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Coming to America: How Restrictive and Arbitrary Immigration Laws Burden the Artistic Community

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ABSTRACT:
The main focus of this work is to explore the effect that U.S. Immigration laws have on the international and domestic artistic community, particularly since the attacks of September 11, 2001. The economic impact of stricter immigration laws is observed in many industries, including music, film, and fashion. While there has been a candid effort by many legislators to re-write the laws, little progress has been made, and the application of the laws continues to be highly subjective and capricious. In fact, practitioners in the field often express their discontent towards a largely discretionary system that has offered little guidance to the community as far as the legal standards and burdens that must be met when filing certain petitions. Nevertheless, the goal of both lobbying practitioners and supportive lawmakers is to make the immigration system more accessible and accommodating to the needs of foreign artists while not jeopardizing national security and safety.

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Coming to America: How Restrictive and Arbitrary Immigration Laws Burden the Artistic Community

Introduction

For better or for worse, the United States of America is the preferred destination for many immigrants. From the English Pilgrims in the 1600’s to the Italian and Irish workers in the 1900’s, immigrants have played such an important role in our society that even some of our most beloved fictional characters, like Fievel Mouskewitz and Michael Corleone, have come from immigrant tales. That trend certainly continues today as immigrants play an increasingly bigger role in nearly every sector of our economy, adding “a net economic benefit of up to $10B a year.”¹ Out of those, many find their version of the “American Dream” in the entertainment community, and likewise, the industry welcomes their artistic and financial contribution. In 2011, foreign artists and entertainers accounted for roughly 30% of Grammy Award winners, and over 45% of Oscar winners.² Not only do they represent a sizeable portion of the industry, but immigrants are also a major source of revenue.

Nevertheless, stricter U.S. immigration laws pose many barriers to foreign artists’ attempts to showcase their talents in the American market. Though national security is undoubtedly the most important and unwavering goal of immigration laws, entertainment industry leaders and practitioners believe that the system does not realistically meet industry demands. To wit, the biggest complaints point to the largely discretionary and arbitrary application of the laws, the harsh procedural requirements, and the unwillingness of many legislators to meaningfully address these issues. From the industry perspective, all these amount to great uncertainty as to whether foreign artists...
will be allowed to perform in the U.S., and whether it is worth taking the risk to book their acts. The economic impact of unclear immigration laws is observed across the board, including the film, music, and fashion industries. Still, the goal of the American artistic and entertainment community should be to make the immigration system more accessible to the needs of foreign artists while not jeopardizing national security and safety.

Part I of the paper will focus on the history and evolution of the Immigration and Nationality Act of 1990 (the “1990 Act”), and will examine how Sections 101(a)(15)(H), (O), and (P) are construed and applied to particular types of petitioners. Part II will expose the detrimental effect that these laws can have on the artistic and entertainment industries, both on a creative and economic basis. Part III will elaborate on what is being done to ameliorate these issues, and propose a new approach realistically tailored to benefit the industry while not subrogating the purpose of the Act. Finally, Part IV will conclude the paper by re-iterating the present state of the 1990 Act and how its application is damaging one of the most thriving and notable industries in America.

I The Acts and the Visa Categories

A The 1952 Act and the H-1 and H-2 Visas

Until the last quarter of the nineteenth century, immigration was not a heavily debated topic among the public or the legislature. At a time when most of America was still uncharted territory, the country welcomed immigrants to explore the frontiers and carve the way to a new American society. As America developed its own social identity - largely through the work of immigrants – the sentiments towards immigrants began to change, and starting in 1921, the first codification of quotas clearly demonstrated the
intent to selectively keep some people out while letting others in.\textsuperscript{5} While the preference quotas referred mostly to the immigrant’s country of origin, behind them lurked reservations about their race, morality, and political ideology.\textsuperscript{6} Finally, in 1952, in an effort to control the flow of immigrants, Congress passed the Immigration and Naturalization Act (the “1952 Act”).\textsuperscript{7} Although the 1952 Act still focused largely on a quota system, it did take into account certain immigration priorities for both skilled and temporary workers.\textsuperscript{8} Particular to the artistic community, nonimmigrant artists and entertainers had to apply for an H-1 or an H-2 visa before traveling or performing in the United States.\textsuperscript{9} Although much has changed in the H visa since then, this category was, and continues to be, applied to skilled and unskilled workers coming to the United States temporarily.\textsuperscript{10}

1 The H-1 Visa

Although not specifically created for artists and entertainers, the H-1 Visa category was applied to petitioners of “distinguished merit and ability...coming to perform services of an exceptional nature requiring such merit and ability.”\textsuperscript{11} In order to establish their eligibility as artists with “distinguished merit and ability,” petitioners had to provide documentation showing a “high level of achievement” and “prominence” in their field of endeavor as demonstrated by “sustained levels of national or international acclaim.”\textsuperscript{12} Among the ways of showing such distinction, the regulations themselves pointed to important determining factors such as (1) whether the petitioner would be performing a leading role; (2) the reputation of the work or group with which the petitioner would perform; (3) the petitioner’s past commercial success and salary; and (4) whether the petitioner had received any prestigious awards.\textsuperscript{13}
This category, unlike the H-2 described below, did not focus on the availability of American labor as much as it did on the talent and recognition of the petitioner; thus, it did not require a certificate from a labor organization, nor did it require that the work performed be temporary.\(^{14}\)

2 The H-2 Visa

Originally created for temporary seasonal workers, the H-2 category nevertheless served as an alternative for those artists unable to meet the prominent distinction required for the H-1 visa.\(^{15}\) In order to qualify for an H-2 visa, the petitioner had to prove that he or she was coming to the U.S. temporarily to perform jobs for which there were insufficient American workers who were willing, available, and qualified to do.\(^{16}\) Further, the petitioner had to obtain a certification from the Department of Labor attesting to such conditions, and also stating that allowing the petitioner to perform the job would not negatively affect the wages of American workers.\(^{17}\)

3 Criticism and Need for Change

The 1952 Act had been written with an eye towards protecting American labor and employment, though it did not effectively or realistically address the needs of immigrant artists and entertainers. For those immigrants, the H-1 and H-2 Visa requirements were seen as “severely time consuming, cumbersome, and too difficult for practical use.” \(^{18}\)

B The 1990 Act and the O, P, and H-1B Visa Categories

As result of a large increase in illegal immigration, and after nearly a decade of Congressional debate and compromise, Congress passed S. 358, also known as the Immigration Act of 1990. \(^{19}\) Sponsored by Senator Kennedy and supported by Senators
Simpson and Dodd, the 1990 Act was a substantial departure from the strict quota based immigration system to a more comprehensive merit and relationship-based approach.\textsuperscript{20} As described by President George Bush upon its signing, the 1990 Act represents “a complimentary blending of our tradition of family reunification with the increased immigration of skilled individuals to meet our economic needs.”\textsuperscript{21}

Divided mostly between family and employment based visas, the 1990 Act seeks to promote family unity while addressing the concerns of U.S. workers regarding cheaper foreign labor and the global economy.\textsuperscript{22} More specific to this discussion, as a result of substantial lobbying by entertainment labor organizations and private business representatives, the 1990 Act created two new nonimmigrant visa categories designed to address the immigration needs of artists and entertainers: The O and the P categories.\textsuperscript{23} Not surprisingly, the newly created visa categories and eligibility requirements created quite a stir in the industry forcing a delay in their implementation until 1992, when further revisions and amendments were made.\textsuperscript{24} Even Senator Kennedy remarked that the arts community saw the new categories as “not only a major departure from current practice, but a serious threat to their artistic programs.”\textsuperscript{25}

In the interim, artists and entertainers used the revised H-1B category to enter the country, despite the statutory language specifically excluding O and P qualifying aliens from using it as an avenue for entry.\textsuperscript{26} This patchwork legislation created an obvious gap in the admission process for such petitioners because they could no longer apply for the H-1 or H-2 visas, and they could not yet apply for the O or P visas.\textsuperscript{27} Still, under this temporary accommodation, foreign entertainers coming to “perform services of an exceptional nature requiring such merit and ability” in the U.S. were required to establish
their “prominence” much like the old H visa categories. Nevertheless, the H-1B category continues to be the only avenue by which some artists and performers may enter the country today.

