

The International Entertainer Under United States Immigration Law

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The foreign entertainer has traditionally brought diversity and enrichment to our culture. Current immigration laws have been tailored to particularly restrict the entry of these aliens. This article describes the procedures available to the alien performer wishing to enter this country either temporarily or permanently. The author concludes immigration laws concerning alien entertainers cannot be formulated until overall immigration policy in terms of economic concerns and the foreign worker is adequately addressed.

Historically, the United States has been enriched by the entry of foreign entertainers who have added excitement to the entertainment world not only because of their great artistic talents, but also by virtue of their foreign nationality. Foreign entertainers, be they ballet dancers from Russia, opera singers from Italy, Shakespearean actors from England, or pop singers from Australia, pose unique and challenging legal questions as they enter upon the American stage.

Protection of the American worker from foreign competition¹

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1. See, e.g., UNITED STATES COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR 8 (1980). Fueled by the depression economy of the 1870's, American nativists blamed foreign workers for taking jobs and driving down wage levels. The Chinese became the most visible and politically vulnerable symbol of this economic discontent. Congress responded by enacting the Chinese Exclusion Act of

and enrichment of our popular culture through the infusion of foreign artistic talent have been the twin cornerstones upon which national immigration policy towards international entertainers has been based. These competing interests have not always operated harmoniously nor has a pacific union of the two always proved possible. Immigration laws in the United States have been enacted and amended over the years to reflect the intent that aliens be excluded to protect the labor market and its various component professional and occupational groups from foreign competition.² Save for the medical profession,³ no group has been more successful in articulating and implementing its need for protection than the American entertainment industry.⁴

Foreign artists may seek to enter the United States, either temporarily to perform a series of engagements on particular dates or permanently to perform on a regular basis.⁵ Set forth below is a discussion of the statutes and regulations that pertain to both bases upon which an artist may wish to enter the United States. Many of the statutory and regulatory provisions applicable to entertainers may also apply to professional athletes, who in our video world of today may in fact be our most popular

1882 which suspended immigration of Chinese laborers for ten years, rendered those not entitled to reside in the United States subject to deportation, and prohibited Chinese immigrants from obtaining United States citizenship after the effective date of the Act. See Fragomen & Del Rey, *The Immigration Selection System—A Proposal for Reform*, 17 SAN DIEGO L. REV. 1, 3-4 (1979). Organized labor resisted open immigration as a threat to their escalating organizing efforts in the late 1800's. Employers often used new immigrants as strike breakers and to incite disharmony and depress wage levels. Thus, the unifying theme of the national immigration initiatives of 1885-1887 was to regulate the influx of immigrant workers but not to bar immigration outright.

For further background on the history of the immigration laws, see Wasserman, *The Immigration and Nationality Act of 1952*, 27 TEMP. L. Q. 62 (1952); E. HARPER, IMMIGRATION LAWS OF THE UNITED STATES (3d ed. 1975).

2. The basic certification provision is contained in Immigration and Nationality Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (Supp. IV 1980), as amended by Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620.

3. Immigration and Nationality Act § 212(a)(32), 8 U.S.C. § 1182(a)(32) (Supp. IV 1980), as amended by Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620, provides that graduates of a medical school not accredited by a body or bodies approved for that purpose by the Department of Education who are coming to the United States principally to perform services as physicians are excludable if they have not passed parts I & II of the National Board of Medical Examiners Examination or an equivalent examination. For further discussion, see Kaye, Danilov & McDonald, *Alien Physicians and Their Admission into the United States*, 16 SAN DIEGO L. REV. 61 (1978); Kaye, *Alien Physicians and Their Admission into the United States—An Update*, 20 SAN DIEGO L. REV. 117 (1982).

4. See *infra* notes 11-14 and accompanying text.

5. What constitutes temporary as opposed to permanent employment is an often-contested issue. See *infra* note 53 and accompanying text.

entertainers.⁶

Before commencing this survey, note should be made that the most publicized basis upon which entertainers from communist regimes remain in the United States is asylum, which is not applicable to a discussion of this nature. In recent years, for example, Mikhail Baryshnikov and Alexander Gudonov, famed Russian ballet soloists, requested and were granted political asylum in the United States.⁷ Other avenues that do not require qualification under the standards discussed below, such as immediate relative status,⁸ are also available to an entertainer. Most foreign entertainers, however, must qualify for proper visa status based upon their talents and the job opportunities available to them.

6. Immigration and Nationality Act § 203(a)(3), 8 U.S.C. 1153(a)(3) (Supp. IV 1980), provides for the availability of immigrant visas to qualified immigrants who as members of the professions or because of their exceptional ability in the sciences or arts will prospectively benefit the national economy, cultural interests or welfare of the United States. Interestingly, no definition of the term "arts" is contained within the Act. The Immigration and Naturalization Service (Service) has recognized the fact that prominent professional athletes are basically entertainers and may therefore be eligible for inclusion within the term "arts" in the sense in which it is used in § 203(a)(3) if the athlete has the exceptional ability required by that section. *See, e.g.*, Matter of Masters, 13 I. & N. Dec. 125 (1969).

7. Asylum provisions are governed by Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (Supp. IV 1980). Highly publicized asylum cases of exceptional individuals seeking artistic freedom present the most appealing situations to the general public. Such cases serve to reinforce our national self-image as a generous people welcoming the oppressed without posing a significant threat of direct competition in the marketplace. It is, perhaps, the personalized character of asylum applications—the compelling portrait of an obviously extraordinary athlete or entertainer petitioning for the protection of American law and the benefits of individual liberty—that accounts for this widespread public support. Witness the most recent case in late July 1982 of Hu Na, 18-year-old tennis star of the Chinese national team, disappearing during Federation Cup play in northern California and applying for political asylum. Hu Na was considered the premier women's tennis player in China. Chinese officials have declined to specify what, if any, disciplinary punishment Hu Na would face if she returned to China. She could be compelled to undergo strenuous written exercises in self-criticism, and be deprived of certain traveling and other privileges. *Houston Chron.*, Sept. 8, 1982, at 4, col. 1.

8. For example, in April 1981, the author represented Li Cunxin, a guest performer of the Houston Ballet from the People's Republic of China, who attracted national attention when he announced that he would remain with his new wife to dance in the United States and was temporarily detained at the Counsel General of the People's Republic of China in Houston. He subsequently filed for permanent resident status in the United States as a spouse of a United States citizen under Immigration and Nationality Act § 201(b), 8 U.S.C. § 1151(b) (1976). *N.Y. Times*, May 2, 1981, at 1, col. 3.

