, John Brown, Senior Immigration Examiner for the INS, indicated at the AILA Conference that before the new O and P visa regulations were promulgated, the INS only infrequently conferred with the unions and did so on only marginal or ambiguous petitions.¹³⁶ Therefore, mandatory consultations will add an unnecessary layer of review by a group with an agenda that conflicts directly with the petitioners' objectives.

Since the AILA Conference, the INS has not calculated the number of petitions that were approved, notwithstanding objections by the unions.¹³⁷ The INS plans to implement a postcard system whereby unions attach a self-addressed postcard to their advisory opinions.¹³⁸ Once the INS adjudicates the petition, it will stamp the postcard with its decision and the date and return it to the union. With this information, the unions will be able to determine how much impact their opinions have on adjudications.

Both Assistant Commissioner Weinig and IATSE Representative Unger indicated at the AILA Conference that the unions have been reasonable in submitting advisory opinions and have not consistently or maliciously delayed the submission of an advisory opinion in order to derail petitions.¹³⁹ Still, practitioners are frustrated by the INS' unwillingness to establish an outer limit on the time afforded labor organization to produce an advisory opinion. Expediting cases remains the primary concern of practitioners because production schedules do not leave O and P visa petitioners sufficient lead time for the lengthy application process.¹⁴⁰

Overall, unions so far seem pleased with the outcome of the

136. John Brown, Senior Immigration Examiner for the Immigration and Naturalization Service, Remarks at the AILA Conference in New York City (Apr. 19, 1993) (author's notes on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*).

137. See *supra* notes 122-27 and accompanying text.

138. Remarks at the AILA Conference in New York City (Apr. 19, 1993) (author's notes on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*).

139. *Id.*

140. *Id.*

new regulations. IATSE Representative Unger estimated that he rejected only one out of ten petitions.¹⁴¹ He argued that for certain types of jobs, particularly those that would fall under the essential support personnel category (O-2 and support personnel for all P visas), the unions can help make the case for a nonimmigrant worker.¹⁴² For example, IATSE can corroborate that though her job might appear inconsequential, a slipper mistress has an essential function within a dance company that can only be performed by an individual who has extensive experience with the company and the dancers.

One recent case gives a clear indication of the INS's preferences and the unions' flexibility in specific cases. Mr. Fragomen represented Paul McCartney on his recent U.S. tour. McCartney's approved O-1 visa petition listed over 80 individuals, including a caterer. Unger, who represents the union that had to advise the INS as to whether the caterer was essential support, pointed out that the caterer had toured with McCartney for years and that members of the band were vegetarians with special dietary requirements. In this instance, IATSE relied upon a fairly liberal interpretation of "essential support" in its advisory opinion. It has been contended that the INS regulations favor big stars, and, thus far, the unions have been willing to oblige these performers.¹⁴³

Unlike concert-hall managers, producers in theater, film, and television do not always seek high visibility talent for very specific artistic reasons that relate both to the particular entertainer as well as to the role. According to Broadway producer Emanuel Azenberg, the decision to import an actor or actress from another country is not one that a producer would make frivolously; Azenberg describes it as an artistic judgment.¹⁴⁴

141. G. Bryan Unger, Remarks at the AILA Conference in New York City (Apr. 19, 1993) (author's notes on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*).

142. *Id.*

143. Remarks at the AILA Conference in New York City (Apr. 19, 1993) (author's notes on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*).

144. *Hearings*, *supra* note 43, at 65; *see generally* *Compromise Reached*, *supra* note 43, at 1429.

A hypothetical situation illustrates this view. Suppose a major American advertising agency auditioned over 50 models and actresses for a commercial that would involve a one-day shoot. The producer was not looking for a celebrity model, which would seem to broaden the pool of potentially qualified talent. Ultimately, the producer selected a Canadian woman. Because she was an unknown in both Canada and the United States, however, she could not provide adequate documentation of "extraordinary ability" to qualify for an O-1 visa.¹⁴⁵ The advertising agency would have to withdraw its offer to the Canadian actress and continue its search.