1 The O Visa Category

Section 101(a)(15)(O) of the 1990 Act establishes the O visa category; the visa option most commonly used by artists, performers, and TV and movie stars to enter the U.S. Generally, the O visa is designed for individuals of “extraordinary ability in sciences, arts, education, business, or athletics,” or individuals of “extraordinary achievement in the motion picture and TV industries.” While these terms seem self-explanatory and similar, they are considered terms of art and distinguishable, illustrating the Act’s intended selectiveness in the admission process. The O visa category is subdivided in three parts, the O-1, O-2, and O-3, however only the O-1 will be discussed at length in this paper.

a The O-1 Visa

i The Original Version

The O-1 category addresses the needs of the actual aliens possessing such extraordinary qualities, often referred to as the O-1 principal. As mentioned above, the language of the 1990 Act makes a clearly distinguishes between artists, movie stars, and the other individuals covered under the section, and each of their applications is subject to a different standard of review. More specifically, “extraordinary ability” in the sciences, education, business, and athletics is demonstrated by proving that the alien is an individual who has reached a “level of expertise . . . [as part] of the small percentage who have arisen to the very top of [his or her] field of endeavor.” These are individuals
who have “sustained national or international acclaim” as established by nominations for internationally recognized awards such as Nobel prizes, or substantial documentary evidence of published works, participation in academic or professional panels, or command of a high salary. Non-artistic O-1 visa petitions are subject to the most exacting standards, requiring detailed and precise documentation of continued fame and recognition.

The other O-1 visa petitions, those filed by artists and movie stars, and the focus of this paper, are considered under a less rigorous standard. Unlike the above-mentioned petitions, in order to establish “extraordinary ability” in the arts, the applicants need not to be at the very top of their fields, but merely “distinguished” in their crafts. Here, “distinction” means a “high-level of achievement substantiated above that normally encountered.” The closely related label of “extraordinary achievement” in the motion picture or TV industry means a “high level of accomplishment in the . . . industry evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that the person is recognized as outstanding, leading, and well known in the . . . field.”

While not as stringent, artistic based O-1 visa petitions still must satisfy high evidentiary requirements to establish the alien’s eligibility. A key difference in the standard of review of artistic and non-artistic O-1 visa petitions is that artists and actors can demonstrate “extraordinary ability or achievement” by a single event, whereas non-artists must prove a sustained record of accomplishments. This less demanding standard is largely a result of influential lobbying by groups such as the Alliance of Motion Picture and Television Producers and the Motion Picture Association of
America. While being nominated for, or having received an internationally recognized award (Oscar, Grammy, Emmy, etc.) will add substantial weight towards proving the alien’s extraordinary prominence, the petitioner may also present documentation that he or she accomplished at least three of the following:

“(1) Starred in a major production; (2) received national or international recognition through critical reviews; (3) worked prominently with distinguished organizations; (4) produced a record that received major commercial or critical acclaim; (5) has been recognized by organizations, government agencies, or experts in the field; (6) commanded a high salary in relation to others in the field.44

The petitioner may also provide comparable evidence analogous to the above criteria.” 45 Despite the language of the law, practitioners are well aware that “[m]eeting only three criteria is a recipe for denial.” Therefore, petitioners should aim to meet as many of these qualifications as possible.46

The regulations clearly state that O-1 visa petitions must also include copies of written contracts between the petitioner and the beneficiary alien, or at least the specific terms of the alien’s employment while in the United States, including an explanation of the nature of the events or performances, and the beginning and ending dates.47 Visas may only be approved for the time required for the completion of the specified event, but only up to three years initially.48 One-year extensions may be granted thereafter if extra time is necessary to complete the original event.49

Under the original language of the 1990 Act, aside from meeting such rigorous evidentiary requirements, petitions were subject to two more hurdles. First, O-1 visas would only be granted if the Attorney General determined that the alien would “substantially benefit prospectively the United States.” 50 Secondly, the 1990 Act also required the Immigration and Naturalization Services (INS) to obtain advisory opinions
directly from the appropriate peer groups, labor organizations, or experts in the field, which validated the petitioner’s claim to fame, and that such “extraordinary ability” was required to perform the job the alien based his petition on.\textsuperscript{51} These advisory opinions must come from already established labor organizations in each sector of the industry, such as the Screen Actors Guild (SAG), the Director’s Guild of America (DGA), and the Academy of Motion Picture Arts and Sciences.\textsuperscript{52}

\textit{ii} Criticism and Amendments

As stated above, the original version of the 1990 Act was the subject of much concern by the entertainment community, particularly regarding the mandatory peer group consultations required for the O-1 visa.\textsuperscript{53} Prior to the 1990 Act, the INS was allowed to consult with a labor organization, but did so only in questionable cases.\textsuperscript{54} The 1990 Act provisions made it a mandatory practice, and a burden on the government to do so for every O-1 petition.\textsuperscript{55} Aside from possible inconsistent opinions between different peer groups or labor organizations, which would only confuse and gridlock the process, another major concern was the added time needed to process each application.\textsuperscript{56} With the law as it was, petitioners would have to wait for the INS to (1) chose an appropriate peer group or labor organization; (2) make the request for an advisory opinion based on that petition; (3) get the results; (4) make a finding on them; and then (5) ultimately accept or reject the petition. Coupled with the already limited time frame for filing such O-1 visa petitions, this process potentially left aliens with very little time to properly organize their travel and engagements, or to respond to a possible denial.\textsuperscript{57}

Once again fueled by pressure from the artistic community, Congress passed the Miscellaneous and Technical Immigration and Naturalization Amendments in December
of 1991, amending the 1990 Act and addressing some of these concerns.\textsuperscript{58} One of the major changes to the O visa category was that obtaining advisory opinions, while still mandatory, was now the responsibility of the applicants instead of the INS.\textsuperscript{59} This change had a number of benefits to the applicants such as more control over the timing of their applications and the documentation included in them.\textsuperscript{60} Applicants could not only decide the labor organization from which to request an opinion, but also were able to get it before filing the petition so as to avoid delays in the processing.\textsuperscript{61}

Underlying this change, however, was a compromise between two struggling forces.\textsuperscript{62} On one side, the entertainment industry fought to protect its interest in promoting diversity in the arts and introducing foreign talents to the American public.\textsuperscript{63} On the opposite end, organized labor representatives feared that a slow economy coupled with low requirements for the admission of alien labor would seriously injure American workers and reduce wages across the country.\textsuperscript{64} After the 1991 amendments, while the entertainment industry is better off than it was under the original law, the “INS admits in its policy guidelines that its priority is to accommodate organized labor under almost any circumstance.”\textsuperscript{65} Even today, practitioners feel that certain labor organizations are very selective when issuing favorable opinions, and will often send letters of no objection instead.\textsuperscript{66}

The other major change eliminated the Attorney General’s need to determine whether the alien would be a “substantial benefit” to the country.\textsuperscript{67} This measure was taken mostly to reduce paper work and streamline the process.\textsuperscript{68}
b The O-2 and O-3 Visa

The O-2 and O-3 visas are considered derivative visas, meaning they cannot be petitioned for independently, but only in conjunction with an O-1 petitioning alien. The O-2 visa is especially reserved for essential support personnel who have such “critical skills and prior experience” with the O-1 [principal] to the extent that they are not readily replaceable by an U.S. worker.” These are often the O-1 principal’s managers or trainers. Although the evidentiary requirement list for O-2 visas is small, in effect it is more difficult to obtain since eligibility for this visa is entirely dependent on the success of the O-1 principal’s application. Still, similar to the O-1, the O-2 petition must contain an advisory opinion from a labor organization affirming that the alien is essential and familiar to the O-1 principal, and that no American workers can perform such supporting services. Furthermore, the O-2 petitioning alien must prove that he or she has skills and experience above a general level and which are related to a longstanding relationship or specific project with the O-1 principal. This must be demonstrated by statements from the O-1 principal or persons closely related to the project in which the two aliens will participate.

The O-3 visa is reserved for spouses and children who are accompanying or following to join the O-1 or O-2 principals. Like the O-2 visa, this visa is entirely dependent on the success of the principal petition.

c Analyzing the Application Procedure Through Case Examples

As if reaching the level of extraordinary ability required for an O visa was not hard enough, the United States Citizenship and Immigration Services (U.S.C.I.S. or the “Service) also has a very strict and demanding application procedure, and failure to fully
comply with it can disqualify even the most deserving applications. This section will expose the twists and turns of the process that often lead petitioners and practitioners astray, resulting in undeserved denials or ambiguous requests for further evidence (RFE). At the heart of it all lays the problem of ambiguity, arbitrariness, and lack of precedent, arguably a lawyer’s most feared trifecta.

No matter how extraordinary they are, artists cannot self-petition for O visas. As is true for every visa category discussed in this paper, only a U.S. employer, a U.S. agent representing both the employer and the beneficiary, or a U.S. Agent representing a foreign employer may file a petition thus the agent becomes the petitioner, and the alien is referred to as the beneficiary. Also, the petitioner is responsible for paying the filing fees, currently $325 per application. Under the current law, O visa petitions cannot be filed more than one year prior to the alien’s projected date of entry. In turn, the projected date of entry must coincide with the dates of employment or the scheduled events in which the alien is performing. For anyone familiar with the touring or production process, this stringent time limitation should already raise some red flags since any possible delays in attaining the alien’s visa could set of a disruptive chain of events, jeopardizing the entire project or tour.

The most crucial part of the process is properly filling out the I-129 Petition for Nonimmigrant Worker Form, the twenty-six-page document asking the petitioner to present competent evidence to establish the beneficiary’s eligibility for the requested visa. As discussed above, unless the beneficiary has won a major internationally recognized award, such as an Oscar or a Grammy, he will have to meet three out of the possible six criteria enumerated in 8 C.F.R. § 214.2(o)(3)(iv). The first criterion is
established by presenting evidence that the alien has performed or will perform as a lead or starring role in a production with a distinguished reputation. The analysis in this criterion is two-fold. First, the Service must determine what is a considered a leading role, and second, the Service must determine what constitutes a production of distinguished reputation. Despite some training regarding visa petitions generally, U.S.C.I.S. agents are in no way capable of evaluating the artistic and qualitative aspects of the petitioner’s work, as they are required to do. While the advisory opinions may provide the adjudicating officers some background about a particular artist and his craft, practitioners understand that it is their job to educate these officials about the merits of the application and the credibility of the evidence presented. Nevertheless, it is generally agreed by attorneys and industry leaders alike that “INS officials must understand the unique circumstances” of the entertainment industry to effectively review these cases.

In a recent case involving a professional stuntman and actor from Japan, the petitioner submitted evidence that the beneficiary had performed leading roles in several Japanese short films, many of which had won awards and received international recognition in foreign film festivals. Nevertheless, the INS rejected such evidence claiming that, while it was undisputed that he played a lead role, “there was insufficient evidence to establish that the film itself or the film festivals in which it appeared had a distinguished reputation.” More shockingly, the beneficiary also received the “Best Actor of the Year” award by the Theater of Arts Hollywood in 2006, with the director of that theater company attesting to the beneficiary’s brilliance. Unconvinced, the INS stated that such evidence did not establish the reputation of the actual award or the
organization, and even if it did, an “award for stage acting is not indicative of [the beneficiary’s] extraordinary achievement in the motion picture and television industry.”

Meanwhile, a British actor having played a starring, not necessarily lead, role in such TV shows and films as “Young Americans” and “Queer as Folk” 1 and 2, was granted a visa, having successfully demonstrated, among other things, his participation in productions of distinguished reputations. It is worth noting that the British actor’s original petition was denied by the INS, but eventually granted by the Administrative Appeals Office (AAO). Such inconsistent and haphazard results appear to indicate that the decision-making process is more a product of the subjectivity of the U.S.C.I.S. agent than any clear objective standard.

The second criterion requires documentation showing national or international recognition by critical reviews in major newspapers or publications. While this may be an easy criterion to meet by someone like Sir Paul McCartney, it may be very difficult, if not impossible, for a newcomer or someone coming from a country with limited or restricted media distribution. A recent case by a Latvian painter illustrates this very problem. Here, the painter presented evidence of several scholarships and awards won over a two-year period and proof that her work had been displayed and sold in several art galleries throughout Europe, but few published reviews. Once again, the INS denied the petition declaring that it was “unclear how she [met] the standard of “distinction’ simply by having her work exhibited in galleries, even if such galleries [were] “highly selective.”

Further, the law does not account for new mediums and unconventional sources of publicity such as Internet blogs and forums. In this day and age, a new artist may very
easily receive all of his or her publicity online and skip the major hard-copy publications entirely. Under the language of the law, even a talent with a clear and substantial virtual fan base may be denied a visa if the U.S.C.I.S. does not recognize the source.¹⁰⁴

The third criterion, the requirement that the alien has performed or will perform in a lead or starring role for distinguished organizations, “turns on the reputation of [the alien’s] past and future employees.” ¹⁰⁵ Returning to the case of the Japanese actor, the INS was equally unimpressed by evidence that the alien would be participating in projects with million-dollar budgets, and acting alongside “some of the most popular actors and actresses in the entertainment industry.” ¹⁰⁶ It is easy to notice how this ambiguous and amorphous terminology can lead to crater-sized holes in the legislation.¹⁰⁷ With no set precedents and no clear cut standards of review, U.S.C.I.S. officials can pick and choose which paragraph of the petition they believe do not meet the requirements; today the issue might be the reputation or documented fame of the alien, tomorrow it may be the reputation of the project, and the next day might be the reputation of the critic.¹⁰⁸

The fourth category requires that the alien artists have “major commercial or critical acclaim as evidenced by such indicators as title, rating, and box office receipt.” ¹⁰⁹ Unlike the previous criteria, this one seems to examine purely objective and quantifiable data, thus participation in a blockbuster movie should carry some weight towards satisfying this category. Unfortunately, even one of the biggest box office titles in history was not sufficient to help the next two actors in attaining their visas.¹¹⁰ When British actors Kenny Baker and Warwick Davis, respectively the famous R2D2 robot and Wicket the Ewok in the original Star Wars Trilogy, were called to participate in a promotional tour of the 20th Anniversary and re-release of the movies, they were not stopped by Darth
Vader, but instead by an even more imposing dark force: the INS.\textsuperscript{111} Despite overwhelming evidence of the financial and cultural success of the \textit{Star Wars} movies, and of the actors’ participation in other notable projects such as “\textit{Willow}” and the “\textit{Harry Potter}” series, the INS nevertheless denied their visa stating that any and all media reports referred to each of them merely as “the person[s] who portrayed [R2D2 and Wicket] without further embellishment.” \textsuperscript{112} Not only does this decision ignore the artistic role they played in those movies, it essentially discredits them as serious actors. Interestingly enough, as required by law, each of these petitioners submitted advisory opinions from the SAG indicating that the organization had “no objection” to their participation in the promotional tour.\textsuperscript{113}

The fifth criterion requires the petitioner to submit evidence that the alien has received significant recognition from organizations, governmental agencies, or other experts in the field.\textsuperscript{114} This can be established by testimonials clearly indicating the expert’s authority and knowledge of the alien.\textsuperscript{115} As previously discussed, the INS had doubts regarding the distinction of the Latvian painter despite her work being displayed in several “selected exhibitions.” \textsuperscript{116} Similarly, the INS was not persuaded by the letter testimony of the director of the Art Academy of Latvia, the Chairman of the City of Sarasota Public Art Committee, and the owners of three other galleries, stating that the beneficiary is “a burgeoning talent” and “truly unique for her young age.” \textsuperscript{117} As if running out of valid reasons for denying the application, the INS declared that O-1 visas are reserved for those extraordinary talents who have already reached a level of leading recognition, while the beneficiary merely has a “growing reputation and the potential to becoming a prominent artist.” \textsuperscript{118}
Explanations such as these, which ignore the obvious and extraordinary talents of the beneficiaries, seriously questions the validity of the evidentiary requirements since the Service can actually deny an application for literally ANY reason.\textsuperscript{119} The current immigration system allows the officers so much discretion in their decision making that most courts reviewing these cases cannot even point to a specific law that has been violated or unfairly interpreted.\textsuperscript{120} In essence, it is difficult for the U.S.C.I.S. officials to break the law when they have the opportunity to make the law as they go along.\textsuperscript{121}

The sixth and last criterion that a petitioner must meet, like the fourth, also appears to be purely quantitative on paper, though vagueness and lack of precedent effectively muddle the issue in its application.\textsuperscript{122} Here petitioner is required to establish that the beneficiary commands a high salary in relation to others in the field.\textsuperscript{123} The main question, which is not addressed in the law or the regulations, is whether the U.S.C.I.S. should compare the beneficiary’s salary with others in the field in the U.S. or in the alien’s home country.\textsuperscript{124} Procedural cues like the requirement of a labor organization certificate, and policy concerns about hiring cheap foreign labor would lead to the assumption that the alien’s salary should be compared to that of equivalent U.S. workers.\textsuperscript{125} The beneficiary aliens on the other hand would urge that their salary should be compared to others in their home countries, which would demonstrate their level of accomplishment in relation to the communities they are coming from.\textsuperscript{126}

The cases unfortunately offer little guidance in solving this issue. Turning back to the Japanese actor, evidence of a contract for an annual salary of $80,000 and $900 per day for work in a feature film was not considered prestigious enough to establish a high salary in relation to highly accomplished television and movie actors.\textsuperscript{127} Despite stating
that only 10% of actors in the performing arts actually earn more than $80,000 a year – most artists are in fact starving artists – the INS responded that such data could not be verified.\textsuperscript{128} The writer of this paper followed the petitioner’s source and confirmed the reported information after a very brief Internet search.\textsuperscript{129} More shockingly, the Latvian painter presented detailed records that her paintings had sale prices ranging from $1,500 to $13,800.\textsuperscript{130} Like the Japanese actor, the Latvian painter also presented information from the Department of Labor showing that painters in the U.S. earned on average between $8.00 and $11.00 an hour.\textsuperscript{131} The INS’ response borders on the irrational; declaring that the average wage data is irrelevant since this alien would not be paid by the hour.\textsuperscript{132} In a clear case of extraordinary ability evidenced by the high price of her work, this painter should have been granted a visa since 1) it would take an average painter at least 1,000 working hours to make up the price of only one of her works.

Ironically, if the famous Dutch painter Vincent Van Gogh was trying to apply for an O-1 visa today as an artist of “extraordinary ability,” it is likely that he would be denied. Despite post mortem worldwide fame, Van Gogh received very little recognition during his lifetime and only sold one painting, “The Red Vineyard,” for 400 Belgian Francs in 1890.\textsuperscript{133} That amount would equal roughly $1,600 today, just slightly above what the Latvian painter charges for her most meager work of art.\textsuperscript{134}

Considering the mountainous amounts of evidence required to establish eligibility for a temporary nonimmigrant artistic visa, it should be no surprise that many petitions are denied. While the regulations allow petitioners to appeal such decisions either to the “Administrative Appeals Unit [AAU] . . . or the Board of Immigration Appeals [BIA] of the Executive Office for Immigration Review, few practitioners actually do so.\textsuperscript{135} The
reason is that petitioners and beneficiaries work in an event driven and business oriented industry, and “massive government bureaucracy has worked to muscle petitioners out of the appeals process.” Despite the sometimes incoherent, often confusing, and always arbitrary process of reviewing applications, even if the alien does prove eligibility for an O visa, he or she is still not guaranteed entry into the U.S., not even the issuance of a visa. The visa process is a frustrating and arduous two-part system, where the applicant must first prove eligibility to the U.S.C.I.S., and then demonstrate that he or she is not inadmissible as determined by the Department of State (DOS). This particular phase will be discussed in greater detail below due to a number of new security measures imposed after the attacks that occurred on September 11, 2001 that apply to all visa applicants. It suffices to say for now that the process involves a great deal of probing into an applicant’s personal life, including a detailed look into his or her criminal and financial records. Also, while U.S.C.I.S. petition denials may be appealed to the AAU, there is no similar review process for DOS consular decisions.

2 The P-Visa Category

Whereas the O visa can be used by a multitude of aliens of “extraordinary ability,” Section 101(a)(15)(P) of the 1990 Act applies only to entertainers and
Still, the P visa, like the O visa, is divided into several subcategories, each covering a different type of principal athlete, entertainer, or derivative. This discussion will focus on the P-1 visa for entertainment groups, the P-2 visa for reciprocal exchange programs, and the P-3 visa for culturally unique programs.

a  The P-1 Visa

i  The Original Version

The P-1 group entertainer visa is awarded to individuals who perform or are an integral part of an “internationally recognized” group that has been considered “outstanding in the discipline for a sustained and substantial period of time.” Although “outstanding” is not defined in the 1990 Act or in the regulations, “it has been suggested that entry under this category could be limited to superstars.” An important distinction between the O-1 and P-1 visas is that P-1 visas are available only to the entertainment group as a unit, and not to individual members to perform separately from their groups. The evidentiary requirements for P-1 entertainment groups are very similar to what is necessary for individuals under the O-1 visa. Entertainment groups must provide evidence of having received a major internationally recognized award or meet at least three of the above described six criteria. It is worth pointing out that only evidence of international recognition is relevant for the P-1 visa, indicating that a group must be more widely recognized than the individual performers in the O-1 classification. This standard is sometimes relaxed if the petitioner shows evidence of restricted access to foreign media in his home country.

As a common thread between the sub-categories, every P visa petitioner must demonstrate that his or her stay is temporary, as shown by specific contracts and dates,
and that they have no intention of permanently leaving their foreign residence.\textsuperscript{152} Further, they must all obtain advisory opinions from an appropriate labor organization.\textsuperscript{153} Under the original version of the 1990 Act, every P-1 group entertainer had to prove he or she had been an integral or essential part of the group for at least one year prior to the filing.\textsuperscript{154} Also, the P-1 and P-3 visa categories were subject to a 25,000 annual cap.\textsuperscript{155}

\begin{enumerate}
\item \textbf{Criticism and Amendment}

Much like the O visa category, the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 made certain notable changes to the P visa that became effective in April of 1992.\textsuperscript{156} The first major change eliminated the P-1 and P-3 annual cap.\textsuperscript{157} Removing a set limitation from the language of the Act did not translate into the unlimited admission of P aliens.\textsuperscript{158} Instead, the 1991 Amendments required the Attorney General to conduct a study every two years to determine the exact number of O and P immigrants that entered the country, and whether their presence was affecting the American labor force.\textsuperscript{159} While removing the number cap from the books seemed like a very good sign for future P petitioners, in reality it just made any limitation on the number of visas issued an internal decision rather than a public regulation.\textsuperscript{160}

The other major change to the P-1 visa category was an accommodation made particularly to members of professional circuses, orchestras, and ballets.\textsuperscript{161} The 1991 Amendment “exempted twenty-five percent of the members of [certain] performing group from the one year relationship criteria, and [allowed] a waiver of requirement for other members of the group if they [were] replacing an essential, former member due to an illness or other unanticipated circumstance.”\textsuperscript{162} This is because of the constant flow and replacement of members in these types of groups, and such relationship limitations
would impose severe hardships on their managers, forcing them to change their longstanding operating practices.\textsuperscript{163} Although limited in application, these amendments demonstrate a real-world level of adaptation rather than a paper-thin compromise between private and public lobbying groups.\textsuperscript{164}

\textbf{b The P-2 and P-3 Visa}

The P-2 visa category is specially allocated to individual artists or members of entertainment groups participating in a reciprocal exchange program between an American and a foreign organization or agency.\textsuperscript{165} Although this visa is rarely used, it provides an easier avenue by which countries can promote cultural and artistic exchange and diversity.\textsuperscript{166} The evidentiary requirements are easily met; however greater attention is paid to the character of the organizations and the history of the exchange program.\textsuperscript{167} Actors Equity and their British sister organization, and the American Foundation of Musicians and their Canadian counterpart are some notable organizations that often take advantage of this visa.\textsuperscript{168}

The P-3 visa allows individual performers, coaches, and groups to come to the United States to participate in “culturally unique” programs.\textsuperscript{169} Like many other terms used in the 1990 Act, “culturally unique” is also not specifically defined.\textsuperscript{170} As a result, P-3 visas have been given many different interpretations over the years, and are sometimes used as an alternative to O-1 visas.\textsuperscript{171} Oddly enough, “it is easier for an obscure German \textit{Schlager} singer to obtain work permission in the United States [with a P-3 culturally unique visa] than it is for an emerging foreign actress . . . who already has some media exposure.”\textsuperscript{172} Similar to the P-1, the P-3 visa was also originally subject to an annual cap.\textsuperscript{173}
c Analyzing the Application Procedure Through Case Examples

Similar to the O visa petitions, P visa applicants must complete an I-129 Form within one year of their intended entry date. Although the language in the P-1 provision is slightly different than in the O-1 visa category, the Service interprets the requirements to be “virtually identical.” Thus, in order to establish “international recognition” as required by law, the petitioner must establish that the group as a whole has reached “a high level of achievement in [the] field evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the extent that such achievement is renowned, leading, or well known in more than one country.” The most crucial element in P-1 visa petitions seems to be proving that the beneficiary group, under its current name and member composition, has achieved such a level of recognition.

