Navigating Difficult Waters: Immigration Laws As They Relate to Foreign Artists, Entertainers and Athletes

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In the past quarter century, the arts and sports world has exploded far beyond the scope of national borders. "Multiculturalism" has become a buzzword in the U.S. almost guaranteed to elicit grant money as we thirstily explore and reinterpret the myriad artistic traditions of others. American artists and athletes routinely perform in countries throughout the world, and in exchange we invite their counterparts here. It is typical in any major U.S. city to have a choice of weekend entertainment as diverse as taking in an Indonesian gamelan concert, a Finnish folk festival, or a Chinese acrobatic display. Foreign sports such as soccer and cricket have grown in popularity and many of our world-class athletes, from professional basketball players to U.S. Olympic coaches, are foreign.

With all of this cultural exchange, most people assume that it is fairly easy and routine to obtain permission for artists and athletes to enter the U.S. Well, they're wrong. First-time event planners often naively plunge ahead, thinking about every detail except the most important one; how is the featured artist going to get into the country? As we'll see, not everyone is qualified. And even among those who are, timing is everything, as most visas require that applications be approved here in the U.S. at one of our four regional immigration processing service centers BEFORE the visa may be applied for abroad at the U.S. consulate in the individual's home country. In addition, many types of visas also require pre-approval by the applicable union or the U.S. Dept. of Labor. While the U.S. Citizenship and Immigration Services ("USCIS") will sometimes accommodate requests for expedited handling and process applications in a matter of days, obtaining such treatment is never guaranteed. Seasoned event planners know to begin working on these applications months in advance to avoid nail-biting in the final days before the show.

A basic rule that applies in nearly all situations (with a few exceptions explained below), is that individuals cannot come to the U.S. to work in any capacity without special advance work permission. This includes even artists who are coming to the U.S. for performances that last less than a week. Although most individuals from first-world countries can come to the U.S. as visitors without having to first apply for a visa, they will definitely be turned away at our borders by USCIS inspectors if there is any suspicion that they are coming to do anything at all for which they might be paid. "Payment" to an USCIS official can mean any remuneration at all, so clever plans to compensate performers by giving them free room, board, and transportation, are no solution. While some people get away with it, others get caught and events are ruined. The bottom line is that most performers and athletes cannot escape the fact that they must obtain visas in advance of arrival. There is a variety of visa types, depending on the applicant's circumstances and qualifications. The different visa options are explained in detail below. After that is a discussion of more permanent options for those who want to remain in the U.S. beyond the scope of short-term events or contracts.

Visas for Artists and Entertainers of "Extraordinary Ability or Achievement"

There are two primary types of visas designed specifically for artists and athletes, called O visas and P visas. Although this is a gross oversimplification that doesn't really fit athletes (whose immigration options will be explained separately), the main difference between the two types is that O's are meant for individuals and fit situations where they may be in the U.S. for extended periods, whereas P's are generally for group artists who are here for shorter durations.

O Visas: O-1 visas are for individuals of "extraordinary ability in the sciences, arts, education, business, or athletics", O-2 visas are for certain support individuals accompanying O-1 artists or athletes, and O-3 visas are for dependents (spouses and children under age 21).[1] Special implementing regulations were passed exclusively for artists, entertainers, and athletes that spell out the exact standards and requirements.[2] "Extraordinary" is defined differently depending on the type of applicant, with a separate, lower standard of "distinction" for artists and entertainers. Additionally, artists and entertainers in the television and motion picture industries must show a "demonstrated record of extraordinary achievement".[3] Note that athletes are subject to the higher standard of extraordinary ability, which means visas will be granted only to those who have reached a level of expertise, "indicating that the person is one of the small percentage who have risen to the very top of the field of endeavor."[4]

