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

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

May 24, 2010

Office of Public Engagement
United States Citizenship & Immigration Services
20 Massachusetts Ave., NW
Washington, DC 20529

VIA E-Mail: opefeedback@uscis.dhs.gov

RE: Draft Memorandum
Clarifying Guidance on "O" petition Validity Period
Revisions to the Adjudicator's Field Manual (AFM)
Chapter 33.4(e)(2) AFM Update AD10-36

Sir or Madam:

The American Immigration Lawyers Association (AILA) submits these comments in connection with the draft policy memorandum "Clarifying Guidance on 'O' petition Validity Period; Revisions to the Adjudicator's Field Manual (AFM) Chapter 33.4(e)(2); AFM Update AD10-36."

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent U.S. citizens, immigrant and nonimmigrant aliens, their family members, and businesses which receive their services, in proceedings with DHS.

AILA applauds USCIS for initiating this important new process in the development of policy and guidance. By publishing proposed policy memoranda in draft form for public review and comment, USCIS is taking an important step toward the goal of transparency, uniformity and consistency in the development of policy and guidance, informing the stakeholders of the direction it is contemplating, and providing an opportunity to the stakeholders to provide input and comment USCIS shapes legal interpretation, policy and procedure.

Purpose

The policies proposed in the draft memorandum provide important clarification and guidance to petitioners and adjudicators with respect to the validity of O-1 petitions "when a gap exists between two or more events reflected in the itinerary." AILA members, particularly those representing petitioners and beneficiaries in the performing arts, have reported a narrowing of the standards for adjudication of the duration of petition validity. Reminding adjudicators "…that there is no statutory or regulatory authority for the proposition that a gap of [a] certain number of days in an itinerary automatically indicates a 'new event' " should contribute to the re-establishment of uniformity in adjudication consistent with the Act, the regulations, and prior USCIS and legacy INS policy.

Scope

The statement of the scope of the memorandum also is an important step to establish uniformity and consistency in adjudication. AILA has raised on several occasions in the recent past the apparent erosion of the principle that USCIS policy materials are binding on all USCIS employees. Stating in the memorandum that the guidance is "…binding on all USCIS employees who adjudicate O-1 visa petitions…" is an invaluable reaffirmation of the binding nature of policy materials.

Background and Policy

The statement of policy in the memorandum provides an important articulation of key principles applicable to O-1 petitions in all fields of endeavor, not just the performing arts. The statement of policy reaffirms that the statutory and regulatory background provides flexibility on the length of validity or a petition approval, reminds adjudicators to "evaluate the totality of the evidence to determine whether the activities described in the itinerary are related in such a way that they would be considered one event," and reminds Service Centers to "[w]henever possible…approve a petition for the length of the validity period requested where the law and regulations permit." The discussion of the statutory and regulatory authority permitting petition approval for the duration requested, up to three years, in the new AFM Chapter 33.4(e)(2) provides adjudicators the guidance needed to render decisions on duration of petition validity consistent with the principles in the statement of policy.

Event

AILA suggests that there is an approach to analyzing what constitutes an "event" that may facilitate evaluation of the "totality of the circumstances." The regulations at 8 CFR §214.2(o)(3)(ii) defines "event" by example: "Event means an activity such as, but not limited to, a scientific project, conference, convention, lecture series, tour, exhibit, business project, academic year, or engagement." In essence, an "event" consists of the

foreign national's proposed U.S. activities. Thus, the "event" can be a contract, an engagement, or a series of engagements. The focus should simply be on the services being rendered, and no further or special relationship need exist between engagements. The real issue is not how many "events" there are, but, rather, the qualifications of the beneficiary or beneficiaries for the particular classification, the nature of the proposed services and whether the documentation of the proposed event, or events, or itinerary, is sufficient for the purpose.

There is another aspect of the definition of "event" the memorandum should address. AILA members report RFEs and denials on O-1 petitions that, in effect, state that the event must be "finite." These RFEs assert that the regulatory definition of "event" "suggests occurrences, phenomena, or 'events' of definite and finite duration" and that the O-1 classification is unavailable to someone seeking entry "indefinitely" to perform the "usual duties" associated with a particular position. The logic, it appears, is that unless an "event" has a specific start date and a specific end date, it cannot be an "event." There is nothing in the statute or the regulations that compel such a conclusion. On the contrary, an O-1 nonimmigrant is coming to the U.S. to work in the area of extraordinary ability (INA § 101(a)(15)(O)) and is authorized to be admitted for a period of stay necessary for the event or events (INA § 214(a)(2)(A)). Guidance should be incorporated that clarifies that an "event" may include ongoing activities for an initial three-year period, with extensions permissible, and no overall consecutive-year time limit, in contrast, for example, to the time limitations for H or L visas, or the limits imposed on P-1 athletes.

