



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-1B Motion Picture or Television Production

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 Motion Picture or Television Industry.

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 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.

Introduction (Page 3)

The second paragraph of the introductory section of the RFE template currently reads:

*The O-1B classification applies to individuals with extraordinary achievement in the motion picture and television industry. **The***

RFE Template: O-1B (Motion Picture or Television Production)

February 5, 2013

Page 2

individual must have sustained national or international acclaim. His or her achievements must be in the field of expertise and show that he or she has a high level of accomplishment in the motion picture or television industry. (Emphasis added).

The regulations do not require that an individual in the motion picture or television industry demonstrate “sustained national or international acclaim.” Sustained acclaim is language found in the immigrant visa regulations for Aliens with Extraordinary Ability under 8 CFR §204.5(h)(3). Therefore, this language is misleading and should be amended. We suggests revising the language to include the appropriate definition of extraordinary achievement with respect to the motion picture and television productions provided in 8 CFR §214.2(o)(3)(ii).

*The O-1B classification applies to individuals with extraordinary achievement in the motion picture and television industry. **The individual must demonstrate a very high level of accomplishment in the motion picture or television industry evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent that the person is recognized as outstanding, notable, or leading in the motion picture or television field.***

Request for Translations (Page 3)

We request a change to the “Request for Translations” section given the fact that certain documents such as press articles and contracts may be voluminous, replete with boilerplate language, and only small portions relevant to the immigration benefit requested. We suggest that the template state that so long as the complete foreign language document is submitted, it is acceptable to translate only those portions of the document that are being relied upon by the beneficiary or the petitioner to prove eligibility.

For example, a 10-page contract for a writer’s services may have multiple pages related to choice of law clauses, provisions for breach and remedies, and confidentiality clauses that extend for pages. These provisions, in most cases, do not bear upon whether the beneficiary’s specific services were retained as a writer and the compensation terms of the agreement. Allowing for partial translations decreases the burden on both the petitioner and the examiner and more closely focuses the evidence on the facts to be proven.

In order to cover situations where a full translation is required, we suggest adding the following note:

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.

Labor and Management Organization Consultations (Page 5)

The fourth paragraph of this section of the draft template provides:

RFE Template: O-1B (Motion Picture or Television Production)

February 5, 2013

Page 3

A consultation is a written advisory opinion regarding the nature of the work and the beneficiary qualifications. 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 achievement.

This language should be revised to accurately reflect what is required by 8 CFR §214.2(o)(5)(iii):

- *The beneficiary's achievements in the motion picture or television field; and*
- *Whether the position requires the services of an alien of extraordinary achievement.*

Evidence of Prominence in the Field of Endeavor (Page 6)

The first paragraph of this section states, "You must show that the beneficiary has **sustained national or international acclaim** and recognition for achievements in the field of expertise."

As discussed above, this language should be revised, as it may be misleading to the petitioner and the adjudicator in terms of the evidentiary standard to be applied to an O-1B petition filed on behalf of an individual in the motion picture and television industries. "Sustained national or international acclaim and recognition" pertains to first employment-based preference aliens of extraordinary ability under 8 CFR §204.5(h)(3).

Achievement Criteria (Page 7)

In the second paragraph under this section, the template provides:

"The documentation you provide should show the beneficiary has a sustained record of prominence in the field of expertise."

"Prominence" is used in the O-1 arts standard as defined in 8 CFR §214.2(o)(3)(iv). This language should be replaced with the language from 8 CFR §214.2(o)(1)(ii)(A)(2):

The documentation you provide should show the beneficiary has a demonstrated record of extraordinary achievement in motion picture and/or television productions.

Lead or Starring Participant in Distinguished Productions (Page 7)

To avoid confusion, we recommend that the following bullets be added to this section:

- *Letters of reference or employment verifying that the beneficiary served in a lead or starring role in a distinguished production;*

RFE Template: O-1B (Motion Picture or Television Production)

February 5, 2013

Page 4

- *IMDB (Internet Movie Database) printouts confirming the beneficiary's leading or starring role;*
- *Nomination or receipt of an award or prize for beneficiary's role in the production.*

In addition, AILA recommends adding the following note as guidance to the ISO:

A supporting role may be considered "lead or starring" if the alien's performance in the role is (or was) important to the production or event.

Commercial or Critically Acclaimed Successes (Page 8)

We suggest adding other forms of evidence to establish eligibility in this category that incorporate social media indicators such as number of views on YouTube, "likes" on Facebook, "followers" on Twitter, etc.

Remuneration (Page 9)

The bullet points provided should be separated by "or" rather than "and" because "and" implies that all points must be present in order to satisfy this criterion. In addition, the following bullet should be added to the list:

- *Earnings reports or financial statements*

We also recommend amending the note to read:

*Note: U.S. Department of Labor (DOL) prevailing wage rate information **may** establish whether the salary or other remuneration is **high in relation to others in the field.***

Respectfully, the regulations only require evidence that the alien has commanded or will command a high salary or other substantial remuneration for services in relation to others in the field. The regulations do not require that the beneficiary demonstrate whether the salary is "significantly higher" than others in the field, just that it is "high in relation to others in the field." Petitioners should be able to rely on DOL nationally reported wage rate information regarding others in the field. If the wage information relates to the occupation of the beneficiary, it is perfectly acceptable evidence in and of itself.

In addition, the list of sample evidence should be amended to read:

Evidence to establish whether the alien's compensation is high relative to that of others working in the field may take many forms. Examples may include, but are not limited to:

- *Geographical or position-appropriate compensation surveys and organizational justifications to pay above the compensation data;*
- *The Bureau of Labor Statistics (BLS): <http://www.bls.gov/bls/blswage.htm>;*

RFE Template: O-1B (Motion Picture or Television Production)

February 5, 2013

Page 5

- *The Department of Labor's Career One Stop website: http://www.careeronestop.org/SalariesBenefits/Sal_default.aspx;*
- *The Department of Labor's Office of Foreign Labor Certification Online Wage Library: <http://www.flcdatacenter.com>*
- *Testimony from industry experts*
- *Other corroborative evidence showing that the wage rate is high relative to others working in the field.*

Agents (Page 10)

The section under “**Agents Performing the Function of an Employer**” should be amended to read:

Agents performing the function of an employer must submit:

- A written contract or agreement between you and the beneficiary that specifies the terms and conditions of employment. A description of the wage offered or fee structure and a statement or evidence that the wage offered/ fee structure was agreed upon may satisfy this requirement.
- An itinerary with dates and locations of work, and information on any other services planned for the intended employment dates. USCIS gives some flexibility as to how detailed the itinerary must be and takes into account industry standards when determining whether the itinerary requirement has been met.

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