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The Economic Impact of Strict Visa Requirements on the Entertainment Industry

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THE ECONOMIC IMPACT OF STRICT VISA REQUIREMENTS ON THE ENTERTAINMENT INDUSTRY

January 2, 2010
Congressman Lloyd Doggett
300 East 8th St. #763
Federal Building
Austin, TX 78701

RE: The Economic Impact of Strict Visa Requirements in the Entertainment Industry

Dear Congressman Doggett:

My name is Mirko Whitfield, and I am in charge of international development for South by Southwest (SXSW), a ten-day interactive media, film, and music festival that takes place in Austin, Texas, every March.\(^1\) This upcoming year we estimate the festival will have a $103 million economic impact on the city of Austin based off our consistent annual growth rate.\(^2\) One of the reasons for this continued growth is due to SXSW becoming an international music festival.\(^3\) Last year we attracted over 100,000 visitors from around the world with a line-up of 1,153 entertainers, 522 of which were foreign.\(^4\) Currently, we have offices in the United States as well as in Ireland, Germany, Australia, and Japan which help bring all of the SXSW registrants to Austin.\(^5\) We depend on these foreign entertainers to continue our expansion. Therefore, I am deeply concerned that this year a number of our artists will have difficulty attending the festival given the stricter visa requirements now in place. For your convenience I researched this issue and have a proposal you might find constructive and effective.

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1. SXSW Contact Information, http://sxsw.com/contact (last visited Dec. 17, 2009) (indicating Mr. Whitfield as the SXSW Director of International Development).
2. Pierre Bertrand, Sagging Economy Didn’t Dent Festival Returns, Officials Say, THE DAILY TEXAN, Mar. 23, 2009 at 1A, 6A.
3. Id.
Currently, there are two categories of United States visas that apply to entertainers. Both visas have strict standards which, by their nature, greatly limit the number of artists who qualify. There is also a business visa for those wishing to temporarily work in the United States—however, the majority of work done by entertainers, such as touring or playing at festivals, is not included under this category. Therefore, I propose we adopt a system similar to that of the United Kingdom (U.K.) by adding an additional visa, the B3 visa, which would be applicable to entertainers who wish to enter the United States to work as entertainers for a brief period of time.

I. THE CURRENT VISAS

The visa system in the U.S. is divided into five distinguishable categories: citizenship, permanent residency (possessing a green card), temporary residency with permission to work, temporary residency without permission to work, and a temporary visitor. In regards to entertainers, there are two directly applicable visas, the O1 Visa and the P1 Visa. In addition, entertainers may enter the U.S. in order to conduct specific types of business, such as negotiating contracts or exploring investment opportunities in the entertainment industry, under the Business Visitor Visa.

Eligible applicants under the O1 Visa include individuals with “extraordinary ability in science, business, education or athletics” who have been recognized nationally or internationally for those achievements. In order to prove an entertainer is “extraordinary,” background information must be submitted, including press and reports written about the individual, proof of the distinguished reputation of the individual, award nominations or wins, or letters from experts in the field. In other words, an entertainer that has been nominated for or won a GRAMMYTM, or has been featured in Billboard or Rolling Stone, should be able to obtain an O1 Visa relatively easily. The O1 Visa is only granted if the artist is coming for a particular event “such as the shooting of a particular program or series . . . , a tour . . .

10. SHAPIRO & DARYA, supra note 7, at 2.
12. SHAPIRO & DARYA, supra note 7, at 8.
ECONOMIC IMPACT OF STRICT VISA REQUIREMENTS

, or an entertainment event.” Though an artist could typically receive an O1 visa for up to three years, this year the United States Citizenship and Immigration Services (USCIS) enacted a stricter approach to all entertainment visas.

The aforementioned tour requirements also pertain to the P1 visa. The P1 visa applies to internationally recognized entertainment groups. To qualify, each member must apply and prove they have been a member of the group for at least one year. Also, the reputation of the group must reflect the group’s high level of achievement in their field, evidenced by a degree of skill and recognition substantially above that ordinarily encountered. Proof may be submitted through a statement from the petitioner listing the group members and the exact dates each member has been employed by the group, awards the group has been nominated for and/or won, and evidence the group has a record of major commercial success. Thus, a group who is nominated for, wins, or performs at the GRAMMY Awards, is written about in Billboard or Rolling Stone, or has albums on the U.S. charts, would likely be eligible for a P1 visa.

Both the O1 and P1 visas require an entity or person to petition on their behalf in order for their applications to be approved. Petitioners, also referred to as sponsors, include a U.S. employer, a U.S. agent, and a foreign employer applied for by a U.S. agent. Eligible agents include the label, manager, booking agent, or promoter. However, the USCIS is now “severely limiting” who may submit a visa petition on behalf of performing artists.

