AILA National Office
Suite 300
1331 G Street, NW
Washington, DC 20005

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

February 5, 2013

USCIS
RFE Project
Submitted via e-mail: scopsrfe@dhs.gov

Re: RFE Template for Comment: Form I-129, O-2 Artist or Athlete

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-2 Artist or Athlete.

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-2 visa category be clarified by including language in the RFE template that highlights the applicable standard of proof. We suggest the following text be added:

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.

Status of the Principal Athlete or Artist (Page 2)

The evidence cited to support that Form I-129 was filed for the principal athlete or artist is listed as Form I-797 Receipt Notice and Form I-797 Approval Notice.

This language, and the limited items sought in response, leaves the potential for an examiner to generate an RFE automatically wherever the O-2 petition was filed concurrently with an O-1. USCIS should discourage this practice by adding a third bullet point to the list of evidence:

- *Copies of cleared filing fee checks, front and back, showing case receipt numbers for this case and that of the O-1 principal.*

Requests for Contracts (Page 3)

An O-2 beneficiary frequently does not have his or her own separate, independent agreement with the U.S. employer/producer/presenter/venue. Rather, there is more often a standing agreement for ongoing services with the O-1 principal, which is frequently an oral agreement, rather than a written agreement. An O-1 principal's contract with the U.S. employer/presenter/producer/venue may reference any services, amenities, compensation, tools, equipment, workspace or other resources to be made available to O-2 support personnel. Examiners should accept these as evidence of the more job-specific terms and conditions of the O-2's offered employment in the U.S., in conjunction with other items such as the agreement between the O-2 and the O-1 principal, and between the O-1 principal and the U.S. agent, which may also reference the required O-2 services. Accordingly, we recommend that the list of suggested evidence be amended to include:

- Copy of the O-1 principal's contract or summary of oral agreement with the O-2 support alien;
- Copy of the O-1 principal's contract or summary of oral agreement with the U.S. agent or employer;
- Copies of the O-1 principal's contracts or summaries of oral agreements for services in the U.S., with the U.S. employers, producers or venues

Explanation of the Nature of the Event or Engagement (Page 4)

With respect to requests for additional documentation regarding the nature of an event, there is a certain illogical quality to requesting copies of ads, invitations, flyers, or event programs, which, in many cases, the U.S. employer, producer, presenter or venue may not finalize and send to the printer until after the appropriate visas have been issued. The U.S. entity would not wish to incur the expense to print invitations or programs for an event featuring a performer whose visa petition has not yet been approved.

An itinerary containing specified beginning and end dates is both appropriate and typically available for certain types of work, such as live performances (for which advertising must occur and tickets must be sold), athletic competitions, and professional

sports seasons (which have published dates set in advance by a league). But there are many other types of work explicitly contemplated by the O regulations for which fixed dates for multiple events enumerated in the contracts - especially project end dates - cannot be specified in advance with any certainty. This is particularly true for creative project-based work. For example, in many types of fine arts, musical recordings, and all areas of design (interior, fashion, graphic or web design, architecture and industrial design), some work will be done independently by the O-1 artist and O-2 essential support personnel in a studio setting. Once the creative and design phase of the project has been completed to the satisfaction of the artist, presentation, exhibition or installation, construction, promotional appearances, etc. may commence. These may take place on-site with a project employer and/or at other designated locations. Original production of a creative work product frequently does not (and by its very nature, cannot) have a fixed, definitive end date as creative control means that the O-1 artist decides when the creation phase is done. Examiners must be able to consider the nature of the offered work, rather than systemically request more specific timelines or itineraries for creative projects. It is essential for the adjudication process to support the nature of the artistic endeavors for which these visas were expressly developed and to remind examiners that the timing of many types of creative work cannot be set in stone without fundamentally undermining the creative process.

Consultation (Page 4)

The template contains the following language: "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. The U.S. peer group may include a person or persons with expertise in the field, labor, or management organization." The language in this draft template does not take into consideration those fields for which no appropriate peer group exists. For those fields of endeavor where no peer group exists, we recommend that the template be revised to state:

> *If no appropriate peer group exists, you may submit letters or affidavits to that effect from individuals with expertise in the field.*

The template also currently provides that the advisory opinion must state:

- The beneficiary's ability and achievements in the field of endeavor;
- The nature of the duties to be performed; and
- Whether the position requires the services of an alien of extraordinary ability."

Extraordinary ability is *not* required of an O-2 beneficiary, but rather of the O-1 *principal*. If this section of the template refers to the advisory opinion obtained by the O-1 principal, this should be clarified. Alternatively, if the O-2 petition is to include a copy of the advisory opinion obtained for the O-1, this should be made clear.

If this section of the template refers to a consultation addressing the O-2 beneficiary, we suggest that the entire section of the template be replaced with the consultation language found under "**Critical Skills**."

Critical Skills (Page 7)

The proposed template currently states:

> A consultation is a written advisory opinion regarding the nature of the work and the beneficiary's/beneficiaries' qualifications. The advisory opinion must state:
>
> - The alien's essentiality to and working relationship with the O-1 artist or athlete;
> - State whether there are available U.S. workers who can perform the support services.
>
> The written 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.
>
> A consulting organization may submit a letter of no objection if it has no objection to the approval of the petition.

It is unclear why this explanation of a consultation appears under the "**Critical Skills**" heading in the proposed RFE template. If the consultation is a form of evidence that may be used to show the critical skills and relationship of the O-2 beneficiary to the principal O-1 beneficiary, this section should be revised to that effect. We suggest that the statement above be preceded by the sentence: "*You may also choose to include an additional advisory opinion that addresses the beneficiary's skills and experience*."

If the consultation is required for this portion of the petition, we suggest the following revision to the beginning of the text: "*Additionally, you are required to submit a written consultation from an appropriate peer group...*"

Agents (Page 6)

As discussed above, an O-2 beneficiary frequently does not have his or her own separate, independent agreement with the U.S. employer/producer/presenter/venue, but a standing agreement for ongoing services with the O-1 principal, more often an oral agreement than in writing. In such a case, it should be sufficient to submit the agreement between the petitioner/agent and the O-1 principal, as well as evidence to establish any agreement between the principal and the support personnel.

Likewise, while multiple employers who wish to hire the O-1 principal through the petitioner/agent will be willing to provide documentation to that effect, it is less likely that they will be willing to do so for the O-2 beneficiaries. Because of this, it should be sufficient to obtain documentation of agreements between the multiple employers and the principal, and also evidence of the agreement between the principal and the support personnel.

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