



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

March 7, 2014

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
*Customer Service and Public Engagement Directorate*  
Washington, DC 20529

Submitted via: [public.engagement@uscis.dhs.gov](mailto:public.engagement@uscis.dhs.gov)

Re: Response to January 15, 2014 teleconference and EIR Idea Campaign  
O and P Nonimmigrant Visa Classifications (Performing Arts and Entertainment)

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) would like to thank U.S. Citizenship and Immigration Services (USCIS) for hosting an informative Stakeholder teleconference last month and announcing the appointment of a three-member Loaned Executives Artists (a.k.a. Artists in Residence “AIR”) program. We understand that USCIS is seeking advice on how to resolve problems and set policy under the current regulatory framework to further the promotion of arts and entertainment in the United States. The AILA committee on Athletes, Culture, Entertainment and Science (ACES) provides the following analysis on issues that we hope are addressed by the AIR program.

AILA is a voluntary bar association of more than 13,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to engage with USCIS and believe that our members’ collective experience makes us particularly well qualified to offer views that would benefit the public and the government.

The ACES committee of AILA is comprised of immigration lawyers who specialize in ACES-related immigration issues. With hundreds of years of combined practice among committee members, and extensive knowledge of the history and implementation of ACES-related regulations, including those for O and P nonimmigrant visas and for EB1-1, National Interest Waiver, and Exceptional Ability immigrant visas, ACES is uniquely poised to provide valuable input on the mission and goals of the AIR program.

#### **Agents as Petitioners**

The regulations at 8 C.F.R. §214.2 (o)(2)(iv)(E) and 8 C.F.R. §214.2(p)(2)(iv)(E) permit a United States agent to act as petitioner for “workers who are traditionally self-employed or

**AILA National Office**

1331 G Street NW, Suite 300, Washington, DC 20005  
Phone: 202.507.7600 | Fax: 202.783.7853 | [www.aila.org](http://www.aila.org)

workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf.”

AILA is concerned about the clarity of this regulation. The regulation starts by noting that “an agent may file a petition involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers” but then goes on to provide only three examples of agents “A U.S. agent *may* be: The actual employer of the beneficiary, the representative of both the employer and the beneficiary; or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent.” (emphasis added). USCIS adjudicators have been imposing a strict requirement that a United States agent may *only* fall under one of the three examples: Agents Performing the Function of Employer, Agent for Multiple Employers, and Agent for Foreign Employer. Although defining the agency relationship is not required and was not imposed in the past, USCIS continues to issue Requests for Evidence (RFE) asking for proof of one of the exemplified categories.

In order to resolve this situation within the current regulatory framework, AILA proposes that USCIS issue policy guidance to inform adjudicators that the word “may” does not mean “must,” i.e., an agent for a traditionally self-employed worker or worker who uses agents to arrange short-term employment need *not* meet one of the three enumerated examples. The regulation should be interpreted as follows “A petition filed by an agent *mentioned in the preceding sentence (i.e., who is actual employer of the beneficiary; the representative of both the employer and the beneficiary; or a person or entity authorized by the employer to act for, or in place of, the employer as its agent)* is subject to the following conditions...” i.e., paragraphs (1), (2), (3) of 8 C.F.R. §214.2(o)(2)(iv)(E) only apply to cases involving one of the three stated examples, but these paragraphs do *not* apply in cases by an agent of workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers. For situations *other than* the stated three, the regulatory requirements of 8 C.F.R. §214.2(o)(2)(ii) would still apply.

There are many types of agency relationships. While many agree an agent may be an artist’s manager or agent, there are other agency relationships envisioned within the regulatory framework. In the fine arts an agent may be a gallery owner, in motion picture and television an agent may be the actor’s loan-out company, and in the music industry an agent may be a record company, promoter, or touring company. AILA urges USCIS to issue guidance stating that USCIS will recognize various types of agency relationships other than the three that are noted as examples.