In a recent case involving a Mexican band seeking to perform and record in the U.S., the AAO affirmed a visa denial by the INS because the petitioner failed to establish that the beneficiary band had received any national, let alone international recognition. The case turned mostly on the name of the beneficiary band as stated in the I-129 Form and in the engagement contracts, rather than the merit of the actual petition. The group had achieved substantial and documented national and international recognition under their original name, but had changed their name for U.S. marketing purposes and had not yet performed under such name, neither in Mexico nor abroad. As a result, the group had no record under its new name, even though their members “had received significant critical acclaim, not only individually, but also as part of the group” under their former name. The INS, focusing on the band’s name and not on who the members were or
how long they had been performing together, declared that having never performed under the new name, the new band did not meet the required level of international success and was not justified in relying on their achievements under its former name.\textsuperscript{182}

Such types of unreasonable decisions should trigger practitioners to think strategically when assisting their clients.\textsuperscript{183} In certain scenarios involving new groups where the individual members already have a strong record of personal accomplishments, counsel should “consider the possibility of filing separate O-1 visa petitions for the group’s members.”\textsuperscript{184}

The new musical group SuperHeavy is a prime example of how practitioners should approach this dilemma. The band was informally created in 2009 and released their first and only album in 2011.\textsuperscript{185} Although critically acclaimed in several major news sources such as Rolling Stone and Billboard Magazine, the album only ranked as high as 13th and 26th in the British and American charts respectively.\textsuperscript{186} Based on the lack of substantial notoriety and the infancy of the group, it is unlikely that the INS would consider SuperHeavy as “outstanding.” Conversely, if Superheavy wanted to perform in the U.S., the members would have better luck applying individually as O-1 “extraordinary ability” aliens than together as a P-1 “outstanding” music group. The reason is that SuperHeavy is composed of super talented foreign individuals such as former Rolling Stone Mick Jagger, R&B phenomenon Joss Stone, reggae royalty Damian Jr. Gong Marley, guitar master Dave A. Stewart, and the multi award-winning singer and composer A.R. Rahman.\textsuperscript{187} As discussed above, each individual seems like a perfect candidate for an O-1 visa, but true to the level of absurdity that only INS decisions can reach, this is a clear case where united they fall and divided they prevail.
3 The H-1B Fall Back Visa

a The Originally Intended Purpose

Section 101(a)(15)(H) relates primarily to the temporary admission of “specialty occupation” professionals as defined by 8 C.F.R. § 214.2(h)(4). Originally, the H-1B visa category was revamped to address the particular immigration needs of foreign professionals regardless of the industry they were part of, and it is thus the most commonly used employment visa.

Unlike the above-mentioned visas however, which have an eye primarily at admitting well deserving aliens with extraordinary abilities, the H-1B category seems to focus more on protecting American workers. Thus, in order to qualify for an H-1B visa, the applicants must demonstrate that 1) they can be classified as a "professional" by showing evidence of a college degree or higher; 2) they are already employed in the U.S. or have an offer; 3) their employment requires a candidate with such a degree; and 4) they will be paid prevailing wages for such professionals as evidenced by a Labor Condition Application and a Labor Wage Report. For the artists and entertainers who have not reached the level of distinction necessary to qualify for an "extraordinary ability" or "outstanding" visa, the H-1B visa may serve as a last resort to lawfully perform in the U.S. The biggest hurdle of this category is that the H-1B visa is subject to an annual cap, and in 2011, that cap was only 65,000. Although fashion models are admitted under the H-1B category and thus subject to the annual cap, their petitions are evaluated based on a “distinguished merit and ability” standard.
b  **As Applied to Fashion Models**

Similar to the requirements for an artist applying for an O-1 visa, the fashion model applying for H-1B must be one who is prominent in the field as evidenced by a “degree of skill and recognition substantially above that ordinarily encountered to the extent the person described as prominent is renowned, leading or well known in the field of fashion modeling.” 194 This requires documentation showing the alien meets at least two of the following four criteria:

“1) has achieved national, or international recognition and acclaim for outstanding achievement in his or her field as evidenced by reviews in major newspapers, . . . magazines, or other published materials; 2) has performed and will perform services as a fashion model for employers that have a distinguished reputation; 3) has received recognition for significant achievements from organizations, critics, fashion houses, modeling agencies . . .; or 4) commands a high salary or other substantial remuneration for services as evidenced by contracts or other reliable evidence.” 195

c  **Analyzing the Visa Procedure Through Case Examples**

It should come as no surprise that the U.S.C.I.S. is as capricious with the application of the laws in these cases as they are in O-1 cases. For example, in 2004, the AAO upheld a denial of an H-1B visa petition for a model concluding that all the evidence only established that she was in fact a model, though did not prove her rank as distinguished. 196 Namely, the petitioner had offered numerous “tear sheets” and letters from leading persons in the industry describing her as “one of the most exciting and inventive models on the international fashion scene,” and that her skills in the runway and in print work transcend from her native Slovak Republic to North America. 197 Nonetheless, the AAO declared the letters only “provided formulaic statements” but did not otherwise substantiate the beneficiary as having significant international recognition in the field. 198

The panic that ensued following the 2001 terrorist attacks affected several areas of our legal system, including immigration laws. Because most of the 9/11 terrorists had entered the country under nonimmigrant visas, Congress passed a series of regulations aimed at increasing the screening process and being more selective in the admission of aliens into the country. Among them, the Enhanced Border Security and Visa Entry Reform Act, the Homeland Security Act, and the Intelligence Reform and Terrorism Prevention Act stand out as new laws “aimed to tighten procedures and oversight of aliens temporarily admitted to the U.S.” Although national security is a top priority, many of these new regulations made the artist visa application process much more complex and costly, resulting in severe economic and cultural impacts for the entertainment community.

1 Mandatory Interviews at a U.S. Consular Office

Section 222(e) of the 1990 Act gives the DOS complete discretion to request personal interviews with each nonimmigrant visa applicant. Before 2003 though, this power was applied liberally and only in questionable cases, but now it is basically mandatory for all applicants, especially artists and entertainers. Data from the U.S. Consulate in South Korea shows that prior to 2004, roughly sixty-five percent of applicants were called for a personal interview. That number has risen to ninety-five percent of applicants since then. While this may seem like a mere inconvenience for an individual artist, it can be a defeating obstacle for larger groups, groups located in remote locations, or groups whose members each live in a different country, which is very common in Europe. The case of the famous British group The Halle Orchestra
serves as an eye-opening example of the impracticality of this rule. In 2007, the group was forced to cancel its first U.S. appearance in over a decade because of the financial and logistical constraints posed by the new regulations. Attainment the visas became cost prohibitive when the entire eighty-five-member group was required to travel to the U.S. Embassy in London, a process that would have cost nearly $80,000.

Another practical problem of the interview requirement is that the people conducting the interviews at the U.S. Consulate are not the same people who approved the visa petition. As stated above, an American agent or employer must file the visa petition to one of the U.S.C.I.S. Service Centers in the U.S. Approving the petition only grants the applicant eligibility for the requested visa, but not the actual visa in his or her passport. Thus, when the applicant arrives at the U.S. Consulate, the officer conducting the interview is often not familiar with the specifics of each particular case. Although visa eligibility determination has already been made, the way the process is structured invites the possibility of a second adjudication at the consulate, and produces yet another potential roadblock to the applicant.

