ARTISTS AND ATHLETES—O AND P VISAS
A NEW MEMO AND A NEW ERA OF ADJUDICATIONS

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WHO CAN PETITION FOR AN O OR P VISA: GUIDANCE ON FILING PETITIONS AS AGENTS/EMPLOYERS

Regulations contained in 8 Code of Federal Regulations (CFR) §214.2(o) allow filing of petitions for nonimmigrants with extraordinary ability. Specifically, the regulations deal with extraordinary ability in the sciences, arts, education, business, athletics, or motion picture and television fields. The petition may be filed only by a U.S. employer, agent or foreign employer acting through a U.S. agent.

Under 8 CFR §214.2(p) petitions may be filed for internationally recognized athletes (individually or as part of a team), members of an internationally recognized entertainment group (P-1), or artists performing a culturally unique artform (P-3). Again, such petitions may only be filed by a U.S. employer, U.S. sponsoring organization, a U.S. agent, or a foreign employer through a U.S. agent.

Prior to October 2009, long-standing U.S. Citizenship and Immigration Services (USCIS) practice allowed a foreign employer or agent of a self-employed artist to file an O-1, P-1 or P-3 petition with an itinerary listing the various events at which the artist would perform. Relying on traditional agency policy, the artist could appoint a U.S. individual or entity as agent to file a petition that included an itinerary of engagements at different venues. However, on October 7, 2009, USCIS published a Fact Sheet entitled "USCIS Clarifies Requirement for Agents Filing as Petitions for the O and P Visa Classification"[1] (Fact Sheet). In this Fact Sheet, USCIS stated that each employer of an O or P visa holder must file a separate petition with the service center that has jurisdiction under the area where the nonimmigrant will perform services, unless an "established agent" files the petition. This dramatic change in long standing policy and practice yielded a tremendous uproar of protest from the artistic community.

Opposition to the Fact Sheet focused on the fact that USCIS was implementing a policy change that prohibits U.S.-based employers from continuing the practice of jointly filing a visa petition on behalf of foreign,

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[1] U.S. Citizenship and Immigration Services (USCIS) Update, "USCIS Clarifies Requirement for Agents Filing as Petitions for the O and P Visa Classification" (Oct. 7, 2009), *published on* AILA InfoNet at Doc. No. 09100861 (*posted* Oct. 8, 2009).

guest artists. The new policy permitted only two types of petitioners: actual employers, who could only petition in their own right for their own event and no other events; and agents in the business of arranging engagements, in which case the petition could include an itinerary of performances for multiple employers.

After reconsideration, USCIS changed the policy announced in the Fact Sheet, in a memo dated November 20, 2009, authored by D. Neufeld, entitled: "Requirements for Agents and Sponsors filing as Petitioners for the O and P Visa Classification"[2] (Neufeld Memo). Essentially, the Neufeld Memo clarifies when an agent may petition as petitioner/employer in both the O and P visa categories. It is important for lawyers to thoroughly understand the legal and evidentiary requirements outlined in the Neufeld Memo when preparing O and P visa petitions.

Petitions filed by an "Agent"

According to the Neufeld Memo, petitions involving multiple employers (meaning multiple "events" or venues) may now be filed by an agent that has authority to act both on behalf of the beneficiary and on behalf of multiple employers. The following is a list of recommended documentation to support the petition:

1. A complete itinerary of all events (for the O) or services or engagements (for the P); the itinerary must include:
   a. specific dates of each service or engagement,
   b. the names and addresses of the actual employers, and
   c. the names and addresses of the establishments, venues or locations where the services will be performed;
2. The contracts between the employers and the beneficiary; and
3. An explanation from the agent, setting forth the terms and conditions of the employment and providing supporting documentation.