Thus, only established foreign artists and entertainers will have the opportunity to perform in the United States. Prior to IMMACT, the rigorous standards of the H-1B visa category prevented models and entertainers who could not demonstrate "pre-eminence," such as the Canadian actress discussed in the above example, from working in the United States, even for less than ten days.¹⁴⁶ The new O and P categories maintain this protectionist policy regarding short term work in the entertainment industry. The H-2B does little to offset this situation since the application process conflicts with industry practice and scheduling. Unless employers of alien entertainers obtain H-2B visas through the protracted labor certification process, lesser known foreign artists and entertainers like the Canadian actress will not find fame and fortune in the United States.

B. *Policy Implications*

It is clear that the unions retain a voice, if not veto power, over which nonimmigrant artists and entertainers may enter the United States to perform. By having potentially determinative input on every petition submitted for an O or P visa, unions can dramatically affect the flow of culture into the United States.

In his testimony before the House of Representatives Subcommittee on International Law, Immigration, and Refugees, Rick Kauzlarich argued that through regulations such as the O and P

145. 8 U.S.C. § 1101(a)(15)(H)(i)(B) (Supp. IV 1992).

146. Wolfsdorf, *supra* note 18, at 36.

visas, democratic societies, which pride themselves on freedom of movement and expression, begin imposing barriers to such freedoms.¹⁴⁷ These restrictions create reciprocal barriers to international trade in services, thereby restricting U.S. exports of those services.¹⁴⁸ Although Kauzlarich outlined two possible repercussions from the O and P requirements set out in the IMMACT before the 1991 Amendments were passed,¹⁴⁹ the possibilities he suggested may become realities if organized labor ultimately objects to the approval of a high percentage of petitions or if the INS takes a harder interpretive line towards the new regulations than it had previously taken toward the H-1B "distinction" criteria.¹⁵⁰ Furthermore, the United States currently has an overwhelmingly positive balance of trade in the area of arts, entertainment, and athletics.¹⁵¹ As Bernard P. Wolfsdorf argues, "For the United States to turn around and impose more restrictive regulations on the import of foreign athletes, artists and entertainers is, in effect, the equivalent of the Japanese increasing restrictions on the import of American cars."¹⁵²

Since unions' *raison d'être* is to protect American workers and jobs, the determination of whether an artist, entertainer, performer, or group of performers possesses extraordinary ability now hinges largely upon whether organized labor believes a particular alien performer will cause the loss of American jobs. This reduces the international exchange of culture to an economy of labor—a very clumsy exchange at that. Given this paradigm, each alien perfor-

147. *Hearings, supra* note 43, at 22; *see generally Compromise Reached, supra* note 43, at 1429.

148. *Hearings, supra* note 43, at 22; *see generally Compromise Reached, supra* note 43, at 1429.

149. *Hearings, supra* note 43, at 22; *see generally Compromise Reached, supra* note 43, at 1429. The possible repercussions include "the prospect of democratic societies who pride themselves on freedom of movement and expression imposing barriers to such freedoms [and] the restrictions can be seen as creating a barrier to international trade of services, thereby restricting U.S. exports of those services." *Compromise Reached, supra* note 43, at 1429.

150. *Hearings, supra* note 43, at 22; *see generally Compromise Reached, supra* note 43, at 1429.

151. Wolfsdorf, *supra* note 18, at 61.

152. *Id.*

mer potentially displaces one U.S. worker. This one-to-one ratio does not consider the possibility that foreign entertainers create jobs for Americans by keeping venues open that employ fifty individuals for every one alien entertainer. In his testimony before the subcommittee, Broadway producer Emanuel Azenberg argued that allowing someone who enhances a show into the United States actually provides employment for many people, such as ticket-takers, ushers, and cleaning personnel.¹⁵³

Australia stands out as one country that has recognized that foreign artists may have a positive impact upon the national economy. Like the United States, Australia requires alien entertainers to submit a consultation by the relevant union with their visa application.¹⁵⁴ Notably, however, Australia also requires that entertainers submit a "net employment benefit" stipulation, showing how many local jobs their tour might provide.¹⁵⁵ While this additional documentation may seem unwieldy, the Australian government thereby recognizes that foreign entertainers can enhance the job market for nationals.

In contrast, by viewing an artist or entertainer in terms of labor easily performed by an American, the United States equates these aliens to seemingly objective, quantifiable functions. Thus the work of an artist, like that of an auto-mechanic, is equated with the value per hour of labor that he or she performs. In general, audiences value artists, entertainers, and performers for unique talents that cannot be readily duplicated by others, even by other artists or entertainers.

As regarding the P-3 visa, the INS regulation defines "culturally unique" as "a style of artistic expression, methodology, or medium which is unique to a particular country, nation, society, class, ethnicity, religion, tribe or other group of persons."¹⁵⁶ Which programs and performers will meet these criteria will depend upon the

153. *Hearings, supra* note 43, at 65; *see generally* *Compromise Reached, supra* note 43, at 1429.

154. GAO REPORT, *supra* note 123, at 13.

155. *Id.*

156. 8 C.F.R. § 214.2(p)(3) (1993).

INS' interpretation of this phrase in view of the evidence presented by petitioners and the advisory opinion submitted. Once again, American peer or labor organizations may greatly influence which alien performers and performances meet these regulatory standards, which seem particularly subjective and ephemeral. Furthermore, because cultural significance must often be understood in the context of global politics, describing some performers and performances but not others as culturally unique, runs the risk of politicization.

In the 1950s, this standard could have been used to bar entertainers whose work might have contained (or could have been construed as containing) Communist or Socialist messages or material. Today, this measure might prohibit entertainers with politically unpopular ideas from performing in the United States. Thus, alien performers who petition for a P-3 visa might not fulfill the statutory criteria if the messages they produce do not align with mainstream America's political temper. This potential political bias could limit Americans' exposure to a diverse range of foreign artists and entertainers. Whether the new P-3 visa category will allow foreign policy and ideological concerns to affect future judgments of cultural merit remains to be seen.¹⁵⁷

CONCLUSION

Given the brief lead times and condensed schedules that characterize many theatrical, film and television productions, the O and P visa categories do little to alleviate procedural obstacles to performing in the United States that greet foreign artists and entertainers even of the highest caliber.

One alternative to the procedural morass that many foreign artists, entertainers, and athletes face under the 1990 Act would be to

157. Approvals for P-3 visas thus far include, inter alia, a Chinese acrobatic group, a Caribbean steel band, and a presentation for the Pope. Remarks at the AILA Conference in New York City (Apr. 19, 1993) (author's notes on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*). These cases have fallen unequivocally under the definition of culturally unique and do not appear to have contained controversial material.

allow these types of aliens to enter the United States for a period of up to thirty days with a variation of the current B-1, or visitor for business, visa.¹⁵⁸ A modification of this limited visa would allow these aliens to perform before American audiences without threatening substantial employment opportunities for American artists and entertainers. Furthermore, a B-1 visa can generally be obtained in one day through an application at the U.S. Consulate, thus avoiding the lengthy process typical of H-1B visa applications.

Additionally, the INS could require those artists and entertainers, who would like to enter the United States to perform for more than 30 days but less than one year, to supply evidence of how their work would create American jobs. This requirement would resemble Australia's "net employment benefit" stipulation.¹⁵⁹ Such a category would allow talented, but lesser known, foreign artists and entertainers to work for brief periods on specific projects and would weed out extraneous support personnel. Proposals such as these would alleviate the procedural problems created by the new O and P visa categories.

158. 8 U.S.C. § 1101(a)(15)(B) (1988).

159. See *supra* notes 154-55 and accompanying text.