Artists and entertainers, on the other hand, must show that they have reached a level of achievement, "evidenced by a degree of skill and recognition substantially above that ordinarily encountered" and are "renowned, leading, or well known in the field."[5] What this means on a practical level is obvious; not all artists and entertainers are going to be qualified for O-1 status. Those who do qualify must prove it by submitting to the USCIS Regional Certifying Center evidence that they have either won a major international award (e.g. Academy, Emmy, Grammy, or a Director's Guild Award) or have done at least *three* of the following: 1) starred in major productions; 2) received national or international recognition through critical reviews; 3) worked prominently with distinguished organizations; 4) produced a record or major commercial or critical acclaim; 5) been recognized by organizations, government agencies, or experts in the field; and 6) commanded a high salary in relation to others in the field.[6] The world's very top artists will have no difficulty with this standard. Most artists are less acclaimed, however, and must work hard to document their record of achievements and obtain letters of support from individuals prominent in their field. Those artists (or their mothers) who have kept careful records of their achievements are fortunate indeed, as it will take far less time to pull together the requisite documentation.

Artists in the motion picture or television industry, including directors and other essential technical and creative personnel, must have a demonstrated record of skill and recognition "significantly above that ordinarily encountered to the extent that [they are] recognized as outstanding, notable, or leading" in the field.[7] This is a somewhat higher standard, in other words, than that applied to artists in other industries. The rationale behind this is rooted in politics and has to do with concerns about foreign competition by the related labor unions.

Speaking of unions, many first-timers in the process of obtaining visas are shocked to learn that foreign artists and entertainers must first obtain written advisory opinions from the appropriate union stating whether the union agrees that these artists are qualified for visas. The only exception is when no relevant union exists, in which case a letter from an expert in the field may suffice. Most unions have directed specific individuals to handle these inquiries, and some are more cooperative than others. Although technically the USCIS may still approve an application without a favorable union opinion, it is far easier to get an approval with one.

Although many individuals enter the U.S. on O-1 visas for short periods, O-1's can be good for up to three years, and indefinite one-year extensions may be granted. O-1 petitions must be filed by U.S. employers or agents, however. Artists or entertainers may NOT self-petition, which greatly decreases their flexibility and work opportunities. Artists who plan to remain in the U.S. for any significant duration should write their applications as broadly as possible to maximize their employment opportunities. For example, a dancer may be hired by a dance company to perform during the main dance season, but we will also recommend including in the job description on the O-1 petition the option of teaching and being subcontracted to other dance companies off season. One thing such artists **cannot** do, however, is work outside their fields of endeavor, as many U.S. artists do to make ends meet.

P Visas: P visas are exclusively for artists, entertainers, and athletes, and are divided into three different classifications (P-1, P-2, and P-3) that do NOT parallel O visas. P-1 visas for entertainers are only for those who are coming to the U.S. as part of a group that has been recognized internationally as outstanding for a substantial period of time. Each member must have been with the group for at least a year (with certain exceptions), and be entering the U.S. exclusively to perform with that group.[8]

P-1 status is granted on the basis of the group's reputation rather than on that of the individual artist. The standard of evidence for group recognition is nearly identical to that for an individual obtaining an O-1. The group must have either received a major international award or have done at least *three* of the following: 1) starred in major productions; 2) received international recognition for outstanding achievement; 3) worked prominently with distinguished organizations; 4) produced a record or major commercial or critical acclaim; 5) been recognized by organizations, government agencies, or experts in the field; and 6) commanded a high salary in relation to others in the field.[9] The main distinction between the two standards is that the acclaim must be international in scope; the USCIS, however, may allow national recognition for groups who come from countries with limited access to the international arena. Note that while individuals may join an existing foreign group in the U.S. in P-1 status, they cannot obtain P-1 status to join a U.S. based group.

P-2 visas are reserved for artists and entertainers who perform individually or with a group pursuant to a reciprocal exchange program between U.S. and foreign organizations. Although there are no other criteria pertaining to these organizations, the relevant labor unions must be involved in either establishing or concurring with the programs. The exchanges must be similar in terms of caliber of artists and terms and conditions of employment.[10] Despite their potential, only a handful of P-2 programs have been established thus far by unions such as Actors Equity (with its British counterpart) and the American Federation of Musicians (with its Canadian counterpart).

P-3 visas are granted to individual or group artists who are considered "culturally unique" and who are coming to the U.S. to express this art form. Cultural uniqueness is defined broadly as a style of artistic expression unique to a particular "country, nation, society, class, ethnicity, religion, tribe or other group of persons."[11] This is an expansive category that allows for the creative immigration lawyer to devise P-3 applications for many different types of artists, especially in this age of multiculturalism in the arts. The required evidence includes testimonials from recognized experts and published materials attesting to the authenticity of skill and history of performing the culturally unique art form. Proof must also be provided that the individuals or groups are coming to present culturally unique performances in the U.S.

All P categories allow for "essential support personnel" who are considered highly skilled and integral to the performance. P applications also all require union advisory opinions for the principal artists AND for the support personnel. In other words, the union applicable to the support person (e.g. the International Brotherhood of Electrical Workers) must be consulted as well as the artistic union applicable to the artist. P visas are granted for the period of time needed to complete the event or performance, not to exceed one year. One year extensions are available indefinitely.

Special Rules for Athletes

O-1 athletes must meet the higher standard of "extraordinary ability" that is applied to non-artists. This standard requires either receipt of a major international award or proof of at least *three* of the following: 1) internationally or nationally recognized awards; 2) membership in associations that require outstanding achievement; 3) published material about the athlete in major trade publications; 4) participation as a judge of others in the same field; 5) contributions to the field of major significance; 6) authorship of articles in the field; 7) employment in an essential capacity in distinguished organizations; and 8) high salary relative to others in the field.[12] Note that obtaining a contract with a professional sports team is not in itself sufficient evidence to obtain O-1 status.

Because the standard for O-1 athletes, who must have "sustained national or international acclaim", is higher than for P-1 athletes, most will apply for P's over O's. P-1 athletes may apply as individuals (as distinct from P-1 artists) and must show that they have been performing at "an internationally recognized level". They must submit as evidence a tendered contract with a major U.S. sports league or team or a tendered contract with an individual sport "commensurate with international recognition in that sport" and prove at least *two* of the following: 1) significant participation in a prior U.S. major league season; 2) participation in international competition with a national team; 3) significant participation in a prior U.S. college/university season in intercollegiate competition; 4) provide a written statement from a major U.S. sports league or official of the sport's governing body of the individual's international recognition; 5) provide a written statement from the sports media or recognized expert regarding international recognition; 6) high international ranking; and 7) significant honors/awards in the sport.[13] P-1 visas for individual athletes may be valid for up to five years, with one extension allowed (for a total stay not to exceed ten years).

One final exception for athletes merits mentioning. Although it was stated above that artists and entertainers should never try to enter the U.S. to perform while on tourist visas, there is a special rule for athletes who enter the U.S. for the purpose of participating in international tournaments or competitions who receive no salary, only prize money.[14]

Other Visa Options for Athletes, Artists and Entertainers

Not all artists and athletes will have the record of achievement necessary to qualify them for O or P status. While some may just plain be out of luck, others may have options. For example, if these individuals have a college degree related to their field of endeavor and if they are coming to be employed in positions that could be classified as "professional" (meaning that a college degree is the typical requirement for entrance into that field), they may be eligible for a visa type called an H-1B.[15]

An H-1B is the most common visa for employed individuals in the U.S., and is applicable to artists and entertainers who fit the immigration definition of "professional". Examples of professions that might be included are: athletic coaches, photographers, graphic designers, arts administrators, and art or music teachers. The key in obtaining H-1B approval is that the job must require a related university degree or its equivalent. Some coaching positions, for example, will qualify for H-1B status and others will not. The nice thing about this visa category is that no further proof beyond the individuals' academic credentials need be submitted. The visa does require an employer, however, and the employer must be paying what is considered to be the prevailing wage for the profession (and obtain a certification to this effect from the Dept. of Labor). H-1B status is granted for three years at a time with a maximum of six years.

Another option that may be especially helpful to younger athletes and artists is a student visa (F-1 for college level and M-1 for vocational schools). Students may work in only a limited capacity, however, such as during school internships or on campus. Most receive a period of practical training allowing them to work in their field for a limited period upon graduation (one year for F-1 students). Many young artists get their start in the U.S. by entering as students, obtaining practical training, and then later switching to an H-1B or even an O-1 if they've been able to garner the necessary acclaim (perhaps while in graduate school, for example).

Obtaining a Visa

Just because the USCIS Regional Certifying Center has agreed to classify an individual as an O or P artist or athlete or H-1B professional does not mean, however, that this person has the automatic right to enter the U.S. The U.S. State Dept., which is separate and distinct from the USCIS, must first approve a visa application. This application is normally made at the U.S. consulate in the individual's home country. Armed with the approval notice from the USCIS, the artist or athlete will fill out a simple application form, and depending on what country he or she is from, attend a personal interview.

Consular officials can and often do deny visa applications for any number of reasons, including concern that the applicants don't intend to return home after time spent in the U.S. in a visa status that requires nonimmigrant intent (a common denial in third world countries), that they have lied in the underlying O or P or H submissions, that they don't have the money to support themselves in the U.S., and even that they don't qualify for admission due to a criminal record or poor U.S. immigration history. It is next to impossible to appeal visa denials, particularly in certain countries with high fraud profiles. Due to the possibility of visa denials, careful consideration of all of the factors surrounding an individual's situation should be made prior to preparing and making any submissions to USCIS.

Permanent Options

Most artists or athletes who are in the U.S. for any significant period of time will want to obtain status as lawful permanent residents (holding "green cards"). This is not as much because they want to live the rest of their lives here as because it is frustrating and expensive to live here in nonimmigrant status on any of the various visas discussed above. Without permanent residence, their options are narrow, limited, and require scrupulous adherence to the specific rules of the visa category. Artists and athletes are locked into relationships with specific employers or agents that cannot be changed without new applications being made. They often do not have the flexibility of doing freelance work even if it is still in their professional field. Further, they certainly aren't allowed to supplement their income with jobs unrelated to their field, which for many artists presents a substantial burden.

As one might imagine after reading this far, however, green cards aren't easy to come by. There are really only three viable avenues available to most artists and athletes who want permanent residence, which are to: 1) prove that they are of extraordinary ability; 2) have an employer establish that there are no U.S. workers available to do the same work; or 3) get married to a U.S. citizen. Aside from cautioning that USCIS truly does comes down very hard on people who engage in fake marriages, I'll only discuss the first two options here.

Artists or athletes of extraordinary ability may self-petition for permanent residence provided they can prove that they intend to continue to work in the U.S. in their field. The standard for establishing extraordinary ability for the purpose of obtaining permanent residence is that these individuals are of "that small percentage who have risen to the very top of the field of endeavor."[16] Although the evidentiary standard for this category is virtually identical to that of obtaining an O-1 for an athlete, USCIS seems to apply an even higher standard. This is likely because it is granting something permanent rather than temporary. The submission to USCIS, therefore, must carefully document and emphasize that the individual is the absolute cream of the crop. The smart immigration lawyer will define the field of endeavor narrowly so that it is more probable that an individual has risen to the top. Often artists or athletes will spend a few years in O-1 status first while putting together an even stronger portfolio to use in their permanent applications.

Of course, not everyone can be extraordinary. Most foreign artists and athletes fall into the category that Garrison Keillor would describe only as "above average". For these individuals, the employment- based option of obtaining permanent residence is limited to whether or not they have employers who are able to sponsor them for permanent residence by establishing that there are no qualified U.S. workers available and willing to fill their jobs. To be successful, the employer must advertise availability of a full time and permanent position, offer to pay prevailing wages, and prove to the satisfaction of the Dept. of Labor that there are no qualified U.S. workers who have come forward in the recruitment process who meet the minimum qualifications for the position.[17] A successful application will result in a "labor certification" from the Dept. of Labor, which can then be used to pursue permanent residence with the USCIS.

There are only limited occupations in the arts in which obtaining a labor certification is a feasible option, however. Male ballet dancers spring to mind. As a general rule, the more education and experience required for the position, the more likely it is that a labor certification application will be successful. There are special handling provisions for labor certifications for university professors[18] that enable them to qualify more easily (allowing the employers to choose the best qualified candidate rather than the minimally qualified one) and for professional athletes that allows them to switch easily between teams.[19]

Despite the obstacles, many foreign artists and athletes do eventually qualify for permanent residence, often after persevering for many years in a variety of nonimmigrant visa categories. They are typically very thrilled and relieved to have crossed the bridge to a freer professional life, so maintenance of their permanent residency is very important to them. People can and do lose their permanent resident status all the time, however. Just as individuals seeking temporary visas may be denied entry to the U.S. due to their permanent intent, individuals with permanent status may be denied entry for having **temporary** intent. In other words, those with green cards must maintain strong and permanent ties to the U.S. or they will lose their status. Artists and athletes are often in more jeopardy than the average person because the nature of their careers is such that they may be moving and performing around the globe. Great care should be taken to ensure that they never stay out of the U.S. for more than a year at a time, file and pay U.S. taxes, and can document permanent ties in the U.S. through bank accounts, property, family relationships, etc. Those planning to depart the U.S. for significant periods of time (over six months) should consider applying for a re-entry permit, which establishes to the USCIS that they have permanent intent to remain in the U.S. for up to a two year period even if that time is spent abroad.

Another way that people lose their permanent residence is by being convicted of certain crimes that render them deportable. The current laws related to immigrants and crime are extremely strict. Any drug related crime, for example, including possession of a small amount of marijuana, is a deportable offense.[20] In other words, an offense that might be a petty misdemeanor in some states can still result in deportability to a foreign artist or athlete. Therefore such individuals must exercise far more caution in certain social settings than their American counterparts.

Because of the insecurity of permanent resident status, it is always advisable that foreign artists and athletes consider the option of obtaining U.S. citizenship. Those who have maintained permanent residence for five years, at least half of which has been spent physically present in the U.S., are eligible for naturalization. Many people do not realize that they are eligible to hold dual citizenship. Unless their own countries require that they relinquish their native citizenship (and most don't), they may keep it and still acquire U.S. citizenship. Not only does citizenship grant them the right to vote; it affords them the same rights as others, which they will never fully have as permanent residents. Only once they become citizens will they truly be able to stop worrying about navigating their way through myriad immigration rules and regulations. For artists and athletes, who by the very nature of their work often lead lives that are mobile and less stable, that is all the more important.

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1. Section 101(a)(15)(o) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1524).
2. 8 CFR § 214.2(o)(1)(ii)(A)(1).
3. *Id.* At (A)(2).
4. 8 CFR § 214.2(o)(3)(ii).
5. *Id.*
6. 8 CFR § 214.2(o)(3)(iv).
7. 8 CFR § 214.2(o)(3)(ii).
8. 8 CFR § 214.2(p)(4)(i)(B).
9. 8 CFR § 214.2(p)(4)(iii)(B).
10. 8 CFR § 214.2(p)(5)(ii)(D).
11. 8 CFR § 214.2(p)(3).
12. 9 FAM 41.31 N.4-8 or O.I. §214.2(b)
13. 8 CFR § 214.2(o)(3)(iii).
14. 8 CFR § 214.2(p)(4)(ii)(B).
15. 8 CFR § 214.2(h)
16. 8 CFR § 204.5(h)(2).
17. 20 CFR §656.21; Employment and Training Admin., U.S. Department of Labor, *Technical Assistance Guide No. 656: Labor Certification (TAG)*(1981).
18. INA § 212(a)(5)(A)(ii), 8 U.S.C. § 1182 (a)(5)(A)(ii)
19. INA §212(a)(5)(A)(iii), 8 U.S.C. §1182 (a)(5)(A)(iii).
20. INA § 212(a)(2)(A)(i)(II), 8 USC § 1182 (a)(2)(A)(i)(II).