The authors of this article interpret the supporting documentation to require any correspondence, contracts, and engagement letters completed between the actual employer(s), the beneficiary and the agent. Moreover, we recommend that the agent actually sign the Form I-129 petition, as well as any supporting documentation. We also recommend that the agent include a detailed letter in support of the petition, and all correspondence substantiating the events listed on the itinerary, (including e-mail correspondence) where the petitioner is acting as an "agent" for both the beneficiary and the employers.

Acting as "Agent" for Multiple Employers

In the real world, "multiple employers" described in the regulations are the various venues, sponsors, promoters and others, who are requesting your beneficiary's performance or services. Therefore, consent to act as the employers' agent, as well as on behalf of the beneficiary, is required. In addition to a detailed itinerary, the petition should include all contracts or any correspondence between the agent and the employers, as evidence that the employers are consenting to the agent/petitioners' acting on their behalf.

The Neufeld Memo offers recommendations for acceptable evidence to confirm this point, and includes signed fee agreements, statements outlining the nature of the representation, and more. Notably, the memo points out that while evidence of the agent's compensation helps establish the petitioner is in business as an agent, compensation is not a requirement to establish agency.

"Agent" as Actual "Employer"

Where an agent files as petitioner and therefore employer, the individual must establish that he or she is also acting on behalf of multiple employers of the beneficiary. To do so, the agent must include evidence that he or she is "in the business as an agent."

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[2] USCIS Memorandum, D. Neufeld, "Requirements for Agents and Sponsors filing as Petitioners for the O and P Visa Classification" (Nov. 20, 2009), *published on* AILA InfoNet at Doc. No. 09113064 (*posted* Nov. 30, 2009).

The memo recommends that USCIS adjudicators consider evidence confirming that it is more likely than not that the petitioner is in the business as an agent for the series of events, services or engagements that is the subject of the petition. The memo further instructs that the focus of the analysis should be on whether the petitioner (agent) can establish that it is authorized to act as an agent for the other employers *only* for *purposes of filing the petition.*

Furthermore, the guidance clarifies that the petitioner does not have to demonstrate that it normally serves as an agent outside the context of this petition. This means that petitioners who do not regularly act as professional agents may nevertheless file petitions, despite their lack of state licensure, if so required, as long as the conditions have been satisfied. (Note: the authors recommend checking state licensing requirements for professional agents. Where no license is required, indicate such within the petition or supporting documentation. Alternatively, where state licensing is required and your petitioner does not possess a state license, argue that state licensure is not required for purposes of the petition. However, the state may still enforce its licensing requirements.)

P Petitions Filed by a U.S. Sponsoring Organization

The memo explains that certain organizations can petition for P nonimmigrants even if they will not employ or directly pay the beneficiary. Rather, a sponsoring organization may petition for any beneficiary under the P classification so long as the petitioner confirms that it will assume responsibility for the terms of the petition. The sponsoring organization should include a written agreement setting forth the terms of the performance with the beneficiary, and an affirmation that the organization will perform all of its obligations under the petition. To reiterate, the memo clarifies that the sponsoring organization need not directly employ the P nonimmigrant.

HOW LONG WILL THE PETITION BE VALID?

Regulations allow validity of up to three years per O petition,[3] one year per petition for P-1 and P-3 artists and five years per petition for P-1 athletes.[4]

Recently, USCIS has been shortening the validity period of many O and P petitions. When reviewing a petition, the length of time between the scheduled events, known as a "gap", has sometimes been viewed as a gauge to determine whether an itinerary represented one continuous "event" or separate events requiring separate petitions. Often the result is that the adjudicating officer would approve the petition only for those events listed prior to the gap. In response to numerous complaints regarding this issue, USCIS issued a July 20, 2010, policy memorandum entitled "Clarifying Guidance on "O" Petition Validity Period, Revisions to the *Adjudicator's Field Manual* (AFM) Chapter 33.4(e)(2) AFM Update AD10-36."[5] The crux of this memo is to clarify that there is no statutory or regulatory authority that a gap of a certain number of days in an itinerary automatically indicates a new event. The regulations speak in terms of tours and multiple appearances as meeting the "event" definition.[6] The memo concludes that service centers should approve a petition for the length of the validity period requested where the law and regulations permit.

