

U.S. IMMIGRATION LAW: A BARRIER TO EFFECTIVE CULTURAL DIPLOMACY

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“The poet, the artist, the musician, continue the quiet work of centuries, building bridges of experience between peoples, reminding man of the universality of his feelings and desires and despairs, and reminding him that the forces that unite are deeper than those that divide.” – John F. Kennedy¹

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¹ SHELLEY SOMMER, *JOHN F. KENNEDY: HIS LIFE AND LEGACY* 102 (2005).

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I. INTRODUCTION

Cultural diplomacy, defined by American political scientist Milton C. Cummings as “the exchange of ideas, information, art, and other aspects of culture among nations and their peoples in order to foster mutual understanding,”² is recognized by many countries as an effective foreign policy tool.³ Countries differ in the importance they place on cultural diplomacy, the benefits they seek to gain from it, and even in how they define it.⁴ Yet it is widely recognized that effective cultural diplomacy can help a country improve its global image and foster international understanding and dialogue.⁵ While at various points in its history, the United States has placed a strong emphasis on cultural

² MILTON C. CUMMINGS, JR., CTR. FOR ARTS AND CULTURE, CULTURAL DIPLOMACY AND THE UNITED STATES GOVERNMENT: A SURVEY 1 (2003), ics.leeds.ac.uk/papers/pmt/exhibits/1434/MCCpaper.pdf.

³ As Rod Fisher, Director of International Intelligence on Culture, in his speech to promote a stronger E.U. cultural policy, commented, “In foreign policy terms the arts and artists are instruments that can help to promote a dynamic image of a country or region. They can help to restore trust in circumstances when a country needs to mend fences with people or nations that its external actions may have offended.” Rod Fisher, Dir. of Int’l. Intelligence on Culture, Address at the Fifth European Forum on Culture & Society: Cultural Cooperation & Mobility in Europe (June 27, 2008), ec.europa.eu/culture/key-documents/doc/ericarts/culture_gov_EU_extern_relations.pdf.

⁴ See generally MARGARET J. WYZOMIRSKI, CHRISTOPHER BURGESS, & CATHERINE PEILA, CTR. FOR ARTS AND CULTURE, INTERNATIONAL CULTURAL RELATIONS: A MULTI-COUNTRY COMPARISON (2003), <http://www.americansforthearts.org/pdf/cac/MJWpaper.pdf> [hereinafter MULTI-COUNTRY COMPARISON] (studying cultural diplomacy philosophy, priorities, programs, structure, and funding in Australia, Austria, France, Canada, Japan, Netherlands, Singapore, Sweden, and the UK).

⁵ *Id.*

diplomacy, its current support and commitment to cultural diplomacy lags behind much of the world.⁶

As the United States struggles to regain its world image and foster good relations, it should renew its commitment to cultural diplomacy; moreover, it must recognize that effective cultural diplomacy is a two-way street. U.S. visa procedures have become unduly restrictive and act as a barrier to cross-cultural exchange. Immigration reform in 1990⁷ and restrictive visa procedures implemented after the attacks of September 11, 2001⁸ have closed the door to many gifted artists attempting to work temporarily within the United States. If the United States makes it too difficult for international artists to enter its borders, other countries will be less willing to open their borders to American artists, and the United States will be unable to reap the long-term benefits of cross-cultural exchange. Recent developments indicate the government's willingness to reconsider its restrictive visa policy for visiting artists. Significantly, the United States Citizenship and Immigration Services ("USCIS") announced in July that it had formed an internal performing arts visa working group to address the problems with the current artist visa adjudication process.⁹

⁶ See discussion *infra* Part II. See also JULIET ANTUNES SABLOVSKI, CTR. FOR ARTS AND CULTURE, RECENT TRENDS IN DEPARTMENT OF STATE SUPPORT OF CULTURAL DIPLOMACY: 1993-2002 (2003), <http://www.nyu.edu/brademas/pdf/sablosky.pdf> (discussing the decline in American support for cultural diplomacy after the Cold War); Patricia Dewey & Margaret J. Wyszomirski, *International Issues in Cultural Policy and Administration: A Conceptual Framework for Higher Education*, presented at THE THIRD INT'L CONF. ON CULTURAL POL'Y RES. 6 (Aug. 25-8, 2004), neumann.hec.ca/iccpr/PDF_Texts/Dewey_Wyszomirski.pdf (comparing different countries' cultural diplomacy initiatives and noting that many countries prioritize cultural diplomacy to a much greater extent than the United States). In comparing American and Canadian cultural diplomacy priorities, the authors state: "In Canada, culture is one of the three pillars of foreign policy (along with economic and political). In the U.S. culture is relegated to a much lower status, and accorded less significance than military, political, economic, or communications/information." *Id.* at 6. See also MULTI-COUNTRY COMPARISON, *supra* note 4, at 2 (examining America's history of discomfort with cultural diplomacy and discussing other countries' lengthier and more consistent commitments to cultural diplomacy activities). Commentators have cited the "aversion to official culture" and the belief that "diplomacy is about power [rather than mutual interests]," as reasons underlying America's lack of long-term sustained commitment to cultural diplomacy. *Id.* Others have cited "an underlying ambivalence about involvement in foreign affairs, a historic mistrust of central government, especially its involvement in education and the arts, as well as the preference to leave such matters to the private sector and the marketplace." SABLOVSKI, *supra* note 6, at 3.

⁷ See discussion *infra* Part III.

⁸ *Id.*

⁹ See *Foreign Artist Visa and Tax News*, LEAGUE OF AMERICAN ORCHESTRAS,

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This Note contributes to the conversation by exposing problems with the current approach and using a comparative analysis to suggest some new possibilities for reform.

Part II of this Note will discuss the history of American cultural diplomacy, its importance as a foreign policy tool, and its connection to visa reform. It will advocate for a more robust cultural diplomacy policy and offer general suggestions for reform. Part III will examine the history and controversy surrounding the 1990 Immigration Reform and the resulting impact on artist mobility. Second, it will address the conflicting policy concerns and implications that must be considered in assessing to what extent the United States should open its borders to international artists. Finally, this Part will discuss the increased barriers to cross-cultural exchange resulting from the premium processing system and post-9/11 security measures; it will argue that many of the procedures adopted place an additional and unnecessary burden on artists and arts organizations. Part IV will compare the visa process for foreign artists seeking to work temporarily in the United States with that of Austria, Canada, and the European Union (“E.U.”). This Part will encourage the United States to look to these countries’ laws and initiatives for guidance in attempting to reform its complex and inefficient system. Part V will suggest that the country can increase cross-cultural exchange without sacrificing important U.S. interests.

II. CULTURAL DIPLOMACY

A. *History of American Cultural Diplomacy*

The United States has long recognized the importance of cultural diplomacy. As Thomas Jefferson remarked to James Madison:

You see I am an enthusiast on the subject of the arts. But it is an enthusiasm of which I am not ashamed, as its object is to improve the taste of my countrymen, to increase their reputation, to reconcile to them the respect of the world and

http://www.americanorchestras.org/advocacy_and_government/foreign_artist_visa_tax_news.html (last visited Nov. 20, 2010); see also Ben Sisario, *U.S. Pledges to Speed up Visa Process for Artists*, N.Y. TIMES, July 23, 2010, at C3, available at <http://www.nytimes.com/2010/07/23/arts/music/23visa.html>.

procure them its praise.¹⁰

The government did not formally commit to the use of cultural diplomacy as a foreign policy tool, however, until the 1930's. In an attempt to counteract Nazi Germany's "cultural offensive" in Latin America, the United States approved the Convention for the Promotion of Inter-American Cultural Relations in 1936.¹¹ Two years later, the U.S. Department of State established the Division of Cultural Relations to strengthen long-term cultural relations with other countries, beginning with those in Latin America.¹²

U.S. support for cultural diplomacy grew during WWII¹³ and peaked during the Cold War, as the country struggled to win the "war of ideas" against the Soviets.¹⁴ During the Cold War, numerous artists were sent abroad by the government as "cultural ambassadors," and important legislation was passed in an effort to promote cultural exchange.¹⁵ In the late 1950's, the United States sent more than one hundred acts to eighty-nine countries in four years.¹⁶ In an effort to "showcase the values of a democratic society in juxtaposition to a totalitarian system,"¹⁷ the State Department sent some of the country's greatest artists, including Duke Ellington, Dizzie Gillespie, and the New York Philharmonic, on tours to the Soviet Union, Africa, South America, and Asia.¹⁸

10 CYNTHIA SCHNEIDER, CTR. FOR ARTS AND CULTURE, DIPLOMACY THAT WORKS; BEST PRACTICES IN CULTURAL DIPLOMACY 1 (2003), http://ccges.apps01.yorku.ca/old-site/IMG/pdf/03_Schneider.pdf.

11 CUMMINGS, *supra* note 2, at 1. "U.S. cultural affairs officer[s] [described German activities] as 'well organized and well subsidized, and designed to counteract and weaken U.S. cultural relationships with the Latin American countries and discredit U.S. motives and purposes in the area.'" *Id.*

12 *Id.* at 3.

13 SCHNEIDER, *supra* note 10, at 7. After World War II, the country sponsored major educational and cultural exchange programs with both Germany and Japan in order to "re-educate and reorient [them in the] values of the democratic society." CUMMINGS, *supra* note 2, at 4.

14 SCHNEIDER, *supra* note 10, at 3.

15 CUMMINGS, *supra* note 2, at 10. The Cold War era saw the passage of the Fulbright Act of 1946, one of the most famous U.S. education/cultural exchange programs, and the Smith-Mundt Act, also known as the Information and Cultural Exchange Act of 1948. The Smith-Mundt Act stated that the government would "conduct international, information, education, and cultural exchange activities on a worldwide scale . . . [in order] to promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of the United States and the people of other countries." *Id.* at 5-7.

16 SCHNEIDER, *supra* note 10, at 2.

17 *Id.*

18 *Id.*

The government-subsidized tours and cultural exchange programs of this period were considered by many to be incredibly effective tools in the “war of ideas” against the Soviets.¹⁹ After the Cold War, however, the U.S. Information Agency (“USIA”),²⁰ one of the main arms of America’s cultural diplomacy efforts during the Cold War period, was abolished, and government support for cultural diplomacy activities dwindled.²¹

B. Future of American Cultural Diplomacy

The limits of military force in the face of America’s current threats have become apparent. Thus, there has been a renewed interest in all forms of diplomacy, and specifically in what has been termed “public diplomacy.”²² In contrast to traditional diplomacy, which takes place between governments and behind closed doors, modern public diplomacy efforts seek to enhance the national interest through broad communication and exchange with foreign

¹⁹ J. William Fulbright, *Open Doors, Not Iron Curtain*, N.Y. TIMES MAGAZINE, Aug. 5, 1951, at 26. Senator Fulbright commented on his program stating:

[T]he Russians have attacked it as being a clever propaganda scheme. I can agree that, as matters have developed, this program of exchange of persons is one of the most effective weapons we have to overcome the concerted attack of the Communists . . . So, while the program was not designed to meet specifically the attack of the Soviet Union, it is the most effective weapon we have in the propaganda war or the war of ideas.

Id.

²⁰ The agency existed from 1953-1999, and its purpose was to inform the world about the “United States, its people, and [its] policies.” Pub. L. No. 80-402, § 501, 79 Stat. 6, 9 (1948) (codified as amended at 22 U.S.C. § 1431 (2010)). The USIA established the Voice of America radiobroadcast system, radio and television broadcast service to Cuba, and the World-net Satellite television service. The agency also coordinated educational and cultural exchanges programs and established information centers in foreign countries. UNITED STATES INFORMATION AGENCY (Sept. 1999), <http://dosfan.lib.uic.edu/usia/> (archived copy of the homepage located on the website of the Federal Depository Library Collection at the University of Illinois at Chicago).

²¹ U.S. DEPARTMENT OF STATE, REPORT OF THE ADVISORY COMMITTEE ON CULTURAL DIPLOMACY, CULTURAL DIPLOMACY AS THE LINCHPIN OF PUBLIC DIPLOMACY 6 (2005), www.state.gov/documents/organization/54374.pdf [hereinafter LINCHPIN OF PUBLIC DIPLOMACY].

²² There are many different definitions of public diplomacy, but the term is attributed to Dean Edward Guillion of the Fletcher School of Law and Diplomacy. See John Brown, *The Purposes and Cross-Purposes of American Public Diplomacy*, AMERICAN DIPL. (Aug. 15, 2002), http://www.unc.edu/depts/diplomat/archives_roll/2002_07-09/brown_pubdipl/brown_pubdipl.html.

publics.²³ American public diplomacy efforts consist of informational programs designed to inform foreign countries about American policy, society, and values, as well as exchange programs and cultural presentations that seek to display America's cultural achievements and promote international goodwill.²⁴ In addition to abundant private efforts to promote public diplomacy, the government has undertaken recent initiatives to prioritize public diplomacy.²⁵ Nevertheless, while governmental attention to public diplomacy has increased in recent years, a disproportionate amount of attention has been given to the informational component of public diplomacy. In 2009, only \$501 million out of a total \$1.6 billion U.S. public diplomacy budget went to exchange and cultural affairs ("ECA") programs.²⁶ Further, the recent U.S. Governmental Accountability Office ("GAO") report on public diplomacy barely mentioned the ECA and its cultural exchange activities.²⁷ As the government seeks to increase its diplomatic toolbox, it should not lose sight of the power of cultural diplomacy. Rather, it should place a greater emphasis on cultural diplomacy and seek to remedy the defects in its current policy by adopting an exchange-based approach to cultural diplomacy and by revising its current restrictive visa policy to encourage cross-cultural exchange.

The government must develop a cultural diplomacy policy that focuses on cultural dialogue. Countries cite many different

²³ *Id.*

²⁴ Public diplomacy efforts are divided among various entities including the Department of State ("DOS"), the Broadcasting Board of Governors ("BBG"), the United States Agency of International Development ("USAID"), and the Department of Defense ("DOD"). See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-679SP, REPORT TO CONGRESSIONAL COMMITTEE, U.S. PUBLIC DIPLOMACY, KEY ISSUES FOR CONGRESSIONAL OVERSIGHT (2009) [hereinafter GAO REPORT ON PUBLIC DIPLOMACY]. The DOS houses the Bureaus of Educational and Cultural Affairs, the Bureau of International Information Programs, and the Bureau of Public Affairs. *Id.*

²⁵ The government has been making concerted efforts to use public diplomacy in order to improve America's image abroad. Advocating for increased cultural diplomacy efforts, the 2005 Report of the Advisory Committee on Cultural Diplomacy stated:

[I]n the wake of the invasion of Iraq, the prisoner abuse scandal at Abu Ghraib, and the controversy over the handling of detainees of Bagram and Guantanamo Bay, America is viewed in much of the world less as a beacon of hope than as a dangerous force to be countered. This view diminishes our ability to champion freedom, democracy, and individual dignity-ideas that continue to fuel hope for oppressed peoples everywhere.

LINCHPIN OF PUBLIC DIPLOMACY, *supra* note 21, at 1.

²⁶ GAO REPORT ON PUBLIC DIPLOMACY, *supra* note 24, at 8.

²⁷ *Id.*

goals when describing their cultural diplomacy initiatives including: (1) projecting a positive image abroad; (2) advancing foreign policy interests; (3) promoting export of a country's cultural products; (4) preventing international conflict; (5) promoting tolerance and cultural sensitivity; and (6) developing trust and mutual cooperation.²⁸ When the United States discusses its goals, it tends to focus mainly on the projection of its image abroad. The motto of the former United States Information Agency (USIA) was "telling America's story to the world."²⁹ Similarly, the 2000 Strategic Plan of the U.S. Department of State focused on the need to project "the creativity, idealism, dynamic and democratic tradition of the American People."³⁰

In contrast, other countries realize the importance of the conversational aspect of cultural diplomacy. In describing the goals of its cultural diplomacy policy, Japan states:

In building trust among peoples and among countries from a long term perspective, we must endeavor to find common values and forge a path towards mutual understanding, while maintaining a deeper respect for the cultures and histories developed by other peoples and for our differences. Abundant cultural contact serves as the driving force in the construction of a peaceful and dynamic human society.³¹

In order to successfully protect its borders, the United States must expand its perspective. Instead of focusing solely on the projection of its image abroad, the United States must acknowledge that it is part of an interconnected world, and it must focus on, as Japan poignantly puts it, "the construction of a peaceful and dynamic human society."³² Instead of using cultural diplomacy as a propaganda tool, the United States must work to promote mutual trust and understanding through a policy that encourages cross-cultural exchange.

The United States must also reform its restrictive visa procedures in order to aid the exchange of artists and signal to other countries its desire to engage in cultural exchange. The remainder of this Note will focus on the need for visa reform, analyzing the current U.S. approach to artist visas from historical and comparative perspectives. By comparing its visa procedures

²⁸ See generally MULTI-COUNTRY COMPARISON, *supra* note 4.

²⁹ *Id.* at 1.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

to that of other countries, the United States can gain insight on how to aid artistic exchange and come closer to achieving what then-Secretary of State Colin Powell stated in 2003 as the goal of the U.S. visa program: “Secure Borders, Open Doors.”³³

III. THE U.S. VISA PROCESS FOR VISITING ARTISTS

Before 1990, there was no specific non-immigrant visa category for artists, and foreign performers entered the United States under the broad H-1 non-immigrant category for “aliens of distinguished merit and ability . . . coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability.”³⁴ With the Immigration Act of 1990 (“IMMACT”), Congress created new non-immigrant visa categories designed specifically for artists, entertainers, and athletes.³⁵ Because of the lobbying efforts of labor unions, these categories, which were intended to take effect in 1991, contained numerous provisions that would have severely restricted the ability of foreign musicians to enter the United States to work temporarily.³⁶ However, due to the outcry from arts organizations, Congress delayed the effect of the categories and moved to amend the provisions to strike a balance between the conflicting concerns of labor unions and arts organizations.³⁷ The categories in effect today are far less stringent than the proposed categories. Nevertheless, the influence of labor unions and the enactment of unwieldy administrative procedures subsequent to IMMACT have produced a visa system that unduly burdens cultural exchange.

³³ STEPHEN YALE-LOEHR ET AL., MIGRATION POLICY INSTITUTE, *SECURE BORDERS OPEN DOORS: VISA PROCEDURES IN THE POST-SEPTEMBER 11 ERA* 3 (2005), http://www.migrationpolicy.org/pubs/visa_report.pdf [hereinafter *SECURE BORDERS OPEN DOORS*].

³⁴ 8 U.S.C. § 1101(a)(15)(H)(1)(1988).

³⁵ Immigration Act of 1990, Pub. L. No. 101-649, § 207-208, 104 Stat. 4978 (1990) [hereinafter *IMMACT*]. This Act created O visas, for individual artists with “extraordinary ability,” and P visas, for members of “internationally recognized” entertainment groups. *Id.* IMMACT also created the Q visa in an effort to facilitate international cultural exchange. Only employers who administer cultural exchange programs approved by the Attorney General are allowed to petition for Q non-immigrants. The Q visa has very limited applications, and it is rarely used. This Note will focus on O and P visas, the visas most widely used by artists.

³⁶ *Admission of O and P Nonimmigrants: Hearing on H.R. 3048 Before the Subcomm. on Int'l Law*, 102nd Cong. 114 (1991) (statement of Jack Golodner, President, Department of Professional Employees, AFL-CIO). See also discussion *infra* Part.III.A.

³⁷ *Id.*

A. *The Immigration Act of 1990 - Creation of the O and P Visa Categories*

The Immigration Act of 1990 created O-1 and P-1 visas for visiting artists.³⁸ Under IMMACT's O-1 category, only artists with "extraordinary ability," as demonstrated by "sustained national or international acclaim," were eligible to enter the United States.³⁹ In addition to this stringent standard, the Attorney General was required to determine that the alien would "substantially benefit [the United States] prospectively."⁴⁰ Finally, the petitioner⁴¹ was required to obtain an advisory opinion from the appropriate labor union, a requirement that was merely discretionary under the H category.⁴²

Under the P-1 category, internationally-recognized athletes and members of internationally-recognized entertainment groups were eligible to enter the country;⁴³ however, each group member

³⁸ This Note will focus on O-1 and P-1 visas because they are the visa categories primarily used by artists. However, there are other visa options available to artists that will not be examined in this Note. After IMMACT, artists were precluded from the H-1B category, but artists who do not qualify as "extraordinary" or meet the "international recognition" requirement may apply for H-2B status. These visas are very difficult to obtain, however, because of the labor certification requirement. 8 C.F.R. § 214.2(h)(1)(ii)(D) (2010). P-2, P-3, and Q visas are also available but not commonly used because they apply only under very specific circumstances. The very rarely used P-2 visa is available for performing artists who are performing as part of a government-recognized reciprocal exchange program. 8 C.F.R. § 214.2(p)(1)(ii)(B) (2010). The P-3 visa is available to an artist coming "to perform, teach, or coach under a commercial or noncommercial program that is culturally unique." 8 C.F.R. § 214.2 (p)(1)(ii)(C) (2010). "Culturally Unique" is defined as "a style of artistic expression, methodology, or medium which is unique to a particular country, nation, society, class, ethnicity, religion, tribe, or other group of persons." 8 C.F.R. § 214.2(p)(3) (2010). The performer must be coming to participate in a cultural event or events "which will further the understanding or development of his or her art form." 8 C.F.R. § 214.2(p)(6)(i)(B) (2010). The Q visa is available to an artist "who is coming temporarily to the United States to take part in an international cultural exchange program approved by the Attorney General." 8 C.F.R. § 214.2(q)(1)(iii) (2010).

³⁹ 8 U.S.C. § 1101(a)(15)(O)(i) (1988 & Supp. II 1991).

⁴⁰ *Id.* This requirement was subsequently deleted. *See infra* note 52.

⁴¹ The petitioner is the individual who files on behalf of the foreign artist. O and P petitions may only be filed by a U.S. employer, a U.S. agent, or a foreign employer through a U.S. agent. 8 C.F.R. § 214.2(o)(2)(i) (2010); 8 C.F.R. § 214.2(p)(2)(i) (2010).

⁴² 56 Fed. Reg. 31, 569 (July 11, 1991).

⁴³ 8 U.S.C. § 1101(a)(15)(P) (1988 & Supp. II 1991). The original P category was divided into four sub-categories. The P-2 category was for aliens in a reciprocal exchange program; the P-3 category was for "culturally unique" aliens; and the P-4 category was for family members of P aliens. Discussion of these categories is outside the scope of this Note. "[I]nternationally recognized" is defined as "having a high level of achievement in a field evidenced by a degree of skill and recognition substantially above that ordinarily

was required to “have a sustained and substantial relationship with the group over a period of at least one year and provide functions integral to the performance of the group.”⁴⁴ Further, under the proposed Immigration Naturalization Service (“INS”) rules, there was a requirement that the group be internationally recognized for one year.⁴⁵ The labor organization consultation requirement was also required,⁴⁶ and an annual cap of 25,000 was imposed.⁴⁷

These proposed visa categories were met with vigorous resistance from arts organizations. These organizations claimed that the new restrictions would actually inhibit the American job market, arguing that “overall, presentations by foreign performers and personnel in fact generate employment, from stagehands to carpenters to restaurant workers.”⁴⁸ Arts organizations also argued that other countries would retaliate if the restrictive provisions were enforced;⁴⁹ this fear was realized when countries around the world began to threaten to invoke “reciprocal provisions,” openly criticizing the United States for protectionist policies that would inhibit cross-cultural exchange.⁵⁰ On the other side of the debate, labor unions stressed the need to safeguard American jobs and heighten the standards to admit only the most exceptional artists.⁵¹

Congress responded to the concerns of arts organizations by defining the “extraordinary ability” requirement for O-1 aliens in the arts as one of “distinction” and by deleting the requirement that they benefit the United States prospectively.⁵² In addition, Congress eliminated the P-1 cap⁵³ and waived the internationally recognized and one-year requirements in certain cases.⁵⁴

encountered, to the extent that such achievement is renowned, leading, or well-known in more than one country.” 8 C.F.R. 214.2(p)(2)(iv)(H) (2010).

⁴⁴ 8 U.S.C. § 1101(a)(15)(P)(i) (1988 & Supp. II 1991).

⁴⁵ 56 Fed. Reg. at 31,555 (July 11, 1991).

⁴⁶ 8 U.S.C. § 1184(c)(4)(B) (1988 & Supp. II 1991).

⁴⁷ 8 U.S.C. § 1184(g)(1)(C) (1988 & Supp. II 1991).

⁴⁸ Judith A. Kelley, Note, *New O and P Nonimmigrant Visa Categories: a Lesson in Compromise*, 16 COLUM.-VLA J.L. & ARTS 505, 510 (1993). *Id.*

⁴⁹ *Id.*

⁵⁰ Countries that protested Section 207 included Australia, Canada, France, the Netherlands, and the UK. The EC cultural ministers adopted a resolution opposing the new provisions, and along with Canada, threatened to impose reciprocal provisions if the US did not amend the Section. *Id.* at 513.

⁵¹ *Id.*

⁵² 8 U.S.C. § 1101(a)(46) (1988 & Supp. III 1992); 8 C.F.R. § 214.2(o)(3)(ii)(1992).

⁵³ 8 U.S.C. § 1184(g)(1) (1988 & Supp. II 1991).

⁵⁴ 8 U.S.C. § 1184(c)(4)(B)(ii) (1988 & Supp. III 1992); 8 U.S.C. § 1184(c)(4)(B)(iii)

B. Impact of the New Categories

Congress has removed many of the restrictions that would have severely restricted cross-cultural exchange; nonetheless, O and P visas are not easy to obtain. Although the INS⁵⁵ ordered officials to interpret the “extraordinary ability” and “distinguished merit and ability” standards identically, the stringent documentation requirements that the reforms imposed are very difficult to meet. In order to satisfy the O-1 “distinction” standard, artists must show that they have reached a level of achievement “substantially above that ordinarily encountered” and that they are “renowned, leading, or well-known in the field of arts.”⁵⁶ The regulations require the artist to produce evidence that they have won a major international award or produce three of the following:

- (1) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation . . . ;
- (2) Evidence that the alien has achieved national or international recognition for achievements . . . ;
- (3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation . . . ;
- (4) Evidence that the alien has a record of major commercial or critically acclaimed successes . . . ;
- (5) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the fields . . . ;
- (6) Evidence that the alien has either commanded a high salary or will command a high salary . . . for services in relation to others in the field⁵⁷

The documentation requirements for P-1 visas, which are available only to entertainers that are entering as part of an “internationally recognized” group, are nearly identical.⁵⁸ The world’s top artists have no trouble meeting these documentation requirements, but for other artists, especially less commercially-established artists, this is a very difficult standard to meet.

(1988 & Supp. III 1992).

⁵⁵ The INS has since been absorbed by the Department of Homeland Security (“DHS”), which has assumed its duties.

⁵⁶ 8 C.F.R. § 214.2(o)(3)(ii) (2010).

⁵⁷ 8 C.F.R. § 214.2(o)(3)(iv) (2010).

⁵⁸ 8 C.F.R. § 214.2(p)(2)(ii) (2010).

Moreover, despite the language of the regulations, it is difficult to meet the standard by providing evidence of only three of the above categories,⁵⁹ and anecdotal evidence suggests that the agency is increasing the difficulty by narrowly interpreting these requirements.⁶⁰

In addition to this stringent standard, Congress left intact the mandatory labor consultation requirement over arts organizations' objections.⁶¹ Prior to the 1990 Act, the INS had the option of consulting with labor unions in deciding whether to admit artists and entertainers applying for H-1 status.⁶² Due to complaints by unions, the 1990 Act made the consultations for O visas mandatory.⁶³ Arts organizations strongly objected to the mandatory consultation requirement, arguing that unions should not have the authority to make decisions about which artists should perform at non-union venues.⁶⁴ They argued that unions had conflicting objectives that would inhibit their ability to make artistic judgment calls.⁶⁵ In contrast, the unions claimed that the INS officials' lack of knowledge of the industry made the unions' input necessary and that their input was the only way the INS would be able to "look beyond the self-serving statement of the petitioner."⁶⁶ Although Congress retained this consultation provision, the amendments clarified the requirements and set forth regulations to counter any delays that might result from union inefficiency or failure to act.⁶⁷ Commentators feared that union

⁵⁹ See Bernard P. Wolfsdorf & Mandy Tomson, *Minding Your O's and P's*, LOS ANGELES COUNTY BAR ASSOC., <http://www.lacba.org/showpage.cfm?pageid=1201> (last visited Aug. 1, 2010). The regulations distinguish between aliens in the arts and aliens in the motion picture and television industries, but the documentation requirements are the same. 8 C.F.R. § 214.2(o)(3)(v) (2010). However, aliens in the arts, unlike artists in the motion picture and television industries, may submit "comparable evidence" to establish eligibility. 8 C.F.R. § 214.2(o)(3)(iv) (C)(2010).

⁶⁰ *How to Prove You're an Alien of Extraordinary Ability*, GUDEON & MCFADDEN (Nov. 9, 2010), <http://www.usvisalawyers.co.uk/article5.htm>.

⁶¹ 8 C.F.R. § 214.2(o)(2)(ii)(D) (2010); 8 C.F.R. § 214.2(p)(2)(ii)(D) (2010).

⁶² 8 U.S.C. § 1101(a)(15)(H)(1) (1988).

⁶³ IMMACT, *supra* note 35.

⁶⁴ Kelley, *supra* note 48, at 531. See also Laurence S. Zakson, Symposium, *Selected Issues in Labor Relations in the Motion Picture and Television Industries: Peer Group/Labor Organization Review of the Admission of Extraordinary and Accompanying Aliens to Work in the Entertainment Industry: A Plea for Precedent*, 21 LOY. L.A. ENT. L. REV. 417, 423 (2001) (discussing the conflicting interests between the employer/petitioner and labor union).

⁶⁵ Kelley, *supra* note 48, at 531.

⁶⁶ *Id.* at 532.

⁶⁷ *Id.* The amendments set a fifteen-day time limit for the union to respond, gave the

interests, in particular the desire to safeguard American workers and jobs, would have serious implications on cultural exchange,⁶⁸ but practitioners at an American Immigration Lawyers Association conference two years later observed that unions had been “reasonable . . . and [had] not consistently or maliciously delayed the submission of . . . advisory opinion[s] in order to derail petitions.”⁶⁹ Although the labor consultation requirement did create another hurdle for artists and has led to some difficulties and delays,⁷⁰ the effect has been insubstantial compared with the effects of the “premium processing” system and the security regulations enacted in response to 9/11.

C. Effect of Premium Processing and 9/11 on the Visa Process for Visiting Artists

Even before 9/11, serious backlogs in the visa processing system led to significant delays for non-immigrant visa applicants.⁷¹ Congress has made many attempts to remedy the problem, providing funds and mandating target dates to eliminate the backlog.⁷² One of the various solutions to the backlog problem was the introduction of “premium processing.”⁷³ Under this system, petitioners willing to pay an extra \$1,000 *per petition*, in addition to the \$320 standard processing fee, can have certain non-

petitioner the opportunity to submit rebuttal evidence, and then gave the attorney general fourteen days to adjudicate the petition. 8 U.S.C. § 1184(c)(6)(D) (1988 & Supp. III 1991). The amendments also gave the INS the authority to waive the requirement where an O-1 alien had a consultation within the previous two years or where no appropriate labor union or peer group existed. 8 U.S.C. § 1184(c)(3),(6).

⁶⁸ See Tibby Blum, *O and P Visas for Nonimmigrants and the Impact of Organized Labor of Foreign Artists and Entertainers and American Audiences*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 533 (1993) (discussing the potential negative impact of new mandatory union advisory opinion requirement).

⁶⁹ *Id.* at 555.

⁷⁰ See Jonathan Ginsburg, *Artists From Abroad: Immigration Procedures for Foreign Guest Artists*, ARTISTS FROM ABROAD (Oct. 10, 2010), <http://www.artistsfromabroad.org/pdf/ArtistFromAbroadWebsite.pdf> [hereinafter *Artists From Abroad*].

⁷¹ STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 841 (Robert C. Clark et al. eds., Foundation Press 2009) (1992).

⁷² See, e.g., American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, tit. 2, 114 Stat. 1251 (2000); Homeland Security Act of 2002, Pub. L. No. 107-296, § 458, 116 Stat. 2135 (2002).

⁷³ See Establishing Premium Processing Service for Employment-Based Petitions and Applications, 66 Fed. Reg. 29682-86 (June 1, 2001) (codified at 8 C.F.R. § 103.2 (2010)).

immigrant visa petitions processed in fifteen days.⁷⁴ Although this change has created an easy alternative for those who are wealthy enough to afford it, the system has significantly increased the processing time for all other applicants.⁷⁵ Unlike the wealthy corporations trying to bring in skilled workers, many artist petitioners are non-profit organizations, for which premium processing is not a viable option.⁷⁶ The costs of premium processing, in addition to the delays and uncertainties caused by the requirements discussed below, deter non-profit organizations from bringing in foreign artists.⁷⁷ And if an organization does decide to bring in foreign artists without “premium processing,” it faces high financial risk.⁷⁸

After the events of 9/11, the government created additional hurdles for artists seeking temporary work visas. Because most of the hijackers were in the United States on non-immigrant visas, the government has focused on reforming the non-immigrant visa system in order to enhance security and prevent further terrorist attacks.⁷⁹ The Enhanced Border Security and Visa Entry Reform Act, the Homeland Security Act, and the Intelligence Reform and

⁷⁴ *Id.* In July 2010, USCIS announced its intention to adjudicate all regularly filed O and P visas within fourteen days without the \$1,000 premium processing fee, and according to USCIS, this is occurring at both the California and Vermont visa processing centers. See *Artists From Abroad*, *supra* note 70.

⁷⁵ *Artists From Abroad*, *supra* note 70, at 36.

⁷⁶ See Sara Elizabeth Macks, Comment, *Caught in the Middle: The Effect of Increased Visa Requirements on Non-Profit Performing Arts Organizations*, 15 SETON HALL J. SPORTS & ENT. L. 109, 127-8 (2005) (discussing the effect of premium processing on non-profit performing arts organizations).

⁷⁷ Alexander Kliment, *Visa Hurdles ‘Bar Cultural Dialogue,’* FT.COM (Apr. 4, 2006), <http://www.visalaw.com/FAS/hearings-combined.pdf> (citing President and CEO of the Association of Performing Arts Presenter’s (“APAP”) statement that the number of APAP members offering foreign talent decreased fifteen-percent between 2002 and 2005 due to visa difficulties); see also Daniel Wakin, *Yo-Yo Ma Plays Capitol Hill to Talk About Visa Problems*, N.Y. TIMES, Apr. 5, 2006, available at <http://query.nytimes.com/gst/fullpage.html?res=9D07E0DF1030F936A35757C0A9609C8B63>; Sarah Kaufman, *Strict Visa Regulations Discourage Visiting Artists*, WASH. POST, Oct. 20, 2007, www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101902544.html.

⁷⁸ See Kaufman, *supra* note 77 (citing an example of a musical group that had to cancel its tour because it did not pay the premium-processing fee. The British band members’ visas were denied because of a technicality that could have been resolved if they had known about it earlier. They waited months after submitting the applications and had no way of tracking the materials because they did not pay for expedited service.). *Id.*

⁷⁹ See CHAD C. HADDAL & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 31381, U.S. IMMIGRATION POLICY ON TEMPORARY ADMISSIONS (2009).

Terrorism Prevention Act of 2004 were intended to “tighten procedures and oversight of aliens temporarily admitted to the United States.”⁸⁰ However, these new procedures and requirements have made the visa process more complex, costly, time consuming, and confusing.⁸¹ Many non-immigrant visa applicants have been adversely affected by these increased security precautions, and many commentators have discussed the effect of these procedures, particularly on students and educational visitors.⁸² The restrictive post-9/11 visa policy has led to a decrease of international students in U.S. universities, and many have argued that this development will negatively impact our economic competitiveness.⁸³ But much less attention has been given to the practical impact this policy has on foreign artists and the broader implications of inhibiting artistic exchange.⁸⁴

1. *Background Checks*

Additional screening and background checks by the United States Citizenship and Immigration Service (“USCIS”) have resulted in further delays and denials for artists.⁸⁵ The USCIS now conducts multiple International Border Inspection System (“IBIS”) checks on the beneficiary of every petition.⁸⁶ Sometimes

⁸⁰ *Id.* at 1.

⁸¹ See *Artists from Abroad*, *supra* note 70.

⁸² See JAMES H. JOHNSON, JR., *U.S. Immigration Reform, Homeland Security, and Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks*, 27 N. C. J. INT'L L. & COM. REG. 419 (2002); Michael R. Traven, Comment, *Restricting Innovation: How Restrictive U.S. Visa Policies Have the Potential to Deplete Our Innovative Economy*, 34 CAP. U.L. REV. 693 (2006); Adrian Arroyo, Comment, *The USA PATRIOT Act and the Enhanced Border Security and Visa Entry Reform Act: Negatively Impacting Academic Institutions by Deterring Foreign Students from Studying in the United States*, 16 TRANSNAT'L LAW. 411, 417 (2003).

⁸³ *Id.*; see generally RICHARD FLORIDA, *THE FLIGHT OF THE CREATIVE CLASS: THE NEW GLOBAL COMPETITION FOR TALENT* (2005) (arguing that making it more difficult for the world's most innovative and creative students to come to the United States will negatively impact the country's economic competitiveness).

⁸⁴ But see *e.g.*, Macks, *supra* note 76 (discussing the negative impact on non-profit arts organizations due to the post 9/11 regulations); Christopher Morrissey King, *Development in the Executive Branch, Visa Administration Sings a Discordant Tune for Entertainers*, 22 GEO. IMMIGR. L.J. 133, 133 (2007).

⁸⁵ *Id.*

⁸⁶ See *Artists From Abroad*, *supra* note 70, at 32. The USCIS conducts background checks of applicants through law enforcement databases. If a “hit” occurs, the agency must clear the applicant before the adjudication process can proceed. This has been one of the main contributors to the visa backlogs and delays. See *SECURE BORDERS OPEN DOORS*, *supra* note 33.

the USCIS also conducts a check on the individual signing the petition.⁸⁷ If there is a “hit” on any beneficiary, the USCIS will send a request for evidence informing the petitioner that he or she will face increased processing delays and recommending that the beneficiaries causing the problem are dropped from the petition in order to expedite the process.⁸⁸ If the petitioner does not drop the performer at issue from the petition, the delays can be endless.⁸⁹ This is especially detrimental for organizations attempting to bring in music groups. In many situations, the particular performer that must be dropped is vital to the group and not easily replaced. Therefore, many organizations decide to cancel tours rather than accept the endless delays that will result if the beneficiary remains on the petition.⁹⁰ “Hits” are not uncommon and can be based on past criminal investigation of any kind.⁹¹ Artists may even face problems after obtaining a visa and entering the United States based on minor incidents that come up in security checks.⁹² For example, in 2007, even after British pop star Lily Allen entered the United States, her O-1 visa was revoked due to an altercation she had with the paparazzi in London, for which she was arrested but never charged.⁹³

2. *Biometric Requirements and Interviews*

The new mandatory biometric data and in-person interview requirements introduced after 9/11 have also seriously burdened artistic exchange. Under section 222(e) of the Immigration and Nationality Act (“INA”), the Department of State (“DOS”) has the discretion to determine whether non-immigrant visa applicants must appear in person at their consular office.⁹⁴ Before 2003, this requirement was liberally enforced;⁹⁵ however, in 2003, the DOS decided by regulation that all non-immigrants were required to appear in person and have interviews with the consular officer.⁹⁶

⁸⁷ *Artists From Abroad*, *supra* note 70, at 32.

⁸⁸ *Id.* at 32-33.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ King, *supra* note 84, at 135.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Immigration and Nationality Act (INA), 82 Pub. L. No. 414, § 222(e), 66 Stat. 163 (1952) (codified at 8 U.S.C. § 1202(h) (2010)).

⁹⁵ LEGOMSKY & RODRIGUEZ, *supra* note 71, at 842.

⁹⁶ 22 C.F.R. § 41.102(a) (2008). In 2003, the State Department told consular officers to

Under Section 41.102 of the Code of Federal Regulations (“CFR”), certain categories of non-immigrant visa applicants were exempt from this requirement, and for those categories, the waiver of personal appearance remains discretionary.⁹⁷ Artists, however, are not exempt; the new regulations require every artist to personally visit his or her consulate for interviews and provide fingerprints and photographs.⁹⁸ These requirements have put an undue burden on arts organizations attempting to bring large ensembles into the country to perform,⁹⁹ and the cost of bringing every player and staff member of an orchestra to the consulate has led to many cancellations of foreign tours.¹⁰⁰

The consular offices do not have the resources to deal with the in-person interview requirement, and thus, applicants are subjected to substantial delays.¹⁰¹ Even artists who have toured regularly to the United States as part of internationally-recognized groups must wait in line each time they enter the country.¹⁰² Yo-Yo Ma discussed the delays faced by artists in his internationally-recognized Silk Road Project in front of the House Committee on Government Reform.¹⁰³ He cited the example of two Iranian

begin face-to-face interviews with most visa applicants, and this requirement was codified in the 2004 Intelligence Reform Act. *Id.*; see also SECURE BORDERS OPEN DOORS, *supra* note 33, at 36.

⁹⁷ See 22 C.F.R. § 41.102(b) (2008). These people include: (1) children under fourteen; (2) people over seventy-nine; (3) certain transit visitors and representatives of particular countries or international organizations; (4) certain diplomats; (5) anyone who previously received a nonimmigrant biometric visa who is applying at the consular post of the person’s usual residence for re-issuance of the same visa less than a year after the visa expired; and (6) certain people for whom it is determined that the national interest or “unusual circumstances” warrant a waiver. *Id.*

⁹⁸ King, *supra* note 84, at 133 (discussing the details and background of the fingerprinting, photography, and personal interview requirements). The Enhanced Border Security and Visa Entry Reform Act requires all visas to be machine readable, tamper resistant, and coded with biometric identifiers. Enhanced Border Security and Visa Entry Reform Act (EBSEVERA) of 2002, Pub. L. No. 107-173, § 303(b)(1), 116 Stat. 54365 (2002).

⁹⁹ See Wakin, *supra* note 77 (citing a case in which a Paris agent spent \$3,000 per dancer to bring sixteen dancers from the south of France to the Paris embassy).

¹⁰⁰ For example, the Halle Orchestra canceled a tour in the United States due to the \$80,000 cost of bringing eighty-five people to the U.S. embassy. Even artists on tourist visas must go to consular interviews; the director of the Smithsonian Center for Folklife and Cultural Heritage had to fly one hundred villagers, who were part of an annual folk-life festival put on by the Smithsonian Center for Folklife and Cultural Heritage, to the embassy in New Delhi because there was no U.S. embassy in Bhutan, where the villagers lived. Kaufman, *supra* note 77.

¹⁰¹ *Id.*

¹⁰² Wakin, *supra* note 77.

¹⁰³ See *Impact of Visa Processing Delays: Hearing Before the H. Gov. Reform Comm.*,

musicians who had come to the United States ten times in the last six years as part of his Silk Road project but were still required to wait months before receiving visas.¹⁰⁴ The musicians were required to make three flights to the consular office in Dubai: a first trip to interview, a second trip to pick up the visas, and then a third trip because the visa printer was out of order.¹⁰⁵ The whole process took the musicians three months and cost \$5,000.¹⁰⁶ As Yo-Yo Ma stated, “ninety days is inexcusable, particularly in a global economy where things are moving at warp speed and the competition doesn’t put up the same restraints.”¹⁰⁷ Paperless visas and digital video interviews are being considered as an alternative, but the government has serious reservations and has emphasized the importance of personal interviews as an “incredibly useful” security tool.¹⁰⁸

3. *Profiling*

Muslim artists have been especially impacted by the increased security requirements. Section 306(a) of the Enhanced Border Security and Visa Entry Reform Act (“EBSEVERA”) states that no non-immigrant visa will be issued to a noncitizen “from a country that is a state sponsor of international terrorism unless the Secretary of State determines . . . that such alien does not pose a threat to the safety or national security of the United States.”¹⁰⁹ Nationals of the seven designated state sponsors of terrorism¹¹⁰ must bear the cost and time of filling out extra paperwork and going through incredibly stringent “Visas Condor” security checks.¹¹¹

109th Cong. (2006) (statement of Yo-Ya Ma, world-renowned cellist) [hereinafter Ma Statement].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Wakin, *supra* note 77 (quoting Tony Edson, Deputy Assistant Secretary of the Department of State).

¹⁰⁹ Enhanced Border Security and Visa Entry Reform Act (EBSEVERA) of 2002, Pub. L. No. 107-173, § 306(a), 116 Stat. 54365 (2002).

¹¹⁰ SECURE BORDERS OPEN DOORS, *supra* note 33, at 83. These countries are Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria. *Id.*

¹¹¹ *Id.* at 109. In addition, all male applicants between sixteen and forty-five, as well as the nationals of the designated state sponsors of terrorism, must fill out a DS-157 form listing the countries the applicant visited in the past ten years, the applicant’s work history, all professional/social/charitable organizations the applicant has contributed or belonged to, and the name of and information about the applicant’s secondary schools. *Id.* at 16.

There is vigorous debate about the effectiveness and wisdom of the governmental policy of ethnic profiling.¹¹² One of the harmful effects of this policy is the increased difficulty faced by artists attempting to travel to the United States. Unfortunately, the countries designated as state sponsors of terrorism are those for which the need for cultural diplomacy is most necessary. Instead of alienating these countries, the government needs to encourage cross-cultural exchange in order to foster better relations and a more positive image abroad.

IV. APPROACHES FROM ABROAD

The increased security measures described in the previous Part affect all or most non-immigrant visa applicants, but artist petitioners are disproportionately burdened by these security requirements. One of the distinguishing factors between artists and other non-immigrant applicants is the fact that many artists come to the United States as part of a musical group.¹¹³ Therefore, the imposition of the interview requirements and increased security scrutiny places a much higher cost on arts presenters as opposed to those petitioners who are attempting to bring individual beneficiaries into the country.

Furthermore, arts presenters have to pay these increased costs before they have earned any money at the box office and without a guarantee that the foreign artists will arrive for the performance. This makes hiring foreign talent an even less attractive option;¹¹⁴ the need for predictability forces many presenters to hire domestic groups instead of risking the costs of losing their foreign acts.¹¹⁵

The United States' approach to cultural exchange—and particularly to artist visas—stands in stark contrast to the approach taken by many other countries. A comparative analysis reveals that the importance countries place on cultural exchange is reflected in their visa policies for visiting artists.¹¹⁶ Although it

See Supplemental Nonimmigrant Visa Application DS-157 form at <http://state.gov/documents/organization/126741.pdf>.

¹¹² See LEGOMSKY & RODRIGUEZ, *supra* note 71, at 846 (citing commentary in support and against government profiling).

¹¹³ See Kaufman, *supra* note 77; see also Kliment, *supra* note 77.

¹¹⁴ See Kaufman, *supra* note 77.

¹¹⁵ Kliment, *supra* note 77 (citing statistics on decrease in domestic groups' use of foreign talent from 2002 to 2006).

¹¹⁶ See discussion *infra* Part IV.

cannot be as flexible as many other countries because of certain security and political realities, the United States can make changes to its policy without sacrificing important U.S. interests. In attempting to reform its visa system to aid artistic exchange, it is instructive to examine other countries' visa systems.

A. Austrian Model

Artistic freedom is highly valued and protected in Austria. Freedom of artistic expression is protected by Article 10 of the European Convention on Human Rights ("ECHR")¹¹⁷ and is specifically guaranteed in Article 17a of the Austrian Basic Law of the General Rights of Nationals.¹¹⁸ The Austrian Basic Law, which has constitutional force, provides that "[a]rtistic creativity as well as the dissemination of art and its teaching shall be free."¹¹⁹ The value of free movement for artists in Austria is also evidenced by the flexibility and ease with which artists are able to obtain visas and work permits.¹²⁰ In 2004, the head of the Department for Residencies of the Ministry of Internal Affairs of Austria explained that artists were exempt from many of the visa and work permit rules because of their special constitutional status:¹²¹

Free movement of artists is considered very important to the cultural sector, therefore it must be easy for artists to obtain their residence permit and work document. In principle, these documents cannot be denied, unless there are other interests at stake which are more important than the artistic value, for example public interest or national security. The exception for artists, based on their special position in the constitution, lies in the fact that everything is possible. Every single case will be assessed per se.¹²²

The Aliens' Act of 1997¹²³ and the Foreigners Employment

¹¹⁷ European Convention on Human Rights, art. 10, Nov. 4, 1950, 213 U.N.T.S. 222.

¹¹⁸ STAATSGRUNDGESETZ 1867 [STGG] [Basic Law on the General Rights of Nationals] BUNDESGESETZBLATT [BGBl] No. 684/1988, art. 17a (Austria).

¹¹⁹ *Id.*

¹²⁰ *See generally* REPORT SICA CONFERENCE, ARTISTS ON THE MOVE, WORKSHOP 3: CROSSING BORDERS IN EUROPE: VISAS AND WORK PERMITS (October 7-8, 2004) (European workshop discussing the barriers to cultural exchange in various European countries).

¹²¹ *Id.*

¹²² *Id.*

¹²³ FREMDENGESETZ [FrgFRG] [Federal Law Concerning the Entry, Residence, and Settlement of Aliens] BUNDESGESETZ I [BGBl I] No. 75/1997, amended 2002 (Austria).

Law Act of 1975¹²⁴ govern residence and temporary work in Austria. Depending on the purpose and length of stay, varying documentation is required.¹²⁵ Generally, all third country citizens¹²⁶ who want to work temporarily in Austria must obtain a visa or residence permit, as well as work authorization.¹²⁷ However, under certain circumstances, artists and entertainers on short-term engagements are exempt from this work authorization requirement and can work temporarily after obtaining a D visitor visa.¹²⁸

For example, workers in the film, radio, and television industry, as well as performing artists, may be employed in Austria for one day without work authorization.¹²⁹ Additionally, if the artist is part of a live radio or TV broadcast, he or she can work up to four weeks in Austria without work authorization.¹³⁰ The artist can then usually obtain repeated four-week employment exemptions if he or she leaves the country and returns.¹³¹

B. Canadian Model

Like Austria, Canada has different requirements for artists depending on the length and purpose of their stay. In order to work in Canada, an individual must obtain a visa¹³² and work authorization.¹³³ However, special rules apply to the performing

¹²⁴ AUSLANDERBESCHAFTIGUNGSGESETZ [AusIBG] [Foreigners' Employment Act] BUNDESGESETZ I [BGBl I] No. 218/1975, amended 2002 (Austria).

¹²⁵ See *Entry and Residence Permits*, AUSTRIAN CONSULATE GENERAL NEW YORK, <http://www.bmeia.gv.at/en/embassy/consulate-general-new-york/practical-advice/visa-and-residence-permit.html> (last visited Nov. 20, 2010).

¹²⁶ "Third country citizens" refers to citizens from states outside the European Economic Area ("EEA").

¹²⁷ See *Entry and Residence Permits*, *supra* note 125; see also *Working in Austria*, FILM COMMISSION OF AUSTRIA, http://www.locationaustria.at/en/employment_in_austria.aspx#1340 [hereinafter FILM COMMISSION]. All EU/EEA citizens with valid travel documents are exempt from the work authorization requirement. *Id.*

¹²⁸ *Id.*

¹²⁹ FILM COMMISSION, *supra* note 127.

¹³⁰ *Id.*

¹³¹ *Id.* at 2. The only requirement is that the producer report to the Public Employment Service office on the day on which work commences. *Id.*

¹³² Many countries do not need a visa to enter Canada. For a list of visa exempt countries, see *Visitor Visa Exemptions*, CANADAVISA.COM, <http://www.canadavisa.com/canadian-immigration-visitor-visa-exemptions.html>. (last visited Nov. 20, 2010).

¹³³ Immigration and Refugee Protection Act ("IRPA"), S.C. 2001, c.27 (Can.).

arts occupations. The Immigration and Refugee Protection Act (“IRPA”) divides performing artists into three categories: (1) artists who are exempt from obtaining a work permit and can come into Canada on a visitor visa; (2) artists who must obtain a work permit but are exempt from obtaining a labor market opinion; and (3) artists who must obtain a work permit and a labor market opinion.¹³⁴ Section 186(g)(i) of the IRPA regulations¹³⁵ sets out the criteria for artists who fall into the first category, those who are exempt from work permits:

186. A foreign national may work in Canada without a work permit . . .

(g) as a performing artist appearing alone or in a group in an artistic performance—other than a performance that is primarily for a film production or a television or radio broadcast—or as a member of the staff of such a performing artist or group who is integral to the artistic performance, if

(i) they are part of a foreign production or group, or are a guest artist in a Canadian production or group, performing a *time-limited engagement*, and

(ii) they are not in an *employment relationship* with the organization or business in Canada that is contracting for their services, nor performing in a bar, restaurant or similar establishment.¹³⁶

The “time-limited engagement” of the IRPA regulations is dependent on the number of rehearsals and performances but can apply to an engagement of up to six or seven weeks.¹³⁷ The “employment relationship” requirement distinguishes between

¹³⁴ *Id.* In order to obtain a work permit, the applicant must receive an offer of Canadian employment. It is the employer’s responsibility to get a labor market opinion (“LMO”) if required. The purpose of the LMO is to safeguard Canadian jobs, and it verifies that the particular job could not have been filled by a Canadian citizen. The processing time for a standard LMO is three to four months. Once the employer obtains the LMO, it must apply for the work permit through Citizenship and Immigration Canada (“CIC”). *Canadian Work Permit*, CANADIAN VISA BUREAU, <http://www.visabureau.com/canada/work-permit.aspx> (last visited Feb. 28, 2010).

¹³⁵ IRPA Regulations, S.O.R./2002-227 (Can.), available at http://laws.justice.gc.ca/eng/SOR-2002-227/page-5.html#anchorbo-ga:l_9-gb:l_3. See also *Working Temporarily in Canada: Jobs That Do Not Require a Work Permit*, CITIZENSHIP AND IMMIGRATION CANADA (Dec. 20, 2010), <http://www.cic.gc.ca/english/work/apply-who-nopermit.asp#artists>, for a list of activities that meet the requirements of 186(g).

¹³⁶ *Id.* (emphasis added).

¹³⁷ Sergio R. Karas, *Work Permits for Occupations in the Performing Arts and Sports*, VISALAW.COM, <http://www.visalaw.com/FAS07jan/10jan07.html> (last visited Jan. 28, 2010).

artists with short-term and long-term employment contracts; there is no “employment relationship” if the artist is hired for an isolated performance or a short series of performances.¹³⁸ The second category includes a small group of artists who are required to obtain a work permit but are exempt from obtaining a labor market opinion. This group includes “artists and technicians involved in film-co-productions (under international or intergovernmental agreements), American Federation of Musicians working under the Cultural Exchange Program in the United States, and *Cirque du Soleil* performers.”¹³⁹ All the performing artists that do not fall into the two above categories must obtain both a work permit and a labor market opinion.¹⁴⁰

C. Artist Mobility in the European Union

The E.U. places a strong emphasis on the need for artistic exchange and has made many efforts to increase the mobility of artists within and from outside the E.U. The 1957 Treaty of Rome encouraged the member states of the European Community (“E.C.”) to allow the free movement of citizens between state borders.¹⁴¹ However, at the community level, the E.C. made little progress towards achieving this goal. Thus, in 1985, France, West Germany, Belgium, Luxembourg, and the Netherlands took independent action and signed the Schengen Agreement, which allowed citizens to move freely between borders without the need to obtain visas or work permits.¹⁴² In 1995, the Schengen Agreement became an E.U. Convention and currently, almost every E.U. Member State, along with Norway, Iceland, and Switzerland, have become parties to the Convention.¹⁴³ Although the Schengen system has promoted the mobility of artists between European countries, touring artists from countries not party to the Convention still face many obstacles in attempting to work

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *EU Facts: The Schengen Convention*, CIVITAS, <http://www.civitas.org.uk/eufacts/FSER/EX2.htm> (last updated Oct. 10, 2010).

¹⁴² *Id.*

¹⁴³ *Id.* It should be noted that the UK and Ireland have not signed the Convention. Many of the new E.U. members have signed onto the convention, and Cyprus, Macedonia, Montenegro, and Serbia, Romania, and Bulgaria hope to become Schengen states within the next several years. *Id.*

throughout Europe.¹⁴⁴

In 2006, the E.C. ratified the United Nations Educational, Scientific and Cultural Organization's Convention on the Protection and Promotion of the Diversity of Cultural Expressions ("UNESCO Convention").¹⁴⁵ The UNESCO Convention encourages the free movement of artists between countries. Certain provisions of the Convention inform ratifying developed countries that they must adopt procedures to facilitate cultural exchange with developing countries.¹⁴⁶ For example, Article 14 of the Convention calls on the ratifying countries to encourage cultural exchange by:

[F]acilitating wider access to the global market and international distribution networks for their cultural activities, goods and services¹⁴⁷ . . . [and] by adopting, where possible, appropriate measures in developed countries with a view to facilitating access to their territory for the cultural activities, goods and services of developing countries.¹⁴⁸

Article 16 provides that "developed countries shall facilitate cultural exchange with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries."¹⁴⁹

Despite these directives, arts organizations argued that complex and costly administrative procedures were preventing E.U. countries from fulfilling their international obligations under the Convention.¹⁵⁰ In response to this concern, Freemuse, an independent international organization advocating for the "freedom of expression of musicians and composers worldwide," joined together with many European Arts organizations to research the visa and work permit problems faced by artists from

¹⁴⁴ See *infra* notes 150-158 and accompanying text.

¹⁴⁵ HANS HJORTH & OLE REITOV, VISAS/THE DISCORDANT NOTE: A WHITE PAPER ON VISA ISSUES, EUROPE & ARTISTS' MOBILITY 5 (2008), <http://freemuse.synkron.com/graphics/Activities/Campaigns/PDF/VisaWhitePaper.pdf> [hereinafter WHITE PAPER].

¹⁴⁶ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, 45 I.L.M. 269 available at whc.unesco.org/archive/convention-en.pdf [hereinafter UNESCO Convention].

¹⁴⁷ *Id.* at art.14(a)(ii).

¹⁴⁸ *Id.* at art.14(a)(v).

¹⁴⁹ *Id.* at art.16.

¹⁵⁰ See WHITE PAPER, *supra* note 145.

non-E.U. countries.¹⁵¹ The initiative resulted in a 2008 White Paper that was presented to the E.U. Commission, the European Parliament, and National and European Artists' Associations; the White Paper consists of a collection of case studies, a summary of the barriers faced by international artists, and a list of proposed changes to the current visa and work permit procedures for artists.¹⁵²

Complaints about the uncertainty and delay due to variation in documentation requirements by country, the refusal of certain consulates to abide by the Schengen system, and the differences in the categorization of artists were commonly cited.¹⁵³ Other complaints centered on the costs and inefficiencies of the biometric requirements and the denial of multiple-entry visas to touring artists who had short breaks in their touring schedules.¹⁵⁴

In order to combat these problems, the White Paper calls on European countries to "actively make visa/work permit procedures and access to the European market more flexible, transparent and homogenous."¹⁵⁵ Specific suggestions include work permit exemptions for artists, the creation of special short-term multiple entry visas for touring artists, and the creation of a unified information system for applicants and administrators.¹⁵⁶ Other suggestions include: (1) having "reasonable, if not reciprocal, procedures between the EU and the US;" (2) changing the biometric system requirements;¹⁵⁷ (3) expediting the process for artists who have previously toured in the E.U./Schengen area; (4) giving the cultural attaché exclusive control over artist visa matters; and (5) considering the "world wide recognition of touring 'artists' passports."¹⁵⁸

¹⁵¹ *See Id.*

¹⁵² *Id.* Prior artist mobility studies were done in response to calls by the European Parliament in 2007. *Id.* at 5.

¹⁵³ *Id.* at 9-10. The White Paper cites the "non-harmonization of categories and 'status' definitions of 'artists' or 'cultural performers' [and the] differences between the Napoleonic system and Common Law system" in their labeling of the employment status of musicians as major impediments to touring artists. *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 16.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 16-17. Proposals cited include "the introduction of harmonized biometric data collection for all Schengen and EU countries . . . [the] implementation of a system that does not require biometrics to be renewed more than every four years . . . and a system that does not require the applicant to apply 'in person' once the biometrics are established in a central database."

¹⁵⁸ *Id.* at 17.

V. PROPOSALS FOR REFORM

Through this comparative study, it is evident that these countries value artistic exchange to a greater extent than the United States. This is not surprising considering America's historic lack of faith and interest in cultural diplomacy.¹⁵⁹ But setting aside the historical and political roots of America's attitude towards cultural diplomacy and the high arts in general, there are valid reasons for America's restrictive visa policies, the most important being the need to protect its borders. Cultural diplomacy is not a panacea, and the United States should not sacrifice its security interests in order to promote cultural diplomacy. Many of the visa procedures and suggestions discussed above would not be feasible because of America's heightened security concerns. Nonetheless, the comparative analysis gives us insight into ways in which the United States can increase cultural exchange without sacrificing its national security. In seeking to promote cultural exchange, the country should increase government attention to the issue of artist mobility, re-examine the efficacy of its current visa procedures, and re-assess the wisdom of its current protectionist policy.

A. Governmental Support of Cultural Exchange

There has been a renewed interest in cultural diplomacy since 9/11, but so far the rhetoric has not been matched by governmental action. Government dedication is necessary in order to achieve an effective cultural diplomacy policy, one that values and encourages cross-cultural exchange. Many private U.S. organizations have recognized the importance of facilitating cross-cultural exchange.¹⁶⁰ Arts organizations have lobbied Congress to make changes to the restrictive visa procedures¹⁶¹ and have sought to provide tools to help artists and arts organizations navigate the

¹⁵⁹ See John Brown, Commentary, *Arts Diplomacy: The Neglected Aspect of Cultural Diplomacy*, in *AMERICA'S DIALOGUE WITH THE WORLD* (William P. Kiehl ed., 2006), available at http://uscpublicdiplomacy.org/pdfs/061220_brown.pdf, for an interesting analysis of the roots of American neglect of what he terms "Art Diplomacy." Brown argues that America's puritanical and democratic roots, as well as its profit-seeking private sector, have contributed to a lack of governmental dedication to the promotion of the high arts (e.g., painting, music, literature, and architecture) abroad. *Id.* at 73.

¹⁶⁰ Macks, *supra* note 76, at 130.

¹⁶¹ *Id.* Opera America, Dance/USA, and Association of Performing Arts Presenters are some of the groups that have been leading the fight for visa reform. *Id.*

complex system.¹⁶² For example, the Association of Performing Arts Presenters (“APAP”) developed a website to educate the performing arts industry on the major issues facing international artists.¹⁶³ The website contains a very useful guide to the non-immigrant visa procedure for artists.¹⁶⁴ Educating the arts world about visa procedures is integral to the development of a comprehensive policy to promote cultural exchange, and this organization and website have made an important contribution. Although there have been many efforts by private organizations to tackle this problem, the federal government has made little effort to facilitate cultural exchange.¹⁶⁵

In contrast, there have been many collaborative governmental efforts worldwide to deal with artistic mobility. This is not an issue unique to America. Countries worldwide have struggled with unwieldy visa procedures and impediments to cultural exchange.¹⁶⁶ The E.U. has specifically addressed the issue, as evidenced by the Schengen Agreement and the White Paper on Visa issues, Europe, and Artists’ Mobility.¹⁶⁷ The Asia-Europe Foundation (“ASAEF”) has also taken up the issue of artists’ mobility and has held numerous conferences to explore the problem and possible solutions.¹⁶⁸ In addition, 110 countries have ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,¹⁶⁹ which encourages the free movement of

¹⁶² *Id.*

¹⁶³ ARTISTS FROM ABROAD, <http://www.artistsfromabroad.org> (last visited Feb. 25, 2010).

¹⁶⁴ *Id.*

¹⁶⁵ Dewey & Wyszomirski, *supra* note 6, at 7.

¹⁶⁶ *See, e.g.*, discussion *supra* Part IV.C.

¹⁶⁷ *Id.*

¹⁶⁸ *See* ASIA EUROPE FOUNDATION, http://www.asef.org/index.php?option=com_content&task=view&id=17&Itemid=62 (last visited Feb. 25, 2010). The ASAEF was formed in 1997 by the leaders of twenty-five European and East Asian countries, together with the European Commission. *Id.* The Foundation’s mission is to “promote greater mutual understanding between Asia and Europe through intellectual, cultural and people-to-people exchanges.” *Id.*

¹⁶⁹ *See* INTERNATIONAL FEDERATION OF ARTS COUNCILS AND CULTURAL AGENCIES, IFACCA BRIEFING NOTE FOR NATIONAL ARTS FUNDING AGENCIES: UNESCO CONVENTION ON THE PROTECTION AND PROMOTION OF DIVERSITY OF CULTURAL EXPRESSIONS 8 (2010), <http://media.ifacca.org/files/BriefingnoteEN.pdf>. For a current list of countries that have ratified the Convention, see UNESCO.ORG, <http://portal.unesco.org/la/convention.asp?KO=31038&language=E> (last visited Nov. 20, 2010).

artists between the member countries.¹⁷⁰ The United States is not a party to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,¹⁷¹ and it has not engaged in any regional collaboration focused on this issue.¹⁷² Therefore, it has had little chance to learn from other countries about successful techniques and policies for promoting cultural exchange.¹⁷³

In his survey of the history of cultural diplomacy in the United States, Cummings observed, “programs in cultural diplomacy are often strongest if they have a firm institutional base, grounded in legislation, and when they have strong support at the top of the federal government.”¹⁷⁴ There has been a renewed governmental interest in cultural diplomacy since 9/11. George W. Bush appointed an Advisory Committee on Cultural Diplomacy (“ACCD”) to consult the U.S. Department of State, and the committee urged America to increase funding for cultural diplomacy.¹⁷⁵ In its report, the ACCD stated: “history may record that America’s cultural riches played no less a role than military action in shaping our international leadership, including the war on terror.”¹⁷⁶ President Obama has also given reason to be optimistic about the future of American cultural diplomacy. As part of his presidential campaign platform, he advocated for more federal support of cultural diplomacy programs and more cultural exchange.¹⁷⁷ Moreover, in 2008, congressional appropriations to the National Endowment for the Arts increased by sixteen percent to 144.7 million, the agency’s largest increase in twenty-eight years.¹⁷⁸ President Obama has also been more open to

¹⁷⁰ See discussion *supra* Part IV.C.

¹⁷¹ *Id.*

¹⁷² Dewey & Wyszomirski, *supra* note 6 (noting the lack of U.S. attention to the issue of artist mobility and the absence of regional efforts by NAFTA countries).

¹⁷³ *Id.*

¹⁷⁴ CUMMINGS, *supra* note 2, at 14.

¹⁷⁵ Monica Revilla, *A New President, A New Era For CD?*, CDN-CULTURAL DIPLOMACY NEWS, <http://www.culturaldiplomacy.org/culturaldiplomacynews/index.php?aid=1182> (last visited Feb. 23, 2010).

¹⁷⁶ LINCHPIN OF PUBLIC DIPLOMACY, *supra* note 21, at 1.

¹⁷⁷ *Obama’s Platform on Arts Policy*, ALLIANCE FOR THE ARTS (Nov. 5, 2008, 4:51PM), <http://www.allianceforarts.org/get-the-news/afta-journal/obamas-platform-on-arts-policy.php> (last visited Nov. 10, 2010).

¹⁷⁸ *Government Support for the Arts—Federal, State and Local 1994 to 2008*, AMERICANS FOR THE ARTS, http://ww3.artsusa.org/pdf/get_involved/advocacy/research/2008/govtfunding08

international dialogue in general and has held himself out as a “champion for arts and culture.”¹⁷⁹ In addition, he has made it clear that he appreciates the importance of building a *long-term* cultural diplomacy policy, as opposed to using cultural diplomacy as a tool only in times of war.¹⁸⁰ Obama’s dedication, however, is not enough to create systemic change. The White House, the Department of State, and Congress, along with private and public organizations, need to work together to promote a long-term dedication to cultural exchange.

B. Efficacy of Premium Processing and Security Procedures

Many of the heightened security requirements enacted after 9/11 are instrumental in helping to protect our borders, but some of the visa requirements cannot be justified based on security grounds. The United States must reassess the procedures it has in place in order to determine whether the benefits of the particular procedure outweigh the costs.

1. Arts Require Timely Service (“ARTS”) Act

One of the biggest barriers to artistic change is the costs and delays resulting from the premium processing system. Congress has recognized the especially high burden premium processing has placed on non-profit organizations attempting to admit foreign artists. In 2003, sixteen congressmen wrote a letter to USCIS Director Eduardo Aguirre, urging him to reduce visa processing for O and P petitions filed by non-profit organizations.¹⁸¹ In response, USCIS informed Congress that legislative action was necessary before it could make the requested reforms.¹⁸²

.pdf (last visited Feb. 23, 2010).

¹⁷⁹ Revilla, *supra* note 175.

¹⁸⁰ Revilla, *supra* note 175; *see also* CUMMINGS, *supra* note 2, at 12 (noting “[a]ctive involvement in-and funding for-cultural diplomacy programs by the federal government has most often been stimulated by a perceived foreign threat or crisis”). Many countries recognized the need for consistency in cultural diplomacy policy. As Charles de Gaulle stated, “[T]he life between two countries is somewhat like that between two individuals. Even if things aren’t going so smoothly in politics or the economy, don’t do any damage or harm to cultural relations. They should remain on the same level regardless of what happens.” MULTI-COUNTRY COMPARISON, *supra* note 4.

¹⁸¹ ARTS ACT, H.R. REP. NO. 110-540 (2008), *available at* <http://thomas.loc.gov/cgiin/cpquery/R?cp110:FLD010:@1%28hr540%29> (follow purpose and summary hyperlink).

¹⁸² *Id.*

Legislators did not act until four years later, however, when they introduced the ARTS Act in March 2007.¹⁸³ The Act represented a bipartisan effort to deal with the difficulties faced by non-profits attempting to bring in foreign artists. The bill would have amended section 214(c) of the Immigration and Nationality Act to provide an expedited visa petition process for non-profit organizations.¹⁸⁴ The bill required the Secretary of Homeland Security to adjudicate petitions for O and P artists within thirty days of filing.¹⁸⁵ It further provided that if the petition was not adjudicated within the thirty-day period, the Secretary would provide premium-processing service without the \$1,000 fee.¹⁸⁶

Representatives in support of the bill cited examples of organizations across the country struggling to bring in foreign artists because of the visa processing delays.¹⁸⁷ They argued that the cancellations of performances resulting from visa difficulties hurt not only the arts organizations attempting to bring in foreign artists, but also the many American artists and support staff that were scheduled to be part of the cancelled events.¹⁸⁸ The House passed the bill in April 2008, but the congressional session ended before any new action on the bill was taken.¹⁸⁹ In March and July of 2009, the bill was re-introduced in the House and Senate, and both Houses referred the bill to subcommittees.¹⁹⁰ When the 111th Session of Congress ended, the ARTS Act was once again cleared from the books. Congress must prioritize visa reform in its effort to aid artistic change, and the passage of this bill is a necessary first

¹⁸³ Art Requires Timely Service (ARTS) Act, H.R. 1312, 110th Cong. (2008).

¹⁸⁴ *Id.*

¹⁸⁵ ARTS Act § 2(c)(ii).

¹⁸⁶ ARTS Act § 214(c)(iii).

¹⁸⁷ 110 CONG. REC. H1859 (daily ed. Apr. 1, 2008).

¹⁸⁸ *Id.* (statement of Rep. Jackson-Lee). Representatives also cited the need to create a supportive atmosphere abroad for American artists. As Representative Jackson-Lee stated:

Our immigration system is an important gateway for artists and musicians from abroad and as such it should serve the broader cultural goals of our nation . . . by inviting foreign artists to perform, arts organizations in the United States provide American audiences the opportunity to experience a variety of artistic talent and encourage a supportive climate for American artists to perform abroad.

Id.

¹⁸⁹ *Id.*

¹⁹⁰ Art Requires Timely Service (ARTS) Act, H.R. 1785; S. 1409, 111th Cong. (2009) [hereinafter ARTS Act]. The bill was sponsored in the House by Representatives by Howard Berman (D-CA) and seven other bipartisan cosponsors and was introduced in the Senate by Senators John Kerry (D-MA) and Orrin Hatch (R-UT).

step.¹⁹¹ In addition to passing this bill, Congress should carefully consider adopting the more substantial visa reforms discussed below.

2. *Personal Interview Requirement*

The mandatory personal interview requirement, codified in the Intelligence Reform Act of 2004, is another procedure that is widely criticized by artists and arts presenters as a serious impediment to cross-cultural exchange.¹⁹² In a 2005 report, the Migration Policy Institute examined the effectiveness of the country's post-9/11 security policy. It questioned the effectiveness of the personal interview requirement, stating that the length and detail of the interviews have led many to view them as "perfunctory at best."¹⁹³ In the words of one State Department employee, "the chances of identifying a security risk purely on the basis of a visa interview is 'like a crap shoot.'"¹⁹⁴ One of the recommendations set forth in the report to facilitate and enhance the effectiveness of the personal interviews was to introduce personal appearance waivers for certain applicants.¹⁹⁵ The report argued that first-time visa applicants should still be required to undergo in-person interviews, but that there should be personal interview waivers for low-risk applicants who have been approved for a visa in the previous two years and have already satisfied the biometric data requirements.¹⁹⁶ In addition to these suggestions, the government should consider permitting waivers for musical groups that would allow representatives of large ensembles to conduct interviews on behalf of the entire group.