The main reason for the in-person interviews is the need to obtain the alien’s biometric data, consisting of fingerprints, photographs, and signatures, in order to “determine if he or she is “safe” to enter the country.” The DOS then matches the data against several international databases screening for criminal records and/or possible association with known terrorist groups.

2 Increased Intensity and Scope of Background Checks

Although not a particularly new requirement, the DOS has significantly revamped the scope and methods used to conduct background checks for nonimmigrant visa
applications. Generally speaking, the DOS is looking for evidence that would classify the alien as inadmissible under 8 U.S.C. § 1182. Grounds for inadmissibility include (1) belief that the alien does not intend to return to his or her home country after his work is complete in the U.S.; (2) evidence that the alien has lied in his visa application; (3) belief that the alien will not have sufficient financial means to support himself while in the U.S. and eventually become a public charge; or (4) a past criminal record, in the U.S. or abroad, or poor U.S. immigration history. The last mentioned factor, relating to prior criminal records, is particularly relevant to the artistic and entertainment community, a community with a long and known record of reckless behavior and recreational drug use.

In 1971, none other than former Beatle John Lennon was placed under deportation proceedings after applying for renewal of his nonimmigrant visa because of a prior “cannabis resin possession” charge in the U.K. According to the INS and the BIA, Lennon’s possession charge violated the U.K.’s Dangerous Drugs Act of 1965, and thus precluded his admission under Section 212(a)(23) of the 1952 Act. After applying for a discretionary waiver of inadmissibility and years of litigation with the INS, Lennon was finally granted a relief from deportation in 1975, and allowed to remain in the country with his wife and new-born child. This point remains relevant in the entertainment community until today. For instance, British pop star Lily Allen had her O-1 visa revoked in 2007 after she was arrested in London for an altercation with the paparazzi, even though this arrest did not result in any criminal charges against her.

More disturbing may be the case of late British singer Amy Winehouse. In 2008, the talented singer was unable to attend the Grammy Awards ceremony because her visa
petition was denied even though she had been nominated for six categories – the one criterion that alone qualifies an artist as having an “extraordinary ability.”221 The details of the denial were not disclosed but sources say it may have been because of her well-documented drug and alcohol use and a previous arrest in Norway for marijuana possession.222 As a result, Winehouse who was schedule to perform live at the event, was forced to perform via satellite from London.223 To add insult to injury, the Bush administration later reversed the decision and granted her a visa.224 By then it was too late, even though she had won five out of the six categories she was nominated for.225 Renowned legal scholar Jonathan Turley says such incidents “demonstrate the disturbing degree of discretion in the visa system, discretion that can lead to the arbitrary and capricious use of the laws governing entry into the United States.” 226

3 Premium Processing

Among the new requirements, the institution of the Premium Processing fee is the wolf in sheep’s clothing, and while it is a blessing to some, it is a curse to many others.227 The Premium Processing fee costs an additional $1225 and ensures that the application will be processed in 15 days.228 Although this may sound like a great extra benefit, in reality it is a cynical example of government bureaucracy and abuse. Under 8 U.S.C. § 1184(c)(6)(D), the Attorney General is already required to adjudicate all complete nonimmigrant visa petitions in “no more than 14 days.” 229 Nevertheless, the Premium Processing petitions also cause further delays for the regular petitions, since those are placed in cue behind the expedited ones.230 The U.S.C.I.S. data shows that before the Premium Processing program was in place, the application process took an average of 45 days, but after the program began, processing regular applications takes between 45-180
days.\textsuperscript{231} Aside from blatantly ignoring the law, and causing even further delays for most applicants, the Premium Processing fee also discriminates against less fortunate artists and organizations.\textsuperscript{232} Duke Special for example, one of Northern Ireland’s greatest new musicians, was forced to cancel two U.S. performances “because he could not get his visa in time.”\textsuperscript{233}

Despite this, the Premium Processing program is still viewed as a step forward by petitioners.\textsuperscript{234} From a real world point of view, practitioners understand that bureaucracy will always be present, so despite the many enumerated problems with the program, paying the fee at least gives them some certainty in a largely arbitrary process.

\textbf{II The Financial Impact on the artistic community}

All of the above outlined issues regarding the capricious application of immigration laws amount to a very tangible result: Economic loss. Although there is an immeasurable amount of cultural loss due to ever increasing barriers to foreign artistic exchange, the dollar amount at stake is very easily calculated, and it affects the entire entertainment industry. Ironically, while labor unions aim to protect American performers, these “unduly harsh eligibility requirements for alien entertainers and artists might affect the current employment of Americans … [overseas due to] retaliation in the form of reciprocal restrictions by foreign governments.”\textsuperscript{235}

\textbf{A Music Industry}

The music industry in the U.S. is one of the best in the world, though it is not a purely domestic enterprise.\textsuperscript{236} As it has been true for decades, it is heavily influenced and reliant on numerous foreign musicians for both inspiration and revenue. Thus, anything
that directly or indirectly works to keep international musicians from penetrating the market translates to lost profits.

Bill Kubeczko, Executive Director of the Cedar Cultural Center in Minneapolis, MN, estimates he has lost over $140,000 just because of visa related performance cancelations between 2001 and 2003. Visa delays, he says, are not always related to arbitrary petition denials; they can also be caused by a tremendously backlogged system which can take up to six months to issue a visa. At today’s pace, six months of exposure to the U.S. market can be the make or break of an entertainer’s career. Mr. Kubeczko’s loss, albeit significant, pales in comparison to what is at stake in larger music festivals. The ten-day music, film, and interactive media festival South by Southwest, SXSW, is a perfect example of how astronomical these losses can be. The festival, which attracts over 100,000 visitors to watch a lineup of 1,100 performers, has an estimated $103 Million impact in the city of Austin, TX. Not only are the visitors from all over the world, but over 50% of the performers are usually foreigners; thus, the success of the event is closely tied to U.S. immigration laws. Considering the problems that took place at the 2009 College Music Journal festival, CMJ, it is not unwarranted that SXSW organizers feared that a number of their headline acts would “have difficulty attending the festival given the stricter visa requirements . . . in place.”

Despite being a success for many years in New York City, the CMJ still has trouble navigating the visa system. In 2009, the CMJ was forced to cancel the appearance of at least three headline acts such as award winning British stars Speech Debelle and V.V. Brown, and the Swedish band First Aid Kit because of visa application delays. Further, were it not for the assistance of New York Senator Kirsten Gillibrand,
the band Brazilian Girls would have been without its German born lead singer, Sabina Sciubba, for a few of their scheduled shows.\textsuperscript{246} A delay in her visa application almost forced the band to cancel pre-scheduled performances.\textsuperscript{247} Thankfully, Sen. Gillibrand understands the importance of cultural diplomacy and that “musicians from overseas who perform in New York add tremendous value to the City’s vibrant cultural and touristic economy.”\textsuperscript{248}

B Fashion Industry

Musicians are not the only performers who see New York as a Mecca for their profession. New York’s Fashion week, one of the most celebrated in the world, is not only a major source of professional exposure for fashion brands and models, it is also one of the city’s biggest revenue producing industries.\textsuperscript{249} In 2011, the total economic impact of the fashion industry was over $773 million, contributing roughly $1.6 billion in annual tax revenue for the city.\textsuperscript{250} Considering that nearly 60\% of that figure comes from direct visitor spending during Fall Fashion Week alone, it is no surprise that local politicians are fighting to help expedite visas for fashion models and industry personnel.\textsuperscript{251} New York City’s Mayor Michael Bloomberg, one of the most notable politicians hoping for visa reform, fears that “if international fashion companies face too many visa problems in America, they will simply move their billions in revenue and thousands of jobs to our competitors overseas.”\textsuperscript{252} He is among many other mayors and business leaders that have joined the Partnership for a New American Economy, a group dedicated to highlighting the “critical need to fix our broken system” by raising “awareness of the economic benefits of sensible immigration reform.”\textsuperscript{253}
C Performing Arts industry