TEMPORARY VISA STATUS

A performing artist who wishes to enter the United States to perform services of a temporary nature would first have to apply for the proper nonimmigrant visa.⁹ "Temporary visitor" is the most common temporary visa classification. It is subdivided into the visitor for pleasure (B-2), which is only appropriate for the ordinary tourist, and the visitor for temporary business (B-1).¹⁰ Under applicable regulations, the B-1 visa may be issued to any alien *other than an entertainer by profession*.¹¹ This exclusion of entertainers is unfortunate as it precludes the possibility of visa application to the American consulate and mandates employer petitions to the Immigration and Naturalization Service (Service).¹²

An alien, other than an entertainer by profession, otherwise classifiable as a person of distinguished merit and ability¹³ or as a trainee, and coming to perform services or be trained, must receive no salary or other remuneration from a United States source.¹⁴ Significant eligibility factors to consider for temporary business visitor status include: clear intent on the part of the alien to maintain his foreign residence; accrual of profits and the principal place of business in the foreign country; and the plainly temporary nature of various entries into the United States even though the business activity is not necessarily temporary.¹⁵

These regulations are unfortunately very narrowly construed so

9. There are at least thirteen major categories of nonimmigrant visas. Immigration and Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1976 & Supp. IV 1980), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1619.

10. Immigration and Nationality Act § 101(a)(15)(B)(1), 8 U.S.C. § 1101(a)(15)(B)(1) (1976). The Department of State defines "business" as a "legitimate activity of a commercial or professional character, not including purely local employment or labor for hire." 22 C.F.R. § 41.25(b) (1982).

11. "The term member of the entertainment profession includes not only performing artists such as stage and movie actors, musicians, singers and dancers, but also other personnel such as conductors, directors, stage managers, propmen, [camera persons], sound technicians, electricians and make-up [persons], etc.," 9 DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, pt. II, § 41.25 n.4.2(b) (1980).

12. H-1 visas have to be filed with the District Director of the INS having administrative jurisdiction over the area within which the beneficiary will perform services or receive training. 8 C.F.R. § 214.2(h)(1) (1982).

13. See *infra* notes 35-48 and accompanying text for a discussion of distinguished merit and ability.

14. 9 DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, pt. II, § 41.25 n.4.2(b) (1980); 22 C.F.R. § 41.25(b) (1981). There can be no contractual or other prearranged employment. *Id.*

15. Matter of B. & K., 6 I. & N. Dec. 827, 829 (1955) (nonimmigrant status granted to alien entering the United States for one-day periods to sell produce; primary business of alien was farming in Canada and a substantial portion of the crops produced was disposed of in Canada).

as to prevent, for example, foreign television crews from entering the United States to film commercials in a B-1 classification. Such a restrictive interpretation should be discarded in favor of a more expansive approach. Employees of foreign advertising agencies who, though not performers, are involved in the production of television commercials that will be shown abroad exclusively and who will receive salaries only from their foreign employers should be eligible for B-1 visas as business visitors.¹⁶ Such temporary entrants are engaging in legitimate activities of a commercial or professional nature and therefore fall within the reach of the term "business" as used in section 101(a)(15)(B) of the Act.¹⁷ They are not engaging in purely local employment or labor for hire.¹⁸ Their activity of filming and editing these television commercials is entirely incidental to an international enterprise, a circumstance qualifying the applicant for business visitor status under

16. At present, such alien applicants are limited to temporary worker (H) visas. It is the position of the American Immigration Lawyers Association that such personnel should be classified as business visitors under instructions of the Department of State that are binding on the Visa Office and that have the force of law. The advertising art directors, television producers, directors, camera persons and support crew all clearly intend to maintain foreign residences. Their entry into the United States will be of temporary duration after which they will return abroad. See Letter from Stanley Mailman and Arthur Helton to Visa Office of Department of State (May 1981). Copy of letter may be obtained from the national office of the American Immigration Lawyers Association at 1000 16th St., N.W., Ste. 501, Washington, D.C. 20036. The INS is tentatively modifying its position on commercial filmmaking: if the film is below feature length and there will be no United States distribution, B-1 visas may no longer be precluded. DEP'T OF STATE, VISA OFFICE MINUTES 7 (Aug. 5, 1982).

17. See *supra* note 10 for a definition of business activity for immigration purposes. An alien need not be considered a "businessman" to qualify as a business visitor, if the function he performs is a necessary incident to international commerce. Matter of R., 3 I. & N. Dec. 750 (1949) (alien coming here merely to help load and unload a moving van incident to delivery of household goods was considered a nonimmigrant where he was regularly employed by a Canadian concern, a common carrier of household goods whose business is preponderantly international in character). Note that the decision to classify an alien as a business visitor is purely discretionary and not a matter of right. See Immigration and Nationality Act § 291, 8 U.S.C. § 1361 (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620.

18. 22 C.F.R. § 41.25(b) (1982). The basic distinction between legitimate activities of a commercial or professional character and purely local employment or labor for hire for B-1 visas was articulated in *Karnuth v. United States*, 279 U.S. 231 (1929). The Supreme Court held that a prime aim of the law was to protect American labor against the influx of foreign workers; business meant intercourse of a commercial character and persons who sought to make temporary visits to perform local employment or labor for hire were not nonimmigrants. The line between business and employment is often a shadowy demarcation. *Id.* at 239.

leading decisions of the Service.¹⁹ Diversity of artistic or commercial expression is vital to the good health of the media and the advertising industry and should not be stunted by overly restrictive Service interpretations.²⁰

There are carefully prescribed situations under which alien entertainers would be eligible for temporary visitor status. First, any alien coming to participate in an amateur musical, sports, or similar event or contest who will receive no remuneration is classifiable as a B-2 temporary visitor for pleasure.²¹ Second, a member of an entertainment occupation who would normally be accorded H-1 status as an alien of distinguished merit and ability may be classified as a B-1 visitor if, and only if, s/he is coming to participate in a cultural program sponsored by his or her government.²² In addition, the alien must perform before a nonpaying audience and all expenses, including per diem, must be paid by the home country.²³ Again, the source and mode of remuneration seem to be the principal concern of the regulation, revealing the economic anxieties underlying much of our national immigration policy.²⁴

Foreign athletes may be able to obtain a B-1 visa with less difficulty than may other alien entertainers.²⁵ Any necessary support staff would also be included within the B-1 umbrella of the principal alien.²⁶ If, by contrast, the professional athlete is coming to

19. *See, e.g.*, Matter of Cote, I.D. No. 336 (1980) (delivering automobiles manufactured in Canada into the United States and picking up automobiles for transport back to Canada qualifies truck driver as a visitor for business under section 101(a)(15)(B)(i) of the Act); Matter of Hira, 11 I. & N. Dec. 824 (1966). In *Hira*, an alien, on behalf of his Hong Kong employer, was in the United States taking orders from prospective customers whom he did not solicit. He received only expense money while in this country; his monthly salary was sent to his parents in India by his employer. His intercourse was characterized as commercial and, having indicated he would return to Hong Kong at the termination of his authorized stay, temporary.

