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USCIS ISSUES CONTROVERSIAL CLARIFICATION OF REQUIREMENTS FOR AGENTS FILING AS PETITIONERS FOR O AND P VISAS

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U.S. Citizenship and Immigration Services (USCIS) issued a controversial clarification on October 7, 2009, for performing arts associations and their members of the regulatory requirements for agents who file as petitioners for the O and P visa classification. The agency said it issued the clarification in response to inquiries "that reveal confusion regarding the circumstances under which an agent may file O and P petitions on behalf of multiple employers."

USCIS noted that O and P petitions may only be filed by a U.S. employer, a U.S. agent, or a foreign employer through a U.S. agent. Both the O and P regulations provide that if the beneficiary employee will work concurrently for more than one employer within the same time period, each employer must file a separate petition with the USCIS Service Center that has jurisdiction over the area where the person will perform services, unless an "established agent" files the petition.

A petition filed by an agent is subject to several conditions, USCIS noted. A petition involving multiple employers may be filed by a person or company in business as an agent as the representative of both the employers and the beneficiary, if:

- The supporting documentation includes a complete itinerary of the event or events.
- The itinerary specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues, or locations where the services will be performed.

- The contract between the employers and the beneficiary is submitted.
- The agent explains the terms and conditions of the employment and provides any required documentation.

In addition, USCIS pointed out, an agent who is also the beneficiary's employer may file a petition, but the agent must specify the wage offered and the other terms and conditions of employment as described in the contractual agreement between the agent/employer and the beneficiary employee. Therefore, while the regulations permit an agent to file a petition on behalf of multiple employers (including the agent/employer itself), the regulations require that the agent be "in business" as an agent. An employer that files a petition on behalf of other employers under the guise of being such employers' "agent" does not meet this condition, the agency said. "For example, if Employer A files a petition for a beneficiary it will be sponsoring, and submits an itinerary that includes performances for the beneficiary with other employers, at different times, and at different venues, USCIS generally would only approve the petition for Employer A and deny the petition with respect to the other employers."

Such a petition may be approved with respect to all employers only if Employer A can establish to the satisfaction of USCIS that it is "in business as an agent," and that the other employers are its clients. This may be accomplished, USCIS said, by agent-Employer A submitting all of the required evidence listed above, as well as evidence of the agency relationship, such as a copy of its contract with the other employers.

This is how the new USCIS guidance can completely kill the nonprofit arts industry. Suppose a symphony orchestra applies for an O visa for a solo violinist and provides an itinerary for its own performances with this artist, and in the O petition the symphony orchestra states that while the beneficiary will perform for this orchestra, she will also be doing some performances on behalf of another symphony orchestra, which will pay the violinist directly. These O-1 petitions have historically been approved, but they would no longer be approvable under the new guidance.

Our colleague Angelo Paparelli predicts that this news release will shake up the world of arts and entertainment. As the "Nation of Immigrators" blog notes, "Major producing and presenting venues, arts organizations, funding and grant-making organizations, the theatre-going public, and especially immigration

practitioners who work with performers should all object formally, forcefully, and fast. Unless this informal rule is rescinded, American theaters, concert halls and other presenting venues are going to find big holes in their budgets for upcoming seasons, and risk losing touch with the world of art and entertainment outside our borders."

The USCIS news release is available at http://www.uscis.gov/USCIS/New%20Structure/Press%20Releases/2009%20Press%20Releases/Oct%202009/o-p-visas-7-Oct09_update.pdf. A related fact sheet is available at http://www.uscis.gov/USCIS/New%20Structure/Press%20Releases/2009%20Press%20Releases/Oct%202009/o-p-visas-7-oct-09-factsheet.pdf. The blog is available at http://www.nationofimmigrators.com/.