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# PEER GROUP/LABOR ORGANIZATION REVIEW OF THE ADMISSION OF EXTRAORDINARY AND ACCOMPANYING ALIENS TO WORK IN THE ENTERTAINMENT INDUSTRY: A PLEA FOR PRECEDENT

Laurence S. Zakson\*

## I. INTRODUCTION

The entertainment industry, acknowledged as one of the premiere industries in the United States, has contributed to the past eight years of economic prosperity.<sup>1</sup> Entertainment industry jobs, particularly in the highly unionized mainstream media, generally pay well and attract applicants to the industry like flies to honey.

At least since the passage of the Immigration and Nationality Act of 1952 (“INA”),<sup>2</sup> the United States has allowed foreign artists and entertainers, including athletes, of demonstrably “distinguished merit and ability,” to enter and participate in the industry’s vibrancy and success.<sup>3</sup> To qualify for a so-called H-1B visa, the foreign artist or entertainer (“Alien Artist”) had to be a nonimmigrant and meet certain statutory requirements.<sup>4</sup>

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1. Alan C. Miller & Elizabeth Shogren, *Convention 2000: Gore Establishing His Own Financial Base in Hollywood*, L.A. TIMES, Aug. 18, 2000, at U3.

2. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in various sections of 8 U.S.C.).

3. 8 U.S.C. § 1011(a)(15)(H) (1994 & Supp. V 2000).

4. Judith A. Kelley, *New O and P Nonimmigrant Visa Categories: A Lesson in Compromise*, 16 COLUM.-VLA J.L. & ARTS 505, 516–17 (1992) (citing now superceded regulatory text and statements by AFL-CIO Department of Professional Employees, President Jack Golodner, in House Judiciary Committee proceedings on the successor to the INA).

In the Immigration Act of 1990 ("IMMACT"),<sup>5</sup> Congress narrowed the scope of the H-1B visa to "specialty occupation[s],"<sup>6</sup> and created new classes of temporary-worker visas for Alien Artists.<sup>7</sup> As amended in late 1991,<sup>8</sup> IMMACT section 207 provisions ("O and P categories"), sought a balance between the need "for a global interchange of creative professionals,"<sup>9</sup> and the need to prevent entertainment producers from abusing the immigration laws seeking to "displac[e] American workers with aliens whose only extraordinary ability seems to be that they will work below scale."<sup>10</sup>

Certain elements of the entertainment industry met these changes with great resistance.<sup>11</sup> Moreover, they spawned a contentious battle with respect to the regulations promulgated by the Immigration and Naturalization Service ("INS").<sup>12</sup> The parties resolved the battle by meeting and agreeing to a compromise version of the regulations. This new version purports to give importance, but not control, to peer group evaluations of the abilities and professional prestige of Alien Artists. Labor unions, and, in some cases, employer associations, intimately familiar with the Alien Artist's area(s) of purported expertise, give these evaluations.<sup>13</sup>

Despite these changes in the legal landscape, many entertainment industry unions and their members feel peer group consultation failed to increase the quality of INS adjudications. Furthermore, they believe the

5. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in various sections of 8 U.S.C.).

6. 104 Stat. 4978, 5020.

7. See Tibby Blum, *O and P Visas for Nonimmigrants and the Impact of Organized Labor on Foreign Artists and Entertainers and American Audiences*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 533, 533-34 (1993) (discussing the changes from a decidedly pro-management perspective). See generally, Kelley, *supra* note 4, at 508-16 (discussing the various conflicting influences that contributed to the changes that resulted in the severance of so-called O and P visas from the H-1B category).

8. See Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991).

9. *Admission of O and P Nonimmigrants: Hearings on H.R. 3048 Before the Subcomm. On International Law, Immigration and Refugees of the House Comm. on the Judiciary*, 102d Cong. 78 (1991) (statement of Alan Gordon, Eastern Executive Secretary, Directors Guild of America).

10. *Id.* Alien Artists may also enter the United States with so-called Q nonimmigrant visas. 8 U.S.C. § 1101(a)(15)(Q) (1994 & Supp. V 2000). The United States grants such visas to Alien Artists participating in bona fide international and cultural exchange programs. However, a discussion of these visas is beyond the scope of this Article.

11. See 137 Cong. Rec. S13979, S13981 (daily ed. Sept. 30, 1991) (statement of Sen. Kennedy).

12. See generally Kelley, *supra* note 4, at 508-16 (describing the controversy in detail).

13. 8 C.F.R. § 214.2(o)(5) (2000).

lack of readily available information about INS procedures for evaluating and deciding whether to defer to, or overrule, peer group consultations precludes meaningful input into the system. This Article explores these issues.

Part II introduces the O and P classifications and discusses the INS consultation requirement regarding the nature of the Alien Artist's work and qualifications. Part III uses hypotheticals as a way of demonstrating the gaps in the INS regulation requirements and emphasizes the need for published INS opinions for consulting labor organizations. Part IV concludes by illustrating how the current INS regulations leave both Alien Artists and consulting labor organizations without the tools they need to play their part under the regulations. Part IV also advocates the need for the INS to publish its resolutions of contested visa applications to improve the current system.<sup>14</sup>

## II. IMPLEMENTATION OF THE O AND P CATEGORIES

### *A. Overview: O and P Classifications and Their Sub-categories*

#### 1. The "O" Categories

Under 8 U.S.C. § 1101(a)(15)(O), a qualified alien may be admitted to the United States as a nonimmigrant if the alien's employer petitions for such admission.<sup>15</sup> The petition must specify the event or events involving the Alien Artist's employment,<sup>16</sup> and must be filed with the INS Service Center with geographic jurisdiction over the area where the Alien Artist will be employed.<sup>17</sup> The employer-petitioner must file a petition for a determination of the Alien Artist's eligibility before the Alien Artist may apply for a visa or seek admission to the United States.<sup>18</sup>

The so-called "O-1 classification" applies to either:

- 1) [a]n individual [Alien Artist] who has extraordinary ability in the arts . . . or athletics which has been demonstrated by

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14. The O and P Categories include Alien Artists in diverse segments of the arts and athletics. The O-1 category also includes extraordinary aliens in the fields of education, science and business. 8 U.S.C. § 1101(a)(15)(O)(i) (1994). Inasmuch as this Article focuses on the entertainment industry, it does not address the issues raised by the application of the IMMACT to these individuals.

15. 8 C.F.R. § 214.2(o)(1)(i) (2000).

16. 8 C.F.R. § 214.2(o)(2)(ii)(c).

17. 8 C.F.R. § 214.2(o)(2)(i).

18. 8 C.F.R. § 214.2(o)(1)(i).

sustained national or international acclaim and who is coming temporarily to the United States to continue work in the area of extraordinary ability; or 2) [a]n [Alien Artist] who has a demonstrated record of extraordinary achievement in motion picture and/or television productions and who is coming temporarily to the United States to continue work in the area of extraordinary achievement.<sup>19</sup>

The duration of an Alien Artist's O-1 status is limited to the life of the event(s) or production(s) prompting the Alien Artist's admission, but is limited to three years,<sup>20</sup> although extensions are possible.<sup>21</sup>

The so-called "O-2 classification" applies to an alien who accompanies an O-1 qualified Alien Artist to assist in the artistic or athletic performance(s) for which the Alien Artist is admitted ("Accompanying Alien").<sup>22</sup> The Accompanying Alien must meet the following criteria:

(1) [The Accompanying Alien] must be an integral part of the actual performances or events and possess critical skills and experience with the O-1 alien that are not of a general nature and which are not possessed by others; or

(2) [i]n the case of a motion picture or television production, [The Accompanying Alien] must have skills and experience with the O-1 alien which are not of a general nature and which are critical, either based on a pre-existing and longstanding working relationship, or, if in connection with a specific production only, because significant production (including pre- and post-production) will take place both inside and outside the United States and the continuing participation of the [Accompanying Alien] is essential to the successful completion of the production.<sup>23</sup>

Not surprisingly, the duration of an Accompanying Alien's O-2 status is tied to the duration of the event or production involving the Alien Artist with O-1 status. The Accompanying Alien's O-2 status is also limited to three years with the possibility of extension.<sup>24</sup>

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19. 8 C.F.R. § 214.2(o)(1)(ii)(A).

20. 8 C.F.R. § 214.2(o)(6)(iii)(A).

21. *See* 8 C.F.R. § 214.2(o)(12), (13).

22. 8 C.F.R. § 214.2(o)(1)(ii)(B).

23. 8 C.F.R. § 214.2(o)(1)(ii)(B)(1), (2).

24. *See* 8 C.F.R. § 214.2(o)(6)(iii)(A); *see also* 8 C.F.R. § 214.2(o)(12), (13).

## 2. The "P" Categories

P classification<sup>25</sup> encompasses three categories of Alien Artists entitled to nonimmigrant visas based on 8 U.S.C. § 1011(a)(15)(P), another part of IMMACT.<sup>26</sup> The P-1 category, created by 8 U.S.C. § 1011(a)(15)(P)(i), is for internationally recognized entertainers and athletes.<sup>27</sup> The P-2 category, created by 8 U.S.C. § 1011(a)(15)(P)(ii), applies to performing artists or entertainers, either individually or as part of a group. Section 1011(a)(15)(P)(ii) also applies to artists or entertainers who are otherwise an integral part of a group and seeking to enter the United States to perform as artists or entertainers under a reciprocal exchange program.<sup>28</sup> The P-3 category, found in 8 U.S.C. § 1011(a)(15)(P)(iii), is "reserved for artists and entertainers coming to the United States under a 'culturally unique' program."<sup>29</sup> There is no published literature or data to show whether the cultural uniqueness requirement makes petitions to afford Alien Artists P-3 status as relatively non-controversial as petitions for P-2 status.

### *B. Consultation Concerning the Nature of the Work and the Alien's Qualifications*

Consultation with an appropriate peer group or labor organization and, where appropriate, management organization, regarding the nature of the work and the alien's qualifications, is mandatory for O-1, O-2, P-1, P-2

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25. The statute also provides for an O-3 classification for spouses and unmarried minor children of nonimmigrant aliens with O-1 and O-2 status. 8 U.S.C. § 1101(a)(15)(O)(iii) (1994). Individuals in this category raise no issues addressed by this Article inasmuch as their admission to the United States is entirely derivative of their spouse's or parent's admission and they are not, by virtue of their O-3 status, entitled to work in the United States. *See id.*

26. There is a so-called P-4 classification for spouses and unmarried minor children of nonimmigrant aliens with P-1, P-2 and P-3 status. 8 U.S.C. § 1101(a)(15)(P)(iv) (1994). This classification is basically analogous to the O-3 classification. *See discussion infra* note 27.

27. Although the statute accords individual athletes P-1 status for individual performance in a specific athletic competition, entertainers may not be accorded P-1 status to perform separate and apart from a group. *See* 8 C.F.R. § 214.2(p)(4)(ii), (iii)(A) (2000).

28. While petitions for Alien Artists coming into the United States require review by a peer group/labor union as part of the process, these petitions do not appear to have generated the same degree of controversy as the P-1 and O petitions. 8 U.S.C. § 1011(a)(15)(P)(ii). This is likely due to the requirement that "an appropriate labor organization in the United States was involved in negotiating, or has concurred with, the reciprocal exchange of U.S. and foreign artists or entertainers." 8 C.F.R. § 214.2(p)(5)(ii)(C).

29. *Report and Analysis of Immigration and Nationality Law*, 69 INTERPRETER RELEASES 1065, 1070 (Aug. 31, 1992) (discussing 8 U.S.C. § 1011(a)(15)(P)(iii)(II)).

and P-3 petitions.<sup>30</sup> The consultation is a written advisory opinion submitted with the petition.<sup>31</sup> Favorable advisory opinions list the alien's achievements in the entertainment field and state whether an alien of "extraordinary achievement" is required for this position.<sup>32</sup> The statute provides one exception to this rule: in the case where the INS determines exigent circumstances exist, a telephonic consultation is permitted instead.<sup>33</sup> The advisory opinions must set forth specific facts supporting the conclusion in the opinion.<sup>34</sup> Letters of no objection, however, are expressly authorized.<sup>35</sup> In cases where petitions are denied, the applicant receives the adverse evidence contained in the file, including any adverse information in the advisory opinion.<sup>36</sup>

Because of the specificity requirement, advisory opinions generally track the regulatory requirements for granting a particular type of O or P classification. For example, an advisory opinion supporting the granting to an Alien Artist of O-1 status will generally track the requirements of 8 C.F.R. section 214.2(o)(3)(iv) if outside the motion picture and television field, or 8 C.F.R. section 214.2(o)(3)(v) if within the motion picture and television industry. Thus, the initial question is whether the Alien Artist "has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field. . . ."<sup>37</sup> If so, the individual is "automatically" qualified, and the advisory opinion generally concludes with this finding. Otherwise, the individual must meet three of the six criteria specified in the regulation.<sup>38</sup>

(1) [e]vidence that the [Alien Artist] has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications contracts or endorsements;

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30. See 8 C.F.R. § 214.2(o)(5)(i)(A) (2000) (regarding O classifications); 8 C.F.R. § 214.2(p)(7)(i)(A) (2000) (regarding P classifications).

31. 8 C.F.R. § 214.2(o)(5)(i)(C).

32. 8 C.F.R. § 214.2(o)(5)(iii).

33. 8 C.F.R. § 214.2(o)(5)(i)(B)-(D); 8 C.F.R. § 214.2(p)(7)(i)(B)-(D). The exceptions for telephonic advisory opinions in certain exigent circumstances are cross-referenced in these regulations. *Id.*

34. 8 C.F.R. § 214.2(o)(5)(i)(C).

35. 8 C.F.R. § 214.2(o)(5)(iii); 8 C.F.R. § 214.2(p)(7)(ii).

36. 8 C.F.R. § 214.2(o)(7)(i), (ii); 8 C.F.R. § 214.2(p)(9)(i), (ii).

37. 8 C.F.R. § 214.2(o)(3)(iv)(A); 8 C.F.R. § 214.2(o)(3)(v)(A).

38. 8 C.F.R. § 214.2(o)(3)(iv)(B)(1)-(6) (pertaining to outside the television and motion picture industry); 8 C.F.R. § 214.2(o)(3)(v)(B)(1)-(6) (pertaining to motion picture industry); 8 C.F.R. § 214.2(o)(3)(iv)(C) (allowing the petitioner to use comparable evidence where six enumerated criteria do not readily apply to the Alien Artist's occupation).

(2) [e]vidence that the [Alien Artist] has achieved national or international recognition for achievements as evidenced by critical reviews or other published materials by or about the individual [Alien Artist] in major newspapers, trade journals, magazines, or other publications;

(3) [e]vidence that the [Alien Artist] has performed, and will perform, in a lead, starring or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;

(4) [e]vidence that the [Alien Artist] has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion pictures or television ratings, and . . . the like published in trade journals, major newspapers, or other publications;<sup>39</sup>

(5) [e]vidence that the [Alien Artist] has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged.<sup>40</sup> These testimonials must clearly indicate the author's authoritative knowledge and expertise.

(6) [e]vidence that the alien either has commanded . . . or will command a high salary or other substantial remuneration for services in relation to others in the field as evidenced by contracts or other reliable evidence.<sup>41</sup>

If it is unclear whether the INS would consider the award sufficiently acclaimed to satisfy the requirement that the award be both national or international and "significant," the advisory opinion is likely given greater weight if it also addresses all six criteria. Generally, advisory opinions for other categories also closely track the regulatory requirements, citing supporting evidence and derogation of the various regulatory criteria.

### III. HYPOTHETICALS

A reading of the foregoing may lead to the assumption that the rendering of an advisory opinion is nothing more than the application of the

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39. 8 C.F.R. § 214.2(o)(3)(iv)(B)(1)–(4).

40. 8 C.F.R. § 214.2(o)(3)(iv)(B)(5).

41. 8 C.F.R. § 214.2(o)(3)(iv)(B)(6).

peer group/labor organization's expertise in a particular field,<sup>42</sup> to the evidence presented by the Alien Artist's or Accompanying Alien's employer. Nothing could be further from the truth. This is because so many of the terms in the regulations are ill-defined.

Furthermore, there is a divergence of interest between the employer-petitioner and the peer group/labor organization. The employer-petitioner may want the alien to gain admission to the United States for many reasons, some wholly unrelated to the alien's abilities as an artist or entertainer.<sup>43</sup> Alternatively, peer group/labor organization will likely want the alien excluded unless the regulatory requirements are precisely met.<sup>44</sup>

This divergence of opinion often affects the way in which the evidence is evaluated, and the weight given to the information contained in the application. Because the employer-petitioner desires the alien's admission, it may carefully circumscribe the data it provides in its application. Peer group/labor organizations generally cannot locate contrary data about often obscure foreign artists. These artists have no incentive to cooperate with the labor organization's search for adverse data especially considering that most petitions are submitted in very close proximity to the time the event or production at issue is scheduled. Consequently, labor organizations are likely to view any evidence adduced by the employer-petitioner with skepticism and will rely heavily on any gaps in the application.

This is best illustrated by the following hypothetical situations:

*A. How Extraordinary is "Extraordinary?" (An "O-1" Hypothetical)*

As previously discussed, to qualify for O-1 status, an Alien Artist must meet either the "automatic" qualification requirements or three of the six alternative criteria.<sup>45</sup> The alternative criteria are designed to determine whether the Alien Artist has "extraordinary" abilities and/or achievements.<sup>46</sup> However, the following example illustrates the

42. Examples of such areas of expertise in motion pictures and television are sound engineering, make-up artistry, hair styling, costume design, set decoration, and cinematography.

43. These reasons may include: 1) the fact that the Alien Artist will work for less than a U.S. artist with comparable experience and skills; 2) the fact that the Alien Artist has a relationship (familial or otherwise) with other members of the cast, crew or others connected with the production; 3) the fact that the Alien Artist has been requested by a star, director or the like or 4) the Alien Artist's foreign language skills may simply save time and effort associated with finding U.S. resident artists with similar language skills.

44. See *supra* text accompanying notes 15–29.

45. See *infra* Part II.A.1 and Part II.B.

46. 8 C.F.R. § 214.2(o)(1)(ii)(A) (2000).

ambiguities existing within the six criteria.<sup>47</sup> Thus, the criteria lack a workable standard for determining when professional-level competence in a demanding field rises to the level of exceptional abilities necessary to satisfy the regulatory requirements. The lack of published precedent places consulting labor organizations at a disadvantage.

### 1. The Facts

Hannah Harriet is a native Australian, and the lead hairstylist for the television series "Mars Madness." Although produced in Australia, the series airs as a children's science fiction program in New Zealand. A cable television channel in the United States ran the show's pilot and three other episodes as a marathon program on Christmas day. The network, expecting lower than normal adult viewership, thought this would be a low-risk way to determine whether the show could develop a following in the United States. As a result of her work on "Mars Madness," Harriet was nominated for, but did not win, an award in hairstyling from the New Zealand Academy of Science Fiction and Fantasy Films.

Paula Proud is the celebrated winner of a Sundance Film Festival award for an autobiographical independent film she wrote, directed and produced. She is currently making a horror film for a new "studio independent" film production company, "Stindy Company." The film is being produced on a non-union basis in Arizona. Proud met Harriet at a screening of Proud's film in Australia, and Harriet told Proud that she always wanted to work in Hollywood. Because of this, Proud thought Harriet would work very hard on the project if hired. Proud then contacted the cable channel and asked to see the episodes of "Mars Madness" that aired at Christmas. After viewing the episodes, Proud hired Harriet, at two dollars per week less than union scale, to work as the only hairstylist on the film.

The next stage of the process occurs when the Stindy Company applies for O-1 status for Harriet, and asks the appropriate labor organization to provide an advisory opinion. In addition to citing Harriet's nomination for an award in hairstyling, Stindy Company provides the consulting labor union with: 1) a copy of Harriet's contract; 2) a letter from Andy Andrews, the 18 year old star of "Mars Madness," stating that he has

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47. While there are a few reported court decisions resulting from judicial review of INS decisions in the sports arena, a real dearth of such decisions exists in the arts and entertainment industries. See Jon Jordan, Comment, *The Growing Entertainment and Sports Industries Internationally: New Immigration Laws Provide for Foreign Athletes and Entertainers*, 12 U. MIAMI ENT. & SPORTS L. REV. 207 (1995) (reviewing more prominent decisions in the sports industry).

worked with Harriet and she is “just tops” in the hairstyling field; 3) a letter from Proud saying that she viewed several episodes of “Mars Madness” and knew Harriet could “uniquely” implement Proud’s vision and 4) an article from a teen magazine in New Zealand touting Andrews as a potential new teen idol, and commenting favorably that “Mars Madness” was a “super popular show with kids and teens alike, and, like Andy himself, destined for greatness.”

## 2. The Analysis

Applying the regulations to these facts, the analysis would proceed as follows. First, the regulations identify significant national or international awards analogous to those granted by the Directors Guild of America, the Academy of Motion Picture Arts and Sciences, and the Academy of Television Arts and Sciences.<sup>48</sup> Thus, the consulting labor organization is likely to determine that a nomination in hairstyling by the New Zealand Academy of Science Fiction and Fantasy Films does not qualify as a significant national or international award in Harriet’s line of work. Accordingly, the consulting labor organization will proceed to examine the remaining criteria, as will the INS.

The next issue is whether Harriet has and will perform services as a lead participant in any production or event with a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts or endorsements.<sup>49</sup> While Harriet has been a lead hairstylist for “Mars Madness,” the only evidence of the reputation of “Mars Madness” is expressed through the teen magazine article. Although the magazine’s comments on the program are favorable, they are far from authoritative and appear only as a side-note to the favorable comments about Andrews. Given its lack of public exposure, it would appear that “Mars Madness” does not qualify as a production with a distinguished reputation.

This is supported by the fact that the series has yet to complete a season and has not received any awards. With respect to future work, while Proud has been recognized as the writer, director and producer of her

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48. Consulting labor organizations consider some longstanding film and television awards from outside the United States, such as the British Academy of Film and Television Arts, to be significant national or international awards. Non-American specialty awards, which are limited to films in a single genre or small clusters of genres or to members of a single craft, ordinarily are not considered significant and of the same stature. Note that if the INS were to systematically disagree with this assessment, there is no mechanism for informing consulting labor organizations of such disagreement.

49. 8 C.F.R. § 214.2(o)(3)(iv)(B)(1).

autobiography, the application does not provide any information distinguishing the upcoming horror film for which she has contracted to provide services. Accordingly, this work criteria is likely not satisfied.

The consulting labor organization would be helped if previous INS decisions were published. In that case, the consulting labor organization could explain its rationale by contrasting the facts of this case with those of another concrete situation. For example, the consulting labor organization could say, unlike *The New York Times* review involved in application of X, involving the request by production company X for O-1 status for a hairstylist Y, the teen magazine's mention of "Mars Madness" does not come from a recognized film critic published in an internationally recognized publication. Additionally, the teen magazine article suffers from a lack of detailed background information that *The New York Times* critic provided in his analysis.

While it is true that the consulting labor organization could juxtapose the two reviews, it would be unable to determine how the INS evaluated this factor in the case of X's application for Y. As a result, the consulting labor organization may cite to an example the INS regards as not apt.

The second factor requires documentation demonstrating that the O-1 applicant has achieved national recognition by critical reviews or other published material such as in a major newspapers, trade journals or other publications.<sup>50</sup> Other than the testimonials of Andrews and Proud, there is no other documentation in the application evidencing recognition of Harriet's work.<sup>51</sup> While Andrews may hold a degree of prominence as a television star, his experience with motion picture and television hairstylists is limited, as he is only an 18-year-old actor. The testimonial apparently makes no mention of any facts suggesting that Andrew has experience with which to compare Harriet's skill and expertise.

Proud's testimonial is also not very probative because her comments are based solely upon her interpretation of Harriet's work through reviewing several episodes of "Mars Madness." Consequently, the evidence fails to demonstrate the requisite national recognition sufficient to satisfy this factor, especially given that the INS is not even required to consider testimonials in considering this factor.<sup>52</sup>

The third factor also turns on the reputation of Harriet's past and future employers. This factor looks to whether Harriet has performed and

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50. 8 C.F.R. § 214.2(o)(3)(iv)(2).

51. The teen magazine article about the program is inapplicable to this factor because it makes no mention of either Harriet or the hair styles in the program.

52. See 8 C.F.R. § 214.2(o)(3)(iv)(2).

will perform in a lead or critical role for any organization or establishment with a distinguished reputation.<sup>53</sup> It is clear Harriet has performed in a lead role because she was the lead hairstylist on “Mars Madness.” However, the evidence in the application is insufficient to establish that “Mars Madness” has a distinguished reputation. Similarly, while there is reason to believe Proud has a good reputation, given her Sundance Film Festival award, nothing in the application suggests her association with this horror film distinguishes the production. Again, this analysis would be more effective if the consulting labor organization could refer to previously decided and published decisions by the INS.

The fourth factor requiring the Alien Artist have a “major commercial or critically acclaimed success”<sup>54</sup> is also not likely met, given that the application does not contain any documentation of such success other than the teen magazine article. As a result, the application lacks documentation of critical acclaim or major commercial success such as title, rating, standing in the field, box office receipts, motion picture or television ratings, or other occupational achievements reported in trade journals, major newspapers, or other publications.<sup>55</sup>

The fifth factor presents a close case but may be the only factor favoring an application on Harriet’s behalf. This factor contains some documentation of significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field as required by the code.<sup>56</sup> The award nomination from the New Zealand Academy of Science Fiction and Fantasy Films is at least arguably a significant organizational recognition. Although the regulation ostensibly requires more than one nomination, it is arguable that a single nomination could satisfy this requirement. Consulting labor organizations could benefit from the guidance provided by previous INS decisions when attempting to resolve this issue.

The sixth and final factor also fails to provide support for Harriet’s application. This factor requires the alien to command or have commanded a high salary in relation to others in the field.<sup>57</sup> A less-than-scale contract abjectly fails to meet this standard. This factor often creates discord between applicants and consulting labor organizations, as the applicants usually urge that the appropriate standard for judging compensation is not compensation given to U.S. workers, but rather to workers in the Alien

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53. 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

54. 8 C.F.R. § 214.2(o)(3)(iv)(B)(4).

55. 8 C.F.R. § 214.2(o)(3)(iv)(B)(4).

56. 8 C.F.R. § 214.2(o)(3)(iv)(B)(5).

57. 8 C.F.R. § 214.2(o)(3)(iv)(B)(6).

Artist's country. Thus, if Harriet's below-scale compensation is relatively high compared to stylists in foreign countries, the applicant would argue that this factor is met. This argument seems preposterous, however, given the applicant is seeking to employ the Alien Artist in the United States. Published decisions revealing how the INS would resolve this dispute would again be valuable. As this example demonstrates, while what is extraordinary may not exactly be a function of who is the beholder, there are many unresolved questions in the application of the statutory and regulatory standards in need of clarification.

*B. Amorphous Requirements for Accompanying Aliens: Vagueness in the U.S. Code (Three O-2 Hypotheticals)*

If there are a great many unresolved issues in determining who qualifies for O-1 status, the question of who qualifies for O-2 status is even more perplexing. While an Accompanying Alien is not required to have the same degree of accomplishment and recognition as an Alien Artist, an Accompanying Alien must have skills "not of a general nature" or, at the very least, the Accompanying Alien must be "essential to the successful completion of the production."<sup>58</sup> Although the U.S. Code looks to the nature of the relationship between the person with O-1 status and the person with O-2 status as a critical factor in determining whether the Accompanying Alien's skills are "critical" or "essential," the regulation clearly requires an evaluation of the Accompanying Alien's level of skills and accomplishment of the Accompanying Alien's field of employment.<sup>59</sup>

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58. 8 U.S.C. § 1101(a)(15)(O)(ii)(III) (1994 & Supp. IV 2000). Accompanying Aliens must meet a four part test for nonimmigrant alien classification. First, the alien must desire to enter the United States on a temporary basis and only for the purpose of assisting in the artistic or athletic performance of an O-1 Alien. 8 U.S.C. § 1101(a)(15)(O)(ii)(I). Second, the Accompanying Alien must be an integral part of the performance of the O-1 Alien. 8 U.S.C. § 1101(a)(15)(O)(ii)(II). Third, the Accompanying Alien must have either:

(a) critical skills and experience . . . which are not of a general nature and which cannot be performed by other individuals, or (b) in the case of a motion picture or television production, has skills and experience with such [O-1] alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place *both* inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production.

8 U.S.C. § 1101(a)(O)(ii)(III) (emphasis added). Finally, the Accompanying Alien must have no intention of abandoning their foreign residence. 8 U.S.C. § 1101(a)(15)(O)(ii)(IV).

59. See 8 U.S.C. § 1101(a)(15)(O)(ii).

The following three hypothetical examples illustrate how statutory requirements of the U.S. Code affect Accompanying Aliens by applying these requirements to tangible situations. The first example is a modified version of the hypothetical discussed in Part III.A.1. The second is an Accompanying Alien application limited to a single foreign motion picture production, with substantial U.S. and non-U.S. components. The final is a variation on the second hypothetical: an Accompanying Alien application limited to a single domestic motion picture production with a majority of filming in the United States.

### 1. Example One

Five years have passed, and “Mars Madness” is now a staple not just on New Zealand public television, but also on British and Australian public television as well as a U.S. pay cable channel. Andy Andrews is a regular feature on the cover of the tabloids and entertainment magazines of each of these nations, and one of Andrews’ trademarks displayed therein is his “hip blue hairdo.” Andrews desires to travel to the United States to star in the newest in a long series of spoofs by a famous comedic director for a major Hollywood studio of a blockbuster science fiction motion picture series. The studio has applied for an O-1 visa for Andrews, and the Screen Actors Guild acknowledged that Andrews is deserving of O-1 status. The studio has also applied for O-2 status for Harriet, who still has not won a single award for her hairstyling.

Unlike the scenario in which Stindy Company sought O-1 status for Harriet, Harriet’s lack of recognition in her own right is less outcome-determinative here. Harriet’s five years of employment as Andrews’ hairstylist clearly qualifies as a longstanding working relationship. Among other things, the statute requires an Accompanying Alien possess “critical skills and experience” not general in nature, and either: 1) that such qualifications are critical based upon a longstanding employment relationship or 2) significant filming will take place both in and out of the United States.<sup>60</sup> Given her lack of professional recognition, Harriet’s skills are at least arguably inadequate to satisfy the requirement of critical or essential to the project. However, the fact that Andrews’ novel hairstyle, created and maintained by Harriet for five years, is considered his trademark may at least somewhat offset Harriet’s lack of unusually distinguished skills. It would not be surprising, therefore, that the

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60. 8 U.S.C. § 1101(a)(15)(O)(ii)(III)(b). It is important to note that this is only one of four total requirements the Accompanying Alien must meet for nonimmigrant alien classification. *See supra* note 58.

consulting labor organization would file a “no-objection” letter in connection with this application.

Harriet’s participation may be considered “critical” if the hypothetical contained additional facts. For example, if Andrews’ “perfect hair” were a significant plot element, and it was crucial to the plot that a hair is never out of place, Harriet’s abilities would become critical and her experience giving Andrews’ hair its trademark look would not be general knowledge.

## 2. Example Two

This example involves a Pakistani director who was twice nominated for an Academy of Motion Picture Arts and Sciences award for best foreign language film. The director decides to make a reprise, in Urdu, of a moody 1980s film in which the urban streets and desolate feel of the cinematography are as much a character in the film as the actors. The film is set in San Francisco. However, to save money, the director films the interior scenes in Pakistan. After those scenes are completed, the exterior scenes, which are expected to constitute about fifty percent of all shooting days, are scheduled for filming in San Francisco.

The director is automatically qualified for O-1 status, and he wishes to bring two Accompanying Aliens with him. One is the cinematographer, C; the second is the make-up artist, M. Neither C’s nor M’s work has ever received recognition by an award or a favorable review in a recognized publication. Each has sufficient professional credits to demonstrate competence and experience, including work on projects with favorable reviews by local press in Pakistan.

C and M have been employed by the Pakistani director since the project’s pre-production stage. The cinematographer will be compensated at about sixteen or seventeen percent above scale and given first class accommodations while traveling in the United States. The make-up artist will be compensated at about one and one-third times the California state minimum wage (equal to one-quarter of scale), and will share his accommodations with other crew members.

The employer petitioning for O-1 status is a joint U.S.-Pakistani venture, with its principal place of business in San Francisco. Its application focuses on alleged scarcity of Urdu-speaking professionals in the United States, but provides no empirical evidence.

Applying the regulatory criteria, there are two requirements for granting an application for entry into the United States for a specific

motion picture or television production.<sup>61</sup> First, “significant production” must take place “both inside and outside the United States.”<sup>62</sup> Second, the continuing participation of the Accompanying Alien must be “essential to the successful completion of the production.”<sup>63</sup>

Although “significant” is an ambiguous term, the facts illustrate significant production is occurring in both the United States and Pakistan. First, an equal number of shooting days will take place in each country. Second, the scenes shot in San Francisco are “significant” to the plot because the urban streets and their desolation are practically a character in the motion picture. Thus, San Francisco is significant to the film in more ways than just the number of shooting days.

However, the necessity of the cinematographer and the make-up artist is another matter. One may argue a continuous cinematographer is essential to a film in which the desolate feel of the cinematography is a central feature. Where the director with O-1 status can provide concrete evidence of this centrality rather than offer vague platitudes applicable to every motion picture, he further bolsters the preceding argument. The fact that the cinematographer’s compensation, while certainly not at the top of his field, is substantially above scale also supports this argument. If the cinematographer was only making scale, this would be a strong indicator by the market that the need for his services, as opposed to those of any other cinematographer, was not that great.

The make-up artist is distinguishable from the cinematographer. The facts fail to demonstrate that make-up is particularly central to this project. There is no evidence that this make-up artist has any particular skills that make him essential. Furthermore, the fact that about one-half of the shooting, including all of the outdoor scenes and some of the most significant scenes, takes place in the United States undercuts any argument that use of a single make-up artist is necessary. The make-up artist’s minimal compensation also undermines any argument that the artist’s services are at all special, and certainly undercuts any argument that they are “essential.”

As to the asserted dearth of Urdu-speaking make-up artists, this is an area requiring INS guidance. Indeed, some Urdu-speaking make-up artists live in the United States. However, not all make-up artists in the United States speak Urdu. The INS fails to offer guidance as to when the supply

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61. 8 C.F.R. § 214.2(o)(1)(ii)(B) (2000).

62. 8 C.F.R. § 214.2(o)(1)(ii)(B)(1), (2) (emphasis added).

63. *Id.*

of United States artists is so small as to render it essential to retain a non-citizen alien with foreign language skills.

### 3. Example Three

To illustrate the case-specificity of these analyses and to demonstrate why precedent, rather than additional regulations, is the best way to provide guidance to the consulting and applicant bar, this hypothetical is a variation of the previous hypothetical.

In this example, Stindy Company, the United States production company discussed in Part III.A.1, hires the same Pakistani director. The director won two nominations for an Academy of Motion Picture Arts and Sciences award for best foreign language film. He decides to make a reprise of the same moody 1980s film in which the urban streets and desolate feel of the cinematography are as much a character in the film as the actors. The film is, of course, set in San Francisco. This time, however, the director does not need to film the interior scenes in Pakistan. Instead, only a few flashback scenes amounting to about a week of shooting take place in Pakistan. The balance occurs in San Francisco.

Pre- and post-production will take place in Stindy Company's Burbank, California, facilities. The director, who is automatically qualified for O-1 status, wishes to bring the same two Accompanying Aliens with him. Again, there has been no recognition of either the cinematographer or the make-up artist for their work by an award or favorable review. In this example, both have worked on a single previous film project with the director. The production will compensate the cinematographer at about sixteen or seventeen percent above scale and will provide first class accommodations while traveling in the United States, which is better than required by the applicable collective bargaining agreement. The production will compensate the make-up artist at scale and, because this is a union production, will provide standard accommodations under the collective-bargaining agreement.

Because only a few days, rather than a significant portion, of filming will take place in Pakistan, one must examine this application under the first of the two tests for O-2 status in the motion picture or television industry; that is, the Accompanying Alien must have "skills and experience with the [O-1] alien which are not of a general nature and which are critical . . . based on a pre-existing and longstanding working relationship. . . ."<sup>64</sup> Here, the application provides no information about the pre-existing

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64. 8 C.F.R. § 214.2(o)(1)(ii)(B)(2).

relationship, except that each of the proposed Accompanying Aliens worked with the Alien Artist on one project. The application also fails to provide useful information regarding what, if anything, about that single previous work experience makes the Accompanying Aliens “critical” to the production. Finally, because both of the proposed Accompanying Aliens lack any recognition for their work, there is no basis on which to conclude their skills are not of a general nature. In fact, this hypothetical suggests that the two beneficiaries are nothing more than competent at their work. Additionally, their unexceptional compensation bolsters this conclusion. Neither will receive the level of compensation reserved for those at the top of the field, and nothing suggests that they have “critical” skills and experience “not of a general nature.”

While one might expect the applicant to argue, at least with respect to the cinematographer, that his higher than scale compensation is an indicator of better-than-average skills, most consulting labor organizations would probably find that measure too crude to warrant a favorable opinion even though this would be a good area for INS guidance. For example, if the production company paid the cinematographer at ten times scale, this huge deviation from average compensation would likely cause the consulting labor organization to believe the production company genuinely regarded the cinematographer as critical. The labor organization would therefore want to provide a favorable ruling despite the paucity of other data.

#### IV. CONCLUSION

The changes in the requirements for nonimmigrant visas for Alien Artists and Accompanying Aliens embodied in the IMMACT, as amended in 1991, spawned a contentious battle between labor and management.<sup>65</sup> The negotiated settlement of that battle in the INS regulations created a sort of truce.<sup>66</sup> As a result, neither applicants nor consulting labor organizations really want Congress or the INS to reopen old wounds by revisiting the law. However, the current INS regulations leave both parties without the tools they need to effectively play their part under the regulations.

With legislative and regulatory changes politically unlikely, the question of how this system can be improved remains. In our system of jurisprudence, published administrative adjudications often serve as precedent, and, in this way, offer guidance to parties in approaching future cases.<sup>67</sup> The use of precedent is particularly applicable to fact-specific

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65. See discussion *infra* Part II.

66. Blum, *supra* note 7, at 543.

67. See Thomas G. Field, Jr., *Access To and Authority To Cite Unpublished Decisions of the*

situations. Thus, INS publication of its decisions on “contested” visa applications appears the most logical way to improve the system.<sup>68</sup>

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*PTO*, 33 *IDEA—J.L. & TECH.* 153, 155 & n.7 (1993) (quoting Fred E. McKelvey, Solicitor, U.S. Patent and Trademark Office). See generally Elizabeth M. Horton, Comment, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 *UCLA L. REV.* 1691 (1995) (discussing the importance of selective publication in United States Courts of Appeals); Kerri L. Klover, Comment, “Order Opinions”—*The Public’s Perception of Injustice*, 21 *WM. MITCHELL L. REV.* 1225 (1996) (discussing the importance of public decisions to the community’s sense of justice and the satisfaction of participants in legal processes).

68. Timothy R. Hagar, *Recognizing the Judicial and Arbitral Rights of Aliens To Review Consular Refusals of “E” Visas*, 66 *TUL. L. REV.* 203, 225 (1991).