20. There appears to be some resistance on the part of the Service to grant B-1 treatment in the foregoing circumstances because of the availability of an alternative visa category, namely H-1, for which a petition to the Service is required. The fact remains, however, that as a matter of policy an alien's eligibility for other types of visas should not foreclose the issuance of a specific visa for which the alien has made application and is otherwise eligible. Indeed, this is the position of the Service. *See, e.g.*, Matter of Tessel, I.D. No. 631 (1981) (alien's qualification for nonpreference status does not preclude eligibility under a preference status).

21. 9 DEPT OF STATE, FOREIGN AFFAIRS MANUAL, pt. II, § 41.25(5)(e) (1981).

22. *Id.* § 41.55 n.16.2.

23. *Id.*

24. For background on some of these economic concerns and the legislation they generated, see J. KENNEDY, A NATION OF IMMIGRANTS (rev. ed. 1964).

25. This is perhaps a reflection of their enormous international appeal as well as the relatively recent impact of trade unionism upon the athletes themselves in the United States.

26. The Service expressly holds, however, that an alien coming temporarily to

the United States pursuant to a temporary contract agreement for which s/he shall receive remuneration or a specified percentage of the admission fees, then B-1 status is precluded and the athlete must resort to an H-1 or other nonimmigrant visa.²⁷

H-1 Temporary Workers

Since most entertainers will not be eligible to enter the United States as temporary visitors for business, the most applicable classification would be the H-1 nonimmigrant visa.²⁸ This visa is available to individuals who are considered to exhibit "distinguished merit and ability" and who are coming temporarily to the United States to perform services of exceptional nature requiring such merit and ability.²⁹ While the "distinguished merit and ability" criterion is often difficult to establish,³⁰ H-1 visa applicants are relieved from the often onerous task of obtaining labor certification.

The most prevalent beneficiaries of H-1 visas are performing artists on a temporary tour of the United States.³¹ People considered as essential support staff, such as managers or musical accompanists, can also be included in the same or separate petitions and receive the same H-1 status as the principal alien.³² The determination as to what is "essential" for a polished and

perform services as a jockey, sulky driver, trainer or groom for his foreign employer may be classified as a B-1 business visitor so long as he continues to work for that employer and performs no work in the United States for any other foreign or United States employer. IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEP'T OF JUSTICE, OPERATIONS INSTRUCTIONS, REGULATIONS AND INTERPRETATIONS § 214.2(h)(2)(i) (1981) [hereinafter cited as OPERATIONS INSTRUCTIONS].

27. 9 DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, pt. II, § 41.55, n.6 (1978).

28. Any alien, even an entertainer in some instances, who seeks to enter the United States without prearranged employment or contract and is therefore eligible for B-1 classification may subsequently petition for H-1 classification as a temporary worker of distinguished merit and ability upon obtaining such employment and filing the appropriate H-1 visa petition. Such flexibility is to be encouraged in this and other visa categories.

29. Immigration and Nationality Act § 101(a)(15)(H)(i), 8 U.S.C. § 1101(a)(15)(H)(i) (1976).

30. See 20 C.F.R. § 656.21a(a)(3)-(4) (1982). The basic labor certification process, as articulated in 20 C.F.R. § 656.21(b) (1980), only requires that the United States worker be qualified, while 20 C.F.R. § 656.21a requires the alien be of superior talent. See, e.g., Matter of Cabaret Tehran *ex rel.* Parvis Ghaidarkhane, 1 ILCR (MB) 1-926 (July 12, 1979); Matter of Cabaret Tehran *ex rel.* Abraham Hamed, 1 ILCR (MB) 1-682 (May 22, 1979).

31. See 20 C.F.R. § 656.21a(a)(1)(iv) (1982).

32. 8 C.F.R. § 214.2(h)(2)(v) (1982).

professional artistic performance is inherently subjective. Any doubts in this determination should be resolved in favor of diversity of artistic expression. It is the performing artist, not the bureaucrat, who is the best judge of what support staff is needed. However, on August 4, 1980, and again on July 9, 1982, the Service published a proposed rule that aliens desirous of coming to these shores to assist foreign-born performers must themselves possess such individually unique qualities as to render their presence essential for a successful performance by the principal beneficiary.³³

Case law has extended the coverage of the H-1 classification to professionals, which normally has been interpreted to necessitate at least a university degree in a field requiring such educational background.³⁴ Most entertainers, with the possible exception of drama teachers, will not be considered to be in a professional position. It will normally be necessary, therefore, to prove that they are of distinguished merit and ability.

The term "distinguished merit and ability" connotes a level of expertise and public acclaim considerably higher than the norm. The person so described must be recognized as preeminent by his peers and the public.³⁵ Foreign entertainers have, on occasion, been denied H-1 visa status unless they have performed in a leading role or supporting part or have been prominently featured by

33. 47 Fed. Reg. 29,851 (1982) (to be codified at 8 C.F.R. pt. 214). Interestingly, the republication of the proposed rule was done for purposes of clarification. Following initial publication on August 4, 1980, four comments were received by the Service regarding the proposed rule. Three of the four comments came from labor organizations opposed to allowing accompanying aliens to enter as H-1 nonimmigrants unless they were also of distinguished merit and ability. The fourth commenter noted the economic contributions of foreign film makers and argued that those who produce films, motion pictures or commercials should be exempted from the normal constraints that attach to the "H" classifications. *Id.* Note that all of the arguments—whether for or against the proposed rule modification—arose from economic concerns. The rule has yet to be implemented in final form. For the reasons discussed *supra* notes 16-20 and accompanying text, the proposed rule will not implement the underlying policies of our immigration system. Effective November 11, 1982, INS will implement this rule in final form. 47 Fed. Reg. 4607 (1982).

