Immigration Issues for Artists, Entertainers and Athletes

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Under U.S. immigration law, a basic rule that applies in nearly all situations, is that artists, entertainers, and athletes cannot come to the U.S. to work in any capacity without special advance work permission. This includes even artists whose American performances are scheduled to last less than a week. There are a variety of visa types which allow individuals to work in the U.S., depending on the applicant's circumstances and qualifications, though the two primary types of visas for artists, entertainers and athletes are O visas and P visas.

I. O Visas for Artists and Entertainers of "Extraordinary Ability or Achievement"

O visa's are designed for individuals and fit situations where they may be in the U.S. for extended periods. 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. For instance, there is 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]

A. *Artists and Entertainers*

Artists and Entertainers 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] Based on this definition, 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]

B. *Artists in the motion picture or television industry, including directors and other essential technical and creative personnel.*

Artists in the motion picture or television industry must have a very high level of accomplishment in the motion picture industry evidenced by a degree 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 than that applied to artists in other industries. There is a special rule for O-2 individuals in motion picture and television production accompanying motion picture or television artists. The O-2 individual must have: (a) skills and experience with the O-1 alien not of a general nature; (b) that are critical ether based on a pre-existing, long-standing working relationship; or (c) with respect to the specific production, because significant production (including pre- and post-production work) will occur inside and outside the United States, and the continuing participation of the individual is essential to the completion of the production.

C. *Union Advisory Opinions*

Foreign artists and entertainers must first obtain written advisory opinions from the appropriate U.S. 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.

D. *Duration of O visas and the Petitioner*

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. Artists or entertainers may NOT self-petition and may NOT work outside their fields of endeavor.

II. P Visas for Performing Entertainers and Athletes

P visas are exclusively for artists, group entertainers, and athletes, and are divided into three different classifications (P-1, P-2, and P-3) that do NOT parallel O visas. Another visa option for artists, entertainers, and athletes is the P visa. The P visa is generally more used in situations for group artists entering the United States on trips of limited duration, for athletes, and culturally unique artists (groups and individuals).

A. P-1 Visas for Entertainment Groups.

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, a " high level of achievement in the field evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the extent that such achievement is renowned, leading or well known in more than one country." 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 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.

B. P-2 visas for Artists and Entertainers

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] 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).

C. P-3 visas for Culturally Unique Artists

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] 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.

D. Accompanying Individuals

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. 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.

III. Special Rules for Athletes

Similar to artists and entertainers, athletes may enter the United States on an O or P visa. Certain athletes have an exception to the standard visa rules: athletes who enter the country for the purpose of participating in international tournaments or competitions and who receive only prize money and no salary may enter under B-1 status.[12] For any other competition or compensation scheme, the athlete should enter on an O or P visa.

A. O-1 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.[13] Note that obtaining a contract with a professional sports team is not in itself sufficient evidence to obtain O-1 status.

B. P-1 Athletes

The P visa is usually more easily obtained by athletes than the O visa. 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.[14] 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).

IV. Other Visa Options for Athletes, Artists and Entertainers

Artists and athletes who do not have the record of achievement necessary to qualify them for O or P status, may have alternative visa options.

A. H-1B visa

Artists and athletes who have a college degree related to their field of endeavor and 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), may be eligible for a visa type called an H-1B visa.[15] 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. The visa does require an employer 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 Department of Labor). H-1B status is granted for three years at a time with a maximum of six years

B. H-2B Visa

The H-2B is a nonagricultural temporary visa for aliens coming temporarily to the United States to perform temporary services or labor not displacing United States workers capable of performing such services or labor and whose employment does not adversely affect the wages and working conditions of United States workers. As a general rule, the period of the petitioner's need must be a year or less. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need , a peakload need, or an intermittent need. Examples of H-2b workers are foreign ski instructors, foreign coaches, or foreign ethnic performers etc. There is an advertisement procedure to determine if American workers are available.

C. F-1 Visa

Another option that may be 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).

IV. Obtaining a Visa

Once an O or P artist or athlete or H-1 B professional has received visa classification, the U.S. State Department, which is separate and distinct from the USCIS, must then approve the visa application based on an approved USCIS petition. This application is normally made at the U.S. consulate in the individual's home country. 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.

V. Permanent Immigration Options

Most artists or athletes who are in the U.S. for any significant period of time may want to obtain status as lawful permanent residents (holding "green cards"). 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.

A. Permanent Residence based on Extraordinary Ability

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 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. 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.

B. Permanent Residence Based on a Shortage of US Workers

Individuals who do not meet the extraordinary ability standard may seek the employment-based option of obtaining permanent residence based upon 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 Department 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 Department 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. As a general rule, the more education and experience required for the position, the more likely it is that the labor certification 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]

C. Citizenship

It is advisable that foreign artists and athletes consider the option of obtaining U.S. citizenship, because of the insecurity of permanent resident status. For artists and athletes, who by the very nature of their work often lead lives that are mobile and less stable, the risk of losing permanent residence may be very real. Permanent residence may be lost for example, when strong and permanent ties to the U.S. have not been maintained or if an individual is convicted of certain crimes. Citizenship allows the artist or athlete to avoid the uncertainty of changes to US immigration law.[20]

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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. *This synopsis was taken from Navigating Difficult Waters: Immigration Law as Applied to Foreign Artists, Entertainers, and Athletes, Laura Danielson, Entertainment and Sports Lawyer, Vol. 19, No. 1(2001).*