While the memo does not provide clarifying guidance on P petition validity periods, the logic of the memo should apply equally in the P visa petition context. Just as in the O visa context, the P visa regulations speak in terms of tours and multiple appearances as meeting the "event" definition.[7] Furthermore, the memo itself states that, at least in the O context, there is no authority that a gap of a certain number of days in an itinerary

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[3] 8 Code of Federal Regulation (CFR) §214.2(o)(6)(iii).

[4] 8 CFR §214.2(p)(8)(iii).

[5] USCIS Memorandum, "Clarifying Guidance on "O" Petition Validity Period, Revisions to the *Adjudicator's Field Manual* (AFM) Chapter 33.4(e)(2) AFM Update AD10-36" (July 20, 2010), *published on* AILA InfoNet at Doc. No. 10072061 (*posted* July 20, 2010).

[6] 8 CFR §214.2(o)(3)(ii).

[7] 8 CFR §214.2(p)(3).

automatically indicates a new event. Prior to issuance of this memo, AILA urged USCIS to include a discussion of P petition validity periods in this memo. It is not clear why USCIS failed to do so.

SERVICE CENTER TRENDS

The ill-conceived USCIS Fact Sheet of October 2009, appeared to indicate a hostility towards O and P visa petitions which has continued to plague service center adjudications of these petitions. During a July 2010, stakeholders meeting with USCIS, many issues were raised about the adjudications of O and P petitions. One issue included the frequent disparity in adjudications, including adjudication of extension petitions for the O and P petition classifications. Petitions may be approved one year only to have an extension petition denied the next. Therefore, in order to avoid unnecessary denials, practitioners should remember to fully document each O and P petition and extension. Furthermore, it may take some time for adjudicators to fully understand the requirements of the 2009 Neufeld Memo. Adjudicators have issued many requests for evidence (RFEs) which incorrectly state the requirements for O and P filings under the Neufeld Memo. Lawyers need to be fully prepared to describe these requirements and defend their filings as adequate under the new memorandum.

It remains to be seen how the service centers will implement the recently issued July 2010, policy memorandum. However, given the attention to itineraries and events outlined in this memo and the November 2009 Neufeld Memo, it is recommended that practitioners request validity to cover only the period of time contained within specific itineraries, or scheduled events or services. Additionally, all events should be thoroughly documented.

CAN MUSICIANS/PERFORMING ARTISTS ENTER AND PERFORM ON THE B-1/B-2?

Under the *Foreign Affairs Manual* (FAM), one of the key issues is whether the musician or performing artist will be paid for his or her services in the United States. The FAM states in part that a B-1 nonimmigrant may not receive a salary from a U.S. source for services rendered in connection with his or her activities in the United States.[8] A U.S. source, however, may provide an expense allowance or reimbursement for expenses incidental to the temporary stay.

The notes are specific in terms of the guidance they provide and should be consulted frequently to determine if the contemplated activities in the United States are permissible. Even if the artist will not be paid, and renders his services without a fee, if the venue hosting the event for the musician/artist will charge an admission fee or request a donation to attend the event, the general rule is the nonimmigrant must apply for a P visa or other work authorized visa, such as an O-1 to perform in the United States. Please note that recording in a studio is generally considered a performance, the results of which would likely be an album, CD or other salable media, from which the performer will receive income such as royalties.

For individuals who are from Visa Waiver Program (VWP) countries, a note of caution is in order. Specifically, such nonimmigrants can be subject to expedited removal at a port of entry if at the time of arrival the Customs and Border Protection officer determines the individual is inadmissible, because he or she intends to work or perform in the United States. In such instance with VWP nonimmigrants it may be advisable to either apply for a B-1 visa at a consulate abroad, or to provide a port of entry letter to explain how the person qualifies for admission under the VWP.