34. *See, e.g.*, Matter of Essex Cryogenics Indus., 14 I. & N. Dec. 196 (1972) (beneficiary, a mechanical engineer, held to be eligible for H-1 status even though previously employed with petitioning employer's engineering staff as a nonimmigrant student); Matter of General Atomic Co., 17 I. & N. Dec. 532 (1980) (classification as member of a profession qualifies as distinguished merit and ability for H-1 purposes).

35. Additional factors in considering whether or not the alien meets the requirement of distinguished merit and ability include whether or not the alien has performed or will perform as the principal entertainer; the past acclaim which the alien has received; the reputation of the employment agency; and the renown of the theatre, performing art group, or concert hall. *See generally* Matter of Tagawa, 13 I. & N. Dec. 13 (1967) (exceptional ability in the art of puppetry).

name, or have been acknowledged as preeminent by experts in their chosen field.³⁶ This emphasis upon the "star system" reflects a questionable focus upon reputation rather than critical achievement as the controlling criterion.³⁷ Moreover, the burden of proving distinguished merit and ability rests upon the person or organization who petitions to bring the alien to the United States.³⁸ The United States employer must substantiate the alleged claim of distinguished merit and ability by filing appropriate supporting documents attesting to the beneficiary's eligibility.³⁹ Such documents would customarily include a detailed description not only of the alien's qualifications but also of the position for which his or her talents are required on a temporary basis.⁴⁰ The H-1 alien may be coming to perform a job which is permanent in character but the term of service is finite and necessarily limited. In addition, the petition would normally be accompanied by diplomas, affidavits from former employers, certificates of special rec-

36. *Matter of Lambeth Prods.*, 11 I. & N. Dec. 534 (1966) (competent theatrical troupe contemplating college tour not prominent enough to merit H-1 benefit). The performing ability need not necessarily be in the field of mass entertainment. *See, e.g.*, *Matter of Tagawa*, 13 I. & N. Dec. 13 (1967) (third preference—arguably also H-1 status under *Essex Cryogenics*—accorded to a master Japanese puppeteer).

Theatrical groups that tour American colleges and universities may find it more difficult to persuade immigration authorities that they have either individually or as a group achieved sufficient renown in the acting field or received favorable plaudits from recognized theatrical experts to substantiate their claim as entertainers of distinguished merit and ability. *See, e.g.*, *Matter of Lambeth Prods.*, 11 I. & N. Dec. 534 (1966).

37. *See, e.g.*, *Matter of Shaw*, 11 I. & N. Dec. 277 (1965) (since the term "distinguished merit and ability" implies preeminence, H-1/status inappropriate for an 18-year-old popular recording star of limited experience whose recording success was ephemeral, and limited to Great Britain); *Matter of Peak Prods.*, 11 I. & N. Dec. 462 (1965) (internationally known stage and film actor, Anthony Newley, whose services were desired as a panelist on the television game show "Password," entitled to H-1 status; his name alone establishes that he is of distinguished merit and ability); *Matter of Browne*, 12 I. & N. Dec. 312 (1967) (requirements of starring role demands actress of high caliber to attain desired artistic objectives); *Matter of Rexer*, 11 I. & N. Dec. 65 (1965) (beneficiaries ineligible for H-1 status since they have not played starring or leading roles or been acknowledged as eminent by recognized critics in the field of entertainment).

38. 8 C.F.R. § 214.2(h)(2)(ii) (1982).

39. 20 C.F.R. § 656.21a(a)(1)(iv) (1982). If there are any contractual arrangements, the Service looks to the amount of money the employer has contracted to pay in salary, living expenses and transportation when bringing the alien to perform in the United States.

40. 8 C.F.R. § 214.2(h)(2)(i) (1982). Not only must the alien beneficiary be a person of distinguished merit and ability, but the position to which he or she is coming must require a person of such merit and ability.

ognition and other appropriate evidence.⁴¹ In determining whether an entertainer is of distinguished merit or ability, the Board of Immigration Appeals (BIA) has looked to such varied but related criteria as critical reviews, popularity, box office appeal, record sales and level of salary.⁴²

It is Service policy, in the course of processing H-1 petitions, to request advisory opinions regarding the qualifications, skills or talents of the entertainer from professional organizations, craft guilds and recognized critics in the field.⁴³ The opinion must be in writing with detailed reasoning set forth.⁴⁴ Only in emergency circumstances when the professional organization or critic agrees to furnish a written evaluation at a later date will oral consultation be permitted.⁴⁵ If, however, the proposed beneficiary is an entertainer of such widespread renown that his or her name and reputation establish beyond doubt that the performer is a person of distinguished merit and ability, then it is not necessary to seek any such advisory opinion.⁴⁶ Where the professional organization or critic has previously advised that the entertainer is of distinguished merit and ability, there is no need for additional consulta-

41. The prospective employer should furnish advertisements, playbills, publicity releases, newspaper reviews, feature stories in trade journals and any national or international awards that the alien has received, to name some of the pertinent ancillary materials. A record of extensive performance is also considered in the determination. *Matter of Lambeth Prods.*, 11 I. & N. Dec. 534 (1966).

42. *See supra* notes 36, 40 and accompanying text.

43. 8 C.F.R. § 214.2(h)(2)(ii) (1982). *Matter of Shaw* 11 I. & N. Dec. 277 (1965). When the performer will be engaged in a legitimate theatre production, the Service customarily consults Actors' Equity Association. If the performer will be engaged in the radio or television field, the opinion of the American Federation of Television and Radio Artists is solicited. The American Federation of Musicians advises the Service when the performer is a musician, while the Screen Actors' Guild performs a comparable function when the performer will be engaged in films. Insofar as the latter two unions are concerned, it is the local office exercising jurisdiction over the area of intended performance that renders the evaluation. If the proposed beneficiary is involved in any of the skilled crafts relating to the motion picture industry or the live stage, including but not restricted to stage hands, electricians, camera personnel, sound technicians, make-up artists and wardrobe attendants, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (IATSE) is consulted. OPERATIONS INSTRUCTIONS, *supra* note 26, § 214.2(h)(2)(ii).

44. OPERATIONS INSTRUCTIONS, *supra* note 26, § 214.2(h)(2)(ii). The professional organizations are granted a period of 15 days in which to present their opinions. A copy of each final decision denying an H-1 petition for an entertainer is sent to the manager of the professional placement center of the New York, Illinois, or California state employment service for information purposes in connection with a possible application for labor certification to support an H-2 petition for this entertainer.