The case of the famous Ballet Freiburg is another instance where the U.S. immigration system failed and left performers at the hands of caring legislators. When directors at New York’s Lincoln Center wanted to bring the German act to our shores, they did not expect they would be relying purely on someone’s handshake in order to put on the show.\textsuperscript{254} One week before the performance, Lincoln Center’s staff discovered one of the dancers had not been granted her visa because she had been born in Libya, a factor that somehow did not sit well with U.S.C.I.S.\textsuperscript{255} When Wendy Margo, an Associate producer of Contemporary Programming at Lincoln Center called the State Department for further explanation, she was told simply that “[she’d] better make other plans, because there is no telling how long it will take [to issue the visa].”\textsuperscript{256} It was a pure coincidence that a former company manager was willing to help and pull some strings at the U.S. consulate in Germany.\textsuperscript{257}

III The Solution

A Legislation

Among several pieces of immigration legislation advanced by the House, none speak more directly to artists and entertainers than the Arts Require Timely Service (ARTS) Act. Originally introduced in 2003, the main focus of the legislation was to amend Section 214(c) of the 1990 Act to eliminate the premium processing fee and guarantee a thirty day processing time for O and P visa petitions filed by non-profit organizations.\textsuperscript{258} Unlike multi-national production companies and talent agencies, non-profit arts organizations are among the biggest losers in this process since they often lack the financial resources to pay for premium processing.\textsuperscript{259} Unfortunately, despite being
approved in the House in 2008, the 110th Congress ended session before the Senate could vote on it. In 2009, the bill was re-introduced and referred to subcommittees in both Houses, but once again it died without a vote.

As stated above, Mayor Bloomberg is one of several politicians supporting realistic immigration reform. He is a strong advocate for a bill that would make fashion models eligible for P visas instead of being locked into the H-1B category and competing with professionals from every other industry. While Mayor Bloomberg has no power to push such a bill in Congress, former NY Representative Anthony Weiner did. In 2008, Rep. Weiner introduced H.R. 4080, a bill that designated 1,000 P visas specifically for fashion models. Unfortunately, the bill went nowhere in either of the Houses.

“There is not a chance that immigration is going to move through the Congress,” said Ohio Senator John Boehner in 2010. To this day, such passive inaction from legislators, likely because of the polarity associated with every immigration bill, shows a complete disdain for the plight of foreign entertainers and domestic supporters of the arts.

B  U.S.C.I.S. Procedural Reform

In 2006, the House Committee on Government Reform held a hearing with industry leaders in response to the mounting delays in visa processing times and the obvious impact that it was having on the U.S. economy. Among panelists from several impacted industries were Yo-Yo Ma, the Artistic Director for the Silk Road Project, Inc., and Sandra Gibson, President and CEO of the Association of Performing Arts Presenters. Among the panelists representing the government were Tony Edson, Deputy Assistant Secretary for Consular Affairs and Jess T. Ford, Director of the
International Affairs and Trade Accountability Office. Mr. Ma and Mrs. Gibson began their discussion by exposing the detrimental impact that visa processing delays and logistical hurdles play on the multi-billion-dollar American entertainment industry, and concluded by requesting a number of proposed changes to the DOS’ procedures. Among them, the panelists suggested the possibility that applicants be allowed to interview at any U.S. Consulate, not necessarily the one in their country of birth, as “[t]his would eliminate costly travels and some delays.” Another request was that something be done to reduce the wait time for visas.

In response Mr. Edson acknowledged the problems and pointed to “the growing number of visa applications and vacancies in 26% of the senior staff positions” as the main causes. In addressing possible solutions, he explained that while face-to-face interviews were an effective “anti-terrorism” tool, further research and development was being done into new technologies that would allow for greater flexibility in the interview process, and to the eventual possibility of a paperless visa. As of today, there have been few procedural or technological changes in the process.

While landmark, or even meaningful, immigration reform may move at a glacier pace, all is not lost in the fight for better visa service. In early 2011, the U.S.C.I.S. released a draft template for Requests for Further Evidence (RFE). One of the biggest criticisms about the adjudication process is that, even with Premium Processing, U.S.C.I.S. only guarantees that it will respond within a certain time frame, not that any final decision will be taken. In reality, petitioners often receive a vague and ambiguous RFE on the 15th day, prompting them to scour their folders and pester their clients for any other evidence they can send to establish visa eligibility. Thus, such templates
would “ensure that the RFE’s are (1) consistent across each of the service centers, (2) related to the classification being adjudicated, (3) tailored to the individual case, and (4) concise and clear,” providing an explanation and a list of the suggested evidence that may satisfy the request.277 Though that is a small improvement, practitioners at least feel some of the impact of aggressive lobbying by the American Immigration Lawyers Association, AILA.

C Other Models and Proposed Reform

Given Canada’s geographic location in reference to the U.S., it is worth looking at how they treat the admission of nonimmigrant artists and entertainers. Like many European Union countries, Canada has different requirements for artists and entertainers depending mostly on the length and purpose of their intended stay.278 While most nonimmigrants must obtain a visa and a work authorization to work in Canada, “special rules apply to the performing arts occupations.” 279 More specifically, under the Immigration and Refugee Protection Act, these types of applicants fall in one of three categories: “(1) artists who are exempt from obtaining a work permit and can come into Canada on a visitor visa; (2) artists who must obtain a work permit but are exempt from obtaining a labor market opinion; and (3) artists who must obtain a work permit and a labor market opinion.” 280

To be eligible for the first category, an artist must be appearing alone or as part of a group to participate in an artistic performance, or be a member of the staff of such performer or group.281 Further, and most importantly, the artist must be coming to participate in a time-limited engagement, which is usually interpreted to mean a period of six to seven weeks.282 The main difference between the first and second category
depends on whether the artist is part of a specific group performing in film-co-production under an international or intergovernmental agreement, or under a Cultural Exchange Program in the U.S.\textsuperscript{283}

Using the Canadian model as a guide, the proposed reform would allow artists and entertainers a “trial” period in the U.S. as a means of giving them exposure to our market. One of the biggest hurdles in the visa application process is meeting the steep evidentiary requirements to prove extraordinary ability and distinguished merit. However, given the size and gravitas of the American market, one of the best ways of becoming well known in the entertainment world is by gaining publicity in American media. Household names like Elton John and Shakira are hardly ever affected by this problem, but new and obscure artists often find hard to meet this burden, no matter how talented they are.\textsuperscript{284}

To solve this paradox, the 1990 Act should be amended to merge the current P-category into the O category, and also create a special kind of O visa for artists and entertainers coming to perform in the U.S. for up to 90 days. Under this particular category, the applicant would not be required to demonstrate “extraordinary ability” or “distinguished merit” in the field, but only present a valid contract for work in the entertainment industry, and an advisory opinion from an appropriate labor organization confirming that the hiring U.S. agent is an established arts organization. All other DOS procedural requirements would remain the same as national security concerns take priority over any cultural or economic issues. Further, the current O visa requirements would still be applicable for petitioners seeking admission for periods longer than 90 days, though clearer standards and regulatory definitions are much encouraged still.
Ralph Waldo Emerson once correctly stated, “Every artist was first an amateur,” and as demonstrated, the biggest problem affecting these amateur artists is providing substantial evidentiary proof of their “extraordinary abilities.” This change would resolve the problem by allowing the artists a brief exposure to the U.S. market. If the artists have such “extraordinary abilities,” they will earn some recognition from reputable U.S. media during their “trial” period in the U.S., and then easily meet the extensive evidentiary requirements of the regular O visas if they decide to extend their stay past the 90-day period.

**IV Conclusion**

There is no question that our artistic and entertainment industry is heavily influenced, and many would say dependent on foreign talent. The term “melting-pot” not only describes America’s social fabric, but also defines the entertainment and artistic community that we have grown so accustomed to. Today, it is nearly impossible to flip through the radio stations or the channel guide without hearing or watching foreign born artists, and their presence in our lives are ever more prominent. Although keeping the homeland safe from domestic and foreign threats is, and should continue to be, the main focus of immigration laws and regulations, such measures should not pose overly burdensome barriers on cultural artistic exchange. For better or for worse, America has always been known for its thriving entertainment industry, one that is greatly reliant and welcoming of foreign artists and entertainers.

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3 Nassi, supra note 1, at 135.