HOW TO DEAL WITH FAMILY MEMBERS

As a general rule, certain family members may accompany a nonimmigrant applicant for admission to the United States. The nonimmigrant dependent must satisfy the qualifying criteria to be issued a visa as a dependent.

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[8] *See* 9 *Foreign Affairs Manual* (FAM) 41.31 N11.1–11.6, and N13.7. *See* Exhibit 1.

If the applicants who apply for admission to the United States have different last names, it is advisable to bring original documents, such as birth or marriage certificates, which establish the underlying relationship, together with a port of entry letter from the attorney that explains the family relationship.

A dependent family member of musicians and performing artists generally is ineligible to work in the United States unless the person qualifies for an independent nonimmigrant status which authorizes employment. The spouse and children also can attend public school provided the principal has been admitted on a work authorized visa, such as an O or P visa.

In the case where a musician or performing artist travels with his or her domestic partner to the United States, the latter must apply for a B-2 visa or use the VWP.[9]

APPLYING FOR PERMANENT RESIDENCY WHILE PRESENT ON AN O OR P

Individuals who hold O or P status in the United States may wish to apply for permanent resident status. There are multiple employment-based permanent residence options which may be available, as follows:

1. EB-1 person of extraordinary ability includes persons with an extraordinary ability in the sciences, arts, education, business and athletics. It is important to review the statute and regulations carefully.[10] Note that a sponsoring employer is not needed for this category; however, the beneficiary must intend to continue in the area of his or her expertise.[11]
2. EB-2 Aliens of Exceptional Ability in the sciences, arts or business is another category which may be available to musicians and performing artists, provided they have an offer of permanent employment.[12] The definition of exceptional ability is a lesser standard than an EB-1 person of extraordinary ability.[13]
3. Labor Certification. Labor certification will only be available where the O or P visa holder is offered full-time permanent employment.
4. The Diversity Visa Lottery may be available to certain musicians and performing artists who are citizens of eligible countries.

When filing for permanent residence, lawyers should advise clients about issues surrounding immigrant intent in light of the nonimmigrant visa that the client holds.

For the O visa, the applicable regulations recognize a version of dual intent for O visa holders, at least for the filing and approval of the I-140 petition.[14] Once an I-485 Adjustment of Status application has been filed, an individual in O status should wait for advance parole before leaving the United States or he or she may be held to have abandoned his or her permanent residence application.[15] Many international artists want to travel before the USCIS issues advance parole (a time frame of about two to three months as this is written). Clients

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[9] *See* 9 FAM 41.31 N14.4

[10] *See* INA §203(b)(1)(A), 8 CFR §204.5(h)(3) and AFM at 22.2(i).

[11] *See* INA §203(b)(1)(A) and 8 CFR §204.5(h)(5).

[12] *See* INA §203(b)(2), 8 CFR §204.5(k) and 20 CFR §656.15.

[13] The applicable case law includes *Matter of Kim*, 12 I&N Dec. 758 (A.C. 1968) held that:

"Exceptional ability in the sciences or arts," as found in §203(a)(3) of the Act, contemplates a broader field of activity, knowledge, and ability than the wording of §101(a)(15)(H)(i), "who is of distinguished merit and ability" coming temporarily to perform temporary services requiring such merit and ability. Section 203(a)(3) encompasses exceptional ability in the field of the sciences or arts such as a painter, sculptor, writer, prominent in his field while "H-1" could be confined to a specific, limited act or ability which is a limited part of the whole field." *See* 8 CFR §204.5(k)(3)(ii).

[14] 8 CFR §214.2(o)(13) involves public appearance(s), or whether the performance is for charity or U.S.-based ethnic society. (*See* 9 FAM 41.31 N13.7 on B-2 visas for amateur performances.)

b. The term "member of the entertainment profession" includes not only performing artists such as stage and movie actors, musicians, singers and dancers, but also other personnel such as technicians, electricians, make-up specialists, film crew members coming to the United States to produce films, etc.

[15] 8 CFR §245.2(a)(4).

should be made aware that expedite requests can be ignored, or may not result in quicker issuance of the advance parole.[16]

For the P visa holder, similarly, the approval of a labor certification or filing of a preference petition shall not be a basis to deny a P petition or extension. Note this does not apply to essential support personnel.[17]

CONCLUSION

Practices involving O and P visa processing can be extremely rewarding. Clients can be exceptionally talented and involved in extraordinarily interesting work; however, given the current adjudicatory environment, and changing legal requirements, lawyers need to well prepared to represent the O and P visa holder. The process can be far more challenging than anticipated.

[16] *See* 8 CFR §214.2(o)(13).
[17] *See* 8 CFR §214.2(p)(15).

EXHIBIT 1

9 FAM 41.31 N11.1 Incidental Expenses or Remuneration

(CT:VISA-701; 02-15-2005)

A nonimmigrant in B-1 status may not receive a salary from a U.S. source for services rendered in connection with his or her activities in the United States. A U.S. source, however, may provide the alien with an expense allowance or reimbursement for expenses incidental to the temporary stay. Incidental expenses may not exceed the actual reasonable expenses the alien will incur in traveling to and from the event, together with living expenses the alien reasonably can be expected to incur for meals, lodging, laundry, and other basic services.

9 FAM 41.31 N11.2 Honorarium Payment

(CT:VISA-1034; 09-24-2008)

INA 212(q) provides that a B-1 nonimmigrant may accept an honorarium payment and associated incidental expenses for usual academic activities (which can include lecturing, guest teaching, or performing in an academic sponsored festival) if:

(1) The activities last no longer than nine days at any single institution or organization;

(2) Payment is offered by an institution or organization described in INA 212(q);

(3) The honorarium is for services conducted for the benefit of the institution or entity; and

(4) The alien has not accepted such payment or expenses from more than five institutions or organizations over the last six months.

9 FAM 41.31 N11.3 Entertainers

(CT:VISA-1034; 09-24-2008)

a. Except for the following cases, B visa status is not appropriate for a member of the entertainment profession (professional entertainer) who seeks to enter the United States temporarily to perform services. Instead, performers shall be accorded another appropriate visa classification, which in most cases will be P, regardless of the amount or source of compensation, whether the services will involve public appearance(s), or whether the performance is for charity or U.S. based ethnic society. (See 9 FAM 41.31 N13.7 on B-2 visas for amateur performances.)

b. The term “member of the entertainment profession” includes not only performing artists such as stage and movie actors, musicians, singers and dancers, but also other personnel such as technicians, electricians, make-up specialists, film crew members coming to the United States to produce films, etc.

9 FAM 41.31 N11.4 Participants in Cultural Programs

(CT:VISA-701; 02-15-2005)

A professional entertainer may be classified B-1 if the entertainer:

(1) Is coming to the United States to participate only in a cultural program sponsored by the sending country;

(2) Will be performing before a nonpaying audience; and

(3) All expenses, including per diem, will be paid by the member’s government.

9 FAM 41.31 N11.5 Participants in International Competitions

(CT:VISA-701; 02-15-2005)

A professional entertainer may be classified B-1 if the entertainer is coming to the United States to participate in a competition for which there is no remuneration other than a prize (monetary or otherwise) and expenses.

9 FAM 41.31 N11.6 Still Photographers

(CT:VISA-701; 02-15-2005)

The Department of Homeland Security (DHS) permits still photographers to enter the United States with B-1 visas for the purpose of taking photographs, provided that they receive no income from a U.S. source.

9 FAM 41.31 N11.7 Musicians

(CT:VISA-701; 02-15-2005)

An alien musician may be issued a B-1 visa, provided:

(1) The musician is coming to the United States in order to utilize recording facilities for recording purposes only;

(2) The recording will be distributed and sold only outside the United States; and

(3) No public performances will be given.