45. *Id.*

46. *Id.* Anthony Newley could obtain an H-1 visa to appear as a panelist on the television game show "Password" without asking for an advisory opinion from Actors' Equity or Screen Actors' Guild. *Matter of Peak Prods.*, 11 I. & N. Dec. 462 (1965).

tion in succeeding visa applications unless there is some indication based on specific and articulable facts that the alien is no longer a person of distinguished merit and ability or there is valid question as to whether the services he or she would perform require such a person.⁴⁷

When it is asserted by the putative employer that a professional athlete is of H-1 caliber and the name or repute of the athlete by itself is not enough to establish beyond contradiction that he or she is a person of distinguished merit and ability, then the Service may consult the appropriate professional players' association to solicit its views.⁴⁸

There is an inherent conflict of interest in seeking advisory opinions from unions or craft guilds who may desire in good conscience to be objective but exist to protect the economic welfare of their membership. This is particularly the case in the athletic and entertainment fields where careers are often relatively abbreviated, the number of vacant positions is always limited, and the membership levels fluctuate according to the profit margin of the employers which, in turn, is uniquely dependent on the availability of entertainment dollars in the consuming public. Moreover, the standards imposed by these advisors are inescapably subjective with no effective outside controls to ensure a reasonable semblance of objectivity. Artistic evaluations are inevitably colored by an American perspective that may not be appropriate when applied to a foreign artist who operates in a different cultural framework with different artistic assumptions.

Given the fact that many well-known artists are in fact self-employed, and the obvious impracticability, where touring artists or guest lecturers are concerned, of each employer petitioning on a separate basis for the alien beneficiary, the appropriate petition may be filed by the artist's agent along with a copy or a summary of the proposed employment contract. As time may be critical, the petition, with the full itinerary of the artist attached, may be filed in any district office of the Service where the alien will be

47. *Matter of Peak Prods.*, 11 I. & N. Dec. 462 (1965).

48. The National Football League Players' Association and the North American Soccer League Players' Association are frequently consulted by the Service. Rather surprisingly, the Major League Players' Association headed by Marvin Miller is not included in this consultative process despite being the most powerful labor union in a professional sport. See OPERATIONS INSTRUCTIONS, *supra* note 26, § 214.2(h)(2)(i).

performing.⁴⁹

H-2 Temporary Workers

Obviously there are many figures in the entertainment and sports world who would not readily qualify as individuals of distinguished merit and ability. The primary alternative is an H-2 visa for purposes of working temporarily in the United States.⁵⁰ The H-2 classification has been utilized for groups as diverse as professional wrestlers and soccer players to mariachi bands from Mexico. H-2 visas require that the alien first obtain labor certification, the legal process of proving to the satisfaction of the United States Department of Labor that there are no persons in the United States available, willing, and qualified for such a position and that the pay and working conditions meet the prevailing standards and will not adversely affect United States workers.⁵¹ This certification generally must be done on an individual basis. There are limited circumstances, however, where precertification can be obtained.⁵²

To be eligible for H-2 classification it must also be proven that the employer intends to utilize the services of the artist for a temporary period only and not in a position of an ongoing nature.⁵³

49. OPERATIONS INSTRUCTIONS, *supra* note 26, § 214.2(h)(2)(i). Promoters may not finalize their contractual arrangements with entertainers until the last possible moment. This allows for a certain degree of "forum shopping" to expedite the procedure. Many district offices have extensive backlogs, and it is to the advantage of the attorney to carefully file the petition in a district without a significant backlog. The H-1 visa cannot be issued in the absence of a duly executed agreement. Hence, the petition and supplementary documents should be prepared for filing in advance of the finalization of any contracts and filed immediately thereafter to minimize the time it will take to obtain the H-1 visa.

50. 8 C.F.R. § 214.2(h)(3)(i) (1982).

51. *Id.*

52. 20 C.F.R. § 656.21(c) (1982). For example, the Department of Labor has precertified that qualified musicians are unavailable 50 miles inland into the United States along the Canadian border and that admitting such aliens to work as musicians for 30 days or less would not be disadvantageous to American musicians. This precertification is applicable to stagehands, drivers and equipment handlers coming into this country in support of employment of the alien musician, if the support personnel obtain H-2 treatment. *See* OPERATIONS INSTRUCTIONS, *supra* note 26, § 214.2(h)(2)(i). Blanket labor certification is now granted to a specified number of foreign-born professional soccer players in accordance with the rules of the North American Soccer League limiting the number of foreign players on each team roster. *Id.*

53. *Matter of Contopoulos*, 10 I. & N. Dec. 654 (1964). H-2 workers are coming to perform temporary services that are adjudged to be in short supply in the United States. Immigration and Nationality Act § 101(a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii) (1976), stipulates that the H-2 beneficiary must be "coming temporarily . . . to perform temporary services or labor . . ." Note that the criterion of temporariness is deliberately repeated. Hence, as the *Contopoulos* decision suggests, even if the term of service is only temporary, H-2 status remains unavailable if the job to which the alien is coming is of a permanent character.

The issue of temporariness of the position itself is normally far more difficult to prove than the intent of the alien only to remain temporarily in the position.⁵⁴ However, in the case of entertainers and athletes, it is normally possible to show that the position is only a temporary one by the inherent limitation on the length of an engagement for the entertainer or the fixed season for the particular sport.

In order to commence the process, an application for labor certification is filed with the appropriate state employment agency, describing the position the alien has sought and the minimum job requirements in terms of education and/or experience and any other special qualifications.⁵⁵ The salary offered the alien must be the prevailing wage that would be offered to United States workers similarly employed.⁵⁶ Also, the employer must undergo a normal recruitment process, which would include placing job orders with the state employment agency, and newspaper advertisements in a newspaper of general circulation or in an appropriate trade publication.⁵⁷

Failure of the employer to submit documentation of recruitment efforts through labor referral sources normal to the occupation can be grounds for denial of the labor certification.⁵⁸ It may

54. Matter of Contopoulos, 10 I. & N. Dec. 654 (1964) (petitioner's intent to remain only two years not sufficient for H-2 status where job itself was permanent). *But see* Matter of Samarius, Ind., 15 I. & N. Dec. 608 (1976) (although job itself permanent, alien hired merely to train others); Matter of General Dynamics Corp., 13 I. & N. Dec. 23 (1968) (although electronic design engineer position permanent, alien granted temporary worker status only during peak service).

55. 20 C.F.R. § 656.21 (1982). General filing instructions for labor certification are indicated in 20 C.F.R. § 656.20 (1981). Labor certification is a requirement for both nonimmigrant H-2 status and third and sixth preference visa petitions for permanent residency, as well as a potential ground of exclusion under Immigration and Nationality Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (Supp. IV 1980).