4 Id.

5 Id.

6 Id.

7 Id. at 109-110.

8 Id. at 110.


10 Id.

11 Id. at 1664.

12 Id.

13 Id. at 1664-65.

14 Id. at 1665.

15 Id.

16 Id.

17 Id.

18 Id. at 1666.


20 Nassi, supra note 1, at 107.


22 Id.


24 Peters, supra note 9, at 1662.


Id.

Id. at 470-71.


Id. at 3.

8 C.F.R. § 204.2 (2011).


Navigating Difficult Waters, supra note 29, at 3. The most significant hurdles encountered by O-2 and O-3 visa petitions usually relate to the principal O-1 visa petition rather than the derivative O-2 or O-3 visa petition. Thus, more time will be devoted to exploring the common issues faced by O-1 visa petitions.

Id. at 4.


Navigating Difficult Waters, supra note 29, at 4.

Id.

Bernard P. Wolfsdorf & Mandy Thomson, Minding Your O’s and P’s, L.A. Law., APRIL 2001, at 47, 48; see also Peters, supra note 9, at 1677.

Id.

Id.

Peters, supra note 9, at 1677-78.

Id. at 1677.

Wolfsdorf, supra note 39, at 49-50.

Id. at 50.

Id.

48 THE O AND P NONIMMIGRANT VISA CATEGORIES, 486 PLI/Lit 267, 281

49 Id. at 281-82.

50 Goldman, supra note 23, at 10.

51 Id. at 11.


53 Peters, supra note 9, at 1670.

54 Worden, supra note 26, at 473.

55 Id.

56 Id.

57 Id.

58 Peters, supra note 9, at 1670.

59 Id. at 1672.

60 Worden, supra note 26, at 475.

61 Id.


63 Id.

64 Id. at 541.

65 Id. at 543.

66 Zakson, supra note 52, at 422.

67 Worden, supra note 26, at 474.

68 Id.

69 Wolfsdorf, supra note 39, at 52.

70 Id.

71 Id.
72 Id.

73 THE O AND P NONIMMIGRANT VISA CATEGORIES, supra note 48, at 279-80.

74 Id. at 279.

75 Id. at 279.

76 Id. at 269-70.

77 Id. at 70; see also Zakson, supra note 52, at 435.

78 Wolfsdorf, supra note 39, at 50.

79 Nassi, supra note 1, at 107; see also Zakson, supra note 52, at 425.


82 Id. at 165.


85 Sara Elizabeth Macks, Caught in the Middle: The Effect of Increased Visa Requirements on Non-Profit Performing Art Organizations, 15 Seton Hall J. Sports & Ent. L. 109, 122 (2005).

86 Bada, supra note 80, at 168.

87 Worden, supra note 26, at 477.


89 Nassi, supra note 1, at 113 (although Nassi discusses the process in relation to the EB-1 visa for “extraordinary ability” immigrants, “the evidentiary standard for this category is virtually identical to that of obtaining an O-1 (Navigating Difficult Waters, supra note 29, at 6)).

90 Id. at 132.

91 Id. at 129.

92 Nassi, supra note 1, at 132. The Immigration and Naturalization Service, INS, has been renamed and implemented into the U.S.C.I.S. as part of an administrative reorganization following the September 11, 2001 terrorist attacks.

94 Id. at 4.
95 Id.
96 Id.
97 Petitioner: [Identifying Information Redacted by Agency], AAU WAC 02 238 54702, 2003 WL 21000193 (INS Feb. 27, 2003), 2 [hereinafter British Actor Case].
98 Id. at 1.
101 Petitioner: [Identifying Information Redacted by Agency], AAU EAC 08 134 51786, 2009 WL 2748855 (INS May 4, 2009), 1 [hereinafter Latvian Painter Case].
102 Id. at 8.
103 Id.
104 Nassi, supra note 1, at 138 n.89.
107 Nassi, supra note 1, at 125.
108 Id. at 129.
111 Id.
113 Id.
114 Latvian Painter Case, 2009 WL 2748855, at 8.
115 Id.
116 Id.
117 Id. at 9.

118 Id.

119 Nassi, supra note 1, at 125.

120 Id. at 129.

121 Id.

122 Zakson, supra note 52, at 429.

123 Id.

124 Id.

125 Id.

126 Id. at 428-29.


128 Id.


131 Id.

132 Id.


134 Id.


136 Nassi, supra note 1, at 129.

137 Kimberly S. Miloch, Coming to America: Immigration and the Professional Athlete, 13 J. Legal Aspects Sport 55, 67 (2002).

138 Nassi, supra note 1, at 129.

139 Navigating Difficult Waters, supra note 29, at 6.

140 Id.
141 Id.

142 Macks, supra note 85, at 121.

143 Navigating Difficult Waters, supra note 29, at 4.

144 Peters, supra note 9, at 1668.

145 Navigating Difficult Waters, supra note 29, at 4.

146 Peters, supra note 9, at 1668.

147 Navigating Difficult Waters, supra note 29, at 4.

148 Id.

149 Id. at 5.

150 Id.

151 Id.

152 Peters, supra note 9, at 1668.


154 Id.

155 Id. at 1669.

156 Peters, supra note 9, at 1670.

157 Id. at 1671.

158 Id.

159 Worden, supra note 26, at 475.

160 Peters, supra note 9, at 1671.

161 Worden, supra note 26, at 475.

162 Peters, supra note 9, at 1672.

163 Worden, supra note 26, at 475.

164 Blum, supra note 62, at 540.

165 Peters, supra note 9, at 1669.

166 Wolfsdorf, supra note 39, at 52.
Peters, supra note 9, at 1669.


Blum, supra note 62, at 549.


Wolfsdorf, supra note 39, at 52.


Id. at 4.

Id. at 6.

Id. at 4.

Id. at 7.

Wolfsdorf, supra note 39, at 52.

Wolfsdorf, supra note 39, at 52.


Greene, supra note 185.

Navigating Difficult Waters, supra note 29, at 6.

Id.
190 Id.
191 Id.
194 Petitioner: [Identifying Information Redacted by Agency], AAU EAC 02 060 53645, 2004 WL 3455909 (INS Feb. 4, 2004), 1 [hereinafter Fashion Model Case].
195 Id. at 1-2.
196 Id. at 2.
197 Id.
198 Id.
199 Fang, supra note 81, at 215.
200 Id. at 215.
201 Id. at 214.
202 Id. at 216.
203 Id.
204 Macks, supra note 85, at 127.
205 Id.
206 Fang, supra note 81, at 217.
207 Bada, supra note 80, at 172.
208 Id.
209 Id.
210 Navigating Difficult Waters, supra note 29, at 6.
211 Navigating Difficult Waters, supra note 29, at 6.
212 Macks, supra note 85, at 120.
213 Id. at 121.
214 Fang, supra note 81, at 215.
Navigating Difficult Waters, supra note 29, at 6.


Id. at 191.

Id. at 195.

Fang, supra note 81, at 216.


Id.

Id.


Id.

Id.

Bada; supra note 80, at 172-73.

Id. at 165.

8 U.S.C.A. § 1184(c)(6)(D) (2011); see also Bada, supra note 80, at 173.

Bada; supra note 80, at 173.

Id.

Fang, supra note 81, at 228.

Bada; supra note 80, at 173-74.

Telephone Interview with Vladmir Galstyan, Founding Partner, Galstyan Law Firm (Nov. 17, 2011).

Blum, supra note 62, at 540.

Fang, supra note 81, at 203.

Macks, supra note 85, at 127.

Id.

Id., supra note 100, at 555.

Id. at 555.

Id. at 555.

Id. at 555.

Id. at 555.

Id.

Id. at 555.

Id. at 555.

Id. at 555.

Id. at 555.

Id. at 555.


Id.

Id.


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Macks, supra note 85, at 128.

Id.

Id. at 128.


Macks, supra note 85, at 128.

Fang, supra note 81, at 229.

Id. at 228.


USCIS Releases Draft RFE Templates for P Nonimmigrants, Seeks Comments, 88 NO. 9 Interpreter Releases 587 (Feb. 9, 2011).

Telephone Interview with Vladmir Galstyan, Founding Partner, Galstyan Law Firm (Nov. 17, 2011).

USCIS Releases Draft RFE Templates for P Nonimmigrants, Seeks Comments, supra note 275.

Fang, supra note 81, at 221.
283 Id.

284 Feldman, supra note 100, at 558.