

SMOKE AND MIRRORS: SPONSORING ORGANIZATIONS VANISH FROM CLARIFICATION TO PERFORMING ARTS ORGANIZATIONS

by Brent Renison*

INTRODUCTION

USCIS recently “clarified” for the arts community which organizations may petition for foreign performers under the O and P visa categories.¹ A Fact Sheet explains that USCIS has received inquiries regarding cases involving performances with multiple employers, and clarifies that the regulations only allow O and P petitions to be filed by a U.S. employer, a U.S. agent, or a foreign employer through a U.S. agent. The Fact Sheet goes on to explain that an employer may not file a petition on behalf of other employers without being “in business as an agent.” Far from clarifying the issue, however, the agency has obscured from view a very important part of the regulations; the sponsoring organization. Arts groups that sponsor extraordinary talent to perform before U.S. audiences are well advised to review whether they should be treated as sponsoring organizations that do not directly employ performers, thereby allowing such sponsors to file one petition for all U.S. performances.

SPONSORING ORGANIZATION

The USCIS Fact Sheet incorrectly states that the regulations at 8 C.F.R. 214.2(o)(2)(i) (governing O petitions) and 8 C.F.R. 214.2(p)(2)(i) (governing P petitions) allows O and P petitions to be filed only by a U.S. employer, a U.S. agent, or a foreign employer through a U.S. agent. While those are the three categories listed for O petitions, the requirement that the petitioner must be “in business as an

agent” has been questioned.² What is most striking about the Fact Sheet, however, is that the regulations governing the filing of P petitions also provide that a performer may be authorized to come perform services for a “sponsor.”³ The regulations provide that the “employer *or* sponsor must file a petition,”⁴ so it is notable that the USCIS Fact Sheet omitted this important regulatory provision. Additionally, the regulations also provide:

“A P-1 petition for an athlete or entertainment group shall be filed by a United States employer, a *United States sponsoring organization*, a United States agent, or a foreign employer through a United States agent.”⁵

The regulations, therefore, clearly contemplate that a sponsor may file a petition. The claim in the Fact Sheet that P petitions may be filed only by employers or those in business as agents is unsupported. What is a sponsor? That term is defined in the regulations this way:

Sponsor means an established organization in the United States which will not directly employ a P-1, P-2, or P-3 alien but will assume responsibility for the accuracy of the terms and conditions specified in the petition.⁶

The regulations provide for an arts organization to act as a sponsor of P performers provided they assume responsibility for the petition. The most common situation involving this type of sponsorship is an arts organization which will be one of several organizations to sponsor a foreign group for a series of festivals. In such a case, the established arts organizations agree on which organization will be the petition sponsor for the other organizations.

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¹ USCIS Clarifies Requirements for Agents Filing as Petitioners for the O and P Visa Classification, Fact Sheet, October 7, 2009.

² See Karin Wolman, Immigration Service Hits Arts Presenters in the Purse, Nation of Immigrants Blog (<http://www.nationofimmigrants.com/?p=278>).

³ 8 C.F.R. 214.2(p)(1)(i).

⁴ *Id.*

⁵ 8 C.F.R. 214.2(p)(2)(i).

⁶ 8 C.F.R. 214.2(p)(3).

Taking the example from the USCIS Fact Sheet, if Sponsor A files a petition for a beneficiary it will be sponsoring, and submits an itinerary that includes performances for the beneficiary with other sponsors B and C, at different times, and at different venues, then USCIS should approve the petition for Sponsor A for those different times and venues. Sponsoring organizations generally do not create employer-employee relationships with performers for short performances, but rather enter into performance agreements.

This type of relationship is explicitly recognized in the regulations which do not require a direct employment relationship. An established arts organization may therefore file one petition for P performers who will perform at different venues provided the sponsor will assume responsibility for the accuracy of the terms and conditions specified in the petition.⁷

While the regulations contemplate that sponsoring organizations may file petitions for P performers, the statute is even more generous. Specifically INA Sec. 214(c)(4)(C) states,

A person may petition the Attorney General for classification of an alien as a nonimmigrant under section 101(a)(15)(P).

In promulgating regulations relating to P petitions, the agency was within its authority to allow a variety of legal “persons” to file petitions, including employers, agents and sponsoring organizations.

PUBLIC POLICY AND COMMON SENSE

When faced with construing statutes enacted by Congress, an agency has a duty to create rules that honor the spirit and intent of the law. Instead of making a common sense rule that facilitates arts presenters in their efforts to bring international talent to American audiences, however, the agency chose to create artificial and needless barriers. In tough financial times, arts presenters are among the hardest hit. Charitable giving is down across the board, and particularly in the area of the arts. Now is not the time for the immigration service to make sponsorship of foreign arts groups more difficult.

It is neither practical nor efficient for a non-profit arts organization to spend many thousands of dollars in attorneys fees and filing fees for a performance that may span only a few days on a multi-venue

tour. Many organizations share the costs of bringing foreign talent to the United States for the benefit of our local communities. In a time when World conflict threatens to open chasms between peoples and cultures, arts organizations are bridging the gaps with new and exciting work that expands thinking. Foreign artists bring new ideas to our shores, and it is imperative that we welcome them and support the organizations that sponsor their work.

The good news, however, is that the Fact Sheet is not the law. It does not have the force of the statute, nor is it a regulation issued after notice and comment that may require courts to defer. The Fact Sheet is merely an illusion, created by the would-be magicians of our government. Now that the show is over, perhaps the smoke will simply blow away.

⁷ 8 C.F.R. 214.2(p)(3).