56. 20 C.F.R. § 656.20(c)(2) (1982); 20 C.F.R. § 656.21(e) (1982). The formula for computation of the prevailing wage is set out in 20 C.F.R. § 656.40 (1982). When the local state employment office prepares and processes the employment service job offer, it also calculates the prevailing wage and gives the employer an opportunity to boost his wage proposal if below the prevailing level. If labor certification is denied, 20 C.F.R. § 656.29(a) (1982) mandates that a new application for labor certification by the same employer cannot, under most circumstances, be filed within six months after the denial. However, if the denial stems solely from the failure of the employer to comply with the prevailing wage, he may reapply immediately by amending the wage offer to meet this standard.

57. 20 C.F.R. § 656.21(g) (1982); *see also infra* note 58 and accompanying text.

58. 20 C.F.R. § 656.21(b)(3)-(4) (1982) sets forth the irreducible minimum recruitment activities which an employer must demonstrate s/he has performed as a prerequisite to the issuance of a labor certification. However, 20 C.F.R.

also be necessary to show that the employer advised any appropriate local union of the job availability. The local union may be required to issue a statement to the effect that it was unable to refer any of its members who would meet the particular job description.⁵⁹ In effect, such a requirement gives the union involved a de facto veto power over the labor certification process. The union functions as an employment agency supplying applicants for employment interviews. The interests of the union coincide with those of government authorities and conflict with those of the employer. The former seek to protect American workers against potential competition, hence they do not want the labor certification process to be either swift or overly successful. By contrast, the latter desire to minimize the rigors of labor certification while still respecting the integrity of the law. In perhaps no other area of national policy today do the interests of labor unions and the bureaucracy coincide as harmoniously as in immigration.

LAWFUL PERMANENT RESIDENT STATUS

Entertainers who wish to remain in or come to the United States on an indefinite basis should consider their eligibility for lawful permanent resident status.

Under the present immigration act, Congress has established four preferences for close relatives of United States citizens and permanent residents who do not otherwise qualify as immediate relatives and only two classifications for individuals who seek to enter the United States for purposes of employment.⁶⁰ The relative liberality of family-based preferences⁶¹ contrasts with the stringency of job-centered preferences where the basic object of individual labor certification is to protect the United States labor

§ 656.24(b)(2)(i) (1982) further provides that a certifying officer may consider that there are appropriate sources of workers where the employer should have recruited or might be able to recruit United States workers. 20 C.F.R. § 656.24(b)(2)(iv) (1982) provides that, in determining whether a United States worker is available at the place of the job opportunity, the certifying officer may consider United States workers who are willing to relocate to take the job. Therefore, if a certifying officer determines that there are appropriate recruitment sources not specifically required by section 656.21(b) and not yet utilized by the employer, he may be unable to certify that able and willing American workers are unavailable. *See, e.g., Matter of McClurg Court Sports Center ex rel. Jorge Jimenez*, 1 ILCR (MB) 1-1057 (Sept. 13, 1979).

59. 20 C.F.R. § 656.21(b)(5) (1982).

60. Allocation of immigrant visas are set out in Immigration and Nationality Act § 203, 8 U.S.C. § 1153 (1976 & Supp. IV 1980).

61. Immigration and Nationality Act § 201(b), 8 U.S.C. § 1151(b) (1976), as amended by Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1622. "Immediate relatives" include the children, spouses and parents of a citizen of the United States. If they are otherwise qualified for admission as immigrants, immediate relatives enter without numerical limitation.

market. Thus, family reunification is encouraged while the injection of foreign workers into the labor pool is carefully regulated.

There are two separate questions to be answered by the foreign entertainer who wishes to immigrate: first, whether or not s/he is required to obtain an individual labor certification; and second, whether or not s/he can qualify under the third preference, for which visa numbers are normally more readily available than under the sixth preference.

Under the current third preference, ten percent⁶² of the current 270,000 quota is allocated to aliens who are professionals or of exceptional merit and ability in the arts and sciences who will substantially benefit the economy, cultural interests or welfare of the United States. If an alien applicant is a professional no additional showing of exceptional merit or ability need be made.⁶³ In either instance, the services of the third preference alien must be sought by an employer in the United States.⁶⁴

As an entertainer will generally not come within one of the classic examples of a profession set forth in the Immigration and Nationality Act,⁶⁵ in order to qualify for the third preference s/he

62. Immigration and Nationality Act § 203, 8 U.S.C. § 1153 (1976 & Supp. IV 1980). In contrast to the preference categories based upon family relationship, the ceiling for the third preference is fixed and this category does not inherit the visa numbers unused by the first and second preference.

63. *Id.* § 203(a)(3), 8 U.S.C. § 1153(a)(3) (Supp. IV 1980). Establishing professional rank is an alternative to proof of exceptional ability under third preference.

64. *Id.* The 1976 amendment added the statutory requirement that the services of a third preference alien had to be sought by a specific employer in the United States. However, a savings clause was appended for those who had filed visa petitions seeking third preference status prior to January 1, 1977. Pub. L. No. 94-571, 90 Stat. 2707 (1976).

65. Section 101(a)(32), 8 U.S.C. § 1101(a)(32) (1976), provides that the term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics or seminaries. Ordinarily the attainment of a baccalaureate, college or university degree is a minimum prerequisite for professional status but this does not mean that all college graduates are professionals. *See, e.g.*, Matter of Shih, 11 I. & N. Dec. 847 (1966) (master's degree in library science); Matter of Reyes, 13 I. & N. Dec. 406 (1969) (bachelor's degree with a major in social work qualifies as a social worker).

In some situations, professional status can be attained by a combination of education and experience. *See, e.g.*, Matter of Devani, 11 I. & N. Dec. 800 (1966) (beneficiary awarded professional status as organic chemist notwithstanding lack of baccalaureate degree in organic chemistry; a master's degree coupled with extensive specialized experience in the chemical industry suffices); Matter of Yaakov, 13 I. & N. Dec. 203 (1969) (three-and-one-half years of college plus twelve years experience qualifies petitioner as a professional librarian).