Apart from the O1 and P1 visas, some entertainers may be entitled to enter the U.S. as a Business Visitor on a B visa. The B visas include both workers who are coming to temporarily conduct business in a professional

13. Id. at 6.
14. Juliana Koranteng, Vexing Visas: Stricter U.S. Immigration Enforcement Sparks Worries About Touring Impact, BILLBOARD, Nov. 14, 2009, at 10. The approved term is now granted for the length of a tour, which must be proved by documentation relating to the specific tour’s itinerary. Id.
15. Id.
16. SHAPIRO & DARYA, supra note 7, at 9.
17. Id.
19. SHAPIRO & DARYA, supra note 7, at 9.
21. Id.
22. See id. at § 314.2(o)(2)(iv).
or commercial nature (the B1 visa) or tourists coming to visit the U.S. (the B2 visa).\textsuperscript{24} Under this classification, “conducting business” includes attending awards shows, conducting business meetings, or negotiating a contract for a project or a show.\textsuperscript{25} Any business done in the U.S. must be incidental to the entertainer’s employment abroad, performed on behalf of a foreign employer, and paid for by the foreign employer.\textsuperscript{26} The initial period under a B1 visa is one to six months with a possibility of a six-month extension.\textsuperscript{27} However, if an eligible candidate is only planning to stay in the United States for 90 days or less, and their country is listed as a Visa Waiver country, they may not need to apply for a visa at all. The Visa Waiver Program only applies to visitors who are eligible for a B1 or a B2 visa.\textsuperscript{28} Currently, thirty-five countries are on this list, located on the USCIS website.\textsuperscript{29}

Thus, the problem we are facing is as follows: not all entertainers fall within one of these stringently outlined categories. International icons would have no trouble obtaining an O1 or P1 visa. However, the percentage of artists who meet the criteria is considerably less than the percentage of entertainers who are just beginning their careers or have a modicum of success. Those entertainers have a harder, if not impossible, time entering the country legally. Risking an incorrect visa could also result in deportation and may even prevent artists from entering the country in the future.\textsuperscript{30} A quick glance at the Billboard Charts for the week of November 21, 2009 lists twenty-two foreign artists on the Top 100 Chart.\textsuperscript{31} Not all of those artists may meet the requirements of an O1 or P1 visa. Nonetheless, with songs on the charts, their presence in the United States is likely in demand from labels, venues, radio stations, talk shows, and, most importantly, the fans.

II. THE ECONOMIC IMPACT

An inability to enter the United States market negatively affects a number of industries in this country. Typically, an artist makes the major-

\begin{footnotes}
25. SHAPIO & DARYA, supra note 7, at 4.
26. See id.
27. Id. at 3.
28. Id. at 2–3.
30. SHAPIO & DARYA, supra note 7, at 11.
\end{footnotes}
ity of their money through touring. Once they achieve a certain level of success, new revenue streams emerge via album sales, endorsement deals, and various other forms of branding. However, an entertainer primarily makes money by going on tour. With a tour, multiple parties profit. Tours create jobs, venues make money, merchandising companies turn a profit, and, though not economically driven, fans profit by seeing and connecting with the artists they support and admire. Additionally, with the recent surge in “360 deals” even labels are now profiting from tours by being able to take a percentage of the income from each tour.\footnote{32} By preventing artists from touring, those entities suffer along with music festivals. For example, several U.K. entertainers were unable to obtain visas and had to cancel their scheduled performances at the College Music Journal Festival this past October.\footnote{33} Replacing last minute cancellations is nearly impossible, and either the venue or promoter ends up suffering from the lost revenue.\footnote{34} While the door to the global market is swinging wide open, the window into the United States is getting smaller and smaller.

III. A LOOK AT THE UNITED KINGDOM

Immigration regulations in comparable, fully-developed, entertainment based countries differ in their approaches from those in the United States. The United Kingdom has a similar system of immigration. However in 2008, the U.K. revisited its immigration rules and added a new, permit-free category for visiting entertainers.\footnote{35} The similar categories include a “Business Visitor” category which is fairly analogous to the B1 visa.\footnote{36} Eligible business visitors are able to enter the U.K. for a period of 6 months in order to engage in business activities such as attending meetings, negotiating contracts, or arranging deals.\footnote{37} Additionally, the U.K. has a “permit” much like a combination of the O1 and P1 visas, the “Tier 5” permit. The Tier 5 permit is for eligible international performers of the

\footnote{32. See generally DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, 348–51 (6th ed. 2006).}


\footnote{34. PASSMAN, supra note 32, at 348.}


\footnote{36. Id.}

highest standard. Eligible entertainers consist of those who are able to make a significant contribution to entertainment or sports in the country. Overall, the two categories are similar. However, there are a few notable exceptions. The focus of the Tier 5 permit appears to be the contribution the entertainer will make during their visit to the U.K. as opposed to the proven success of the artist. In addition, the duration of the Tier 5 permit allows an entertainer to come for the length of the tour plus rehearsal time.38

The new permit-free category, marks a noteworthy change in their system. The category applies to:

- professional entertainers visiting to the U.K. to take part in music competitions;
- amateur entertainers travelling to the U.K. for a specific engagement;
- professional entertainers visiting the U.K. to take part in a charity show where they will receive no fee; and
- professional and amateur entertainers taking part in a ‘permit-free festival’ which is listed in the Border Agency’s website.39

Entertainers would not have to apply for a permit if they are visiting the U.S. for less than six months to perform in one of the aforementioned areas. However, the U.K. has a list of “visa-national countries,” and any national from one of those countries must always apply for a visa regardless of the category.40

IV. THE PROPOSED B3 VISA

A seamless solution to the problem created by the strict U.S. visa requirements would be to create a new class of visa, for example, the B3 visa. The B3 visa would fall under the same umbrella as the B visa categories and parallel the basic approach of the U.K.’s “Entertainer Visitor” classification. It would fit within the basic U.S. system by still requiring all immi-

grants to apply for and obtain a visa, yet it would enable entertainers who do not meet the strict standards of the O1 or P1 visas to enter the U.S. as entertainers. As noted above, a business visitor is able to enter the U.S. for a limited period of time to “conduct business.” An entertainer’s business involves selling and promoting their “brand,” which includes activities such as touring, attracting sponsors for endorsement deals, making guest appearances, providing interviews, participating at music festivals, and attending award shows and conferences. Entertainers who want to enter the U.S. to work for long periods of time would still have to be of the highest echelon and apply under the normal O1 and P1 visas. However, entertainers who wish to enter the U.S. for just a short period of time and for a specific purpose would be able to apply under the newly enacted B3 Visa.

Following the same standard as the B1 Visa, the B3 Visa would pertain to entertainers or groups entering the U.S. to conduct business as entertainers. The applicable business activities that an eligible candidate could partake in would consist of:

1) touring
2) promoting an album that has been commercially released
3) participating in any of the following:
   - music competitions
   - travelling to the U.S. for a specific engagement
   - charity shows for which no fee is received
4) taking part in a ‘permit-free festival.’

Under the first three categories, suitable sponsors would include the promoter, the label, a manager, the venue, and the person or business in charge of each event. The duration of each visa would vary according to the category the artist applies for. For example, if the entertainer applies to tour in the U.S., the duration would encompass the length of the tour plus an additional twenty-eight days before or after the tour in order to rehearse or complete any responsibilities that come with the tour, such as granting interviews or meetings with the label. To be accepted, the tour’s itinerary would have to be provided along with evidence that the artist is actually booked on the tour.

The approach used in the fourth category would be almost identical to that in the U.K. The governing body will come up with a list of eligibility requirements for festivals to meet in order to be added to the list. Subsequently, music, entertainment, media festivals, and major tours (such as Warped Tour or Lilith Fair) can apply to be added to the list on the USCIS website. An entertainer who is invited to one of the listed events would only have to submit the invitation or request to perform, the signed con-
tract, or any other viable documentation in order to prove they are performing at the event. For the duration of the event, plus twenty-eight days (to do press for the event or grant interviews), an entertainer would be eligible to enter the U.S. Moreover, any applicant who qualifies for the B3 visa would also be subject to the Visa Waiver Program. Thus, any national of a Visa Waiver Country would not have to obtain the visa.

V. CONCLUSION

Unlike most countries in the world, the U.S. market does not have any domestic content requirements. There are no regulations relating to the percentage of “American” content that has to be shown or played on the radio, in theaters, or at any other venue. The only hurdle is in impressing the hard-to-please, ever-elusive American consumer, and that should remain the only hurdle. It is a mark of success in an artist’s career to receive an invitation to perform at any one of the many influential festivals and events in the U.S., and the U.S. benefits from having those artists here as well. Although some believe the economy in 2009 was the worst it has been since the Great Depression, SXSW continues to grow annually, reaching $103 million in 2008 up from $95 million in 2007. It is because entertainment is an indispensable, emotional escape from the burdens of everyday life. The business world is getting smaller. Corporations are extending past their national borders, trips around the world are more affordable than ever, and music and culture are crossing lines, borders, and genres. The B3 visa would be a simple solution to the economic impact we are now facing from the strict application of the existing regulations. Even the title is ideal, as “B3” fits within the already existing business category by following the B1 and the B2 categories. It even evokes the B3 Hammond Organ, an instrument of choice used by many successful and talented artists for the past few decades.

Thank you for taking the time to consider this compelling issue concerning the music industry.

42. Bertrand, supra note 2.
43. See 8 C.F.R. § 214.2(B).
Mirko Whitfield

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