AILA members also report receiving RFEs requesting itineraries in O-1 petition proceedings involving beneficiaries who will be engaged in ongoing activities, such as researchers and university professors. Regulations at 8 CFR § 214.2(o)(2)(ii)(C) describing evidence that must be included with a petition provide that an itinerary is not an absolute requirement. What must be provided is "An explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities." AILA suggests that guidance be included that reminds adjudicators that evidence "explaining the nature of the events or activities, the beginning and ending dates for the events or activities…" will often be sufficient.

Extensions

The revision to the AFM Chapter 33.4(e) discusses approval of a petition after the date the petitioner requested, and directs that the period of validity should commence with the date of approval and ending with the date requested in the petition. AILA urges USCIS to revise this provision and to allow for a full three-year period of validity where the petitioner requests. It is not unusual for an O-1 petitioner to request an O-1 beneficiary for a specific event of a defined duration, such as a research project, where the duration of the activity is controlling, not the actual beginning or end date. Where the activity will take a specific period of time, no matter when it is commenced, the petition should be

approved for the duration requested, and duration should not be artificially abbreviated. As in the past, O-1 petitioners should be able to indicate in the petition and supporting documentation that the requested validity date is "X years [up to three] from the date of approval."

AILA recommends that the memorandum include guidance directing that an O-1 extension of stay may be approved for up to three years where the O-1 petitioner identifies a new event. The regulations at 8 CFR § 214.2(o)(12)(ii) provide that an extension of stay may be granted in one year increments to continue or complete the same event or activity for which the O-1 alien was admitted. However, where the O-1 petition identifies a new event or activity, the petition, and the corresponding extension of stay, may be approved for up to three years. Such clarifying guidance will improve adjudication and ease the burden on O-1 petitioners.

P Classification

AILA recommends that the memorandum also include the "P" classification. There is no difference in principle between the O and P classifications with respect to the definition of event or the gaps between engagements. There is thus no reason to distinguish between the two classifications. Clarifying that the same principles apply to "P" adjudications would be fair, and eliminate a potential and inappropriate burden on a wide range of artists and entertainers.

Just as it is common for an O-1 opera singer to be engaged by a particular U.S. opera venue for several weeks a year, over a period of years, so it is common for many foreign groups and culturally unique performers in the "P" classification to enter the U.S. for festival or holiday performances, then to travel abroad, and to return to the U.S. for remaining performances of the "tour." The same principles apply to such "P" entertainers as apply to an O-1 alien, and such gaps should not result in a finding that each part of the tour or performance schedule is a "new event" requiring a new petition.

Limiting the length of itinerary gaps may have the same deleterious effect on petitioners and beneficiaries in both classifications. Forcing U.S. petitioners and foreign artists alike to undertake more petitions and more visa applications vastly increases costs in time, money and effort and greatly discourages all parties from participating in the process.

There are equally serious ancillary effects. Limiting itinerary gaps may prevent foreign artists from acquiring Social Security numbers, which can be a time-consuming process. It can prevent foreign artists planning to be present in the U.S. for a longer period, or under contract with a particular venue, from obtaining drivers licenses. It can interfere with their ability to make reasonable and affordable housing arrangements.

The draft memorandum observes that, "unlike other nonimmigrant categories that have a specific time limit, a temporal period is not specified for the Os." The same observation applies, other than for athletes, to the P classification.

Conclusion

This memorandum provides critically-needed guidance and clarification at a time when adjudication of O-1 petitions has been particularly challenging and troubling due to the introduction of new interpretations of regulations, policies and practices by Service Centers, abrogating nearly two decades of established practice.

With respect to the subject of this memorandum, we urge USCIS to:

- Expand its scope to encompass the P classification, as there is no basis to distinguish that classification from the O classification, and because the problem of inconsistent Service Center responses to itinerary gaps is common to both classifications.
- Emphasize that the term "event" or "events" refers to the relationship of the services proposed to be rendered, such that all are consistent with the applicable evidentiary requirements, and de-emphasize any suggestion that an adjudicator must find any other relationship between events or engagements.
- Clarify that there is no requirement in the regulations for either classification that the activities, or the job, or the "event" be finite. The requested classification period, or the maximum available period, will establish any necessary limitations in that regard.

We are grateful for this opportunity and we look forward to a continued dialogue with USCIS on the full range of issues in the O and P classifications not addressed in this particular memorandum.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION