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# Artist Mobility
# Between Canada and the United States

*Brief prepared by CAPACOA on behalf of the Canadian Arts Coalition.*
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*CAPACOA and the Canadian Arts Coalition welcome comments from the arts sector about this position statement and recommendation. Comments may be emailed to Frédéric Julien, Director of Research and Development, at frederic.julien@capacoa.ca.*

## Background

### The Performing Arts Exception

While many cultural industries require some form of protection from foreign investments and from cultural exports, the performing arts sector stands out as an exception within the 'cultural exception'. In the performing arts sector, exchanges with other countries generally do not represent a threat to cultural diversity, but actually provide a positive contribution to cultural diversity. There are, for example, many genres in the music, dance or theatre sector that cannot flourish without ongoing exchanges with their country of origin.

### Labour Mobility in Canada

The Canadian government has made every effort to enable greater labour mobility with other countries:

- In 2014, Canada expanded the R186(g) work permit exemption, to include performances in bars, clubs and similar establishments. Previously, the work permit exemption was only available for performances in festivals and in performing arts centres. If any given tour included a performance in a bar, the foreign music band was required to pay a $150 work permit fee for each individual artist and staff member (or $450 for performing units of 3 or more). Moreover, in those circumstances, the Canadian engager needed to pay a $275 fee for a Labour Market Opinion (later changed into a Labour Market Impact Assessment, with a processing fee increased to $1,000). The expanded work permit exemption removed both fees.

- In 2015, Canada streamlined the Temporary Foreign Workers Program, and, in 2016, made it easier for foreign performing artists to come to Canada for co-productions and longer term engagements, under the International Mobility Program. Regulation [R205(b)] (exemption code C23) affirms: "Facilitating the entry of foreign nationals working in dance (e.g., ballet, contemporary), opera, orchestra and live theatre

contributes to competitive advantages and reciprocal benefits for all Canadians, including Canadian performing artists and performing arts organizations."

- The Government of Canada is currently in discussion with Canadian performing arts groups to find ways of simplifying non-resident taxation. Non-resident taxation is currently the greatest administrative and financial barrier to labour mobility in the performing arts.

## Labour Mobility in the United States

U.S. immigration laws (and the particular ways in which they are enforced) make it extremely difficult for Canadian artists to enter the U.S., even for short term presenting engagements.

- First, it must be noted that, in most circumstances, Citizens of Canada traveling to the United States do not require a nonimmigrant visa. This exemption is however circumvented by U.S. authorities, as explained below.

- While Canadians citizens do technically not require visas to enter the U.S., they are required to demonstrate that USCIS has approved their O or P classification in order to do paid performances in the U.S. (some business activities may also be conducted under a B-2 classification). This, in effect, means that Canadian performing artists are required to submit an I-129 application for O or P visas in order to tour in the U.S., even though they are visa exempt.

- The I-129 petition process is slow, time consuming and expensive. Since 2015, there have been ongoing significant processing delays for I-129 petitions. These delays are caused by a number of factors, including lack of resources and frequent *requests for further evidence* (often because USCIS officers do not understand the peculiarities of performing arts engagements. The Artists from Abroad website recommends filing I-129 applications "at least six months in advance, unless premium processing", while the CFM recommends to submit P2 applications "at least 75 calendar days prior to first performance". As a consequence of these delays, many touring artists are forced to pay a Premium Processing Service fee of $1,225, even though they file their petition months in advance of the 14-days service standards for regular processing. The fee for regular processing was increased in December 2016, from $325 to $460, which is a significant burden for many touring artists, groups and companies.

- Many arts organizations now seek administrative or legal assistance to help them navigate through the complexities of the visa process, incurring fees that range from $800 to $8000 per petition.

- However at odds as it may seem with current immigration practices, it must be noted that the U.S. Government has recognized the value of labour mobility and cultural exchanges in regulations and legislation. The USCIS *Foreign Affairs Manual* (9 FAM 402.2-2(F)) states that, "The policy of the U.S. Government is to facilitate and promote

> international travel and free movement of people of all nationalities to the United States for the cultural and social value to the world and for economic purposes." The Mutual Educational and Cultural Exchange Act of 1961, established the Bureau of Educational and Cultural Affairs as a division of U.S. Department of State to "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange (Mutual Educational and Cultural Exchange Act, Pub. L. No. 87–256, § 101, 75 Stat. 527).

This cumbersome immigration process is obviously an issue for Canadian touring artists, but it also negatively affects U.S. presenters, festivals and performing arts organizations. In response, several coalitions have been formed to advocate for improvements to the artist visa process.

