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February 5, 2013

USCIS

RFE Project

Submitted via e-mail: scopsrfe@dhs.gov

**Re: RFE Template for Comment: Form I-129, O-1B Alien
of Extraordinary Ability in the Arts**

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments on the proposed USCIS Request for Evidence (RFE) template for Form I-129, O-1B Alien of Extraordinary Ability in the Arts.

AILA is a voluntary bar association of more than 12,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes advancing the law pertaining to immigration and nationality and facilitating justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. permanent residents, and foreign nationals regarding the application and interpretation of U.S immigration laws. We appreciate the opportunity to comment on this RFE template and believe that our members' collective expertise provides experience that makes us qualified to offer views that will benefit both the public and the government.

Standard of Proof

We recommend that eligibility for the O-1B visa category be clarified by including language in the RFE template that highlights the applicable standard of proof. We suggest the following:

You must demonstrate eligibility by a preponderance of the evidence. That is, the evidence must demonstrate that it is more likely than not that the eligibility requirements are met.

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Page 2

Introductory Paragraph (Page 3)

We suggest changing the word “employ” in the first sentence to the word “sponsor.” Work arranged by agents, who commonly sponsor O-1B beneficiaries, does not necessarily constitute “employment.”

Request for Translations (Page 3)

First Paragraph: “All foreign language documents must have a complete English translation to establish eligibility.”

Suggested Change: “All foreign language documents must have an English translation of pertinent parts to establish eligibility.”

Suggested Insert after Bullets: “Note: In some cases, only a full translation will provide the significance of the evidence. Where a partial translation does not demonstrate that the beneficiary meets a specific regulatory criterion, please submit a full translation.”

Reasoning: Some documents for an O-1 can be quite lengthy, e.g., a book, a playbill, etc. A complete English translation should not be required for all documents. The addition of the note warns the petitioner that translating only parts of a document could affect eligibility for O-1 classification.

Contracts (Pages 4–5)

First Paragraph: “All petitions seeking O nonimmigrant classification must be supported by a copy of a written contract.”

Suggested Change: “All petitions seeking O nonimmigrant classification must be supported by either a copy of a written contract, or if a written contract does not exist, a summary of the terms of the oral agreement between you and each performer listed in the petition.”

Reasoning: To bring the RFE requirements more aligned with the regulations.

Fourth Paragraph, Top of Page 5: “Written contracts or the summary of the terms of an oral agreement must specify the terms and conditions of employment.”

Suggested Change: “Written contracts or the summary of the terms of an oral agreement must specify the terms and conditions of employment or services.

Reasoning: O-1s are often not “employed.”

Suggested Insert After Bullets: “A summary of the oral agreement need not be signed.”

Reasoning: To confirm this fact.

Consultation (Pages 5–6)

First Paragraph: “All petitions seeking O nonimmigrant classification must include a written advisory opinion from a U.S. peer group in the area of the beneficiary’s ability”

Suggested Change: “All petitions seeking O nonimmigrant classification must, unless waived, include a written advisory opinion from a U.S. peer group in the area of the beneficiary’s ability.”

Suggested Insert at End of First Paragraph: “A consultation may be waived where the alien will be employed in the field of arts, entertainment, or athletics, and USCIS has determined that a petition merits expeditious handling or, in the field of arts, where the alien seeks re-admission to the U.S. to perform similar services within two years of the date of a previous consultation. Neither of these exceptions applies in this case.”

Reasoning: This is in accordance with 8 CFR §214.2(o)(5)(i)(E) and (ii)(B).

Fifth Paragraph: “The opinion should contain a statement of facts that support the conclusion reached in the opinion and must be signed by an authorized official of the group or organization.”

Suggested Change: “The opinion should contain a statement of facts that support the conclusion reached in the opinion and, if provided by an organization, must be signed by an authorized official of the group or organization.”

Reasoning: As worded, it does not apply if the consultation is provided by a person with expertise in the field.

Evidence of a Significant National or International Award (Page 6)

Suggested Change (First Three Paragraphs): Replace all three instances of the word “major” with “significant.”

Reasoning: Per 8 CFR §214.2(o)(3)(iv), the award or prize need **not** be major. The award or prize could be minor as long as it is “significant.” “Significant” is not necessarily synonymous with “major.”

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Page 4

Third Paragraph: “Evidence that could help us determine that the award is a major national or internationally recognized award may show:”

Suggested Change: “Evidence that could help us determine that the award is a significant national or internationally recognized award may, but is not required to, show:”

Reasoning: To change “major” to “significant,” as described above, and make it clear that these are not required elements.

First Bullet: “The award is national or internationally recognized as one of the top awards for the field”

Suggested Change: “The award is national or internationally recognized as an important award in the field.”

Reasoning: Per 8 CFR §214.2(o)(3)(iv) the award or prize need **not** be “one of the top awards for the field.” It need only be “significant.”

Sixth Bullet: “The award attracts competition from internationally recognized individuals in the field such as an Academy Award, an Emmy, a Grammy, or a DGA award.”