A catalogue of occupations considered to be professional in nature for third pref-

must prove to the satisfaction of the Service that s/he is of exceptional ability in his or her artistic field. The term "exceptional ability" as used in the statute has been interpreted by various decisions of the BIA.⁶⁶ Exceptional ability involves some unusual talent or ability in an occupation or calling that requires particular expertise and may be demonstrated by accomplishment in a chosen field with an eminent professional reputation recognized by experts qualified in that field.⁶⁷

If the alien alleges exceptional ability in the arts or the sciences, documentary evidence must be submitted attesting to the alien's national or international acclaim, awards, and prizes for excellent performance or outstanding achievement in national or international associations that maintain standards recognizing such extraordinary accomplishment. Any affidavit attesting to the alien's exceptional ability should ideally set forth the manner in which the affiant has acquired his or her knowledge of the alien's qualifications and describe in detail the facts on which the assessment of the alien's superior qualifications are based.⁶⁸

One does not qualify automatically for third preference status solely by virtue of having been accorded H-1 classification as a person of distinguished merit and ability in the entertainment field.⁶⁹ Third preference criteria calling for exceptional ability in the sciences or the arts "contemplates a broader field of activity, knowledge and ability" than that encompassed by the phrase "of distinguished merit and ability" contained in section 101 (a) (15) (H) (i) of the Immigration and Nationality Act.⁷⁰

Whether or not the entertainer qualifies under the third or sixth preference, s/he must still obtain an individual labor certification and prove the unavailability of United States workers unless s/he is eligible for blanket certification under *Schedule A*, Group II.

erence purposes appears in the appendix to OPERATIONS INSTRUCTIONS, *supra* note 26, § 214.2(h)(2)(i).

66. See, e.g., Matter of T.C.F.F.C., 5 I. & N. Dec. 454 (1953) (exceptional ability granted on basis of opinion of vice-president of motion picture corporation). Compare Matter of Frank, 11 I. & N. Dec. 657 (1966) (tailor not qualified). See also Matter of Duncan, 11 I. & N. Dec. 909 (1966) (well-known lecturer); Matter of Tagawa, 13 I. & N. Dec. 13 (1967) (exceptional ability in the art of puppetry); Matter of Masters, 13 I. & N. Dec. 125 (1969) (outstanding professional tournament golfer).

67. 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 2-204.5 (rev. ed. 1982).

68. 20 C.F.R. § 656.21(a)(1)(iv) (1982). Documentation must show the alien's current activities and must establish current exceptional ability. Documentation from earlier periods is acceptable only to show sustained performance of exceptional ability.

69. Matter of Kim, 12 I. & N. Dec. 758, 761 (1967).

70. *Id.* See generally 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 2.27d (rev. ed. 1982).

Blanket certification relieves the employer or agent from advertising and proving the unavailability of United States applicants. *Schedule A*, Group II provides in pertinent part that aliens of exceptional ability in the arts and sciences,⁷¹ *except those in the performing arts*, may obtain blanket labor certification.⁷²

At least four types of documentation must be provided for *Schedule A*, Group II certification. Two of the types are mandatory: documentary evidence of the *current* widespread acclaim and international renown accorded the alien by established experts in their chosen field; and, documentation showing that their work in that field over the previous year demanded exceptional talent.⁷³ Applicants must also provide at least two other forms of documentation⁷⁴ from the following seven groups:

- 1) Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought;
- 2) Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievements of their members, as judged by recognized international experts in their disciplines or fields;
- 3) Published material in professional publications about the alien, relating to the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material;
- 4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought;

71. For the purpose of *Schedule A*, Group II classification, 20 C.F.R. § 656.101b (1982) defines the term "science or art" to mean any area of knowledge and/or expertise in which colleges and universities routinely offer specialized courses leading to a degree in that field. However, an alien need not have formally studied at a college or university in order to qualify for Group II blanket certification. Colleges and universities do not normally award degrees in a specific area of sports, such as tennis or football. Hence, exceptional ability in athletics does not exempt an alien from the individual labor certification process. EMPLOYMENT AND TRAINING ADMINISTRATION, UNITED STATES DEPT' OF LABOR, LABOR CERTIFICATION 8 (1981).

72. 20 C.F.R. § 656.10 (1982).

73. 20 C.F.R. § 656.22(d) (1982). The recognition must be international in scope. Thus, the documentation must indicate that the expert possesses knowledge of the alien's current recognition in more than one nation or be from experts in various countries where the alien's contemporary accomplishments are known. Any testimonial letters must clearly indicate the author's expertise and academic credentials. The alien's exceptional work over the past year can be documented in various ways: letters from colleagues or co-workers; copies of magazine, journal or newspaper articles; and documents which analyze the unique qualities of the alien's work and the exceptional ability required for a successful performance.

74. One document may be used to satisfy more than one requirement if each requirement is substantiated. EMPLOYMENT AND TRAINING ADMINISTRATION, UNITED STATES DEPT' OF LABOR, LABOR CERTIFICATION 10 (1981).

- 5) Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought;
- 6) Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation; and/or
- 7) Evidence of the display of alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.⁷⁵

One further factor to consider in application for blanket labor certification is that the intended employment in the United States must demand such exceptional ability. Hence, if Luciano Pavarotti is seeking to be classified as a music teacher for *Schedule A*, Group II purposes, then the employer must demonstrate that a music teacher of exceptional ability is required and that anything less would be unsatisfactory.⁷⁶

Unable to obtain blanket labor certification under *Schedule A*, Group II, aliens of exceptional ability in the performing arts have no choice but to endure the rigors of individual labor certification. Unlike regular labor certifications that are decided at the regional level, however, applications for aliens of exceptional ability in the performing arts are only reviewed by the regional certifying officer for completeness, then they are forwarded to the national office of the Employment Service of the Department of Labor in Washington, D.C., for final determination.⁷⁷ In addition to date-stamping the application and reviewing the forms for completeness, the state employment service determines a prevailing wage for the occupation as with other labor certification cases.⁷⁸ In

75. 20 C.F.R. § 656.22(d) (1982).