"International Artist Visa Processing" is one of three advocacy priorities for the Performing Arts Alliance, a formal coalition of 14 U.S. industry associations representing over 30,000 arts organizations, artists, and arts supporters. In addition, to issues related to processing delays and high application fees, the Performing Arts Alliance claims that difficulties also include "inconsistent interpretations of requirements, and unwarranted requests for further evidence". The Performing Arts Alliance affirms that "the nature of scheduling, booking, and confirming highly sought after guest soloists and performing groups requires that the timing of the visa process be efficient and reliable."

Many U.S. associations and unions are also part of the Performing Arts Visa Working Group (PAVWG). The PAVWG is an ad hoc coalition of associations committed to issues of artist mobility to the U.S. The PAVWG has been active for several years, and has advocated for legislative changes to streamline the visa process (see below). Most recently, it coordinated joint statements "[urging] policy leaders to retain access to artist visas and support opportunities for worldwide cultural exchange during ongoing consideration of new immigration policies."

The PAVWG, under the leadership of the League of American Orchestras, the American Federation of Musicians, and The Recording Academy, has been working to raise awareness in Congress of the need for an improved visa process, with the goal of the Arts Require Timely Service (ARTS) Act being signed into law. The bill would require the Department of Homeland Security to adjudicate O and P visa petitions within 14 days after receiving such petitions and related documents.

The American Association of Independent Music (A2IM), the American Federation of Musicians (AFM), and The Recording Academy have been supporting another bill in Congress. The Bringing Entertainment Artists to the States (BEATS) Act specifically aims to streamline the process for allowing Canadian artists to perform in the United States. The BEATS act would modernize the P-2 visa process for entertainment artists and speed up the admission process. It would also loosen the regulations around date and location changes in the tour once the original petition is filed. The BEATS ACT would closely emulate, for Canadian musicians, the limited-time entry

process for Canada – it would also be very similar to the U.S. J-1 which was applicable to Canadian musicians prior to 1996.

The Artist Mobility Advocacy Coalition (AMAC) is yet another, more recent, ad hoc coalition. It brings together international arts organizations committed to improving the U.S. artist visa process. The purpose of the coalition is to coordinate advocacy efforts toward progress reform. Under the auspices of Tamizdat, the AMAC has been developing and is building support for a *White Paper on Artist Mobility to the United States*. While still in draft form, the *White Paper* identifies 37 recommendations based on the analysis of thousands of problem cases. The draft *White Paper* dated May 2017 affirms:

> "The current policies and procedures around the enforcement of O and P classifications have created an unconscionable lose/lose situation for the United States: they impede the activities of U.S. businesses and cultural organizations that rely on foreign performers, they unnecessarily strain chronically understaffed and overworked employees at USCIS and DOS, and they significantly impact the American people's access to international culture."

## Recommendation

The modernization of the North American Free Trade Agreement presents itself as unique opportunity to enable greater reciprocal labour mobility between Canada, the United States, and Mexico.

With respect to labour mobility between Canada and the United States, CAPACOA recommends the amendment of subsection 214.6 of NAFTA, in order to **add "Performing Artist" as an eligible profession for NAFTA Professional (TN) Nonimmigrant Status**, with the objective of more closely aligning NAFTA with the Canadian regulations R186(g) and R205(b), C23.

Under the TN status, as citizens of Canada seeking temporary entry as a business person to engage in business activities at a professional level, Canadian artists would be able to make application for admission with a Department officer at the United States Class A port-of-entry, at a United States airport handling international traffic, or at a United States pre-clearance/pre-flight station.

The requirement for credentials demonstrating professional status could represent a challenge. However, regarding *Documentation demonstrating engagement in business activities at a professional level and demonstrating professional qualifications*, NAFTA 214.6(d)(3)(ii) states:

> "This documentation may be in the form of a letter from the prospective employer(s) in the United States or from the foreign employer, and must be supported by diplomas, degrees **or membership in a professional organization**." (bold characters added)

A signed contract with a U.S. engager (or signed contracts with several U.S. engagers), and a letter or other form of documentation confirming membership in a recognized professional organization could be presented as evidence of employment at a professional level and of professional qualifications.

## Particular considerations

1. Performing artists engage in a number of different creative activities, spanning from creation, production, distribution and live performance. This brief was designed specifically for time-limited live performance engagements by presenting organizations and festivals. The recommendation and the following consideration may not be applicable to other activities such as recording, for example.

