OBTAINING "O" AND "P" VISAS FOR ENTERTAINERS: Minding your Os and Ps

By Rita Kushner and Mandy Tomson[*]

I. INTRODUCTION:

With the passage of the Immigration and Nationality Act of 1990 (INA),[1] Congress created the O and P visa categories for entertainers, artists, and athletes (as well as for "extraordinary" scientists, businesspersons, and educators). Previously, under the Immigration Act of 1952,[2] "preeminent" entertainers, artists, and athletes were included in the H-1 visa category. Organized labor, particularly the AFL-CIO, mounted a lobbying effort to change the law after noting that the Immigration and Naturalization Service (INS) was overly generous and vague in its definition of "preeminent" and thus was allowing fairly average foreign entertainers to undercut the wage levels and eliminate job opportunities for U.S. entertainers. The INA addressed labor's concerns by creating the O and P categories and excluding entertainment industry professionals from the H-1 category.

The O and P visas require a U.S. company, organization, or agent to petition for a foreign entertainer, artist, or athlete. Both visas are employer-specific, although in most instances a petitioning agent may include a general reference to "additional performances or engagements" with other employers in the original petition and can add specific engagements after the petition is approved without filing a new or amended petition.[3] As part of the application process, both visa categories mandate consultations with unions, such as Screen Actors Guild (SAG), or management groups, such as Alliance of Motion Picture and Television Producers. A peer group can be consulted if no union or management group exists for, or has jurisdiction over, the alien.

Consultations obtained from unions or management groups should provide a written advisory opinion on the alien's credentials and whether the assignment requires the services of a professional with those credentials.[4] The consultation requirement is waived when the alien will perform similar services with the same employer within two years of the date of a previous advisory opinion.[5] If the alien's job duties are covered by more than one union, multiple union consultations are required. For example, a petition for a foreign actor who is being sought for

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[1] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).
[2] Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).
[3] 8 C.F.R. §214.2(o)(2)(iv)(D).
[4] 8 C.F.R. §214.2(o)(5)(ii)(A).
[5] 8 C.F.R. §214.2(o)(5)(ii)(B).

both film and television projects would require advisory opinions from SAG and the American Federation of Television and Radio Artists (AFTRA).

While the consultation process is mandatory for initial O and P visa applications, no laws compel the consulting organizations to provide advisory opinions, and the organizations are not subject to regulatory standards of adjudication or legal standards of confidentiality. Despite the fact that statutes require the INS to obtain the consultation when a petition is filed without advisory opinions, practitioners not representing petitioners should not rely on INS to do the work. For example, if the INS requests a union advisory opinion, the union has 15 days from the date it receives the request to respond; after this period, and provided the petitioner has a chance to submit a rebuttal if the opinion is negative, the INS has 14 days to adjudicate the case.[6] While the submission of an O or P visa petition without an advisory opinion is permissible, it is never advisable and may cause substantial delays.

In order to exert some control over the O and P visa application timeline, practitioners should provide copies of the petition to the relevant labor union or management group prior to filing the petition with the INS. This will allow for the inclusion of a rebuttal argument in the petition in the event the consultation results in a negative written opinion.

Most consulting organizations require at least five or more working days to issue an opinion and do not appreciate requests to expedite the advisory process. When a response is not received within a reasonable time, practitioners may file the petition along with a detailed recitation of counsel's efforts to obtain an opinion and a request that the INS either adjudicate the application without the consultation or give the petitioner a chance to respond in the event that the INS independently obtains a negative written or telephonic advisory. When a union or management group declines in writing to issue an opinion, practitioners should provide the INS with a copy of the letter of refusal.

Although the opinion from a management group is technically supposed to have the same legal significance as a union opinion, the INS is well aware that management groups tend to acquiesce to almost every petition while labor unions are more discerning. In practice, therefore, INS will not accord much weight on management opinions but will rarely deny a case that receives a labor union's advisory opinion or "no objection" letter. When there is a conflict between management and union opinions, practitioners may bolster the petition with a positive advisory opinion from a peer, such as a distinguished professor in the alien's field or an appropriate professional association, as well as a strong rebuttal argument in favor of the alien. O and P applications should not be filed without at least one positive advisory opinion.

II. COMMONLY USED VISAS FOR ENTERTAINERS:

1. O Visas:

[6] 8 C.F.R. §214.2(o)(5)(i)(F).

The law distinguishes between O-1 aliens in the arts and O-1 aliens in the motion picture and television industries. O-1 "extraordinary ability" in the arts is defined as "distinction," "a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that the person described as prominent is renowned, leading, or well-known in the field of arts."[7] The term "arts" includes the performing arts, fine arts, visual arts, and culinary arts and all related technical and creative positions.[8]

O-1 aliens in the television and motion picture industries, including all related technical and creative personnel, must show "a demonstrated record of extraordinary achievement" defined as "a very high level of accomplishment … evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent that the person is recognized as outstanding, notable, or leading in the motion picture or television field."[9]

Despite the use of slightly different adjectives, both O-1 arts and O-1 motion picture and television beneficiaries must meet the same evidentiary criteria. They must either demonstrate that they have won a major nationally or internationally recognized award,[10] such as an Oscar, Grammy, Emmy, British Academy Award or Director's Guild Award, or meet at least three out of six enumerated criteria:

1) The alien has performed or will perform services as a leading or starring participant in productions or events with distinguished reputations as shown by critical reviews, ads, publicity releases, publications, contracts or endorsements;[11]
2) The alien has received national or international recognition for achievements through critical reviews or other published material by or about the beneficiary in major papers, trade journals or other professional publications;[12]
3) The alien has performed in a lead, starring or critical role for organizations and establishments that have a distinguished reputation evidenced by media articles, testimonials, and the like;[13]
4) The alien has a record of major commercial or critically acclaimed successes;[14]
5) The alien has achieved significant recognition from organizations, critics, government agencies, or recognized experts;[15] and
6) The alien has commanded or will command a high salary or other remuneration in relation to others in the field.[16]

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[7] 8 C.F.R. §214.2(o)(3)(ii).
[8] *Id.*
[9] *Id.*
[10] 8 C.F.R. §214.2(o)(3)(iv)(A).
[11] 8 C.F.R. §214.2(o)(3)(iv)(B)(1).

[12] 8 C.F.R. §214.2(o)(3)(iv)(B)(2).
[13] 8 C.F.R. §214.2(o)(3)(iv)(B)(3).
[14] 8 C.F.R. §214.2(o)(3)(iv)(B)(4).
[15] 8 C.F.R. §214.2(o)(3)(iv)(B)(5).
[16] 8 C.F.R. §214.2(o)(3)(iv)(B)(6).

Meeting only three criteria is a recipe for denial, despite the language of the law, unless the evidence submitted is extremely strong and the practitioner is able to show that most of the evidentiary criteria do not apply to the alien's profession.

The law allows artists, but not motion picture and television artists, to submit "comparable evidence" to establish to establish eligibility.[17] Practitioners should note that it is prudent, even in motion picture and television applications, to submit any available comparable evidence to strengthen the alien's case. Comparable evidence may include lesser awards, artistic exhibitions, presentations or speeches at industry conferences, lectures at renowned universities, evidence that the artists were competitively recruited, and anything establishing professional distinction.[18]

The practitioner should submit a reasonable amount of documentation confirming the alien's career achievements. Reference letters from diverse sources should also be obtained to meet the criterion of "significant recognition from organizations, critics, government agencies, or recognized experts" and to confirm any achievements or contributions made by the alien that are not easily verifiable through other means, such as an original artistic contribution to a particular project or a festival award that was kept by the client in the case of a commercials director. It is important to ensure that the experts writing letters on the alien's behalf understand the high benchmark of proof in these visa applications and utilize appropriate language that assists the case. More modest cultures in Europe, Africa and Asia consider "competent" to be an extremely high form of praise, and yet it is completely destructive to any O-1 claim of "extraordinary" ability or achievement. The INS could use such submitted evidence with terms like "competent: against the alien, arguing that even the alien's own supporters "only" call him or her competent, not extraordinary. Likewise, any reference to the alien as a "promising" artist will be regarded as a statement rejecting his eligibility, since one who is "promising," by definition, has not reached the top.