76. *Id.* Aliens seeking labor certification under *Schedule A*, Group II must also show that their work over the past year required exceptional ability. *Id.*

77. 20 C.F.R. § 656.21(a) (1982). Aliens of exceptional ability in the performing arts are considered an occupation designated for special handling. In normal labor certification, if the individual United States worker meets the objective job requirement established by the employer, then that United States applicant is deemed to be "qualified," thereby rendering the alien ineligible under third or sixth preference. The major benefit of an alien proving exceptional ability in the performing arts is that the United States worker must not only meet the minimum job criteria but must also show himself/herself to be equally or more qualified — an inherently subjective assessment — in order to supplant the proposed alien entertainer. EMPLOYMENT AND TRAINING ADMINISTRATION, UNITED STATES DEP'T OF LABOR, LABOR CERTIFICATION 67-68 (1981). The section 656.21a application of a competitive recruitment and selection process is limited to college and university teachers. 20 C.F.R. § 656.21a(a)(1)(iii) (1982). Imposition of a competitive recruitment burden on employers who seek to hire international entertainers and the corresponding conclusion that the United States job applicant must be equally or more qualified, rather than just meeting the minimum job requirements, derives from a judicial and administrative gloss on section 656.21a rather than from the provisions of the regulation itself. *See, e.g.,* Matter of Cabaret Tehran *ex rel.* Parvis Ghaidarkhane, 1 ILCR (MB) 1-926 (July 12, 1979); Matter of Cabaret Tehran *ex rel.* Abraham Hamed, 1 ILCR (MB) 1-682 (May 22, 1979).

78. 20 C.F.R. § 656.21(e) (1982).

most instances, before filing an application for an alien of exceptional ability in the performing arts with the state employment service, the employer must advertise the job opportunity in a national publication appropriate for the occupation.⁷⁹ However, when it is clear to the certifying officer that the labor market has been adequately tested within the six months before filing the application and there is no expectation that compliance with normal advertising will produce qualified, able, and willing applicants, then the certifying officer may reduce in part or completely eliminate the employer's recruitment obligation.⁸⁰ By the very nature of the "exceptional ability" requirement and the *Schedule A*, Group II restriction that applies to aliens in the performing arts, relatively few alien entertainers will directly benefit.⁸¹ Most aliens in the performing arts will, therefore, require individual labor certification.⁸²

79. EMPLOYMENT AND TRAINING ADMINISTRATION, UNITED STATES DEPT OF LABOR, LABOR CERTIFICATION 73-74 (1981).

80. Matter of McClurg Court Sports Center *ex rel.* Jorge Jimenez, 1 ILCR (MB) 1-1057 (Sept. 13, 1979). If the sport or art form is of national interest or has nationwide popularity, then the advertising must be done in national journals for that sport or art form with mention of salary in the advertisement. 20 C.F.R. § 656.21(g) (iv) (1982).

81. See 20 C.F.R. § 656.22(d) (1982). It may be possible for a well-known performing artist to qualify for blanket labor certification under *Schedule A*, Group II by establishing that she or he has exceptional ability in a complementary field other than the performing arts. The Department of Labor does not restrict the term "performing artist" to persons actually appearing on stage before an audience. Rather, dramatic coaches, directors, choreographers, choral directors, music teachers, and other off-stage ancillary personnel would also be considered "performing artists." See EMPLOYMENT AND TRAINING ADMINISTRATION, UNITED STATES DEPT OF LABOR, LABOR CERTIFICATION 70-71 (1981). The fact that the Service rather than the Department of Labor decides *Schedule A*, Group II cases strengthens any argument that the job offered is not that of a performing artist but a related position for which the alien would qualify under *Schedule A*, Group II.

82. See *supra* notes 55-59 and accompanying text. Congress is currently considering massive revision of the immigration laws. See S. 2222, 97th Cong., 2d Sess. (1982); H.R. 5872, 97th Cong., 2d Sess. (1982). The House bill was renumbered as H.R. 6514 after being reported out by the House Subcommittee on Immigration, Refugees, and International Law. Under the proposed bill, labor certification in general and the H-2 process would be modified to the following extent:

1. All labor certifications except those granted to H-2 temporary workers will be granted on the basis of nationwide job market data, instead of on a case-by-case basis. Labor certification would then include a finding that sufficient United States workers could not be trained within a reasonable time. The Senate version of the bill authorized the Secretary of Labor to render this finding without reference to the specific job opportunity, while the current House version gives the Secretary the option of using this information *with* or *without* reference to the specific job opportunity.

CONCLUSION

The only constant factor in the realm of immigration law is the inevitability of periodic legislative revision. As in the past, factors that will influence Congress over the course of its deliberations include economic stability, global geopolitics and cultural pluralism. The most insistent of these forces is the state of the national economy.

Receptivity towards foreign workers, including entertainers, will be intimately affected by the health of our domestic economy, the manpower requirements of multi-national corporations, and the level of opposition by organized labor and American workers. The manner in which our national political leadership responds to these often conflicting and always demanding pressures is seldom politically profitable. Indeed, so long as immigration remains an explosive issue, it is doubtful whether a consensus will emerge in Washington which is broad and durable enough to deal in a forthright and innovative fashion with an intractable dilemma. In the final analysis, the actions and decisions taken here in the United States will change the lives of those overseas who seek the hospitality of our shores and the protection of our tradition as a nation

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2. Nationwide economic data apparently will not be relied on by the Department of Labor in the adjudication of H-2 certification petitions.
 3. The Secretary of Labor may require as a condition of issuing the labor certification the payment of a fee in an amount which reflects the cost of processing applications for certification and of monitoring compliance with the conditions of those nonimmigrants admitted under H-2 status.
 4. Labor certification will be precluded for any nonimmigrant admitted to the United States within the previous five year period *unless* the alien can demonstrate that during that period, s/he was not present in the United States as an H-2 nonimmigrant for more than the allowable period of time. In addition, the alien must demonstrate that s/he did not violate the terms of that previous admission. Moreover, if the employer who wants to bring the H-2 temporary worker into the United States violated a term or condition with respect to the employment of H-2 aliens during the previous five-year period, he cannot thereafter petition for an H-2 beneficiary who needs labor certification.

This proposal, as currently drafted, is problematic. The data used by the Department of Labor will rarely be current, leading to decisions on labor certification that do not reflect existing conditions in the labor market. Moreover, there is no quick or easy administrative definition as to what would constitute a "reasonable time" for the training of United States workers, nor how many such native workers would be a "sufficient" number. Rather than promoting speed, efficiency and objectivity, the so-called "Simpson-Mazzoli bill" might complicate and slow down the entire labor certification process, already moving at a snail's pace.

Given the controversial nature of the amnesty provisions and the disinclination of Congress to incur political risk during mid-term election year, it is doubtful that the Simpson-Mazzoli bill will become law this session. Moreover, insofar as labor certification is concerned, House Judiciary Chairman Peter Rodino appears committed to the retention of individual labor certification. See *N.Y. Times*, Aug. 24, 1982, at 28, col. 3.

of immigrants. Whether the law will continue to be refined in future legislation to encourage cultural enrichment and diversity will depend upon how we confront the broader question of immigration and foreign workers.