2. The TN classification is designed for individuals who practice one of the eligible professions; it not designed for groups of individual artists seeking entry as NAFTA professionals. Although the adjudication of the TN classification is much less complex than the adjudication of O and P classifications, it may still be difficult for Custom and Border Protection to assess request for entry as NAFTA professionals by large ensembles of performing artists. Therefore, in order to be applicable at a port-of-entry, the process for TN classification of performing artists has to be as simple as possible. Here are proposed adaptations within the current regulation for each type of evidence:

    a. *Evidence of engagement in business activities at a professional level*
    In the performing arts presentation industry, engagement contracts are signed between two parties: the engager and the party responsible for providing the service, who holds both rights over the production and authority to sign performance contracts on behalf of every single performing artist involved in the production. While the number performing artists are often indicated in presentation contracts, the names of every individual artist are seldom listed in contracts. In fact, performing artists are not always known at the time of contract signature (for example, while the lead artists may be known, supporting artists may not). This would present a challenge in terms of presenting evidence of professional employment for each performing artist. This could be circumvented by appending a list of performers to presenting contracts. This list could be referenced in the body of the contract and be appended as an enforceable schedule after contract execution.

    b. *Evidence of professional qualifications (education and/or experience requirement)*
    Not every professional performing artist holds a university degree. However, every professional performing artist that earns a living out of his/her art must have acquired a level of mastery through formal or informal training that is comparable to university education. The education requirement should therefore not be applied to performing artists.

With regards to the experience requirement, 9 FAM 402.17-5(C) states that "evidence attesting to the applicant's experience should be in the form of letters from former employers." In instances where performing artist are hired by a Canadian performing arts company and touring with that company, we believe the above-proposed list of performing artists appended to the engagement contract should be sufficient evidence of experience. In instances where the performing artists are entering as a non-incorporated group, then evidence should be provided in the form of membership in a recognized performing arts union or industry association.

3. The O and P classifications have sub-classifications for accompanying or support personnel whose services are essential to the performance or who are an integral part of it. These would include a technical director, a stage manager, a tour manager and other essential professions that may not fit under the "performing artist profession". No such sub-classification exists in the TN status. There are exceptions under 9 FAM 402.17-10 for spouse and minor children (TD classification), and 9 FAM 402.17-11 for domestic employee (B-1 classification) of NAFTA professionals. Those could be used as proxies to create a simple process for admitting support personnel of performing artists, or a distinct sub-classification for them.

4. Determination of TN status at a port-of-entry or at a pre-clearance station is a convenient, but last-minute and unpredictable procedure: if any performing artist within a touring group was to be denied entry under the TN status, there would no possibility for appeal, no time to take alternative measures, and the touring activities may be jeopardized. Consequently, a procedure should be considered to allow artists who so desire to seek determination prior to entry. This could be done by submitting an I-129 application to USCIS or by seeking determination at a consulate office, as proposed in the *White Paper* recommendation II.1 for B-1 visas determination.

5. Tracking systems would need to be put in place in order to evaluate the impact and the efficience of the change. The number of entries could be documented by Customs and Border Protection, and shared with USCIS and other authorities. Additionally, instances of denial of TN status could be documented by a third party to assess to efficiency of the procedure and the consistency with which it is applied by Customs and Border Protection. Similarly, a tracking process could also be introduced in Canada to assess the reciprocity of exchanges between the two countries.

## Justifications

1. The current visa classifications required to enter the United States already recognize the extraordinary nature of professional services rendered by performing artists:

    - O-1B classification for aliens of extraordinary ability in the arts;
    - P-1B classification for internationally renowned performing groups and essential support personnel; and, for individual foreign artists performing as a member of a U.S.-based internationally renowned performing group;
    - P-2 classification for reciprocal exchange program;
    - P-3 classification for culturally unique performers or groups, teachers and coaches.

2. Canada's work regulations (R186(g) and R205(b)) also affirm the unique status of performing artists, key creative personnel and talent.

3. Cultural exchanges between neighbour countries create affordable career development opportunities for emerging artists.

4. In some niche subsectors, such as contemporary circus or dance, a domestic market may not sufficient to ensure the long-term viability of art companies. For example, it is common for ballet companies to have reciprocity or exchange agreements with ballet companies in other countries.

5. Greater artist mobility would also facilitate last-minute engagements between border states and Canada (for example, when a last-minute cancellation requires a last minute replacement).

6. Enhanced artist mobility fits well within the U.S. administration's renegotiation objectives with regard to Trade in Services.

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