Adjudicators frequently issue RFEs asking for clarification regarding the relationship between the petitioner and the beneficiary and requesting written contracts or detailed description of the terms and conditions of employment, including contractual agreements establishing the type of working relationship between the agent and beneficiary. This is not only overly burdensome, but forces the parties to enter into agreements with non-standard contractual provisions which are not typical in the normal course of business simply to satisfy an unwarranted request from a government entity. A statement from the agent explaining that it is acting as an agent for immigration purposes and providing an explanation of the agency relationship with the beneficiary should be sufficient for O or P purposes. Examples may include, but are not limited

to, the agent arranging performances for the beneficiary or the agent receiving 10% of beneficiary's earnings.

Lastly, it is important for USCIS to recognize that 8 C.F.R. §214.2(o)(2)(iv)(D) permits an artist or entertainer to add additional performances or engagements during the validity of the petition without filing an amended petition. This commonly occurs in an agent-sponsored situation. For example, an actor who has an agent-sponsored O-1 to perform in movie X for a Warner Brothers' production is not required to file a new petition to perform in movie Y for a Universal Studios' movie. AILA recommends that USCIS issue clear guidance acknowledging that if the petitioner is an agent for an artist or entertainer, there is no requirement to file an amended or new petition, even if there is a new employer, where the nature of activities to be done at the new employer are described in the original petition.

### **Field of Endeavor**

It is not uncommon for accomplished artists and entertainers to move to new occupations in the same field in which they rose to notoriety. Examples include a famous artist, dancer or actor who is now a teacher, choreographer, or TV commentator. This is also common for sports figures. The federal statute, INA § 203(b)(1)(A)(ii), states that a person seeking status as an EB1-1 immigrant must be coming to the U.S. "to continue work in the area of extraordinary ability." AILA suggests that USCIS set forth a clear policy stating that "to continue work in the area of extraordinary ability" includes work in related occupations in a given field, including such occupations as coaching, teaching, broadcasting, after (or during) a career as an artist, entertainer, or athlete.

### **Types of venue**

No strict guidelines should be imposed regarding the size of the venue. The size of the venue at which the beneficiary(ies) have and will perform can vary widely. For example, summer tours tend to have more options for outside venues and festivals with larger capacity that are not available in the winter. Moreover, an actor in a play will perform at smaller venues than a rock band. DJs in electronic music, who are paid substantial sums of money, typically play smaller club size venues with limited capacity.

### **Extra-Regulatory Requirements Imposed by Some Peer Groups to Obtain Consultation**

In the case of O-1 petitions filed on behalf of aliens of extraordinary achievement in the motion picture or television industry, 8 C.F.R. §214.2(o)(5)(iii) requires a consultation with the appropriate union representing the alien's occupational peers and a management organization in the area of the alien's ability. In some cases, the consultation organization imposes more onerous requirements than the O-1 regulations. Failure to satisfy the additional requirements by the organization may result in delayed issuance of advisory opinions and/or adverse O-1 advisory opinions. Delayed issuance of advisory opinions adds further delays to a case that often needs expeditious handling. Adverse O-1 advisory opinions may lead to RFEs or outright denials of O-1 petitions by USCIS. Furthermore, full compliance with the additional requirements may impose new contractual requirements or liabilities for the parties to an entertainment event that are not in accord with normal industry practices.

As an example, attached is a chart showing the requirements by the Alliance of Motion Picture

and Television Producers (“AMPTP”) in its nine-page instruction pamphlet for submitting requests for O-1 Advisory Opinions, along with an email sent by AMPTP further insisting that requests for Advisory Opinion follow their precise format or the request will be rejected and destroyed.

It is important for USCIS to issue guidance to the unions reminding them that their role is to review the nature of the work to be done and the beneficiary’s qualifications.