O-1 visas can be granted for an initial period of up to three years,[19] depending on the length of the "event" (activity or collection of activities) for which the alien is being hired, while extensions to complete the same event for the same employer are granted in one-year increments.[20] Aliens may be admitted up to 10 days prior to the validity of the petition and may remain 10 days thereafter, but are not permitted to work during these 10-day periods.[21]

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[17] 8 C.F.R. §214.2(o)(3)(iv)(C).
[18] *Cf.* 8 C.F.R. §204.5(h)(3) (setting forth criteria for establishing "extraordinary ability" in the immigrant visa context). The analogous criteria for establishing extraordinary ability in immigrant visa application are a good place to start when seeking "comparable additional criteria" for the nonimmigrant visa.

[19] 8 C.F.R. §214.2(o)(6)(iii).

[20] 8 C.F.R. §214.2(o)(12)(ii).

[21] *Id.*

Additionally, O-1 aliens may bring in their essential support personnel under the O-2 accompanying alien category (except in the fields of science, business, or education), provided the personnel have critical skills and prior experience with the O-1 alien that make them not readily replaceable by U.S. workers. Individual extraordinary ability is not required for O-2 aliens.[22] Thus, for example, an O-1 director can bring in the director of photography he customarily uses on his projects on an O-2 visa; an O-1 author or producer can bring in his long-time personal assistant; and an O-1 animation director can bring in his longstanding team of O-2 animators. An additional rule pertaining only to motion picture and television aliens allows for O-2 classification where significant production is taking place both inside and outside the U.S. and production continuity mandates the alien's continuing participation to successfully complete the project.[23] Unlike the general accompanying-alien O-2 visa, the production continuity O-2 is not based on the long-term essentiality of the O-2 alien to the O-1 principal alien's individual career, but rather on the O-2's essentiality to the specific production in question. Thus, for example, an O-1 director can seek to ensure that an O-2 director of photography that the O-1 director is working with for the first time if the production is being shot both inside and outside the U.S. and the participation of the director of photography throughout the duration of the production is essential to its stylistic and technical continuity. Indeed, an entire overseas cast and film-production team can be brought in on O-2 visas annexed to one O-1 principal alien of extraordinary ability where production continuity is essential to the successful completion of the shoot, even if they have no prior history of working together on other projects.

O-2 beneficiaries are not authorized to work apart from the O-1 alien, and they "must be petitioned for in conjunction with the services of the O-1 alien."[24] Individual O-1 petitions may be filed for any of these support positions provided "extraordinary ability" in the arts or "extraordinary achievement" in the motion picture and television field can be demonstrated.[25] Practitioners must therefore make the most strategic visa choice based on an evaluation of the union's likely position and the aliens' qualifications and current and future career plans.

2. P Visas:

P-1 visas are for individual foreign athletes,[26] visiting sports teams,[27] and entertainment groups (not individuals).[28] P-1 individual athletes or sports teams must perform at an

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[22] 8 C.F.R. §214.2(o)(4)(i).

[23] 8 C.F.R. §214.2(o)(4)(ii)(C).

[24] 8 C.F.R. §214.2(o)(4)(i).

[25] *Id.*

[26] 8 C.F.R. §214.2(p)(4)(i)(A).

[27] 8 C.F.R. §214.2(p)(4)(i)(B).

[28] *Id.*

"internationally recognized" level, a lower legal standard than that of the O-1.[29] The P-1 is also a better choice for the individual athlete because it has the advantage of being given for an initial period of five years (versus three for the O-1).[30] P-1 sports teams, however, are only admitted for the period of time necessary to complete the competition or performance, not to exceed one year.[31] A professional P-1 athlete traded from the petitioning organization to another is entitled to work for 30 days from acquisition, provided a new petition is filed during that period.[32] The athlete's employment is then authorized until the new petition is adjudicated.[33]

With the exception of circus personnel, [34] 75 percent of the P-1 entertainment group members must have been performing together for at least one year[35] to qualify for P-1 status. Under the P-1 criteria, only the achievements of the group as a whole are relevant. P-1 entertainment groups, like P-1 athletic groups, are only admitted for the period of time necessary to complete the competition or performance, not to exceed one year.[36] Since P-1 entertainment groups must meet evidentiary standards comparable to those required of O-1 aliens and are only accorded visa status for one year, practitioners should consider the possibility of filing separate O-1 visa petitions for the group's members. This O-1 option is particularly useful for relatively new groups in which individual members each have a strong record of accomplishment outside of the group. Moreover, the O-1 gives the individual members more freedom to pursue solo projects, while the P-1 visa, by contrast, limits their activities to those of the group.

The rarely used P-2 visa category is for performing artists who are part of a reciprocal exchange program between the United States and their home countries, such as Actors Equity with its British equivalent, and the American Federation of Musicians with its Canadian counterpart.[37] This visa category essentially functions as an informal exchange program for U.S. and foreign artists and entertainers with comparable skills and similar terms and conditions of employment. While the regulations stipulate that the applicable labor organization provide a full opinion for a P-2 visa petition, the substantive requirements are minimal. The petition must include the formal reciprocal agreement along with confirmation that an appropriate union has been "involved in negotiating, or has concurred with" the reciprocal program.[38]

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[29] INA §214(c)(4)(A)(i), 8 U.S.C. §1184.
[30] 8 C.F.R. §214.2(o)(3)(iv)(C).

[31] *Id.*
[32] 8 C.F.R. §214.2(p)(2)(iv)(C)(2).

[33] *Id.*
[34] 8 C.F.R. §214.2(p)(4)(iii)(C)(1).

[35] *Id.*
[36] *Id.*
[37] Jonathan Ginsburg, *O & P Nonimmigrants*, in American Immigration Lawyers Association, Immigration And Nationality Law Handbook 251, 266 (2000-01 ed.).
[38] 8 C.F.R. §214.2(p)(5)(ii)(C).

P-3 visas are for "culturally unique" artists and entertainers, either individually or as part of a group, who intend to perform, develop or teach their art form.[39] This category allows for the admission of more obscure, culturally specific specialists. For example, groups who would be unable to meet the more commercial O-1 or P-1 evidentiary standard of sustained national or international acclaim - such as folk dancers, Zulu dance troupes, and *ney* (Persian flute) players – may apply for this visa. Paradoxically, it is easier for a completely obscure German *Schlager* singer to obtain work permission in the United States than it is for an emerging foreign rock music group who has already had some media exposure.

One additional benefit available only to P-1, P-2, and P-3 qualified groups is the substitution procedure. The rule basically allows a group previously approved for P classification to substitute a group member not included in the original petition. To do so, a copy of the group's approval notice together with a letter from the petitioner requesting a substitution must be submitted directly to the Consulate where the substitute alien will apply for the visa or directly to the port of entry where the visa-exempt substitute alien would apply for admission to the United States. No new petition is required for the substitute alien, with the exception of essential support personnel, who may not be substituted at consular offices or ports of entry and who require a new P visa petition filed on their behalf.[40]

Finally, practitioners should note that O and P petitions must be filed in duplicate original of form I-129 together with its O and P Supplement and a filing fee. Aside from the mandatory consultation process, the petition must include a signed contract or deal memo for the alien's services, and a letter from the employer together with a legal brief clearly referencing the supporting exhibits is advisable.

III. CONCLUSION:

While Os and Ps continue to be viable options for bringing foreign entertainers and athletes into the United States, the adjudication principles for attaining extraordinary or internationally recognized status have been raised significantly by the INS. This has resulted in uncertainty for petitioners and beneficiaries seeking visas through these categories. Over the past few years, practitioners have noticed a definite increase in Requests for Evidence and even denials on these cases. While the law has remained constant, the INS has shifted its standards for the worse. Therefore, it is advisable to appropriately adjust our approach to case selection and preparation in order to minimize the impact of this often unpredictable adjudication. Clients need to know that, despite the regulatory attempt to offer objective criteria in adjudicating these cases, the subjective factors continue to provide for inconsistent decision-making.

[39] 8 C.F.R. §214.2(p)(3).

[40] 8 C.F.R. §214.2(p)(2)(iv)(H).