¹⁹¹ Since this Note was written, despite the lack of requested legislative action, USCIS announced its intention to adjudicate all regularly filed O and P visas within fourteen days, going beyond what the ARTS Act promised. See *Foreign Artist Visa and Tax News*, *supra* note 9. It has also formed an artist visa working group to improve the quality of adjudication. *Id.* While these are encouraging developments, Congress needs to hold USCIS to its word by making these changes official.

¹⁹² See discussion *supra* Part III.C.2

¹⁹³ SECURE BORDERS OPEN DOORS *supra* note 33, at 37 (discussing the typical questions and length of interviews).

¹⁹⁴ *Id.* Concerns have been voiced that interviewing every single person produces the "white-noise effect," making it more difficult for officers to identify the actual high-risk applicants through this mechanism. *Id.*

¹⁹⁵ *Id.* at 43.

¹⁹⁶ *Id.* The report stated that the program could be modeled on the NEXUS and SENTRI programs, "travel facilitation programs" at the Canadian and Mexican borders. These programs simplify the border crossing process for frequent, previously approved travelers.

While an effective screening process is essential to protecting our country, the United States must weigh the costs and benefits of each individual procedure to ensure that it is spending its time and money on the methods most likely to protect the country. Adopting these procedures would make a significant impact on eliminating visa backlogs and would allow USCIS officers to focus on more high-risk applicants.¹⁹⁷

3. *Amending Legislation that Discourages Organizations From Hiring Muslim Artists*

A 2009 report, issued by New York University (“NYU”) Center for Dialogues, urged the U.S. government to ease visa restrictions and change the parts of the Patriot Act that discourage organizations from hiring Muslim artists.¹⁹⁸ The Director of the Center stated, “[i]n order to bring about the ‘new beginning’ between the United States and Muslims around the world that President Obama advocated during his June address in Cairo, the federal government must amend legislation that hampers cultural exchanges.”¹⁹⁹ Promoting cultural exchange and dialogue with the Muslim world will help build mutual respect and interest between the United States and Muslims around the world.

Because artistic performances appeal to emotion, they can have an incredibly powerful impact on ideology and decision-making.²⁰⁰ Clinical research based on neuroscience, psychology, and behavioral science has shown that “associations driven by emotions” impact decision making in an even more substantial

¹⁹⁷ *Id.*

¹⁹⁸ NYU’S CENTER FOR DIALOGUES, BRIDGING THE DIVIDE BETWEEN THE UNITED STATES AND THE MUSLIM WORLD THROUGH ARTS AND IDEAS: POSSIBILITIES AND LIMITATIONS (2009), *available* at <http://www.nyu.edu/public.affairs/releases/detail/2912> (follow hyperlink to download report). Farhan Nizami, Director of the Oxford Centre for Islamic Studies at the University of Oxford, described the need for cultural diplomacy with the Muslim world and distinguished between diplomacy and cultural diplomacy, stating “[diplomacy is] the art of providing ladders for people to climb down . . . cultural diplomacy can make these ladders stable and comfortable; perhaps more importantly, it can suggest a desire to understand the narrative of the other, without trying to influence or reinterpret it.” *Id.* at 27.

¹⁹⁹ Press Release, NYU Office of Public Affairs, Amend Patriot Act to Ease Travel Restrictions for Muslim Artists, NYU’s Center for Dialogue Urges in New Report (Dec. 8, 2009) (statement of Mustapha Tlili, Dir. of Center for Dialogues), *available* at <http://www.nyu.edu/public.affairs/releases/detail/2912>.

²⁰⁰ SCHNEIDER, CYNTHIA ET. AL, BROOKINGS INSTITUTE, MIGHTIER THAN THE SWORD: ARTS AND CULTURE IN THE U.S.-MUSLIM WORLD RELATIONSHIP 20 (2008).

way than previously thought.²⁰¹ A recent Brookings Institute Project on U.S.-Muslim Relations applied this research in advocating for artistic exchange between the United States and the Muslim world.²⁰² The study argued that because of its emotional power, artistic and cultural experiences could have a strong impact on deeply divided communities, encouraging mutual understanding and empathy.²⁰³ The war against radicalism can only be won through diplomatic means, and cultural dialogue is an invaluable tool in building a strong and lasting relationship with the Muslim world.

C. Protectionism Versus International Cultural Exchange

It may be that by allowing more foreign artists to perform in the United States, fewer jobs will be available to American artists. Nevertheless, it is not clear that admitting more foreign artists will have an overall negative impact on the American job market. As arts organizations argued during the 1990 visa reform debate, bringing in foreign performers may even generate jobs for American workers.²⁰⁴ Even if American jobs are lost, however, those losses must be weighed against the benefits of international cultural exchange. A protectionist immigration policy deprives American artists and audiences of inspiring and educational experiences. Moreover, it threatens America's ability to showcase and present its cultural achievements to the rest of the world. As the United States learned during the 1990 debates, foreign countries will react to the implementation of restrictive immigration measures by invoking reciprocal provisions to restrict access to U.S. performers.²⁰⁵ The proper balance between safeguarding American jobs and international cultural exchange should be re-considered, and the United States should look to the Austrian and Canadian models for guidance.

One of the major problems with the U.S. visa system is the "one-size fits all" visa procedure. Every artist, regardless of how long and for what purpose they are coming to the United States,

²⁰¹ *Id.* The research cited was conducted by Dr. Drew Westen. *Id.*

²⁰² SCHNEIDER, *supra* note 200.

²⁰³ *Id.* at 30.

²⁰⁴ Kelley, *supra* note 48, at 512; *see also* Blum, *supra* note 68, at 560 (discussing Australia's recognition that foreign artists can contribute to the national economy as evidenced by its requirement that entertainers submit a "net employment benefit" stipulation showing how many jobs may be provided by the tour).

²⁰⁵ *See* discussion *supra* Part III.A.

must go through the same visa process and fulfill the same documentation requirements.²⁰⁶ Like the Austrian and Canadian models, artists could be grouped into different categories based on the time and purpose of their stay, and the requirements and procedures could differ according to the category.²⁰⁷ Many touring artists are in the United States for a very limited amount of time, and it makes little sense for an artist who will be in the country for a weekend tour go through the same process as an artist visiting for a year or more.

One possible solution would be to allow artists performing short tours to enter on a B-1 business visa. The United States currently allows individuals to enter the country to conduct short-term business via B-1 visas.²⁰⁸ “Conducting business” includes attending conventions, engaging in consultations, and carrying out other commercial activities.²⁰⁹ However, the B-1 category is inapplicable to anyone “seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or other prearrangement.”²¹⁰ If the United States allows touring artists to enter under the B-1 visa, it can aid artistic exchange without threatening substantial employment opportunities for American artists.

Furthermore, the government should consider expanding the U.S. Visa Waiver Program (“VWP”) to O and P applicants. The VWP currently allows residents of thirty-five specified countries to travel to the United States without visas for stays of ninety days or less.²¹¹ This program is limited to B visa applicants, those that are traveling to the United States for tourism or business purposes.²¹² The United States should consider extending this program to touring artists who meet the requirements of the VWP.²¹³ Although there has been opposition to the visa waiver program, especially after 9/11, a 2002 GAO study found that the

²⁰⁶ See discussion *supra* Part III.

²⁰⁷ See discussion *supra* Part IV.A-B.

²⁰⁸ 8 C.F.R. § 214.2(b) (2010).

²⁰⁹ 22 C.F.R. § 41.31(b)(1) (2010).

²¹⁰ *Id.*

²¹¹ See *Visa Waiver Program*, U.S. DEPARTMENT OF STATE: BUREAU OF CONSULAR AFFAIRS, http://travel.state.gov/visa/temp/without/without_1990.html#vwp (last visited Feb. 23, 2010). There are currently 36 countries that participate in the VWP program. *Id.*

²¹² *Id.*

²¹³ In addition to being from one of the specified countries, applicants must not be a security threat, must not have violated the terms of the VWP program in the past, and must have a return ticket. 8 U.S.C. §1187(a)(6-8).

implications of repealing the system would outweigh the potential costs.²¹⁴ Expanding the visa waiver system to artists from VWP countries would be another way for the United States to increase cultural exchange with countries that the government has determined are eligible to participate in the program.

Another suggestion, based on the Canadian Model, would be to place artists in categories depending on the time and *purpose* of their stay.²¹⁵ Under the IRPA regulations, certain artists are exempt from work permits.²¹⁶ In order to qualify for this exemption, the artists must satisfy the following requirements: (1) they must be in Canada for a short time period;²¹⁷ (2) they must not be in an *employment relationship* with the organization that is contracting for their services;²¹⁸ (3) they must be performing in a performance that is not primarily for a film production or a television or radio broadcast; and (4) they must not be performing at a restaurant, bar, or similar establishment.²¹⁹ Having documentation requirements dependant on the type of work the artist will perform would be a way to increase exchange, but at the same time, respond to union concerns about foreign competition threatening the American job market. Moreover, having categories more specifically tailored to the type and length of performance would enable the government to find a better balance between the competing interests at play.

VI. CONCLUSION

One month after 9/11, Yo-Yo Ma performed a show, focused on the music of Iran, with his Silk Road Ensemble in Dallas,

²¹⁴ UNITED STATES GENERAL ACCOUNTING OFFICE, BORDER SECURITY-IMPLICATIONS OF ELIMINATING THE VISA WAIVER PROGRAM, No. GAO-03-38 (Nov. 2002). For a critique of the visa waiver system, see Jan C. Ting, *Unobjectionable but Insufficient-Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145 (2002) (arguing that repealing the system would help block foreign terrorists from entering the United States).

²¹⁵ See discussion *supra* Part IV.B.

²¹⁶ *Id.*

²¹⁷ The time-limited engagement requirement of the IRPA regulations is dependent on the number of rehearsals and performances but can apply to an engagement for up to four to six weeks. *Id.*

²¹⁸ *Id.* This requirement distinguishes between artists with short-term and long-term employment contracts. There is no "employment relationship" if the artist is hired for a short series of performances. *Id.*

²¹⁹ *Id.*

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Texas.²²⁰ Anxious about the audience's reaction to music from a country so closely tied to the 9/11 attack, Yo-Yo Ma and his ensemble were pleasantly surprised when the audience reacted to the show with overwhelming support and approval.²²¹ The success of his show throughout the country is emblematic of Americans' receptiveness to understanding and engaging with other cultures. The country's current visa policy deprives U.S. audiences of the privilege of hearing performances by gifted artists and of gaining insight into cultures with which they may have no other contact.

America has discovered the limits of military power, and it must now look for alternative ways to protect its borders and ensure its prosperity. Cross-cultural exchange has the unique power to break down stereotypes and instill mutual trust and understanding. Through visa reform, the United States can foster international cooperation and reaffirm its status as a champion of freedom of expression, openness, and rich cultural diversity.

²²⁰ See generally Ma Statement, *supra* note 103.

²²¹ *Id.*