### **Contracts**

USCIS should not impose a strict contract requirement for O and P petitions. In many circumstances, contracts are simply not utilized. It is for this reason that the regulations state “...if no written contract, a summary of the terms of the oral agreement under which the alien will be employed” in *both* 8 C.F.R. §214.2(o)(2)(ii)(B) and 8 C.F.R. §214.2(p)(2)(ii)(B). RFEs that require a signature on a Summary of Oral Contract or Deal Memo force artists and entertainers to enter into contracts that they would not ordinarily encounter in the customary course of business. USCIS should adhere to the regulation at 8 CFR §214.2(o)(2)(ii)(B) and 8 CFR §214.2(p)(2)(ii)(B) and accept letters of intent in lieu of fully executed contracts that may not be signed prior to the filing of the I-129 Petition.

### **Salary:**

We offer the following four comments regarding the issue of salary in O and P petitions:

1. The regulations at 8 C.F.R. §214.2(o)(3)(iv)(6) and (v)(6) provide that the alien must provide evidence that she has either commanded a high salary *or* will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence. USCIS adjudicators have recently imposed stricter requirements regarding the evidence submitted in support of this criterion such as requiring the beneficiary to demonstrate *both* past and future high salary, evidence that the beneficiary’s salary or remuneration is high relative to others working in the field *for a sustained period*, and/or that the wage is *significantly higher* than others working in the field.

These RFEs elevate the regulatory criteria from demonstrating that the petitioner has in the past or will in the future, command a high salary (or other substantial remuneration) for services compared to others working in the field by adding a temporal requirement “during the same time period”, as well as adding a requirement to compare earnings not just against others working the field, but to others “performing similar work at the top level of the field”. While the distinction may seem small, it is, in fact, very profound. By adding new evidentiary requirements and expanding the language of the criteria enumerated in 8 C.F.R. §214.2(o)(3)(iv) and (v), USCIS is re-defining the standards and imposing new regulatory criteria without notice and comment.

2. As noted above and as permitted by the 8 C.F.R. §214.2(o)(3)(iv)(6), USCIS should accept letters of intent as other reliable evidence to confirm high compensation.

3. USCIS's December 22, 2010, memorandum "Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14," advises that when "considering evidence regarding whether the alien's compensation is high relative to that of others working in the field," adjudicating officers should consult with the three Department of Labor (DOL) websites listed. Adjudicators are deviating from this policy by issuing RFEs stating that petitioner's evidence of wage information published on the DOL websites, *on their own*, will not establish the salary is high in relation to others in the field. USCIS should rely on the DOL's wages as credible evidence for purposes of analyzing whether the beneficiary's past or future earnings are considered "high."

According to USCIS's policy memorandum "Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14:"

Evidence regarding whether the alien's compensation is *high relative to that of others working in the field* may take many forms. If the petitioner is claiming to meet this criterion, then the burden is on the petitioner to provide appropriate evidence. Examples may include, but are not limited to, geographical or position-appropriate compensation surveys and organizational justifications to pay above the compensation data. Three Web sites that may be helpful in evaluating the evidence provided by the petitioner are:

The Bureau of Labor Statistics (BLS):  
<http://www.bls.gov/bls/blswage.htm>

The Department of Labor's Career One Stop website:  
[http://www.careeronestop.org/SalariesBenefits/Sal\\_default.aspx](http://www.careeronestop.org/SalariesBenefits/Sal_default.aspx)

The Department of Labor's Office of Foreign Labor Certification Online Wage Library:  
<http://www.flcdatacenter.com>

(Emphasis added.<sup>1</sup>)

4. Finally, USCIS should take industry standards regarding contracts or deal memos into consideration. Often, a particular booking or production is confirmed, but the actual details or compensation are not yet memorialized. In certain industries, the artist or talent is paid an amount that is commensurate with the rates publicized by their agents or managers or the standard fees for the venue. Although all parties understand and agree that the artist/talent/model will be paid in accordance with these norms, the details are often not memorialized in writing.

---

<sup>1</sup> USCIS memorandum, "Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14, PM-602-0005.1" December 22, 2010, <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf>; AILA InfoNet Doc. No. 11020231 (posted February 2, 2011); <http://www.aila.org/content/default.aspx?docid=34375>.

### **Comparable Evidence**

The regulations state at 8 C.F.R. §214.2(o)(3)(iv) that if the enumerated criteria “do not readily apply to the beneficiary’s occupation, the petitioner may submit comparable evidence in order to establish the beneficiary’s eligibility.”

In somewhat recent times, we have had reports of adjudicators disregarding comparable evidence on that basis that comparable evidence is allowed only where *none* of the criteria apply. The adjudicators have stated that because some of the criteria apply, comparable evidence is not allowed.

Comparable evidence should be accepted whether all, some, or none of the enumerated criteria apply, as long as the evidence strengthens the case. “Readily” means easily or appropriately, and connotes a best fit, so that the petitioner can (and should) *strengthen* the case with comparable evidence. In other words, when the criteria do not easily apply, the petitioner should be allowed to develop its case based on other applicable or comparable evidence. Comparable evidence could also be used to address some of the evidentiary concerns raised by the AIR team, such as “international recognition.” Consideration of comparable evidence, whether or not the enumerated criteria apply, would be consistent with the intent of the regulation.

### **Timely Adjudication**

We recognize USCIS’s efforts to adjudicate O&P petitions in a timely manner and to facilitate the tight deadlines and performance schedules entertainers and athletes are often under. We believe that USCIS’s attention to these cases is consistent with the statutory provision found at INA § 214(c)(6)(d). This provision addresses consultation letters and states that once a case is complete with the consultation letter, the case should be adjudicated in 14 days. It reads:

Once the 15-day period [to obtain a consultation] has expired and the petitioner has had an opportunity, where appropriate, to supply rebuttal evidence, the Attorney General *shall* adjudicate such petition in no more than 14 days. (Emphasis added.)

In other words, if a petition is filed with the appropriate consultation letter, and no rebuttal is implicated, USCIS will adjudicate the petition within 14 days of receipt.

We hope USICS will continue its commitment to adjudicate O&P petitions for artists and entertainers in a timely manner and within the statutory time frame. We believe this is consistent with the intent of the statute and the mission of the AIR team.

### **Request for Summit**

We would appreciate having a “summit” between stakeholders and USCIS to discuss in more detail issues such as agents, O visa eligibility standards, unions and consultation requirements, industry standards regarding contracts or agreements, and itineraries in an effort to provide clear and consistent adjudication standards aligned with entertainment industry realities. The Entrepreneurs in Residence program had a few such summits that were lauded by USCIS and stakeholders alike. With your support, we are able to arrange for a summit at a Los Angeles area university in March. We look forward to your prompt response regarding arranging a Loaned Executive Artists “summit” this March.

Sincerely,

American Immigration Lawyers Association ACES Committee

Attachment- AMPTP

The table below illustrates a side-by-side comparison of the AMPTP and O-1 regulatory requirements.

<b>THE DEAL MEMO</b>	
<i>AMPTP Requirements</i>	<i>Regulatory Requirement</i>
(1) Name of beneficiary.	8 C.F.R. 214.2(o)(2)(ii)(B): Petitions for O aliens shall be accompanied by copies of any written contracts between the petitioner and the alien beneficiary, or, if there is no written contract, a summary of the terms of the oral agreement under which the alien will be employed.
(2) Position or job title.	
(3) Dates the beneficiary will be required in the U.S. <sup>2</sup>	
(4) Project(s) the beneficiary will be working on.	
(5) Each project must have an accompanying genre (e.g., movie, commercial, TV, etc.).	
(6) Fee or salary to be paid to the beneficiary.	
(7) Principal U.S. location where the beneficiary will be working.	
(8) The contract or deal memo must be signed by both the employer and the beneficiary.	
(9) Contract or deal memo cannot be longer than seven pages.	

<b>THE ITINERARY</b>	
<i>AMPTP Requirements</i>	<i>Regulatory Requirement</i>
(1) If the list of projects is not part of the deal memo, it must be included in a separate document.	The requirement for the itinerary is found at 8 C.F.R. 214(o)(2)(ii)(C), however, there is no requirement that it be submitted printed on company letterhead.
(2) Itinerary must be on company letterhead.	

<b>BENEFICIARY'S BACKGROUND INFORMATION</b>	
<i>AMPTP Requirements</i>	<i>Regulatory Requirement</i>
(1) The request must include the beneficiary's resume, CV, or print-out of previous work.	There is no corollary requirement in the regulations governing O petitions.
(2) Must provide 2-4 news articles from major publications by or about the beneficiary.	Similar regulatory language is found at 8 C.F.R. 241.2(o)(3)(v)(B)(2). However, the regulation does not require submission of newspaper articles in all cases.
(3) Must provide 2-4 support letters from	Similar regulatory language is found at 8

<sup>2</sup> Note that Part 5, Item 10 on Page 5 of Form I-129, also submitted to the AMPTP, already contains the dates of intended employment.

experts in the beneficiary's field of endeavor.	C.F.R. 214.2(o)(3)(v)(B)(5). However, the regulation does not require submission of support letters in all cases.
---	---

**ADDITIONAL ARBITRARY REQUIREMENTS**

<i>AMPTP Requirements</i>	<i>Regulatory Requirement</i>
(1) Packets cannot be more than 50 pages.	There are no corollary requirements in the regulations governing O-1 petitions.
(2) Two-sided documents will be rejected.	
(3) Documents must be submitted in the specific order outlined in the instructions pamphlet.	
(4) Packets must be secured only with binder clips or two-pronged fasteners	

**From:** Immigration <[immigration@amptp.org](mailto:immigration@amptp.org)>

**Date:** March 3, 2014 at 7:57:58 PM EST

**To:** Immigration <[immigration@amptp.org](mailto:immigration@amptp.org)>

**Subject: IMPORTANT NOTICE FROM THE AMPTP REGARDING O-1 VISA ADVISORY LETTERS**

**Reply-To:** Immigration <[immigration@amptp.org](mailto:immigration@amptp.org)>

NOTICE TO IMMIGRATION ATTORNEY:

We have noticed that several of your past submissions to our office for an O-1 advisory letter did not comply with our requirements for a deal memo or contract between the employer and beneficiary. Please be advised that beginning March 17, 2014, any submission that does not include a deal memo or contract with items A. through H. listed below will be rejected, and you will be required to resubmit. All rejected submissions are immediately destroyed. Please remember that we do not accept submissions via email or fax, including any resubmissions. Fees already paid will be applied to the edited submission.

The following information must be included:

- A. Name of beneficiary with any a.k.a. or p.k.a.;
- B. Position or job title;
- C. Dates the beneficiary will be required in the United States;
- D. Project or list of projects the beneficiary will be working on;
- E. Genre of project(s) -- All work must state motion picture, television, web-based series/program, commercials or music videos;
- F. Fee/salary;
- G. Principle U.S. location where the beneficiary will be working; and
- H. All necessary signatures. Any offers, letters of intent or requests will be rejected unless signed by both the employer and beneficiary as accepted. Deal memos stating the terms of an agreement that has already been reached between the employer and beneficiary may be signed by the employer only.

If items C., D, E., or G. are not already listed in the deal memo or contract, you must submit this information in a separate itinerary.

You may refer to our website at <http://www.amptp.org/files/immigration.pdf> for sample deal memos and a sample itinerary which conform to our requirements. You will also find a complete list of our requirements for O-1 advisory letters, which you may wish to review in order to prevent any future delays.