Suggested Change: The award attracts competition from recognized individuals in the field.

Reasoning: The referenced awards are misleading and confusing because they do not modify the word “field” or “individuals.” Moreover, there is not a requirement that the individuals be internationally recognized.

Achievement Criteria (Page 7)

Title: Achievement Criteria

Suggested Change: Qualifying Criteria

Reasoning: The word “achievement” is used throughout the regulations primarily in the motion picture/television area and is confusing to be used as a title in the arts area.

Second Paragraph: “The beneficiary does not appear to satisfy three of the six criteria to show national or international acclaim and recognition.”

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Page 5

Suggested Change: “The beneficiary does not appear to satisfy three of the seven criteria to show distinction or prominence.”

Reasoning: The comparable evidence criterion should be included as a potential criterion for which evidence could be provided. (See comments below regarding comparable evidence.) 8 CFR §214.2(o)(3)(iv) refers to prominence and is therefore more precise than “national or international acclaim.”

Lead or Starring Participant in Distinguished Productions (Page 7)

Add to the lists of suggested evidence:

- Trade journals;
- Magazines;

National or International Recognition (Pages 7-8)

Edit the second and third bullet points to read:

- Trade journals;
- Magazines;

Reasoning: The regulations do not require the trade journals or magazines to be “major.”

Commercial or Critically Acclaimed Successes (Page 8)

Add a New Bullet: “Chart rating”

Reasoning: Charts are a common way of showing distinction or prominence in the field of music. They are an inherent part of the industry.

Remuneration (Page 9)

Second Bullet: “Evidence establishing the beneficiary has received a high salary or other significant forms of compensation for services in comparison to **other** in the field”

Suggested Change: “Evidence establishing the beneficiary has received a high salary or other significant forms of compensation for services in comparison to **others** in the field”

Note: “U.S. Department of Labor (DOL) prevailing wage information alone does not generally establish whether the salary or other remuneration is “significantly” higher than that of others in the field.”

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Page 6

Suggested Change: “U.S. Department of Labor (DOL) prevailing wage information can establish whether the salary or other remuneration is “significantly” higher than that of others in the field.

Reasoning: DOL prevailing wage rate data *is* and *should be* sufficient in *most* cases. DOL collects national wage data, upon which petitioners should be able to rely for wage rate information regarding others in the field. If the wage information applies to the occupation of the beneficiary, it is perfectly acceptable evidence in and of itself. It should be accepted at face value.

Comparable Evidence (Page 9)

First Paragraph: “If the preceding criteria do not readily apply to the beneficiary’s occupation, you may submit comparable evidence in order to establish the beneficiary’s eligibility.”

Suggested Change: If one or more of the preceding criteria do not readily apply to the beneficiary’s occupation, you may submit comparable evidence in order to establish the beneficiary’s eligibility. (ISO should remove this section if not applicable.)

-OR-

You submitted comparable evidence. However, you have not provided sufficient evidence to demonstrate eligibility for O-1 classification in the arts. (ISO should explain what evidence was submitted and why it is insufficient to demonstrate distinction or prominence.) You may submit additional comparable evidence to demonstrate distinction or prominence.

When submitting comparable evidence, you should explain why the evidence you submitted is “comparable” to demonstrate distinction or prominence.

Reasoning: The regulations state “[i]f the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary’s occupation, the petitioner may submit comparable evidence in order to establish the beneficiary’s eligibility.” The plain language of this criterion shows that it may be used if “the other criteria do not readily apply,” not if *none* of the criteria apply.

Agents (Page 10)

U.S. Agents: It appears that you are a U.S. agent filing this petition. You must provide evidence to establish the relationship between you and the relevant parties, showing that you:”

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Page 7

Suggested Change: It appears that you are a U.S. agent filing this petition. A U.S. agent may:

- Perform the function of the employer;
- Represent the beneficiary and multiple employers with whom the beneficiary is contracted to work;
- Represent a foreign employer; or
- File a petition in cases involving workers who are traditionally self-employed.

Reasoning: It is critical to emphasize that the three listed options are only options; the regulatory language states that a U.S. agent MAY be the actual employer, the representative of both the employer and the beneficiary, or a person or entity authorized by the employer to act for or in place of the agency. 8 CFR §214.2(o)(2)(iv)(E). In light of the fact that 214.2(o)(2)(iv)(E) also allows an agent to file a petition in cases involving workers who are traditionally self-employed, the list at 214.2(o)(2)(iv)(E)(1)-(3) cannot logically be exclusive.

Agents performing the function of an employer must submit:

Suggested Change: Delete current language and replace with:

An explanation of the nature of the events or activities, the beginning and end dates for the events or activities, and a copy of any itinerary for the events or activities.

Reasoning: The change more clearly reflects the regulatory language.

Conclusion

We appreciate the opportunity to provide comments on this RFE template and look forward to continuing dialogue with USCIS on these important visa classifications.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION