



May 19, 2021

Samantha Deshommes
Chief, Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services, Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: DPE Comment on Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services (DHS Docket No. USCIS-2021-0004)

Dear Ms. Deshommes,

On behalf of the 24 national unions in the Department for Professional Employees, AFL-CIO (DPE), thank you for the opportunity to provide our perspective on how U.S. Citizenship and Immigration Services (USCIS) can eliminate barriers and improve services for U.S. citizens and foreign citizens.

DPE's 24 national unions represent over four million professional, technical, and other highly skilled workers. The members of DPE's unions come from a diverse array of backgrounds, nationalities, and immigration experiences. Within our coalition are U.S. citizens, permanent residents, and professionals working on an array of temporary nonimmigrant visas - including F, J, H, O, and P visas. Union professionals also work in industries where employers commonly use these temporary nonimmigrant visa programs, in particular the H-1B visa program. Our recommendations for USCIS are informed by the lived experiences of our unions and their members.

Improve visa processing times to promote the economic interests of professionals

Some union professionals' livelihoods are inextricably linked to USCIS services, and processing delays can have serious consequences for them, including the loss of job opportunities. The American Federation of Musicians of the United States and Canada (AFM) represents members on both sides of the border. Canadian members of the AFM rely on the P-2 reciprocal exchange visa program to perform in the U.S. The treatment of Canadian AFM members by USCIS warrants particular attention because of the unique nature of AFM representing both Canadian and U.S. musicians. For these creative professionals, delayed processing has meant missing gigs because approval to work in the United States came after the performance date passed. When this happens, the U.S. professionals scheduled to work alongside these performers can lose out on work too. We urge USCIS to look for ways to streamline processing for Canadian members of AFM. We also urge that when processing delays result in P-2 petitions being approved after the performance date, USCIS refund fees or apply the fees to subsequent P-2 reciprocal exchange visa petitions.

Similarly, for faculty members and graduate employees, USCIS processing delays can affect travel plans, enrollment, grants, research, study, and employment. We recommend that USCIS take the necessary steps to improve staffing levels at its service centers so that the agency is capable of adjudicating petitions within the time frames set by statute and regulations.

Strengthen and protect the union consultation process for O and P visas

Included in DPE are 12 national unions that represent people who work in our country's arts, entertainment, and media industries. These unions serve as advisors in the adjudication of O and P visa petitions, the visa categories used by artists, entertainers, and support personnel who want to work temporarily in the United States. The unions' expertise helps maintain standards and educate USCIS adjudicators about industry nuance.

Our affiliate unions in the arts and entertainment industries take seriously their role as advisors in the O and P visa petition process. The unions use their advisory role to help ensure that employers adhere to existing industry practices and standards, not to deny work opportunities for qualified foreign performers. Any weakening of these unions' consultation rights would undermine the ability of these unions to maintain the workplace standards that their members fought hard to achieve. Lowered standards would hurt all performers, including those individuals coming from other countries to work in the United States.

At the same time, there are improvements USCIS can make that would better protect performers and their workplace standards, while bringing clarity, predictability, and fairness to the O and P visa petition process. We recommend USCIS:

- *Give union consultation letters greater weight.* Labor unions provide favorable letters to petitioners in the vast majority of cases. However, USCIS does approve petitions over union objections and denies petitions despite union approval, effectively disregarding union expertise. In the adjudication process, USCIS should give greater weight to union expertise. Additionally, in cases where USCIS did not follow union expertise, USCIS should provide the union a brief written explanation, thus, allowing for the opportunity for USCIS and consulting unions to learn from each other.
- *Take additional steps to prevent fraud and abuse.* Nearly every labor union that provides consultation letters for petitioners has had their letterhead fraudulently altered by O and P visa petitioners, threatening the integrity of the O and P visa system. Fraudulent submission of labor union consultation letters is made possible by the fact that, until recently, labor unions were required to submit their consultation letters to the petitioner and not to USCIS. Unions may now send consultation letters directly to USCIS in instances when a letter is not favorable to an O or P visa petitioner. This improvement should be more formally codified and expanded to require the direct submission of all consultation letters to USCIS with a copy to the petitioner. Additionally, unions that regularly participate in the consultation process should be called on to help develop training materials to educate O and P visa adjudicators about industry standards and practices and how to identify signs of potential fraud in petitions.
- *Open lines of communication with consulting unions.* Unions have little ability to directly communicate with USCIS to raise concerns about fraud and abuse when it happens, and USCIS rarely informs the unions that provide consultation letters of the outcomes of visa

adjudication cases. In order to strengthen the integrity of the O and P visa system, direct lines of communication must be established and notification must be given to the consulting union of petition adjudication outcomes.

Adopt a wage-based allocation process for the H-1B visa program

USCIS has the authority to determine how the government selects H-1B petitions subject to the annual numerical limit. The statute requires the agency to select petitions in the order in which they are received, which is practically impossible when USCIS receives more petitions than available visas. When this occurs currently, USCIS uses a random lottery process that was never formalized through the regulatory process.

We urge USCIS to reissue, through proper notice and comment, rules to adopt a visa allocation process that is more formalized and transparent, and that prioritizes the petitions of employers paying the highest wages, rather than the existing method of an ad hoc random lottery. Establishing a wage-based allocation system will provide certainty to employers, while increasing the number of international graduates from U.S. colleges and universities hired on H-1B visas since education, experience, and time in the U.S. should command higher salaries. At the same time, a wage-based allocation system will advantage direct-hire employers, including start-ups and small businesses, over the large outsourcers whose business model is built on gaming the random lottery to increase their chances of “winning” large shares of H-1B visas every year.¹

Join in an interagency effort to protect professionals’ workplace rights

Professionals working on temporary work visa programs are particularly at risk for exploitation because employers control their ability to live and work in the United States. This dynamic also means that individuals’ immigration statuses can be used against them in retaliation for blowing the whistle on workplace crimes. When this happens, unscrupulous employers lower standards for all working people, including U.S. professionals.

We urge USCIS to join in an interagency effort similar to the Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment, and Immigration Laws that existed at the end of the Obama Administration. An interagency working group will improve communications between the labor, employment, and immigration agencies, and also send a signal to low-road employers that immigration laws cannot be used to threaten or intimidate professionals exercising their workplace rights.

An interagency working group can also provide a forum for reviewing current rules and engaging in new rulemaking where necessary to better protect workers’ rights. As an example, updated regulations are better needed to protect F-1 and J-1 beneficiaries. The F-1 regulations² require “a full course of study” and the J-1 regulations³ require a sponsor to terminate an exchange visitor’s participation in the program if they “fail to pursue the activities for which he or she was admitted to the United States.” The U.S. government should clarify both

¹ Julia Preston, “Large Companies Game H-1B Visa Program, Costing the U.S. Jobs,” *New York Times*, November 10, 2015, <https://www.nytimes.com/2015/11/11/us/large-companies-game-h-1b-visa-program-leaving-smaller-ones-in-the-cold.html>.

² 8 CFR §214.2(f)(5) & (6)

³ 22 CFR §62.40

regulations to make clear that labor protest, including strikes, are protected and would not be grounds under either regulation for any adverse action either from employers or the government. The F-1 regulations also include a provision called “effect of strike” which requires the suspension of work authorization in case of a strike.⁴ The government should clarify these regulations so that employers cannot use them to threaten professionals who are organizing unions or striking.⁵

DPE appreciates USCIS taking our perspective and our suggestions into consideration. USCIS has an important mission and its work impacts the lives of union professionals on a near daily basis. We are available as a resource and welcome the opportunity to follow-up on any of the above issues.

If you have any questions, please contact DPE Assistant to the President/Legislative Director, Michael Wasser at mwasser@dpeaflcio.org.

Sincerely,

A handwritten signature in blue ink, appearing to read 'JDorning', is centered below the word 'Sincerely,'.

Jennifer Dorning, President

⁴ 8 CFR §214.2(f)(14)

⁵ For example, see *Washington University in St. Louis*, Case 14-CA-202172, NLRB Advice Memorandum dated Oct. 31, 2017 (noting the tension between the regulation and labor law); Bill Shackner, *Is fear over visa status being used to derail Penn State unionization effort?* (Pittsburgh Post-Gazette, Apr. 12, 2018) available at <https://www.post-gazette.com/news/education/2018/04/12/Penn-State-University-graduate-students-international-students-visas-labor-Pennsylvania/stories/201804120153>.